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Subcommittee on Public Lands, Forests, and Mining
United States Senate
Washington, D.C. 20510

Re: S. 1695 and S. 4215; subcommittee hearing of November 18, 2020

Dear Senators:

We watched the above-captioned hearing on the proposed Human-Powered Travel in Wilderness Areas Act, S. 1695, and the Bonneville Shoreline Trail Advancement Act, S. 4215. We submit this letter for requested inclusion in the hearing record.

STC is a nonprofit, grass-roots organization with tens of thousands of followers on social media. We work to restore National Forest, Bureau of Land Management, and National Park staff discretion to allow mountain biking in Wilderness on a case-by-case basis. They were able to do this as recently as the year 2000 in the case of the BLM, but no longer can. The Forest Service instituted the first nationwide blanket bicycle ban in 1977, taking away its line officers' discretion, and the BLM and NPS eventually followed suit. STC believes that these blanket bans are not required by the Wilderness Act of 1964 and should be reconsidered.

S. 1695

Not only does STC support S. 1695, but this legislation is our reason for existing. Subcommittee Chairman Lee's legislation is modest. It would not open a single mile of Wilderness trail to mountain biking. It merely authorizes line officers who know the terrain to allow it if they think it is feasible.

S. 1695 gives the federal agency in charge of a Wilderness area a very reasonable two years to decide affirmatively where, if anywhere, bicycles may be authorized. And it allows yet more discretion: If agency staff prefer to take no action, they can run a pilot program without the effort that a formal determination might require. In that case, trails would open to nonmotorized, human-powered travel, letting line officers observe the result. They would still be able to regulate or prohibit mountain biking, exercising discretion on the basis of what they observe.

The agencies already have this authority for all of the activities currently allowed in Wilderness. They can regulate horseback-riding, canoeing, camping, backpacking, hunting, trail running, and the Wilderness dude-ranch industry. Some of these activities' environmental impacts are significantly higher than the low impact of riding a bicycle, but agencies have found ways to accommodate them.

Here is a hypothetical example of how S. 1695 would work. The fictional Akhenaten National Forest manages the Eight Peaks Wilderness area, which contains the Isocoma, Kayenta, and Oneonta trails.

— The Isocoma Trail is oversubscribed and social conflict already exists between legions of day hikers, backpackers, and commercial pack outfitters, with numerous complaints to the National Forest staff. The National Forest disallows mountain biking on the Isocoma Trail. It is already being loved to death.

— The Kayenta Trail is a well-maintained trail that runs 12 miles to Sapphire Lake. Because the trailhead is 20 miles down a rocky jeep road, it's lightly used, and most backpackers turn around two miles in, at Emerald Lake, which has lake trout and good campsites. Sapphire Lake has many mosquitoes but no fish and so is unpopular with hikers and backpackers. The National Forest allows mountain biking except on summer weekends.

— The Oneonta Trail fell into disrepair years ago and has disappeared. The local mountain bike club says it will restore it for the benefit of all user groups, if it can ride the trail. But a local environmental group wishes that humans would stay out of Wilderness entirely and likes the fact that the trail has disappeared. The Forest Service doesn't want to mediate between the two groups and says nothing about bicycle access but does allow volunteers to repair the trail. Mountain bikers restore the trail and then, after waiting two years and now authorized under S. 1695, begin to ride it legally, while forest rangers monitor the experiment.

With regard to the hypothetical Oneonta Trail: In exchange for this modest relaxation of the agencies' rigid bicycling bans, agencies could expect to gain the help of a large corps of mountain bikers who provide trail maintenance voluntarily throughout the United States. As it stands, a number of Wilderness trails have been lost to overgrowth. One sees them on a map but, on arriving at trailheads, finds that they have vanished. The agencies have neither time nor money to maintain all of their Wilderness trails (see www.gao.gov/products/D05042) and the current cadre of civilian volunteers has proved inadequate to the task. S. 1695 does not address this problem directly, but it will have the indirect effect of making Wilderness trails more accessible to all, not just mountain bikers.

S. 4215

S. 4215 would trade 344.16 acres of Wilderness abutting the Salt Lake County, Utah, urban area for the same acreage of newly designated Wilderness land in the backcountry.

The bill would thus allow completion of the Bonneville Shoreline Trail as a route open to all human-powered travelers, including mountain bikers.

STC endorses this sensible legislation. We note that if S. 1695 is enacted, the Uinta-Wasatch-Cache National Forest will not have to wait for an act of Congress, but can leave the current Wilderness boundaries in place while allowing mountain biking on the short stretches of trail on which the Forest Service's rigid nationwide rule forbids bicycling.

Forest Service Deputy Chief Chris French's Testimony Regarding S. 1695

STC is pleased that the Forest Service endorses S. 1695 in principle. We wish, however, to respond to one aspect of Mr. French's testimony:

"Our advice and interpretation from our attorneys is that the Wilderness Act specifically calls out mechanized— not allowing mechanized [activities] and there [are] some court cases that support that."

The Forest Service's attorneys may not be aware that legal research in recent years has debunked the idea that Congress wanted to ban bicycles when it prohibited "mechanical transport" (16 U.S.C. § 1133(c)) in Wilderness. We would refer the subcommittee to the following:

Applegate, A.: *Congress, Let Bicycles Back In*

<https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=3182&context=lawreview>

Ruckriegle, H.: *Mountain Biking Into the Wilderness (I)*

<https://www.wyomingbar.org/june-2016-wyoming-lawyer/>

Ruckriegle, H.: *Mountain Biking Into the Wilderness (II)*

https://www.colorado.edu/law/sites/default/files/attached-files/ruckriegle_final.docx_2.pdf

Stroll, T: *Congress's Intent in Banning Mechanical Transport in the Wilderness Act of 1964*

<http://www.ecocyclist.org/norcamba/wilderness/stroll.pdf>

As for court cases, STC is unaware of any judicial decision that bicycles constitute prohibited "mechanical transport" (16 U.S.C. § 1133(c)) under the Wilderness Act of 1964. Mr. French and Forest Service counsel may have in mind cases generally allowing for agency discretion in interpreting statutes. (See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 468

U.S. 837.) The *Chevron* deference doctrine has, however, long been criticized and the U.S. Supreme Court may soon pare it back or eliminate it.

Addressing Senators' Concerns

During the hearing, the concern was raised that mountain bikers will annoy elk herds.

It's a fair point, but studies show that *all* human interactions annoy wildlife. "Recreational activities like hiking, cross-country skiing, snowshoeing, mountain biking, climbing, and trail running often disturbed nearby wildlife even more than motorized recreation. [¶] Bobcats, for example, were less concerned about nearby motor vehicles than they were of hikers. The same was true of deer and elk." ("Wildlife Hates Hikers," *Sierra Magazine* (Sierra Club 2017).) "Distances between elk and recreationists were highest during ATV riding, lowest and similar during hiking and horseback riding, and intermediate during mountain biking." ("Elk responses to trail-based recreation on public forests," *Forest Ecology and Management* (2018).) The authors include two Forest Service employees.

Hiking has "driven elk to the brink," according to the United Kingdom's *Guardian* newspaper. "To measure the impact on calves, [a Colorado State University wildlife professor] . . . sent eight people hiking into calving areas until radio-collared elk showed signs of disturbance, such as standing up or walking away. The consequences were startling. About 30% of the elk calves died when their mothers were disturbed an average of seven times during calving. Models showed that if each cow elk was bothered 10 times during calving, all their calves would die. [¶] When disturbances stopped, the number of calves bounced back." ("Americans' love of hiking has driven elk to the brink, scientists say," *The Guardian*, Aug. 25, 2019.)

In any event, to the extent that studies or anecdotes suggest that mountain biking bothers a particular species of wildlife, S. 1695 gives federal land managers comprehensive ability to prohibit or limit mountain biking whenever and wherever the activity might cause a disturbance.

It was also asserted that originalists must find that the Wilderness Act of 1964 banned bicycling.

Originalism requires applying legal texts as their words were understood when they were set down. In 1964 the term "mechanized," as applied to conveyances, meant "motorized" and only that. There was no obvious nonmotorized but wheel-using method of trail travel then, including by bicycle. The Wilderness Act's preamble states a desire to provide refuges from "growing mechanization." (16 U.S.C. § 1131(a).) We doubt that Congress had in mind horse-drawn stagecoaches or children's Radio Flyer wagons—or Schwinn bicycles. It had in mind jeeps, Chevrolet Impalas, and Ford Fairlanes.

A House of Representatives hearing of April 28, 1964, is indicative of this textual reality. Representative Compton White of Idaho and Forest Service lawyer Reynolds Florance had this exchange:

“Mr. FLORANCE: Horses and buggies are not prohibited.

“Mr. WHITE: I am talking about the mechanical contraption with wheels that goes behind the horse. The buggy. Or the spring wagon. This is considered—and this is not a mechanical device?

“Mr. FLORANCE: No, it is not a motorized vehicle.”

In other words, as Representative White said, “They [Wilderness visitors] cannot come in by jeep, they must come in by horse and buggy.” (*Wilderness Preservation System: Hearings Before the Subcomm. on Public Lands of the Comm. on Interior and Insular Affairs, House of Representatives*, 88th Cong., 2d Sess. (Apr. 28, 1964) 1053, 1159.)

In 1962, a wildlands report used the term mechanized to mean motorized and only that. It stated:

“In our judgment, wilderness recreation will be available in areas having the following characteristics. [¶] . . . Not open to *auto, jeep, truck, motorcycle, motorboat, airplane, helicopter*, or other means of *mechanized* travel.” (Italics added.)

“. . . [P]rimitive areas have been redrawn to exclude portions containing roads. [¶] Nevertheless, serious problems of *mechanized* access remain. It is widely recognized that . . . jeeps, scooters, and motorcycles . . . can get around the barriers . . . or can operate cross-country without roads.” (Italics added.)

“. . . [P]ublic entry of wilderness reserves by *mechanized* means is increasing. It is reported, for example, that jeeps have been flown into private airfields in the Idaho Primitive Area and then used for prospecting, hunting, or fishing trips on national forest land.” (Italics added.)

(“Wilderness and recreation—a report on resources, values, and problems,” *Outdoor Recreation Resources Review Commission Study Report No. 3* (1962), pp. 298-299, 313.)

In 1970, the Comptroller General issued a report to Congress (www.gao.gov/assets/200/195991.pdf) titled “Problems Relating to Restricting the Use of Motorized Equipment in Wilderness and Similar Areas.” It stated:

“The methods used by the Forest Service to transport bridge materials to the construction sites varied from using such primitive means as pack animals to such *mechanized transport* as helicopters.” (P. 27, italics added.)

In addition, as mentioned above, a solid body of legal research shows that Congress did not intend to ban self-powered visits to Wilderness, even if the visitor used a device like a bicycle.

We think that a distinguished member of the then-titled Committee on Interior and Insular Affairs, Senator Clinton P. Anderson of New Mexico, would agree. In introducing the 1961 version of the proposed Wilderness Act, he quoted President Kennedy: “ ‘Many of the routine physical activities which earlier Americans took for granted,’ he points out, ‘are no longer part of our daily life. A single look at the packed parking lot of the average high school will tell us what has happened to the *traditional bike to school* that helped to build young bodies. The television set, the movies, and the myriad conveniences and distractions of modern life all lure our young people away from the *strenuous physical activity* that is the basis of fitness in youth and in later life.’ ” (“Statement by Senator Anderson on the Wilderness Bill,” 107 Cong. Rec. 189, 192 (Jan. 5, 1961), italics added.) It’s likely that Senator Anderson and President Kennedy would have seen bicycling as an environmentally benign way to gain fitness and self-reliance needed to counter the all-consuming Soviet threat.

So why then did the Forest Service ban bicycles in Wilderness in 1977? It was concededly an arbitrary decision. “Mechanical devices are difficult to define, so we arbitrarily drew the line around bicycles,” a Forest Service employee stated in 1983. (“Agency Wants Bikes Kept Out of Wilderness,” Spokane, Wash., *Spokesman-Review*, Aug. 25, 1983, p. 8.) Unfortunately, this exercise in line-drawing, not based on scientific review, left out those who travel by bicycle—people who, like other Wilderness visitors, seek, to again quote Senator Anderson, a “whole environment in which we ourselves can often feel most deeply refreshed, inspired in the scenes of our own distant beginnings.” (“Statement by Senator Anderson on the Wilderness Bill,” *supra*, 107 Cong. Rec. at p. 191.)

The Forest Service, Bureau of Land Management, and National Park Service have full authority to reverse their Wilderness bicycle bans. The law will be with them if they do this. Apparently, however, they are unwilling to act, so Congress must direct them to do what they are unwilling to do on their own initiative.

We thank the subcommittee for including our views in the record if it is so inclined, and for taking the time to consider them.

Respectfully submitted,



Ted Stroll
STC board president

cc: The Hon. Lisa Murkowski
The Hon. Mike Lee
Mr. Chris French, USDA Forest Service