Keeping the Wild in Wilderness: Minimizing Non-Conforming Uses in the National Wilderness Preservation System

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Introduction

Forty-three years after passage of the 1964 Wilderness Act, it is increasingly clear that, despite the best intentions of the law, the lands within the national wilderness preservation system (NWPS) are degrading. One of the greatest emerging challenges to protecting the wild character of these lands is the preponderance of *special provisions* or *non-conforming uses* in subsequent wilderness bills. These provisions not only allow activities within wilderness that are inappropriate and degrade individual areas, but the cumulative impact of these provisions threatens to diminish the core values that distinguish wilderness from other public lands.

Wilderness has its own meaning and character

The statutory definition of wilderness is found in Section 2(c) of the Wilderness Act. The framers of the act intended the first sentence of this section to establish the meaning of wilderness:[1]

> A wilderness, *in contrast* with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are *untrammeled* by man, where man himself is a visitor who does not remain (emphases added).[2]

By law, wilderness is to remain *in contrast* to modern civilization, its technologies, conventions, and contrivances. Incompatible activities are prohibited because allowing their intrusion blurs the distinction between wilderness and modern civilization, diminishing wilderness character and the unique values that set it apart.

Congress also specified that wilderness would be *untrammeled*, meaning free of the human intent to manipulate, alter, control, or subjugate nature. In wilderness, the forces of nature should shape the landscape without intentional human interference.

The overarching statutory mandate in the Wilderness Act is to preserve the wilderness character of each wilderness within the NWPS.[3] Though the law did not itself define wilderness character, perhaps the best attempt to do so came from the U.S. Fish and Wildlife Service. This policy stated in part:

> Preserving wilderness character requires that we maintain the wilderness condition: the natural, scenic condition of the land, biological diversity, biological integrity, environmental health, and ecological and evolutionary processes. But the character of wilderness embodies more than a physical condition.

> The character of wilderness refocuses our perception of nature and our relationship to it. It embodies an attitude of humility and restraint that lifts our connection to a landscape from the utilitarian, commodity orientation that often dominates our relationship with nature to the symbolic realm serving other human needs. We preserve wilderness character by our compliance with wilderness legislation and regulation, but also by imposing limits upon ourselves.[4]

How non-conforming uses degrade wilderness

The unique values that characterize lands within the National Wilderness Preservation System are being steadily degraded. The culprits can be broadly categorized as (1) increased motorized use, (2) commercialization, (3) manipulation of natural processes, and (4) changing types and levels of recreational use. These problems are exacerbated by special exceptions written into wilderness bills. Indeed, special provisions are becoming paramount in the overall threats to Wilderness nationwide.

Non-conforming uses diminish an area's wilderness character and the opportunity for present and future generations to experience the unique benefits of authentic wilderness. Section 4(d) of the Wilderness Act is titled "special provisions." These so-called *nonconforming* uses are compromises that diminish wilderness character, but were nonetheless written into the original law. These special exceptions are qualified to various degrees so as to provide federal wilderness managers with the ability to regulate these uses to minimize their impacts on wilderness.

With the exception of honoring private existing rights and for fire management, where Congress gave the secretary of agriculture broad discretion, the Wilderness Act requires that the other activities be administered to protect wilderness character. For instance, the exception for commercial services allows for commercial outfitting and guiding, but those activities must be done in a manner that protects the wilderness character of the areas. Unfortunately, the good intentions of the law are not always being realized on the ground.

The responsibility for regulating the uses allowed by special provisions falls to federal agencies that have often *not* been supportive of good wilderness stewardship. All four agencies with wilderness responsibilities are falling woefully short in meeting their stewardship obligations, and these shortcomings transcend the past several administrations.[5] Given the lack of commitment to or understanding of good stewardship on the part of some managers, exceptions in wilderness bills often result in far more damage to wilderness character than the supporters of these exceptions anticipated.

The Central Idaho Wilderness Act (CIWA), which designated the River of No Return Wilderness, is a case in point. When that law was passed in 1980, eight airplane landing strips existed in the wilderness for public use on national forest land. Under the Wilderness Act, the Forest Service had the authority to close any or all of the landing strips and was moving in that direction on at least two. A special provision in CIWA prohibited the Forest Service from closing any landing strip "in regular use on national forest lands" at the time of designation without the express approval of the state of Idaho.[6] This provision effectively precluded closing any of the existing strips and in fact has resulted in a far worse condition. Under pressure from pilots and the state, the Forest Service recently recognized four more meadows as additional historic landing strips, increasing the total number to 12. Further-

more, the landing of airplanes in the wilderness has exploded to more than 5,500 annually, much of it for practicing touch-and-go landings and for "bagging" airstrips—activities that have nothing to do with accessing the area for wilderness purposes.

Similarly, another provision of CIWA that allowed some jet boat use on the main Salmon River has been used to dramatically increase both commercial and private use of jet boats. In short, special provisions in the CIWA have allowed the largest contiguous wilderness in the lower 48 states (2.5 million acres), an area that should provide the ultimate wilderness experience, to instead be riddled with unlimited airplane and jet boat use.

Significantly, much of the motorized use occurs in order to facilitate *commercial services* (outfitting and guiding), a Wilderness Act exception that itself is limited to the degree that the activity is both *necessary* and *proper* in a wilderness context.

One of the most widespread examples of the unanticipated consequences of special provisions is the Congressional Grazing Guidelines (CGG) that Congress first adopted in a Colorado national forest wilderness bill in 1980. The guidelines authorized ranchers to use motor vehicles to develop new "improvements" for certain livestock activities provided there were no "practical alternatives" and where such activities cannot "reasonably and practically be accomplished on horseback or foot."[7] Again, these guidelines have been expanded over time.

Many of the wildernesses added to the system in the past two decades, particularly those in the Intermountain West and the desert Southwest, are extensively grazed by livestock. Ranchers have become increasingly accustomed to using off-road vehicles, including all-terrain vehicles, in these areas. In particular, the Bureau of Land Management (BLM), which now administers about one-quarter of all wildernesses, has proven woefully lenient in allowing ranchers to drive off-road vehicles in wilderness. For example, in administering the Steens Mountain Wilderness in eastern Oregon, BLM allows ranchers unrestricted use of motor vehicles for tending cattle.[8]

Further damage to wilderness can be traced to the guidelines. In 2002 a federal court, relying on the grazing guidelines, ruled that the Department of Agriculture was justified in killing a large number of mountain lions in the Santa Teresa Wilderness in Arizona in order to protect domestic livestock.[9]

These examples represent just a few of the threats presented by special provisions in wilderness bills, and they also highlight the *unintended consequences* from such exceptions. Most managers have been unable or unwilling to regulate or limit these non-conforming uses. Thus, even when discretionary safeguards have been included in legislation, they have proven ineffective for protecting wilderness character from the harm resulting from special provisions.

This array of non-conforming uses decreases the recognizable core qualities that define wilderness across the system. It brings about a gradual decline in the overall wilderness standards that govern the NWPS. Some non-conforming uses in wilderness may seem small, or of little impact in a system that encompasses more than 700 areas and 107 million acres. But each non-conforming use violates the ideal and integrity of wilderness and diminishes the wilderness character and symbolic value of all wilderness areas in the system. The cumulative impact of hundreds of non-conforming uses is significant.

Non-conforming uses allowed in one wilderness bill are replicated—and often expanded—in subsequent wilderness bills. Once an exception is made in one bill, it becomes harder to exclude similar exceptions in future wilderness bills. Three noteworthy examples of provisions that have become troublesome precedents for other bills include the CGG, discussed above; motorized access for state fish and wildlife agencies; and access to inholdings (non-federal lands).

Special language allowing motorized access for fish and wildlife management shows how a narrow exception in one bill evolves into highly destructive exceptions in future bills. The first specific exception allowing for vehicle use for wildlife management appeared in the 1984 Wyoming Wilderness Act. The provision allowed motorized access to a specific location in the Fitzpatrick Wilderness for capturing bighorn sheep.[10] Six years later, Congress allowed for greatly expanded motorized access and other wilderness-damaging activities under the guise of wildlife management in 39 new wildernesses designated in the Arizona Desert Wilderness Act.[11] As a result there are now permanent roads in some wildernesses used for constructing, operating, and maintaining artificial water developments, called "guzzlers," to artificially inflate the numbers of bighorn sheep and other game species. In various forms, this exception for motorized uses for fish and wildlife management has been continued in subsequent wilderness designations, including the Los Padres Condor Range and River Protection Act (1992), the California Desert Protection Act of 1994, the Clark County Conservation of Public Land and Natural Resources Act of 2002, and the Lincoln County Conservation, Recreation, and Development Act of 2004.

Access to private lands ("inholdings") surrounded by wilderness provides a third example of how precedents are unexpectedly set with damaging provisions in a wilderness bill. The framers of the Wilderness Act anticipated the potential conflict between wilderness protection and the desires of private landowners wanting access to their lands. In those cases where the desired access is incompatible with wilderness protection, the 1964 act offers the inholder "adequate access" or an "exchange for federally owned land in the same state of approximately equal value" (Section 5[a]). An opinion from the United States Attorney General in 1980 concluded that wilderness managers retained the right to deny access that would be harmful to wilderness and could offer an exchange instead:

> The language of 5(a) indicates that a landowner has a right to access or exchange. If he is offered either, he has been accorded all the rights granted by the statute. If you offer land exchange, the landowner has no right of access under 5(a).[12]

It was an excellent solution to a problem with dangerous potential to degrade wilderness. Yet, here again, special provisions in new bills have begun to erode the protections ensured by the Wilderness Act.

A provision in the Alaska National Interest Lands Conservation Act (ANILCA) in 1980 dealt the first blow to the protections afforded in Section 5(a). That provision states that the secretary of agriculture "shall provide such access to nonfederally owned land within ... the National Forest System . . . adequate to secure the reasonable use and enjoyment thereof. . . ." While every other provision in ANILCA applies only to Alaska, the reference to "National Forest System" led the Forest Service to conclude that the provision applies to all national

forest lands, including wilderness, in the lower 48 states. Whether or not the agencies have correctly interpreted this special provision in ANILCA, it has effectively eliminated the option of protecting wilderness by offering a land exchange in lieu of allowing potentially harmful access.[13]

As with other special provisions, the "access" exception in ANILCA is being repeated in subsequent bills. In 1994, the California Desert Protection Act (CDPA) included access language nearly identical to ANILCA, thereby ensuring that this weakening provision would apply to the 69 areas and millions of acres of wilderness it designated. Subsequent laws designating wilderness in Oregon and Nevada have included variations of the language used in the CDPA.

As a result of access provisions included in the above-mentioned laws, BLM and the Forest Service have begun approving motorized access (and related road development and improvements) to inholdings for a variety of inappropriate uses in wilderness.[14]

Suggestions for ensuring that new wilderness bills protect wilderness character

It is imperative that wilderness advocates oppose the use of special provisions in new wilderness bills. Forty-plus years of experience in implementing the Wilderness Act have shown that the special provisions in various wilderness bills are leading to serious degradation to both the wilderness *ideal* and to the wilderness condition.

1. Avoid non-conforming uses in new wilderness designations. Wilderness advocates should keep proposals for designating new wildernesses clean of non-conforming uses, while working to remove such provisions from bills introduced in Congress.

2. Keep wilderness bills brief and free of special management language, even if the intent of the language is simply to reiterate the provisions of the Wilderness Act. The simplest and most straightforward way to address this problem is to eschew special language and instead include a statement saying the area is to be managed in accordance with the Wilderness Act.

3. Minimize the impacts of any new non-conforming uses in wilderness legislation. First, *phase out the non-conforming uses over time.* Congress included motorboat phase-outs for specific lakes at specific dates in the 1978 Boundary Waters Canoe Area Wilderness Act. Second, *limit the impacts from non-conforming uses allowed in the Wilderness Act that might not be phased out over time.* Require, for example, the Wilderness Act to regulate grazing, rather than the more liberal CCG. Third, *place the non-conforming uses outside of the wilderness boundary if possible.*

4. Consider alternative designations if special provisions compromise the ability to manage the area *as wilderness* and if protection is needed from threats such as logging or off-road vehicles. In the 60,000-acre Rattlesnake area that borders Missoula, Montana, Congress designated the lower half of the area, which is popular for day-hiking, mountain biking, and horseback riding, as the Rattlesnake National Recreation Area and the upper half as the Rattlesnake Wilderness.

Conclusion

Wilderness advocates must ensure that special provisions in new wilderness bills and

incompatible uses in existing wildernesses are not allowed to further degrade the wilderness character of NWPS units. We must seize opportunities to stem the erosion of wilderness standards and the gradual degradation of the system due to special provisions in wilderness legislation. By taking an aggressive stance against new non-conforming uses we can ensure that we pass on to future generations the "enduring resource of wilderness" that the framers of the Wilderness Act sought to preserve and that future generations deserve to inherit.

Ed. note: A more detailed version of this paper can be found at www.wildernesswatch.org.

Endnotes

1. In testimony before the final Senate hearing on the wilderness bill in 1963, the bill's chief author, Howard Zahniser, testified that: "The first sentence defines the character of wilderness.... In this definition the first sentence is definitive of the meaning of the concept of wilderness, its essence, its essential nature—a definition that makes plain the character of lands with which the bill deals, the ideal."
2. 1964 Wilderness Act, Sec. 2(c).
3. Numerous courts have found that preserving wilderness character is the purpose of the Wilderness Act. See, for example, *Wilderness Watch v. Mainella*, 2004 (11th Circuit Court of Appeals) and *High Sierra Hikers Assn. v. Blackwell*, 2004 (9th Circuit Court of Appeals).
4. U.S. Fish & Wildlife Service, "Draft Wilderness Stewardship Policy," *Federal Register* 66:10 (January 16, 2001), 3714.
5. See, for example, Pinchot Institute for Conservation, *Ensuring the Stewardship of the National Wilderness Preservation System*: *A Report to the USDA Forest Service, Bureau of Land Management, US Fish and Wildlife Service, National Park Service, US Geological Survey*. September 2001. On-line at www.pinchot.org/pubs/?catid=32.
6. The name of this wilderness was later changed to the Frank Church–River of No Return Wilderness. Beyond the on-the-ground impacts to the wilderness, this provision has the dubious distinction of being the first so-called Sagebrush Rebellion provision in a wilderness bill in that it granted the state decision-making authority over parcels of federal land.
7. The Congressional Grazing Guidelines have been incorporated in the Forest Service Manual at FSM 2323.22 and can be found at www.fs.fed.us/im/directives/fsm/2300/2320.doc.
8. The Congressional Grazing Guidelines are *more* restrictive than BLM's implementation of them on Steens Mountain. However, environmentalists have thus far been unsuccessful in trying to prevent unlimited driving, while local congressmen have consistently pressured BLM to interpret the guidelines in the most lenient fashion. BLM relies on ambiguous language in the Steens Act to justify its actions.
9. *Forest Guardians v. Animal & Plant Health Inspection Service,* no. 01-15239, United States Court of Appeals for the Ninth Circuit, 309 F.3d 1141, 2002.
10. The provision applied only to a 6,000-acre addition to the Fitzpatrick Wilderness in order to allow occasional motorized access for capturing and transporting bighorn sheep. The trapping program had been conducted for many years to transplant bighorns from

the Wind River Mountains to other mountain ranges throughout the West where Rocky Mountain bighorns had been extirpated.

11. The Arizona Desert Wilderness Act of 1990 referred to a memorandum of understanding (MOU) between BLM, the Forest Service, and the International Association of Fish and Wildlife Agencies (IAFWA) as guidance for the types of activities that should be allowed in wilderness. The MOU allows for predator control, constructing artificial water sources, poisoning streams, stocking non-native fishes, and, in many cases, the use of motor vehicles and motorized equipment in carrying out these activities. While the federal land managers retain authority to regulate or limit any activity under the MOU, they are often unable or unwilling to do so. MOUs are not legally enforceable unless they are incorporated into statutes, as is the case in a growing number of wilderness bills.
12. 43 Op. Att'y Gen. 243, 269 (1980).
13. The U.S. Department of Agriculture has codified this interpretation in its regulations applying to all national forest wildernesses. For its part, BLM has also applied the access language of ANILCA to all lands under its jurisdiction. It is important to note, however, that the courts have not yet ruled on the question of whether this section (1323[a]) of ANILCA effectively amended the Wilderness Act.
14. These include weekend camping and star-gazing (Palen–McCoy Wilderness, California), building and operating a horse breeding and dude ranch (Mt. Tipton Wilderness, Arizona), campground development (Kalmiopsis Wilderness, Oregon), and commercial outfitting and guiding (Steens Mountain Wilderness, Oregon).