An analysis of Wilderness provisions in the Draft Utah Public Lands Initiative Act

Prepared by Wilderness Watch
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Introduction. In January 2016, Rep. Rob Bishop (R-UT) and Rep. Jason Chaffetz (R-UT) released a discussion draft of their long-awaited Utah Public Lands Initiative Act (PLI) for public lands in eastern Utah. The 65-page draft, dated Jan. 20, 2016, despite designating 41 Wildernesses, contains many problematic provisions dealing with the administration of Wilderness under the 1964 Wilderness Act (16 USC 1131-1136). These special provisions weaken the protection of Wilderness dramatically from the standards of the Wilderness Act and should be removed.

The Public Lands Initiative also warrants concern with regard to where wilderness boundaries are drawn, the size of proposed Wildernesses, cherrystems that fragment the proposed areas and compromise their remoteness, and the release of several wilderness study areas. The potential for innumerable roads to penetrate or dissect the wildlands surrounding the Wildernesses as a result of RS-2477 claims would further diminish the wilderness values of the designated areas. This analysis, however, examines only the special provisions in the PLI that depart from the 1964 Wilderness Act and would compromise the protection afforded the Wildernesses designated by the PLI.

To be sure the PLI is not the first wilderness bill to include special provisions not part of the Wilderness Act. Some of the provisions in the PLI that depart from the Wilderness Act have appeared in one or more previous wilderness bills, though others are entirely novel and potentially precedent setting. Never before have so many exceptions been compiled in a single bill. The sheer number and types of special provisions in the PLI ensures the Wildernesses designed by the PLI would lack many of the protections afforded by the Wilderness Act. They would become what have been referred to as WINOs—Wilderness In Name Only.

The Wilderness Act defines Wilderness in part as *"an area where the earth and its community of life are untrammeled by man…retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions."* In order to preserve wilderness conditions the Act generally prohibits the use of motor vehicles, motorized equipment, motorboats, or any form of mechanical transport, the landing of aircraft, construction of roads, or building or placing any structure or installation. Taken together, both the noble language describing what Wilderness is and the prohibitions describing what it is not set the context for analyzing and understanding the provisions in the PLI.

In General – Section 103(a) of the PLI includes the catch-all phrase that the Wilderness designated by the PLI will be administered "in accordance with the Wilderness Act (16 U.S.C. 1131 et seq.), but then follows with five pages of special provisions and management language ensuring they won't be. Section 103(a) should be

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revised to forthrightly state the Wildernesses in the PLI will not be administered in accordance with the Wilderness Act except in those few instances where the provisions of the Wilderness Act are not modified by the PLI.

Fire, Insects, and Disease – Section 4(d)(1) of the Wilderness Act provides that, *"such measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable."* This provision has been interpreted and used to allow broad discretion for fire suppression and, to a much more limited degree, insect and disease control in Wilderness.[1]

Section 103 (b) of the PLI would permit "any measures to manage wildland fire and treat hazardous fuels, insects, and diseases…." This provision goes beyond fire suppression and would allow for any management action designed to reduce forest fuels or the potential for insect or disease infestations, which runs counter to allowing Wilderness to be shaped by natural processes. The PLI places no limitations on the types of actions managers could implement including logging, thinning, burning, aerial herbicide applications, construction of fuel breaks or any other measures that might be used to limit natural fire, insects or disease. Such sweeping authority to waive wilderness protections under the guise of fire, insect, or disease control has never been included in a wilderness bill passed by Congress.

Section 103(c) allows any local, State, or Federal agency to conduct any kind of wildfire management operations in the areas designated as Wilderness. It specifically allows the use of aircraft and mechanized equipment by State and local authorities, which the Wilderness Act does not do. This provision also devolves federal control for conducting fire management in Wilderness to any local or State agency. While the Wilderness Act provides federal managers with latitude for fire suppression, there are some inherent checks on those decisions because federal managers are also responsible for protecting an area's wilderness character. Conversely, State and local agencies have no such constraints, or wilderness expertise that can be relied upon to ensure fire control actions don't seriously harm the Wildernesses the PLI is supposed to protect. To our knowledge similar language has never been included in a wilderness bill passed by Congress.

Livestock Grazing. Section 4(d)(4)(2) of the Wilderness Act provides that, "the grazing of livestock, where established prior to the effective date of this Act, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture." In 1980, Congress expounded on this provision with the so-called "Congressional Grazing Guidelines"[2] that have been included in most national

[1] *See e.g. Sierra Club v. Lyng*, 663 F.Supp. 556, 560 (D.D.C. 1987) (noting that "[t]he Secretary's burden under Section 4(d)(1) affirmatively to justify control actions taken for the benefit of adjacent land-owners is grounded on the need to ensure that wilderness values are not unnecessarily sacrificed to promote the interests of adjacent landowners which Congress authorized the Secretary to protect.").

[2] House Report 96-617 accompanying Public Law 96-560, commonly referred to as the "Colorado Wilderness Act of 1980."

forest or BLM wilderness bills since that time.[3] The key provisions of the grazing guidelines are summarized as follows:

> 1. There shall be no curtailments of grazing in wilderness areas simply because an area is, or has been designated as wilderness, nor should wilderness designations be used as an excuse by administrators to slowly "phase out" grazing. Any adjustments in the numbers of livestock permitted to graze in wilderness areas should be made as a result of revisions in the normal grazing and land management planning and policy setting process.
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> 2. The maintenance of supporting facilities, existing in the area prior to its classification as wilderness (including fences, line cabins, water wells and lines, stock tanks, etc.), is permissible in wilderness. Where practical alternatives do not exist, maintenance or other activities may be accomplished through the occasional use of motorized equipment.
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> 3. The placement or reconstruction of deteriorated facilities or improvements should not be required to be accomplished using "natural materials", unless the material and labor costs of using natural materials are such that their use would not impose unreasonable additional costs on grazing permittees.
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> 4. The construction of new improvements or replacement of deteriorated facilities in wilderness is permissible if in accordance with those guidelines and management plans governing the area involved. However, the construction of new improvements should be primarily for the purpose of resource protection and the more effective management of these resources rather than to accommodate increased numbers of livestock.
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> 5. The use of motorized equipment for emergency purposes such as rescuing sick animals or the placement of feed in emergency situations is also permissible. This privilege is to be exercised only in true emergencies, and should not be abused by permittees.

Section 103(d) of the PLI diverges from the Wilderness Act and the Congressional Grazing Guidelines in a number of ways. Unlike almost every other wilderness bill since 1980, the PLI does not explicitly incorporate the Congressional Grazing Guidelines (CGG), but instead appears to pick and choose among its provisions by including those most beneficial to livestock permittees, while not incorporating the limitations or qualifiers found in the CGG. The PLI also includes many new provisions not found in the CGG.

Section 103(d)(1) of the PLI locks in the current (as of Jan. 1, 2016) numbers of livestock and other grazing permit provisions without regard to range conditions, watershed conditions, conflicts with wildlife or human visitors, or any other social or environmental concern. While the CGG prohibit agencies from curtailing livestock grazing simply because an area is Wilderness, they do not lock-in existing livestock grazing numbers or practices where there is resource damage or conflicts with other

[3] The congressional grazing guidelines were first incorporated in a BLM wilderness bill as Appendix A of H. Rept. 101-405 that accompanied the Arizona Desert Wilderness Act of 1990, Public Law 101-628. Wilderness bills designating areas administered by BLM generally cite to this provision rather than the 1980 House Report, but the language is essentially identical.

public land purposes. This provision in the PLI is unprecedented in wilderness legislation.

Section 103(d)(2)(B) of the PLI is a reiteration of the previous provision locking in existing grazing levels. It also specifically prohibits any change in the number or type of livestock permitted to graze at the time of wilderness designation. It also mandates increases in livestock grazing levels if resource conditions are determined to allow for it. This, too, is a provision unique to the PLI that has not been approved in any previous wilderness legislation.

Section 103(d)(2)(C) of the PLI addresses the maintenance of fences, line cabins, water wells and pipelines, stock tanks, etc., and the use of motorized or mechanized tools and equipment in the performance of such maintenance. The CGG provide that the maintenance of such facilities "is permissible", though not guaranteed, whereas the PLI states such maintenance "shall continue." With regard to motorized and mechanized equipment, the CGG states they may be allowed "based on a rule of practical necessity and reasonableness" and a number of other limitations, whereas the PLI mandates their use. In mandating maintenance of grazing related structures and the use of motorized and mechanized equipment, the provisions in the PLI are unprecedented in wilderness legislation.

Section 103(d)(2)(E) of the PLI expressly provides for the use of motorized equipment for the placement of feed in emergency situations. The need to provide supplemental feed (not salt or other minerals) is often prima facie evidence that the range is overstocked. This provision is unprecedented in wilderness legislation.

Section 103(d)(3) of the PLI prohibits the U.S. Forest Service from applying the plant and animal viability requirements of 36 CFR 219 to any decision regarding livestock grazing in Wildernesses designated by the PLI. This provision in the PLI is unprecedented in wilderness legislation.

Section 103(d)(4) requires the secretaries of interior and agriculture to give priority consideration to information provided by the Utah Department of Agriculture for resolving disputed historic grazing areas, access, or use, even if that information contradicts information provided by the federal agencies that administer these public lands. This provision in the PLI is unprecedented in wilderness legislation.

Taken together, the livestock grazing provisions of the PLI represent a significant departure from the Wilderness Act and the Congressional Grazing Guidelines. The mandates in the PLI significantly weaken wilderness protections while providing livestock grazing interests with unprecedented favor not afforded ranchers anywhere else on public lands.

Outfitting and Guiding. The 1964 Wilderness Act bans commercial enterprise (section 4(c)), but elsewhere includes an exception for commercial services (such as outfitting and guiding). "Commercial services may be performed within the wilderness

areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas." (Section 4(d)(5)). The federal courts have interpreted this clause to be a very narrow exception, ruling that wilderness conditions cannot be harmed in order to maintain or increase levels of commercial use, precluding commercial activities that are not wilderness-dependent, and ruling that a "desire" or "preference" for commercial services does not equate to a "need" for those services. (See *High Sierra Hikers Ass'n v. Bernie Weingardt,* 521 F.Supp. 2d 1065.)

Section 103(e) of the PLI expands the commercial services exception by removing the discretion of the federal wilderness-administering agency (from "may be performed" to "are authorized"). This could be interpreted to require federal land managers to authorize any commercial service, not just commercial outfitting and guiding, that serves a recreational purpose of the area even if the service is degrading wilderness character. This is not the first bill that has included this provision, but it has been applied only a couple of times in the hundred-plus wilderness bills Congress has passed.

Fish and Wildlife. Section 4(d)(7) of the Wilderness Act states, "Nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests."[4] This is considered a neutral clause, maintaining the *status quo,* whereby the various states would continue to regulate hunting and fishing in wilderness, but in a manner compatible with wilderness. The Senate Report that is part of the legislative history of the Wilderness Act describes the relationship of Wilderness and wildlife management by quoting from a resolution adopted by the Wildlife Society in support of the values of benefits of the wilderness bill: *"the science of wildlife management is peculiarly concerned with the perpetuation of primeval areas as check areas against which the practices in game production on lands under management can be measured."*[5]

Section 103(f) of the PLI severely weakens wilderness protection by expanding the authority of State wildlife managers to engage in wilderness-damaging activities, such as exempting the State of Utah from the general prohibition against the use of aircraft in wilderness when conducting wildlife management activities. Specifically, PLI grants the State of Utah unfettered authorization to the "use of helicopters to maintain healthy wildlife populations within the wilderness areas." Fish and game agencies have sought this authority elsewhere to promote aerial predator control, unlimited capturing, collaring and translocation of native and non-native wildlife, and to facilitate habitat manipulation projects geared toward increasing game populations. This provision is severely at odds with protecting wilderness character, though it has been included in a few of the hundred-plus Wilderness bills Congress has passed.

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[4] While the Wilderness Act does not affect the States' "jurisdiction and responsibilities" relating to wildlife management, the federal government has not relinquished its authority over fish and wildlife on public lands if it chooses to exercise it (for example, in *Kleppe v. New Mexico 426 US 529,* the U.S. Supreme Court ruled, "We hold today that the property clause gives Congress the power to protect wildlife on the public lands, state law notwithstanding.").

[5] Senate Report No. 109, April 3, 1963.

Access to State or private lands. The Wilderness Act balances the interests of wilderness preservation and access for the owners of state-owned or privately owned lands surrounded by Wilderness by providing the owners "such rights as may be necessary to assure adequate access to such State-owned or privately owned land…or [the land] shall be exchanged for federally owned land in the same State of approximately equal value." (Section 5(a)). The intent of this provision was to ensure that access to private or state-owned land did not compromise the wilderness character of the area or, in those cases where access would harm wilderness, that the interest of the landowner could be met through an exchange. The U.S. Attorney General has interpreted this provision to mean "Absent a prior existing access right, the Secretar[ies] may deny 'adequate access' to land within a [wilderness area], but must offer a land exchange as indemnity."[6]

Sec. 103(g) of the PLI appears to preclude the Federal government's ability to offer an exchange in lieu of access. By stating the Federal government "shall" provide access without also stating the Federal government may instead offer an exchange, the PLI may preclude the Federal agencies' ability to preserve the wilderness character of the areas when destructive access plans are put forth. To be fair, the PLI does not require the Federal government to provide any specific type of access to inholdings, so the actual effect of the PLI language is uncertain. Given the large number of State-owned parcels in addition to any privately owned parcels within the Wildernesses that would be designated in the PLI, the ambiguous language is a serious concern. This is not the first bill that has included this provision, but it has been applied only a couple of times in the hundred-plus wilderness bills Congress has passed.

Wildlife Water Development Projects. Section 4(c) of the Wilderness Act prohibits the building or placement of structures and installations in Wilderness.

Sec. 103(h) of the PLI allows current and future structures and facilities to be built and maintained within Wildernesses for wildlife water development projects. These projects could include "guzzlers," ponds, reservoirs, dams or similar structures. Many of these developments, especially guzzlers, also require perpetual motor vehicle access to maintain the structures or refill the water supply during dry years. These projects would not only conflict with the Wilderness Act's ban on structures, they would also violate the foundational definition of wilderness as an area, "*where the earth and its community of life are untrammeled by man…without permanent improvements…and managed so as to preserve its natural conditions."* Though not the first time a wilderness bill has included similar language—it has been included in a couple of Nevada bills—this provision of the PLI profoundly conflicts with the Wilderness Act.

Hunting, Fishing, and Shooting. The Wilderness Act neither prohibits nor condones hunting, fishing, and shooting in Wilderness, but the federal wilderness-administering agencies can limit those activities in order to protect against resource damage, protect the experience of other visitors, or wilderness character. Wilderness Act architect and chief lobbyist, Howard Zahniser pointedly proclaimed, "The purpose of the

[6] 43 U.S. Op. Atty. Gen. 243.

wilderness act is to preserve the wilderness character of the areas to be included in the wilderness system, *not to establish any particular use*."

Sec. 103(i) of the PLI provides that hunting, fishing, and recreational and target shooting shall continue in Wildernesses designated by the PLI if those activities occurred prior to wilderness designation. Not only does this provision *establish a particular use* above preserving wilderness character, it prohibits agencies from ever curtailing these activities, even if damage to wildlife or wilderness resources occurs. This provision in the PLI is unprecedented in wilderness legislation.

Trail and Fence Maintenance. Section 4(c) of the Wilderness Act generally prohibits the use of motorized equipment such as chainsaws. It provides for the use of motorized equipment, such as chainsaws, in those rare instances when it is "necessary to meet minimum requirements" to administer the area as Wilderness.

Sec. 103(k) of the PLI specifically authorizes the use of chainsaws as a routine practice in the Wildernesses designated by the PLI for trail and fence line maintenance, even though Forest Service and BLM trail crews have maintained trails for more than 50 years largely without motorized equipment, and would be able to do so in the Wildernesses designated by the PLI. This provision in the PLI marks another weakening of wilderness standards from the Wilderness Act, and is unprecedented in wilderness legislation.

Water Rights. [Note: water rights are a very specialized area of law and unique to each State, so this analysis won't do justice to the full implication of the language in the PLI. Some implications, however, are apparent.] Section 4(d)(6) of the Wilderness Act states, "Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws." This has been interpreted as a neutral clause that has allowed the federal government to assert wilderness water rights, subject to existing water rights. Also relevant to the PLI, the Wilderness Act prohibits new or expanded water developments in Wilderness unless specifically authorized by the President after determining the developments are needed in the public interest (Section 4(d)(4)(1)), a provision that has never been exercised.

Sec. 104(a), (b) and (c) of the PLI preclude any express or implied reservation by the federal government of any water rights in Wildernesses designated by the PLI, and appears to limit the federal government's ability to protect its water rights on public lands. They require the federal government to follow State water law, and prohibit the federal government from taking any actions that affect the State's water rights, State authority, or State groundwater law.

Section 104(d)(1) of the PLI prohibits federal agencies from putting limits on motorized access and road maintenance for the maintenance of any water resource facilities in areas designated as Wilderness by the PLI. It also appears to allow for new water development facilities. The inability of federal agencies to regulate access to water

developments and the authorization for new water developments in Wilderness is contrary to the Wilderness Act.

Section 104(d)(2) extends some of the same allowances for development and access for anyone claiming a livestock water right or recognized beneficial use. This, too, would likely lead to significant harm to Wildernesses designated in the PLI.

Taken together, it appears the water rights and associated development language in the PLI represents a significant weakening of wilderness protections and is unprecedented in wilderness legislation.

Military Overflights. The Wilderness Act does not speak specifically to airspace and is generally interpreted as to not control the airspace above Wildernesses. There is no question, however, that overflights can degrade wilderness by impacting wildlife and visitor experiences. For these reasons the Federal Aviation Administration (FAA) has adopted guidance that recommends aircraft maintain an altitude at least 2,000 feet above ground level when flying over designated Wilderness. The one protected airspace above Wilderness lies in Minnesota, above the Boundary Waters Canoe Area Wilderness, where flights lower than 4,000 feet mean sea level (about 2,000-2,500 feet above ground) have been prohibited since 1949.

Sec. 105 of the PLI would preclude wilderness designation from affecting low-level overflights of military aircraft, flight testing or evaluation, or the designation of new military airspace or training routes over designated wilderness. This provision does not create an exception to the Wilderness Act and would not be a precedent, as similar language has appeared in several wilderness bills in recent years, however, it could certainly lead to degrading wilderness values in the new Wilderness areas.

Adjacent Management (Buffer Zones). While the Wilderness Act does not create buffer zones around Wilderness, it does, however, require federal agencies to preserve the wilderness character of designated Wildernesses. This requirement means agencies must consider impacts to the nearby Wilderness when deciding whether to authorize uses or activities outside Wilderness. The federal courts have affirmed this responsibility to consider impacts to wilderness character when approving uses or activities just outside wilderness boundaries (see *Izaak Walton League of Am., Inc. v. Kimbell*, 516 F.Supp. 2d 982 (2007)).

Sec. 106 of the PLI contains language that explicitly precludes a federal agency from prohibiting an activity or use outside Wilderness because it can be "seen, heard or smelled" within the adjacent Wilderness. This could result in uses or activities near the boundary of a Wilderness that significantly harm the values of the Wilderness. Prohibiting buffer zones isn't a precedent, as similar language has appeared in most wilderness bills since the early 1980s, though "smells" is a new category heretofore not mentioned in any wilderness bill.

Land Acquisition. Under current law the Federal government can purchase State-owned or privately owned land inside designated Wildernesses, often utilizing funds from the Land and Water Conservation Fund. Over the years the agencies have exercised this authority many times to acquire land from willing sellers.

Sec. 108 of the PLI prohibits the federal government from purchasing State-owned or privately owned lands inside the boundaries of the Wildernesses designated by the PLI. Only land exchanges or donations of land are permitted in such cases. Not only could this compromise wilderness protection, it would also restrict the right of private landowners or the State of Utah to sell their land to the buyer of their choice, even if the federal government were the highest bidder. This provision in the PLI is unprecedented in wilderness legislation.

Airsheds. The federal Clean Air Act (42 USC 7401-7661) established Class I air quality protections for national parks over 6,000 acres in size and Wilderness over 5,000 acres in size that were in existence as of August 7, 1977. Class I areas are afforded the highest level of air quality protections. Wildernesses designated after August 7, 1977 were designated as Class II and receive lesser mandated protection. Under current law, states can redesignate Class II areas to Class I.

Sec. 110 of the PLI prohibits airsheds above Wildernesses designated by the PLI from receiving Class I designation, therefore it preempts the State's ability to redesignate the areas as Class I. It would also remove the Class I airshed designations for the wilderness portions of Arches and Canyonlands national parks where Class I airshed designations currently exist. These air quality provisions in the PLI are unprecedented in wilderness legislation.

Bighorn Sheep Viability (High Uintas Wilderness). Section 303(g) of the PLI would effectively dedicate most of the High Uintas Wilderness west of Gilbert Peak to domestic sheep grazing while vanquishing native bighorn sheep from the area. At least that appears to be the intent of the PLI. However, because Title III applies to Special Management Areas (SMA) and the High Uintas Wilderness is not within an SMA, it is unclear how the geographic scope of this provision would be applied by the agencies or interpreted by the courts. Assuming this provision would be applied to the High Uintas Wilderness, it would be unprecedented in wilderness legislation.

Conclusion. The Wilderness management provisions in the PLI depart from the Wilderness Act in numerous, significant ways. While some of the damaging provisions have been included in one or more previous wilderness designation laws, several of the provisions are new and would set destructive precedents, such as those relating to fire, insects, and disease control; livestock grazing; hunting, fishing, and shooting; trail and fence maintenance; water rights and water developments; land acquisition; airshed protection; and bighorn sheep viability. Taken together, the provisions in the PLI would completely undermine the values and character that the wilderness designation should afford, resulting in what are often referred to as WINOs, Wilderness In Name Only.

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