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Keeping Wilderness Wild

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Testimony on H.R. 5727
Emery County Public Land Management Act of 2018
by
Wilderness Watch

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Wilderness Watch is providing this testimony on H.R. 5727, the Emery County Public Land Management Act of 2018. Wilderness Watch is a national wilderness conservation organization focused on the protection and proper stewardship of lands and wild rivers within the National Wilderness Preservation System.

Wilderness Watch staff and board members are intimately familiar with the lands and the management issues affected by H.R. 5727, having been involved in the Utah BLM wilderness review process since its inception and in RARE II since the early 1970s. Our staff and members have hiked, worked, explored, rafted, fished, hunted, and photographed throughout the Desolation Canyon-Book Cliffs, San Rafael Swell, and Wasatch Plateau country.

I. Problems with Bill Language for Wilderness Administration

Special provisions in wilderness designation bills are provisions that weaken the protection and stewardship of Wildernesses from the standards set in the 1964 Wilderness Act, 16 U.S.C. 1131-1136. These provisions often make it difficult or impossible to protect these areas as truly wild Wilderness. In general, they should be avoided. Our specific comments on the special provisions in H.R. 5727 follow:

• **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 expanded this provision

with the so-called "Congressional Grazing Guidelines"[1] that have been included in most national forest or BLM wilderness bills since that time.

Section 202(b) of H.R. 5727 references the provision from the 1964 Wilderness Act, as well as Appendix A of House Report 101-405, which accompanied the 1990 Arizona Desert Wilderness Act, P.L. 101-628. The language from House Report 101-405 repeats the language from House Report 96-617. The Congressional Grazing Guidelines have expanded the special provision on grazing beyond that allowed by the Wilderness Act. The reference to the House Report should therefore be removed.

In 2009, Congress included language in designating five Owyhee Wildernesses in Idaho that allows the donation of livestock grazing permits or leases within those five newly-designated Wildernesses. This language is found at P.L. 111-11, Section 1503(b)(3)(D). We strongly suggest that Congress also include that language in H.R. 5727.

• **Wildfire, Insect, and Disease Management**. 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.[2]

Section 202(c) of H.R. 5727 reiterates this provision and references the above-cited section of the Wilderness Act, but also adds in the reference to House Report 98-40. This report accompanied the 1984 California Wilderness Act, P.L. 98-425.

But the language contained in this House Report, intended specifically and only to the dry chaparral forests of southern California, is a significant weakening of the language of the Wilderness Act and allows extensive "presuppression" activities. This report language, for example, allows the construction of roads and fuelbreaks in Wilderness, and the intentional setting of prescribed fires in Wilderness in mere anticipation of a future wildfire:

> In other cases, fire roads, fuel breaks or other management techniques have been used. The Committee also believes that prescribed burning could prove to be an especially significant fire presuppression method, particularly in cases where a history of past fire suppression policies have allowed "unnatural" accumulations of dead or live fuel (such as chaparral) to build up to hazardous levels.[3]

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[1] H.Rept. 96-617 accompanying Public Law 96-560, commonly referred to as the "Colorado Wilderness Act of 1980."

[2] *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.").

[3] H.Rept. 98-40, pp. 40-41.

This language is a significant weakening of the protections otherwise provided by the 1964 Wilderness Act, and should be removed from the bill.

• **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. 202(d) of H.R. 5727 contains language that explicitly precludes a federal agency from prohibiting an activity or use outside Wilderness because it can be "seen or heard" 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 many wilderness bills since the early 1980s, but its inclusion is a weakening of the 1964 Wilderness Act. This provision should be removed from the bill.

• **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

Sec. 202(e) of H.R. 5727 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. This provision should be removed.

• **Casual Collection**. Section 202(g) of H.R. 5727 allows the "casual collection" of rocks, minerals, and fossils within the Wildernesses designated by the bill. The removal of such items could degrade an area's wilderness character and represent a loss of important resources in the area, particularly in the case of fossils, petrified wood, or other rare items.

This is unprecedented language for a wilderness bill and, to the best of our knowledge, has never been enacted into law. This language would transform what might otherwise be illegal actions into authorized and permitted uses in Wilderness. It would lead to the loss of rocks, minerals, and fossils from Wildernesses, and might encourage

visitors to casually collect archeological artifacts as well. This provision should be stripped from the bill.

• **Climatological Data Collection**. Section 4(c) of the Wilderness Act requires that there be "no structure or installation within any such area." This provision has been interpreted to prohibit any building, structure, or installation of any kind unless it serves the cause of wilderness protection.

Section 202(j) of H.R. 5727 provides that "the Secretary may authorize the installation and maintenance of hydrologic, meteorologic, or climatological collection devices in the wilderness areas if the Secretary determines that the facilities and access to the facilities are essential to flood warning, flood control, or water reservoir activities."

To the best of our knowledge there is no need for such structures or installations in any of the areas affected by the bill and, to the extent there might be, those structures or installations could be placed outside the areas designated as Wilderness. This provision should be removed from the bill.

• **Water Rights.** 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 H.R. 5727, 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.

Section 202(k) of H.R. 5727 precludes any express or implied reservation by the federal government of any water rights in Wildernesses designated by this legislation, and appears to limit the federal government's ability to protect its water rights on public lands. It requires the federal government to follow State water law, and prohibits the federal government from taking any actions that affect the State's water rights, State authority, or State groundwater law. This section is a significant weakening of protections in the 1964 Wilderness Act, and should be removed from the bill.

• **Memorandum of Understanding**. Section 202(l) of H.R. 5727 has a special provision for a Memorandum of Understanding (MOU) establishing motorized search and rescue in the Crack Canyon Wilderness dsignated by this bill. This is really odd; motorized use can already be allowed for emergencies under the section 4(c) of the 1964 Wilderness Act. This provision in H.R. 5727 could lead to significantly more motorized use and mechanical transport than allowed already for search and rescue in designated Wilderness.

Section 202(l) should be removed from the bill.

• **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."

Section 203 of H.R. 5727 reiterates this statement, but also goes on to reference "applicable policies described in appendix B of House Report 101-405." The language in the House report mimics a memorandum of understanding between the BLM and the Association of Fish and Wildlife Agencies. Unfortunately, that in-house MOU allows for many activities that are incompatible with Wilderness preservation and thus should not be incorporated in any wilderness bill. These activities include construction of buildings, structures, and installations; use of motorized equipment and motor vehicles; predator killing in Wilderness; fish stocking in naturally fishless lakes and streams; and the use of toxic chemicals to poison lakes and streams. Because of all of these incompatible uses found in that House Report appendix, Section 203(b) of H.R. 5727 should be removed from the bill.

II. Problems with Wilderness Boundaries

The proposed wilderness boundaries exclude too much great wild country, and even in those areas where the proposed wildernesses are fairly large, the proposed boundaries severely fragment the areas, making management of the areas as wilderness more difficult and significantly reducing their potential wilderness values. It seems apparent the boundaries were drawn not to protect wilderness values, but to protect the interests of those who don't want wilderness. The problems center mainly on too little acreage designated as Wilderness (more than 900,000 acres of proposed wilderness would be left unprotected in Emery County), fragmentation of the areas designated as Wilderness, and cherry-stemmed road corridors.

Two areas in particular stand out with regard to fragmentation and cherrystems. Desolation Canyon is part of a nearly million-acre roadless area including adjacent federal, tribal, and state land, perhaps the largest unprotected wildland in the contiguous 48 states. Its extraordinary wildlife, ecological, and recreational values derive from its intact wilderness-like condition. The proposed legislation designates only a paltry number of acres west of the Green River as Wilderness, but equally as troubling are the proposed cherrystems along the Beckwith Plateau, lower Range Creek (below the Turtle Canyon confluence), and along Turtle Canyon. These primitive routes are rarely if ever used by motor vehicles, but with the proposed boundaries they would stick out on a map like neon signs beckoning the motorized explorer. They would also result in visitors never getting more than a few miles from a road, despite Desolation's large size. The cherrystems should be removed from the proposed Wilderness and the boundaries should be expanded to include all of the adjacent roadless country. Desolation Canyon is a world-class wild area and should be protected as such.

The proposed San Rafael wildernesses suffer many of the same problems, but the evisceration of the Sids Mountain area is particularly egregious. Sids is a 90,000-acre intact

roadless area that has been sliced into several pieces in the bill, greatly reducing the wilderness value of the entire area. None of these dividing routes or cherrystems were more than barely passable wash-bottom jeep trails when the BLM review began. They are important corridors for wildlife and should all be included in the designated Wilderness.

These two areas represent two of the most glaring problems with the wilderness designations in the bill, but there are many others of a similar vein. While the bill might never include all areas as wilderness that conservationists would like, those areas that do get designated should be made whole, such that their wilderness values are protected.