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## An analysis of Wilderness provisions in the Utah Public Lands Initiative Act H.R. 5780<sup>1</sup> August 2016

### Introduction

On July 14, 2016, Representatives Rob Bishop (R-UT) and Jason Chaffetz (R-UT) introduced H.R. 5780, the Utah Public Lands Initiative Act (PLI), legislation aimed at resolving the decades-long debate over wilderness designation on public lands in eastern Utah. Despite designating 41 Wildernesses in seven counties, the legislation contains numerous special provisions that depart from the Wilderness Act and severely compromise the protections that would normally be afforded to areas designated as Wilderness.

This analysis 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. The PLI 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 for humans and wildlife, the release of several wilderness study areas, and the potential for innumerable roads to penetrate or dissect the wildlands surrounding the Wildernesses as a result of RS-2477 claims. These concerns deserve much attention in the ensuing debate over the PLI, but are not a part of this analysis.

Some of the harmful provisions in the PLI that depart from the Wilderness Act have appeared in one or more previous wilderness bills, while others are entirely novel and would be precedent setting. The sheer number and types of special provisions in the PLI are unprecedented and ensure the Wildernesses designed by the PLI would lack many of the protections afforded by the Wilderness Act. They would become what are referred to as WINOs—Wilderness In Name Only.

### In General

Section 103(a) of the PLI includes the catch-all phrase that the Wildernesses designated by the PLI shall be administered “in accordance with the Wilderness Act”, but in reality the PLI’s special provisions and management language ensure they won’t be. Section 103(a) should be revised to more accurately state the Wildernesses in the PLI will be administered in accordance

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<sup>1</sup> Wilderness Watch is a national conservation organization dedicated to protection and proper stewardship of the National Wilderness Preservation System. For questions about this report contact George Nickas ([gnickas@wildernesswatch.org](mailto:gnickas@wildernesswatch.org)) or Kevin Proescholdt ([kevinp@wildernesswatch.org](mailto:kevinp@wildernesswatch.org)).

with the Wilderness Act in part, but will be largely be administered by a new set of standards to create diminished wilderness.

### **Fire, Insects, and Disease**

Section 103(c) of the PLI includes the statement: “Nothing in this title precludes a Federal, State, tribal, or local agency from conducting wildfire management operations (including operations using aircraft or mechanized equipment).” It is unclear whether this provision would allow State, tribal or local agencies to operate independent of federal agency control, or if fire control will remain solely under the supervision of federal authorities. Given the antipathy some local officials in Utah have toward federal agencies and public lands, it is certainly possible this provision will generate future conflicts over fire control in Wilderness.

While the Wilderness Act provides federal managers with latitude for fire suppression, including the use of motorized equipment, 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. Similar language has appeared in one other bill designating Wilderness in Nevada, though that bill did not include tribal agencies. At a minimum, the PLI should be modified to make clear that fire control efforts remain under the federal land management agency’s control.

### **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”<sup>2</sup> that have been included in most national forest or BLM wilderness bills since that time.<sup>3</sup> Section 103(d) of the PLI states grazing will be administered consistent with the Wilderness Act and the grazing guidelines. However, Division B, Title XIII in the PLI (“Long-Term Grazing Certainty”) belies these assurances by statutorily enshrining domestic livestock grazing as the priority use of public lands in Utah including Wildernesses designated by the PLI. If the livestock grazing provisions in the PLI are enacted into law, it would set a terrible precedent for Wilderness and public lands.

**Division B, Title XIII** essentially makes domestic livestock grazing the priority use of public lands in Utah, including Wilderness. **Section 1301** requires that grazing “shall continue”

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<sup>2</sup> House Report 96-617 accompanying Public Law 96-560, commonly referred to as the “Colorado Wilderness Act of 1980.”

<sup>3</sup> 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.

on all public lands covered by PLI, apparently without regard to resource or social conflicts. **Section 1302** which states, “the viability or existence of bighorn sheep shall not be used to alter the use of domestic sheep or cattle where such use was permitted as of January 1, 2016,” would sound the death knell for bighorn sheep in the areas covered by the bill. Domestic sheep transmit fatal diseases to bighorns for which the bighorns have no immunity. This had led to bighorn die-offs throughout the West, including in Utah, and is the reason efforts are being made in most states to separate domestic sheep from bighorns. The PLI would prohibit such efforts in Utah, and is most likely targeted at the fragile bighorn population in the High Uintas Wilderness, where domestic sheep grazers are working to prohibit the expansion of the area’s bighorn herd.

**Section 1303** states it is the intent of Congress that livestock grazing levels not be reduced below current permitted levels regardless of range conditions or other resource conflicts, “except for cases of extreme range conditions where water and forage is not available”—a meaningless limitation since grazing can’t occur if forage or water is not available. This section also requires that grazing be reinstated in areas where it has been reduced or eliminated in the past. The provision is not limited to the seven counties, but apparently includes “all public grazing lands” in Utah. This would require that large areas of the High Uintas, Desolation Canyon and Dark Canyon, for example, where in some cases grazing has been eliminated for decades, to be opened to domestic livestock grazing regardless of the impacts to native wildlife, soils, vegetation, water quality, cultural resources or recreation use.

Public grazing lands are not defined in the statute. It is therefore likely this provision would apply to all federal lands where grazing may have taken place at some time in the past. If so, it could also retroactively apply to national parks, recreation areas, and monuments managed by the Park Service.

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

### **Commercial Services – Outfitting and Guiding**

The 1964 Wilderness Act generally bans commercial enterprise (section 4(c)), but includes an exception for commercial services (such as outfitting and guiding). Section 4(d)(5) of the Act states, “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.” 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 replacing the

permissive “may be performed” language of the Wilderness Act with language stating commercial services “are authorized,” essentially mandating managers allow commercial use. 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 degrades 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.

### **Access to State or Private Lands**

The Wilderness Act balances the interests of wilderness preservation with 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 is to ensure that access to private or state-owned land does not compromise the wilderness character of the area or, in those cases where access would harm wilderness, that the interest of the landowner can 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.”<sup>4</sup>

Sec. 103(f) 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. The PLI does not require the Federal government to provide any specific type or mode of access to inholdings, so the actual effect of the PLI language is uncertain. Given the large number of State-owned parcels and any privately owned parcels within the Wildernesses that would be designated in the PLI the ambiguous language in section 103(f) 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**

Sec. 103(g) of the PLI “grandfathers” existing water development structures and allows for building and maintaining new wildlife water development projects within Wilderness. This conflicts with section 4(c) of the Wilderness Act, which prohibits the building or placement of structures and installations in Wilderness.

The authorized projects could include “guzzlers,” ponds, reservoirs, dams or similar structures, many of which would likely require perpetual motor vehicle access for maintenance. The purpose of such structures is almost always to increase game population numbers beyond what natural conditions provide. 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 untrammelled by man...retaining its primeval*

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<sup>4</sup> 43 U.S. Op. Atty. Gen. 243.

*character and influence, without permanent improvements or human habitation, which is protected 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.

### **Fish and Wildlife**

Section 103(h) reiterates the language from the Wilderness Act indicating nothing will change with regard to the State of Utah’s responsibilities for managing wildlife and regulating hunting, fishing, and trapping.

The provisions relating to domestic livestock grazing described above, which give priority to livestock over native wildlife, are unprecedented and will have a significant deleterious effect on the areas’ wildlife and its habitat. Most notably, the provision that prohibits removing domestic sheep from bighorn sheep habitat will lead to the likely extirpation of bighorn sheep throughout eastern Utah.

### **Trail and Fence Maintenance**

Section 103(j) of the PLI states the secretary shall maintain trails and fence lines with the Wildernesses. This would seem to mandate maintaining trails and fences that may not be needed, conflict with other management goals or are causing resource damage. This provision is unprecedented in wilderness legislation.

### **Water Rights and Water Infrastructure**

[Note: water rights are a specialized area of law and unique to each State, so this analysis won’t do justice to the full implications of the PLI, however some impacts 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 is a neutral clause that allows the federal government to assert wilderness water rights, subject to existing water rights. Additionally, 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.

Sections 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 appear to limit the federal government’s ability to protect its water rights on public lands. The provisions also 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(b) of the PLI would remove public land managers’ existing authority to put limits on motor vehicle access and road maintenance to service water development facilities in

areas designated as Wilderness by the PLI. It also appears to remove land managers' authority to limit new water development facilities in these areas. These restrictions on land managers' authority apply whether the water rights holder is a public or private entity. 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.

Taken together, 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.

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 however, it could certainly lead to degraded wilderness conditions in the new Wilderness areas.

### **Adjacent Management (Buffer Zones)**

While the Wilderness Act does not create buffer zones around Wilderness, it does require federal agencies to preserve the wilderness character of designated Wildernesses. This requires agencies to consider impacts to the nearby Wilderness when authorizing uses or activities outside Wilderness, and to prohibit or modify those activities to limit the impacts to the nearby Wilderness.

Sec. 106 of the PLI explicitly precludes a federal agency from prohibiting an activity or use outside Wilderness because the activity or use 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 Wilderness.

Including "buffer zone" language in a wilderness bill 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.

### **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(a) of the PLI states it is the intention of Congress that airsheds above Wildernesses designated by the PLI “shall not be” upgraded from Class II to Class I air quality unless Class I status is agreed to by the State of Utah. This would likely preclude federal land managers from initiating efforts to upgrade air quality status, however the practical effect of this provision is probably not great. Nevertheless, the air quality provisions in the PLI are unprecedented in wilderness legislation.

Section 110(b) appears to recognize that Wildernesses in the national parks are currently Class I airsheds and will remain so under the PLI, however, the reference to Wildernesses designated by “section 101(K), (AA), and (BB)” is likely intended to apply to section 101(11), (27), and (28).

### **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. Taken in combination, the special provisions in the PLI would completely undermine the values and character that the wilderness designation should afford and would likely result in similar provisions in future wilderness bills.

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