



## WILDERNESS WATCH

*Keeping Wilderness Wild*

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Bureau of Land Management  
Commercial Service Access in Desolation Canyon of the Green River  
125 South 600 West  
Price, Utah 84501

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Dear BLM Planning Team:

These are comments from Wilderness Watch on the Commercial Services Access in Desolation Canyon of the Green River Environmental Assessment (EA). Wilderness Watch is a national nonprofit wilderness conservation organization dedicated to the protection and proper administration of the National Wilderness Preservation System. The EA does not provide enough information to conclude the proposed action is either necessary or proper. We go into more detail on our concerns.

### **Background**

As part of the John D. Dingell Jr. Conservation, Management, and Recreation Act in 2019, Congress designated the Desolation Canyon Wilderness and two Wild and Scenic segments on the Green River in Desolation/Gray Canyons. The Desolation Canyon and Turtle Canyon Wildernesses, surrounding Wilderness Study Areas (WSAs), and other adjoining roadless public and Tribal lands in the Book Cliffs constitute a million-acre wild region with superlative wildlife and other wilderness values. Desolation Canyon includes an 80-mile stretch of the wild Green River, which has carved a 5,000-ft gorge providing one of the wildest and most remote river running experiences in the western U.S. Rocky Mountain bighorn, bison, black bear, cougar, elk, mule deer, and at least three endangered fishes all call this Wilderness home. The EA, Figure 1-1, correctly looks at this larger area.

That said, the EA fails to adequately consider changes that have taken place since the river management plan was put into place. That plan, which is 45 years old, still contains important direction. However, the fact there is now a designated Desolation Canyon Wilderness coupled with other changes necessitates something more than the status quo. The three alternatives analyzed are essentially the status quo, with minor differences.

### **Wilderness Introduction**

Section 4(c) of the Wilderness Act states "...there shall be no commercial enterprise..." within any wilderness area. Commercializing wilderness tends to inject economic considerations into

wilderness management decisions, something Congress clearly wanted to avoid. At the same time, Congress recognized outfitting as a traditional use of wilderness and that some people needed the services of outfitters in order to experience the benefits of wilderness. Thus, Section 4(d)(5) of the Act provides that "Commercial services **may** be performed...**to the extent necessary** for activities which **are proper** for realizing the recreational or other wilderness purposes of the areas" (emphasis added). Whether to allow commercial outfitting and guiding is a discretionary decision for wilderness administrators. The Act requires that managers preserve wilderness character and that commercial services be allowed only to the extent necessary.

In other words, for Wilderness to be in contrast to other areas, where human works dominate, it must be treated with humility and restraint. To protect the unique values of wild wilderness, the 1964 Wilderness Act prohibits commercial enterprise in designated Wildernesses. The prohibition against commercial enterprise (and permanent roads) is the strongest protection in the Act subject only to "existing private rights."

Outfitters and guides can play an important role in education and an important role by making it possible for people who don't have the equipment, skill, or physical ability to enjoy wilderness on their own. Demand, however, expressed as a function of the industry's ability to market wilderness, is not a valid indicator of what is necessary. The needs assessment should define the level and type of commercial services necessary to achieve the allowable public purposes of wilderness within the constraints of preserving wilderness character.

Commercial outfitters, guides and their clients must abide by the same rules that apply to other wilderness users. For example, they should be governed by the same party-size and length of stay limits, they should compete fairly for campsites, they must "pack out" what they "pack in" (i.e. no caches or permanent structures) and they must strive to leave no trace of their visit.

When it is necessary to limit use, all workable options should be explored to ensure that all citizens share equal opportunities to visit wilderness and wild rivers where use is limited by permits. The current system allows those who can afford and choose to hire an outfitter far greater opportunities to visit the Desolation Canyon Wilderness and float the Green River over what the general public enjoys.

The Ninth Circuit Court of Appeals decision in *High Sierra Hikers v. Blackwell* made clear that preservation of Wilderness Character is paramount:

The Wilderness Act twice states its overarching purpose. In Section 1131(a) the Act states, "and [wilderness areas] shall be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character." 16 U.S.C. § 1131(a). (emphasis in original omitted). Although the Act stresses the importance of wilderness areas as places for the public to enjoy, it simultaneously restricts their use in any way that would impair their future use as wilderness. This responsibility is reiterated in Section 1133(b), in which the administering agency is charged with preserving the wilderness character of the wilderness area.

BLM regulations state, "The BLM should determine through analysis if one or more of the public purposes of wilderness would go unrealized if there was no commercial use. If a given purpose can be adequately realized in a given place and time without commercial services then the commercial service is not necessary." BLM Manual at 6340 1.6 C. 4. i.

BLM regulations also state:

Commercial services can be allowed only where their authorization will not impair wilderness character as a whole. Where commercial services are likely to impair wilderness character as a whole, reduction in commercial service use or non-commercial use (or both) may be necessary. Reductions will be based on levels of demand, need, equity, and availability of similar experiences in the vicinity of the wilderness.

BLM Manual at 6340 1.6 C. 4. i.

This background is important because the EA is misleading about the purpose (singular) of Wilderness. Page 16 misstates regarding the Desolation Canyon Wilderness, “Wilderness is managed to protect natural processes, preserve natural and cultural resources, and facilitate recreation opportunities while minimizing impacts to the landscape.”

The overriding purpose of the Wilderness Act is the preservation of Wilderness. Nowhere in the Act does it say the purpose of the Act is to facilitate recreation opportunities while minimizing impacts to the landscape or preserve cultural resources. As the Wilderness Act's author, Howard Zahniser, stated, “The purpose of the Wilderness Act is to preserve the wilderness character of the areas to be included in the wilderness system, not to establish any particular use.” This directive was codified in the statute with the clear mandate that “[e]ach agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character.” In other words, the EA statement inverts the statutory language by prioritizing recreation and cultural resources over the Wilderness itself.<sup>1</sup>

With this background, we address in more detail concerns related to need, impacts on Wilderness, and abnormalities in recent use data later in this comment.

### **Wilderness and Need**

The US Court of Appeals for the Ninth Circuit held regarding the “need” for commercial services in Wilderness:

The finding of necessity required in the Wilderness Act is a specialized one. The Forest Service may authorize commercial services only “to the *extent* necessary.” (emphasis added). 16 U.S.C. § 1133(d)(5) Thus, the Forest Service must show that the number of permits granted was no more than necessary to achieve the goals of the Act. ...

When the Forest Service completed the Needs Assessment it examined independently three topics related to the need for commercial services: the types of activities for which commercial services are needed, the extent to which current permits are being used, and the amount of use the land can tolerate. All of these are relevant factors to consider when determining

1 See also Appendix A page 9 for BLM's explicit prioritization of recreation over Wilderness.

how much, if any, commercial activity is appropriate in a wilderness area.  
*High Sierra Hikers v. Blackwell*

The court further states that the Forest Service may have “elevated recreational activity over the long-term preservation of the wilderness character of the land.”

With that introduction, we now address some of the interrelated factors that affect the discussion of need and what is proper. They include:

- Demand does not equate to need.
- The amount of commercial use proposed in Alternative B is well in excess of what has been recently used. Further, changes in recreational use patterns have not changed how BLM looks at need.
- Not all commercial services are analyzed in this EA. Rather than a piecemeal approach, an analysis of all commercial use is needed. Further, the bifurcation of two types of commercial river users—so-called access permits and other permits—is unduly complicated and confusing.
- Similarly, the data in the EA and appendices are, at times, contradictory and/or show that existing limits have been exceeded.

The EA appropriately admits on page B-6 and B-10 that demand cannot be conflated with need. However, the EA conveniently forgets this important point in other places (see EA pages 17, 22, and A-9). In another example, “Desolation Canyon is a highly in-demand recreation resource and, as on other whitewater rivers, commercial services are vital to facilitating access by a broad spectrum of the public.” EA at B-1. Also, “The user day and daily launch limits for Desolation-Gray Canyon are designed to meet as much of the public demand for river recreation within the capacity limitations of the river resource.” EA at B-16. Further, “The extent necessary entails allowing all commercial river trips, within the current bounds of river use levels and allocations, to engage in guided or guide-facilitated activities in Desolation Canyon Wilderness.” Ibid.

The limits mentioned in the paragraph above (the first quotation from page B-16) are not proposed to be changed under any alternative even though the EA admits that it must comply with the Wilderness Act in terms of special use recreation permits by revisiting them in this analysis. Since no changes are proposed under any alternative in the amount of commercial use, the EA is merely a *pro forma* exercise. To the degree that the second sentence from page B-16 quoted above means anything at all, it appears that it conflates the limitations of the river resource with what is necessary and proper in Wilderness in terms of commercial services. The Wilderness Act standard is different and higher than the existing system. If it weren't, then this EA would not be needed at all. This last statement quoted above appears to be a tacit admission that rather than comply with the Wilderness Act, BLM simply declares what is necessary is the status quo in spite of changes that have taken place over the past 45 years (see below).

The amount of commercial use is nowhere near what is allocated. While need is not demand, there is no need in the absence of demand. In a wilderness context, need is always less than or in rare cases equal to demand because the narrow exception for commercial services in the Wilderness Act is optional. For example, EA pages 13, 22, 23, 31, and others point out

commercial use is well below current allocations (though the figures seem to be inconsistent on how much below). The need for commercial use, at most, would translate to what is currently occurring, which is considerably less than what the proposed action would allow.

In addition, there are changes that need to be factored into the needs assessment/EA. While the EA mentioned some of these changes, they are not factored into the needs assessment. These include the above noted commercial use levels below what is allocated, an increase in private use (reflecting an increase in the capability of private users), an increase in institutional use (though less than the decrease in other commercial use), development of social trails in the Wilderness, and closing of all campsites on the Ute Reservation, which includes four popular sites at Log Cabin and one near the mouth of Chandler Canyon. Because of the closure of the Ute Reservation to camping, the carrying capacity of the campsites along the river has diminished. That fact should cause BLM to consider changes in the number of permits issued, cumulative user days, and/or adjustments in party size limits.<sup>2</sup> BLM admits as much on page 41, when discussing Alternative C, that puts limits on where commercial users can camp, “However, the current river allocations were set based on all users being able to camp throughout the river corridor (i.e., no camping restrictions for commercial groups).”

Not all commercial uses are included in the EA, though they should be. Land-based commercial permits are omitted.<sup>3</sup> Ironically, Alternative B proposes to add hiking, a land-based use, as part of the river-based permits. This is technically an expansion of commercial use in the Wilderness and cumulative impact area even if commercial services are currently guiding hikes for clients. Daily river permits (see EA page 22, Nefertiti to Swasey's Campground) are not detailed or analyzed even though that use has an impact on the west side of the river, which is Wilderness. Packraft use is not addressed (EA page 14), either for private or commercial use. Collection of antlers, many of which are sold making it a commercial venture, is ignored in the EA. Regarding this last point, we recommend that BLM have a stipulation that commercial and private parties be required to leave all natural and cultural objects where they find them, including antlers. Collecting should be prohibited.

What is most puzzling is the strange bifurcation of commercial uses between institutional (labeled access in the EA) and other commercial services. As the EA recognizes, these institutional permits are commercial and have been treated as such since BLM policy correctly included this use as commercial many years ago. BLM should treat them like other commercial services and monitor their compliance with permit requirements.

Inconsistencies in or lack of adequate explanation of the use information in the EA makes it difficult for a decision maker to make a well-grounded decision about need for commercial services. For example, the EA at page B-4 states, “From 2021 to 2023, there were an average of 395 private launches and 116 commercial launches during the high-use season resulting in an average of 25,015 private user days and 10,477 user days. Combined, this comprised an average of 75% of all trips.” In other words, an average of 35,492 user days were counted just for the high use season (more on that later), which exceeds the carrying capacity for the **entire year** by

2 BLM may be able to do this through stipulations, like those proposed in EA appendices, rather than a potentially lengthy process of amending plans.

3 Only 5 annual clients with 7 guides are listed for hunting trips in the EA page on 22. We don't know if this is the Wilderness itself or the entire cumulative impact area, outlined on Figure 1-1 of the EA.

nearly 500 user days (See EA page 2 for the first reference to that carrying capacity). This high-use figure represents only 75% of trips. Assuming trips in the other season are, on average, similar to the high-use season, then this would result in about 47,333 user days for the entire year, more than 12,000 user days in excess of the stated carrying capacity. As noted before, that carrying capacity has been diminished by the closure of the Ute Reservation to camping.

Further, we don't know what BLM even means by the high-use season. Is it May 1 to September 30 (major use, EA page 2), May 15 to September 15 (also page 2, page 21, and elsewhere), May and June (page 21), May to August (page 23), or May to July (page 34)?

These are just two examples of inconsistency in the data that is presented.<sup>4</sup> The EA does not include use data or monitoring data, such as at campsites, for a reader to determine trends or what BLM is seeing on the ground.

In sum, the recognition in the EA that a needs assessment is required (see EA page 7), while at the same time proposing nothing of real substance in the way of changes, is perplexing. The failure to look at “allocation and other trip parameters” in light of the changed conditions, including ones recognized in the EA, is clearly flawed (EA page 2).

### **Impacts to Wilderness**

One overarching general concern in the EA's analysis is the improper use of wilderness character monitoring protocol as a basis for making “tradeoffs” in Wilderness. The notion of five wilderness qualities came about in Landres' *Keeping it Wild* protocols—internal agency guidance documents that have not gone through formal notice and comment rulemaking. These documents are the subject of much disagreement and controversy, largely because they promote—intentionally or not—an interpretation of the Wilderness Act that is internally inconsistent and results in management actions that are antithetical to Wilderness preservation. See, e.g. Cole, et. al. 2015 (attached). While initially envisioned as a tool to help agencies measure wilderness character on the ground, it has had unintended consequences.

A prime example of a rapidly growing consequence from *Keeping it Wild* is the erroneous idea that managers can weigh various components of wilderness character against each other, thereby reducing the Wilderness Act to a point tallying system rather than a substantive law with cohesive goals and stringent prohibitions. This management mindset effectively and unlawfully repeals and rewrites the Wilderness Act.

The Wilderness Act sought to remove agency bias and influence from the equation. Put another way:

In contrast to other public land management statutes, which typically authorize agencies to consider and weigh diverse values through exercise of their scientific and policy expertise, the Wilderness Act required certain areas to be managed predominantly for one use: wilderness preservation....

<sup>4</sup> Others include the number of land-based outfitters. Data on these outfitters is sparse, inconsistent, or not well explained.



Unlike all other land-management statutes, the Wilderness Act's basic purpose was not to delegate authority to expert agencies, but rather, to exclude certain lands from the application of the agencies' specialized expertise, to restrain agency flexibility, and to protect (with limited, narrow exceptions) certain lands from the impact of the sort of policy choices land managers typically make.

Sean Kammer, *Coming to Terms with Wilderness: The Wilderness Act and the Problem of Wildlife Restoration*, 43 ENVTL. L. 83, 100-101 (2013). Attached.

One specific example of the above general concern in the EA is sacrificing solitude in Wilderness (and the WSA) for recreation use in the high-use season. This is especially evident in the tortured analysis in Alternative C, which closes camping in the Wilderness to commercial uses but does not close the river to that use, thereby supposedly "forcing" commercial users to degrade the WSA by overusing campsites between Coal Wash and Nefertiti. See EA at 21, 33, and 38.

The EA's analysis omits some key issues:

- The use of motors on the river is not analyzed in the EA and is omitted entirely from the body of the EA. Thus, the impacts from motor use to the Wilderness, WSA, or other visitors are not revealed. This is a serious omission. The EA is written as if there is no motor use on the river. A stipulation that closes the river to public motor use on boats should be adopted.
- The EA purposely fails to consider packraft use that would enter and/or exit at points other than Sand Wash and Swasey's Campground. Current management direction requires permits for all river use. Does BLM intend packraft use would be exempt from the permit system once a decision is made? Further, the EA does not indicate if any commercial service does trips that use packrafts that don't enter at Sand Wash and exit at Swasey's Campground. In any case, such a commercial enterprise is not likely to be deemed necessary. Any private parties using packrafts for any length should be required to obtain a permit as well.
- The EA is not clear on whether BLM considered the impacts on the Wilderness of river-based recreation originating at Nefertiti and going to Swasey's Campground. The EA on page 22 admits such daily use takes place, but elsewhere it is missing from the analysis. Thus, the EA does not seem to consider this use as part of the established river permit program even though the existing plans may consider that use as part of the program. This needs to be explained and rectified. Further, the campsites in the Wilderness below Nefertiti are mentioned but the EA largely ignores any impacts from daily or overnight use in this stretch of the river.
- The EA omits any analysis of impacts to ground-nesting birds or other wildlife that might be affected during the high runoff spring/early summer season. Further, the analysis in Appendix A only looks at certain species.
- Even though the EA supposedly looks at the entire cumulative impact area, the analysis of campsites is confined to the Wilderness and for Alternative C, the WSA portion east of the Green River. There is no analysis of impacts to the WSA campsites in the WSA

portion north of the Wilderness. Also, only Alternative C considers a slightly different future than the status quo. However, this alternative, which does not allow camping in the Wilderness itself but does still continue the existing commercial river program, is a straw man alternative. It isn't a serious option.

Perhaps the major problem with the wilderness analysis is the mindset that commercial use must occur at least at current levels or the Wilderness itself will suffer. Nothing could be further from the truth. Commercial services are a non-conforming use, one that by definition has an impact on Wilderness, but may (rather than must) occur under certain limited conditions. This mindset that is baked into the EA skews the analysis of impacts by improperly assigning recreation as the dominant value of Wilderness.

### **NEPA Analysis**

One problem with the NEPA analysis is that every alternative has essentially the same number of commercial permits and user days, all in excess of what is currently happening. While it is probable there is a need for commercial services, the EA fails to justify any commercial use, let alone continuation of a program that allocates more user days to commercial entities than they use. All alternatives are largely a continuation of this unjustifiable status quo.

Another problem is that only river based commercial use is considered, with the exception of adding hiking to river-based commercial services (which is technically an expansion of existing services). Land-based use should have been evaluated as well. There are cumulative impacts and connected actions that should be considered. This proposal to add guided hiking to the commercial river permits demonstrates how connected actions, in this case combining river-based and land-based commercial services in one permit, would have cumulative impacts. While this might make sense to add this use to the commercial permits as it is likely ongoing already, the EA is not explicit as to what impacts may occur. There are no parameters such as party size, explicit direction as to precisely where this activity might take place, or what areas might be too sensitive, either seasonally or permanently, for commercial (or any) recreation use. Research shows that land-based party size in excess of 10 is usually considered too big, yet river party size is 25.

Thus, the EA should have considered the following in one or more alternatives:

- In order to reduce impacts to the campsites, to reduce impacts to the campsites, to reduce the proliferation of social trails, and to reduce impacts to wildlife and vegetation, don't reissue unused commercial permits to private parties. The EA admits the carrying capacity of the river is diminished from what it was in 1979.
- Consider changing parameters such as reducing party size, currently at 25 per day, or revising the number of launches per day. Average party size for commercial users is below the maximum anyway and not all of the launches are used.
- Factor in private and commercial daily use from Nefertiti to Sand Wash in the analysis of impacts.
- Close the river from Sand Wash to Swasey's Campground to motor use. This would improve the wild and wilderness conditions of the area.



- Close the cumulative impact area to antler and other artifact collection, be it commercial or private. Antler sheds are becoming rare in the river corridor and that diminishes the character of the area.
- Factor in land-based recreation into the analysis and decision-making process for commercial services as suggested elsewhere in this comment. This would include issues such as guided hiking, hunting, packraft use (river and land-based), and any others currently under permit.

### Summary

While the extant plans provide useful parameters and direction for commercial recreational use of the river corridor, the EA needs a major overhaul and should be reissued. This is necessary to address diminished carrying capacity, unused commercial permits, land-based commercial uses, motor use, and commercial uses that conflict with Wilderness (commercial use of antler sheds).

Please keep us updated on this issue.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gary Macfarlane".

Gary Macfarlane  
-for-  
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