



## **Keeping the Wild in Wilderness:**

### **Minimizing Non-Conforming Uses in the National Wilderness Preservation System**

### **A Tool for Protecting Wilderness in Future Wilderness Designations**

**A Wilderness Watch Policy Paper  
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## Forward

*“It behooves us then to do two things: First we must see that an adequate system of wilderness areas is designed for preservation, and then **we must allow nothing to alter the wilderness character of the preserves.**”*

— Howard Zahniser, “The Need for Wilderness Areas” 1956

The Wilderness Act, passed in 1964, was a uniquely American idea and a tribute to the vision of several generations of Americans who saw the value in setting aside from human domination some valuable remnants of primitive North America. The Act established the National Wilderness Preservation System “for the *permanent* good of the whole people” to be protected and managed so as to preserve its wilderness character.

Forty years later it is increasingly clear that despite the best intentions of the law the lands within the 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* being included in Wilderness bills. These provisions not only allow activities within Wilderness that are inappropriate and degrade individual areas, but more importantly the cumulative impact of these provisions threatens to diminish the core values that distinguish Wilderness from other public lands.

It is with the hope and urgency to reverse this trend and to better acquaint citizen activists and others involved in Wilderness stewardship and policy with the special challenges of protecting Wilderness that this policy paper has been prepared.

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Wilderness Watch was formed in 1989 to assure that the wilderness qualities and special values of areas within the National Wilderness Preservation System (NWPS) and Wild and Scenic Rivers System are preserved and not allowed to diminish over time. In this respect, Wilderness Watch fills a vital and unique niche not otherwise filled by our partners in the wilderness community. Wilderness Watch is the only national organization whose primary mission is to assure that the wilderness qualities of our designated Wildernesses remain protected into the future.

Wilderness Watch’s Board of Directors and staff have decades of experience in wilderness protection as conservation group leaders, wilderness managers, and as wilderness guides. While Wilderness Watch as an organization does not lobby directly for passage of new designation bills, members of the board and staff have many decades of experience and continue to be involved in campaigns to designate millions of acres of additional Wilderness across the country. Wilderness Watch strongly supports the designation of additional Wilderness and expansion of the National Wilderness Preservation System, but believes that protecting additional Wilderness can and must be done in a manner that does not “alter the wilderness character of the preserves.”

# Executive Summary

Wilderness character in many parts of the National Wilderness Preservation System (NWPS) has been steadily declining. A primary reason is the growing number of exceptions or “special provisions” included in wilderness bills coupled with a lack of understanding for how those provisions are affecting the NWPS. This whitepaper describes those values most at risk, how special provisions threaten those values, and provides a series of recommendations to ensure that new wilderness bills don’t inadvertently further the erosion of those values that make Wilderness authentic, valuable and unique.

## I. Overview: Wilderness has its own Meaning and Worth

**1. National Wilderness Preservation System (NWPS).** Congress established a nation-wide system of wilderness, now covering lands administered by four federal agencies, with passage of the 1964 Wilderness Act. By creating a System of wilderness, Congress intended that each unit would be part of and add to the value of a cohesive, greater whole.

**2. Wilderness – legal definition.** The Wilderness Act also established a statutory definition of wilderness. The Act defines it in part as: “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 untrammelled by man, where man himself is a visitor who does not remain.”

**3. Wilderness Character – What the law seeks to preserve.** The Wilderness Act mandates the preservation of wilderness character within each unit of the NWPS. Wilderness character includes not only the physical attributes of a land unmanipulated by humans, but also many intangible values like outstanding opportunities for solitude, or primitive and unconfined recreation and all of its components.

## II. How Non-Conforming Uses Are Degrading Wilderness

Wilderness is being degraded by many things including increasing motorized uses, commercialization, manipulation of natural processes, and recreational pressures. Special provisions in some new wilderness bills exacerbate these problems and are becoming of paramount concern in their own right.

**1. Non-conforming uses diminish an area’s wilderness character and the opportunity for present and future generations to experience the unique benefits that authentic Wilderness provides.** An array of non-conforming uses has decreased the recognizable core qualities that define wilderness across the System, and has brought about a gradual decline in the overall wilderness standards that govern the NWPS. Special provision written into Wilderness bills since 1980 are proving to be particularly damaging to wilderness character.

**2. Non-conforming uses allowed in one wilderness bill are replicated—and oftentimes expanded—in subsequent wilderness bills.** The Congressional Grazing Guidelines, provisions

exempting fish and wildlife management practices from the Act's prohibitions, and provisions fostering access to private land "inholdings" provide examples of how non-conforming uses allowed by some wilderness bills are replicated in subsequent bills.

### **III. Suggestions for Ensuring that new Wilderness Bills Protect Wilderness Character:**

Protecting the quality and integrity of the National Wilderness Preservation System requires that wilderness advocates stem the use of special provisions in new wilderness bills. Specific suggestions for addressing this concern in new bills include:

- 1. Avoid non-conforming uses in new wilderness designations.** Keep proposals for designating new Wildernesses clean of non-conforming uses not already allowed under the 1964 Wilderness Act.
- 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.** Resist the temptation of some in Congress to re-phrase the provisions of the Wilderness Act; instead insist on language that simply states that the new wilderness shall be managed in accordance with the Wilderness Act. Saying the "same thing" in different words inevitably leads to different interpretations of what was intended by the new law.
- 3. Minimize the impacts of any non-conforming uses in wilderness legislation.** Place the non-conforming uses outside of the wilderness boundary if possible. Consider the use of phase-outs of non-conforming uses over time.
- 4. Consider alternative designations if special provisions that compromise the ability to manage the area as Wilderness can't be avoided and where the goal to prevent other uses such as logging or ATVs in an area can be achieved with another classification.** The Rattlesnake Wilderness and National Recreation Area in Montana provide an example for a combination of classifications used by Congress to protect part of the Rattlesnake area from extractive uses and ATVs with other than wilderness designation.

### **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 units in the NWPS. We must seize opportunities to stem the erosion of wilderness standards and the gradual degradation of the system that is occurring 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 founders of the Wilderness Act sought to preserve and that future generations deserve to enjoy.

## I. Overview: Wilderness Has Its Own Meaning and Worth

*Wilderness, above all its definitions, purposes and uses, is sacred space, with sacred power, the heart of a moral world.*

— Michael Frome

To understand the manner in which wilderness standards are being eroded and wilderness character is degrading, we must first understand what wilderness is, what wilderness character means and symbolizes, and what the standards are for protecting wilderness as an unique resource.

### 1. National Wilderness Preservation System

With passage of the 1964 Wilderness Act, Congress established the National Wilderness Preservation System (NWPS). The System now includes lands within national forests, national parks, national wildlife refuges, and lands administered by the Bureau of Land Management.

Units in the NWPS range in size from the tiny Pelican Island Wilderness off the coast of Florida (less than 5 acres) to the 9.1 million acres in Wrangell-St. Elias Wilderness in Alaska. The NWPS has grown to include more than 660 areas that collectively total 106 million acres.

By creating a System of wilderness, Congress intended that each unit would be part of a cohesive, greater whole. Like many biological systems, the Wilderness system has been enhanced as it has grown larger and more ecologically and physiographically diverse. So too, however, have the risks to the health of that system grown from incursions by incompatible uses and activities that undermine the authenticity of Wilderness. In this sense it is useful to think of the Wilderness system as analogous to a river. Each new tributary can bring strength and diversity to the river system. At the same time, however, each new tributary has the potential to harm the main river if the tributary is laced with pollutants. As is often the case with rivers, each additional pollutant might seem a small matter, but the cumulative effect of many impurities significantly degrades the river system as a whole. Unlike a river, where a polluted tributary only harms water quality downstream of where it enters the main stem, in the Wilderness system the damage also works its way “upstream” harming those areas that were seemingly protected with Wilderness designation years or decades before.

Congress, federal agencies and citizen advocates must always be mindful that exceptions to generally established wilderness principles and prohibitions in one area pose the threat of setting precedents that could affect, and, in fact, have affected wilderness stewardship throughout the system.

### 2. Wilderness – legal definition

Wilderness designation is a protective overlay given by Congress to some federally owned lands in the United States. With passage of the Wilderness Act in 1964, Congress created this new land classification and gave the concept of ‘wilderness’ a legal definition. The first paragraph of the Act refers to an “enduring resource of wilderness,” with “resource” being singular. Congress specifically recognized wilderness as a unique resource in its own right, not just a collection of other natural resources.

The statutory definition of wilderness is found in Section 2(c) of the Wilderness Act. The framers of the Act intended that the first sentence of this section would establish the meaning of wilderness:

“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 *untrammelled* by man, where man himself is a visitor who does not remain.”<sup>1</sup> (emphases added)

By law, wilderness is to remain *in contrast* to modern civilization, its technologies, conventions, and contrivances. This intent is underscored in Section 4(c) of the Act that expressly prohibits commercial enterprise and permanent roads, and with only very narrow exceptions prohibits temporary roads, motor vehicles, motorized equipment, motorboats, aircraft landings, mechanical transport, structures, or installations in wilderness. These incompatible activities are prohibited because allowing the intrusion of such things blurs the distinction between wilderness and modern civilization, diminishing wilderness character and the unique values that set it apart.

Congress also intended that Wilderness would be *untrammelled*, which means free of intentional human manipulations. In Wilderness, the forces of nature would be allowed to shape the landscape and the interplay of plants and animals without intentional human interference. By choosing this definition, Congress defined not only the core qualities of wilderness but also provided statutory direction for how humans will interact with wilderness, what our relationship will be with these special places. In Wilderness, Congress clearly intended that human activities and technologies will not dominate or develop the landscape, and will not manipulate natural processes.

The Act further indicates that Wilderness 1) generally appears to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable, 2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation, 3) generally covers at least 5,000 acres in size, and 4) may contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

Taken together, the definition recognizes that areas designated as wilderness may have some signs of past human influence and uses, but that, once designated, human influence will be restrained and minimized so that wilderness will remain untrammelled from that point forward, and signs of past human dominance will fade over time.

The statutory definition of wilderness demonstrates Congress’ clear intent that wilderness encompass recognizable core qualities and have meaning and value in its own right.

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<sup>1</sup> 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.”

### 3. Wilderness Character – What the law seeks to preserve

*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.*

— Howard Zahniser testifying to Congress, 1962

The overarching statutory mandate in the Wilderness Act is to preserve the wilderness character of each wilderness within the NWPS. This principal tenet of the law is described in Section 4(b):

“...each agency administering any area designated as wilderness shall be responsible for preserving the 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.”<sup>2</sup>

Preserving wilderness character includes protecting the natural and scenic qualities of the landscape, natural soundscapes, and the free play of ecological and evolutionary processes. Wilderness character also includes the absence of those things that diminish it such as human-built structures, roads, bridges, campsites, highly developed trails, motor vehicles, mechanized equipment, crowding, mining, and livestock grazing.

Like personal character, wilderness character is comprised of even more than these tangible attributes, it involves intangible qualities as well. These components include outstanding opportunities for solitude and primitive and unconfined recreation, and their related values of freedom, self-reliance, risk, adventure, discovery, mystery, and as a place set apart –both physically and psychologically – from modern civilization and its commercialized and material distractions.

While the intangible values are subjective and may seem esoteric to some, there is a direct correlation between maintaining these intangible attributes and maintaining Wilderness on the ground. As these values erode and Wilderness becomes less wild and unique, there will be fewer opportunities for future generations to experience the benefits of an authentic Wilderness setting.

Perhaps the best attempt to define and embrace all these aspects of wilderness character came in the U.S. Fish and Wildlife Service’s 2001 Draft Wilderness Stewardship Policy. 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 connec-

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<sup>2</sup> Numerous courts have found that preserving wilderness character is the purpose of the Wilderness Act. See, for example, Wilderness Watch v. Mainella, 2004 (11<sup>th</sup> Circuit Court of Appeals) and High Sierra Hikers Assn. v. Blackwell, 2004 (9<sup>th</sup> Circuit Court of Appeals).

tion 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. *Federal Register*, Vol. 66, No. 10, p. 3714, (2001).

## II. How Non-Conforming Uses Are Degrading Wilderness

The unique values that characterize lands within the National Wilderness Preservation System are being steadily degraded. The culprits can be broadly categorized as increasing motorized uses, commercialization, manipulation of natural processes, and recreational pressures. The underlying causes of these challenges include lack of commitment to wilderness protection at the highest levels within the agencies, lack of oversight or commitment to wilderness stewardship from Congress, and limited public awareness of the risks threatening the integrity of the NWPS. These problems are exacerbated by special exceptions written into wilderness bills. Indeed, special provisions are becoming paramount in the overall threats to Wilderness nationwide.

### 1. Non-conforming uses diminish an area's wilderness character and the opportunity for present and future generations to experience the unique benefits that authentic Wilderness provides.

*Wilderness must be kept whole, with all its physical as well as more intangible parts.*

— Olaus Murie

Section 4(d) of the Wilderness Act is titled “special provisions.” These so-called *non-conforming* uses are compromises that diminish wilderness character, but were nonetheless written into the original law. They include special provisions for such things as aircraft and motorboat use where previously established, mining, water developments, grazing, commercial services, fire suppression, timber cutting (in the Boundary Waters), and continued regulation of hunting, fishing, and trapping by the various states. These special exceptions are qualified to various degrees so as to provide federal wilderness managers with the ability to regulate these uses so as to minimize their impacts on Wilderness. Moreover, many of the special provisions applied only to national forest and BLM-administered Wildernesses, not to Wildernesses in national wildlife refuges or national parks.

The damage caused by these exceptions varies, with some of the original provisions resulting in little or no impact. For example, the provisions allowing logging in the Boundary Waters Canoe Area Wilderness were later rescinded by Congress. The provision allowing the President to authorize new water developments has never been exercised, and the allowance for staking new mining claims expired in 1984.

Conversely, some of the special exceptions in the Act are resulting in serious degradation to wilderness character, most notably from livestock grazing and its administration, suppression of naturally ignited fires, expansion of commercial services (and their inappropriate reliance on motorized equipment and structures), and the conduct of state fish and wildlife agencies (including habitat manipulation, fish stocking, and motor vehicle use).



It is important to keep in mind that with the exception of honoring private existing rights and for fire management, where Congress gave the Secretary broad discretion, the Wilderness Act required that the other activities be administered in a way that protects 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. In other words, while the Wilderness Act allowed for some non-conforming activities, the law also provided managers with the tools they needed to ensure that the impacts from these exceptions would be rare and carefully controlled. Unfortunately, the good intentions of the law are not being realized on the ground.

The responsibility for regulating the uses allowed by special provisions falls to federal agencies that have historically not been supportive of good stewardship. Special interests, especially economic ones, are particularly effective at influencing management and policies. The “nose in the tent” enabled by the special provision soon becomes the entire animal, if not the whole herd running roughshod over the area’s wilderness character. It’s not a matter of an isolated instance or occasional transgression. All four agencies are falling woefully short in meeting their stewardship responsibilities, and these shortcomings transcend the past several administrations.<sup>3</sup> Given the lack of commitment to good stewardship on the part of managers, exceptions in



Special provisions have allowed motorized recreation to skyrocket in many areas, as seen here in the Frank Church-River of No Return Wilderness in Idaho.

wilderness bills often result in far more damage to wilderness character than was anticipated at the time of designation.

Special provisions that have been included in Wilderness bills since 1980 are proving to be particularly damaging to wilderness character. In all likelihood, the impacts of these exceptions were expected to be small and carefully regulated at the time, but the reality has been far different. Relaxed restrictions on livestock grazing, expanded access to private inholdings, actions of fish and wildlife management agencies, and myriad other exceptions are resulting in consequences far beyond what could ever be considered as appropriate in

Wilderness. Similarly, exceptions in some Wilderness bills coupled with rapidly expanding technologies, growing affluence among the general public, and the popularity of motorized recreation have opened some of the most remote Wilderness lands to routine aircraft, jetboat, and snowmobile use.

The Central Idaho Wilderness Act (CIWA), which designated the River of No Return Wilderness,<sup>4</sup> is a case in point. When that law was passed in 1980 there were eight airplane landing

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<sup>3</sup> 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.

<sup>4</sup> The name was later changed to the Frank Church-River of No Return Wilderness

strips in the Wilderness in 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.<sup>5</sup> This provision effectively precluded closing any of the existing strips and in fact has resulted in a far worse condition. Under pressure from the pilots and the State, the Forest Service recently recognized four meadows as additional historic landing strips increasing the total number to 12. Furthermore, the landing of airplanes in the Wilderness has exploded to more than 5,500 each year, 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.

Another special provision in CIWA prohibited the Forest Service from reducing motorboat use on the main Salmon River to a level below that which occurred in 1978. Forest Service reports prepared at the time indicate there were a relatively small number of jetboats using the main Salmon River, primarily to access private lands on the lower-half of the river. The upper 40 miles of designated Wild River received fewer than one jetboat trip per day in 1978. Today, in addition to those using jetboats to access private property in the lower river canyon, the Forest Service permits 18 commercial companies unlimited use for hauling rafters, hunters, fishers, and sightseers up and down the entire length of the 85-mile-long Salmon River. In 2003 the agency also tripled (to 40 boat-days/week) the amount of private jetboat use allowed during the summer season. There are no limits on off-season trips. In short, special provisions in the CIWA have allowed the largest contiguous Wilderness in the lower 48 States, an area that should provide the

ultimate wilderness experience, to instead be riddled with unlimited airplane and jetboat use.



It is also important to note that 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.

Commercial outfitting camps catering to aircraft-intensive hunting parties have become common in many Wildernesses in Alaska. This camp is in the Arctic Wilderness.

Special provisions in the law opened the door for the damage that is seriously degrading the character of this Wilderness, and Forest Service managers have found the language in

the law a convenient excuse to avoid adopting safeguards to protect the area from even greater abuse.

A similar problem has emerged from the 1980 Alaska National Interest Lands Conservation Act (ANILCA), which designated 56 million acres of Wilderness. This landmark law allowed

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<sup>5</sup> 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.

airplane, snowmachine and motorboat use for traditional activities, which to the bill's supporters were understood to be subsistence uses such as hunting, fishing, and berry-picking. Anti-wilderness interests and their supporters in the agencies, however, have used the special provision to open most of Alaska's Wilderness to motorized recreation.

Today, recreational snowmobiling has become a popular pastime on parts of the Kenai Wilderness, and snowmobiles have penetrated nearly every drainage on the north slope of the Brooks Range in the 8 million-acre Arctic National Wildlife Refuge Wilderness.<sup>6</sup> Arctic visitors complain about the inability to escape the drone of airplanes shuttling trophy hunters in, out, and around the refuge in search of game, and landing strips now scar the arctic tundra in places where airplane landings were non-existent at the time of ANILCA. In one of the most egregious cases of abusing a special provision in ANILCA, the National Park Service is proposing to open more than 40 percent of the 3.9 million acres of potential wilderness in Denali National Park to recreational snowmobiling. No one, at least not in the late-1970s, could have anticipated the development of the modern high-power, go-anywhere snowmobiles that we have today, nor would they have expected that the NPS would promote such a destructive plan. But the seeds for destruction were planted by the special provision in the 1980 wilderness bill, and they are bearing fruit that is growing more toxic to Alaska's wilderness character with every passing day.

Similarly, motorboats roar across one-fifth of the water surface area of the Boundary Waters Canoe Area Wilderness and the Forest Service is promoting an increase in motorboat permits there. Due to a provision in the California Desert Protection Act (CDPA), State game and fish managers routinely use motor vehicles for access in dozens of desert Wildernesses in California, while motorized access for construction, maintenance, and operation of artificial water sources ("guzzlers") in Arizona has resulted in permanent roads in some areas. Construction of new guzzlers to increase populations of game species is authorized in several recently designated Wildernesses in Nevada. As motorized allowances become more routine, both managers and special interests clamor for even more.

One of the most widespread examples of the unanticipated consequences from special provisions is the Congressional Grazing Guidelines (CGG) that Congress first adopted in a Colorado national forest wilderness bill in 1980, and have included in most national forest and BLM wilderness bills since that time. Livestock grazing was "grandfathered" in the 1964 Wilderness Act, which provided that subject to reasonable regulation livestock grazing shall be allowed to continue in those areas where it was an established use. The 1980 grazing guidelines, written to appease ranchers in the hope that it would lessen that industry's opposition to new wilderness designation, cracked open the door to a variety of more abusive uses. The guidelines authorized ranchers to use motor vehicles and equipment and to develop new "improvements" for certain livestock management activities provided there were no practical alternatives and where such activities cannot "reasonably and practically be accomplished on horseback or foot."<sup>7</sup>

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<sup>6</sup> The name "Arctic National Wildlife Refuge Wilderness" is the name given to the area in 1980 and is still in common usage. However, the name was changed to the Mollie Beattie Wilderness in 1996.

<sup>7</sup> The Congressional Grazing Guidelines have been incorporated in the Forest Service Manual at FSM 2323.22 and can be viewed at [www.fs.fed.us/im/directives/fsm/2300/2320.1-2323.26b.txt](http://www.fs.fed.us/im/directives/fsm/2300/2320.1-2323.26b.txt).

For a number of reasons, it's reasonable to believe that wilderness advocates at the time felt the impact of the guidelines would be minor and result in motor vehicle incursions only under the rarest of circumstances. Most Wildernesses designated prior to 1980 had little or no domestic livestock grazing within their borders. In those Wildernesses with substantial livestock grazing the use of motor vehicles as part of those grazing operations was rare or non-existent.<sup>8</sup> The impact of the CGG would have seemed very minor at the time.

That is changing. 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 cattle and sheep. Ranchers whose livestock graze in these areas have become increasingly accustomed to using off-road vehicles, including ATVs. The BLM in particular, which now administers about one-quarter of all Wildernesses, has proven remarkably 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 their cattle.<sup>9</sup>

If anything, 25 years of experience with the grazing guidelines argues for stricter limits on grazing-related management practices in future Wilderness bills. Unfortunately, the trend appears to be in the other direction. The recently released Owyhee Initiative covering nearly 1 million acres of land in southwestern Idaho would expressly allow ranchers to routinely drive motor vehicles, including ATVs, in wilderness to herd their cattle from area to area. This is a far cry from the standard of "no practical alternatives" established in 1980. What seemed like a narrowly crafted and rare allowance for vehicle use in a wilderness bill 25 years ago has morphed into making vehicle use the *modus operandi* for tending cattle and sheep, fixing fences, distributing salt, and "riding the range" in modern wilderness bills.

Further insults to the ecological and aesthetic values of 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 order to protect domestic livestock.<sup>10</sup> Without the grazing guidelines in place, one would be hard-pressed to make the case that the Wilderness Act allows for predator control to protect domestic livestock. As Aldo Leopold succinctly stated in *A Sand County Almanac*, "*One of the most insidious invasions of wilderness is via predator control.*"

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<sup>8</sup> In the late 1990s, as part of an appeal challenging a US Forest Service decision allowing motorized access to a line-shack on the Mazourka Allotment in the Inyo Mountains Wilderness in California, neither Wilderness Watch nor the Forest Service were able to identify a single instance where the Forest Service had permitted motorized access in a Wilderness for grazing purposes.

<sup>9</sup> 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.

<sup>10</sup> *Forest Guardians v. Animal & Plant Health Inspection Serv.*, No. 01-15239, United States Court of Appeals for the Ninth Circuit, 309 F.3d 1141 (2002).

These examples represent just a few of the challenges presented by special provisions in wilderness bills, but they highlight the *unintended consequences* from making such exceptions. Most managers have proven loathe to regulate or limit these non-conforming uses, thus even when discretionary safeguards have been included in legislation it has proven ineffective for protecting Wilderness character from the harm resulting from special provisions. One can only guess what the extent of damage will be from new wilderness bills being proposed that allow for military training exercises, the construction of telecommunication structures, and that elevate recreation use, stock use, new trail construction, and commercial and other economic interests above preservation of wilderness character.

This array of non-conforming uses decreases the recognizable core qualities that define wilderness across the System, and brings about a gradual decline in the overall wilderness standards that govern the NWPS. The growing array of exceptions for non-conforming uses provides excuses for wilderness managers (many of whom are unsympathetic to the wilderness ideal) to provide only lax management protections or shirk their wilderness stewardship responsibilities when they see Congress permitting all sorts of new non-conforming uses in wilderness legislation. Sadly, the growing number of exceptions is being used by some conservationists as justifying even more exceptions in new bills.

Some non-conforming uses in Wilderness may seem small, or of little impact in a National Wilderness Preservation System that encompasses more than 660 areas and 106 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 not small.

## **2. Non-conforming uses allowed in one wilderness bill are replicated—and oftentimes expanded—in subsequent wilderness bills.**

Once an exception is made in one bill, it becomes politically harder to exclude exceptions in future wilderness bills. It also becomes psychologically easier for conservationists to accept exceptions and compromises when “it’s already been done elsewhere.” Adding non-conforming uses and special exceptions in wilderness bills results in lowering the standard for what wilderness means, how we interact with these special places, and diminishes the unique benefits that authentic Wilderness can provide.

Three noteworthy examples of provisions that have become troublesome precedents for other bills include the Congressional Grazing Guidelines (CGG), allowances for motorized access for State fish and game departments, and access to inholdings (non-federal lands). While some may argue that there are no binding precedents, that each bill is a unique situation, history argues otherwise.

The grazing guidelines discussed earlier are a prime example that needn’t be discussed further except to note that as precedents go, the guidelines have been included in nearly every new wilderness bill involving national forest and BLM-administered lands since they were first applied in 1980.



“Meals on Wheels:” A water truck fills a wildlife “guzzler” in the Cabeza Prieta Wilderness (US FWS) in Arizona (left). Constructing a “guzzler” in the BLM-administered North Maricopa Mts. Wilderness in Arizona (right). Both guzzlers require permanent vehicle routes. Special provisions in recent Wilderness bills are used to rationalize this incompatible activity in Wilderness.

Special language allowing motorized access for fish and wildlife management provides another example of 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 1984 in the Wyoming Wilderness Act, 20 years after the 1964 Act was signed. The provision allowed motorized access to a specific location in the Fitzpatrick Wilderness for capturing bighorn sheep.<sup>11</sup> Six years later, Congress allowed for greatly expanded motorized access and other wilderness-destroying activities under the guise of wildlife management in 39 new Wildernesses designated in the Arizona Desert Wilderness Act.<sup>12</sup> As a result there are now permanent roads in some Wildernesses used for constructing, operating, and maintaining artificial water developments, called “guzzlers”, which are designed to artificially inflate bighorn sheep and other game species’ numbers. In various forms this exception for motorized uses for fish and wildlife management has been continued in several subsequent wilderness designations including the Los Padres Condor Range and River Protection Act (1992), 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.

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<sup>11</sup> 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.

<sup>12</sup> 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 have consistently refused 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.

Unlike the first exception which appeared in the Wyoming bill and applied to a specific place in only one of the 13 Wildernesses designated or added to in that bill, these subsequent bills have granted carte blanche exceptions for all the areas included in the bills. In short, a narrow exception applied once to a tiny portion of a single area in the first 20 years of Wilderness designation has become in the last 15 years a broad and expansive exception applying to the entirety of more than 100 Wildernesses.

Access to private lands (“inholdings”) that are surrounded by Wilderness provides a third example of how precedents are unexpectedly set when damaging provisions are included 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 inheld lands. In those cases where the desired access is incompatible with Wilderness protection, the 1964 Act offers the inholder “adequate access” or an “exchange[d] 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 recounted the legislative history of this section and 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).”<sup>13</sup>

It was an excellent solution to a problem with dangerous potential to destroy Wilderness. Within the 106 million-acre Wilderness System there are well over one-half million acres of inholdings in thousands of widely scattered individual parcels. By giving land managers the authority to offer an exchange rather than allow harmful access, the Act assured that the right decision for Wilderness could be made every time. Yet, here again, special provisions in new bills have begun to erode the protections ensured by the Wilderness Act.

A provision inserted into 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.<sup>14</sup> Whether or not the agencies have correctly interpreted this special provision in ANILCA, its effect has been to eliminate the option of protecting Wilderness by offering a land exchange in lieu of allowing potentially harmful access.

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<sup>13</sup> 43 Op. Att’y Gen. 243, 269 (1980)

<sup>14</sup> The US Dept. 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.

As with other special provisions, the “access” exception in ANILCA is being repeated in subsequent bills. In 1994, the California Desert Protection Act 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 designated by the CDPA. Subsequent laws designating Wilderness in Oregon and Nevada have included variations on 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) for a variety of inappropriate uses such as weekend camping and stargazing (Palen-McCoy Wilderness, CA), building and operating a horse breeding and dude ranch (Mt. Tipton Wilderness, AZ), campground development (Kalmiopsis Wilderness, OR), and commercial outfitting and guiding (Steens Mountain Wilderness, OR). While many of these approvals are currently under appeal or litigation, they represent the tip of a very large iceberg that could melt away Wilderness qualities in hundreds of areas as more and more landowners demand access in areas where managers lack the affirmative option of offering an exchange.

### **III. Suggestions for Ensuring that new Wilderness Bills Protect Wilderness Character**

In order to protect the quality and integrity of the NWPS and to realize the benefits that authentic Wilderness can and should provide, it is imperative that wilderness advocates stem the use of special provisions in new wilderness bills. Forty 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 Wilderness on the ground. The exceptions in the 1964 Act should be treated as the floor, not the ceiling, for protecting wilderness. Some specific suggestions follow:

**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. This can be very difficult at times and in certain states because of the particular political setting, but it can and must be done. Several wilderness bills have been crafted and drafted recently that do in fact avoid non-conforming uses.

**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.** Language that applies across the board, like the wildlife management language in some new bills, rather than to a particular situation in a specific area, is especially noxious. Even if a bill does not explicitly contain special provisions, putting in added verbiage or re-phrasing what the Wilderness Act says is guaranteed to result in differing interpretations and differing opinions about what Congress really intended for management of the area. The Steens Mountain Wilderness bill (P.L. 106-399) offers one example of where such language is subsequently being used by managers and wilderness opponents to allow activities destructive to wilderness character. Saying the “same thing” in different words inevitably leads to different interpretations of what was intended by the new law. The simplest and most straightforward way to address this problem is to eschew special



language and instead include a statement akin to the one below that accompanied many of the early wilderness bills:

*The [ ] Wilderness shall be administered by the Secretary of [Agriculture or Interior] in accordance with the provisions of the Wilderness Act governing areas designated by that Act as wilderness areas, except that any reference in such provisions to the effective date of the Wilderness Act shall be deemed to be a reference to the effective date of this Act.*

**3. Minimize the impacts of any new non-conforming uses in wilderness legislation.** In some cases it might be virtually impossible to avoid including a non-conforming use without seriously compromising other Wilderness values (as in the examples below). If the decision is made to still support such a bill, consider one of the following suggestions for reducing the long-term impact on the wilderness character of the area and for helping protect the integrity of the National Wilderness Preservation System:

a) *Phase-out the non-conforming uses over time.* In this manner, wilderness character can be restored eventually. For example, in the 1978 Boundary Waters Canoe Area Wilderness Act, Congress included motorboat phase-outs on specific lakes for specific periods of time that ended anywhere from 5-20 years after passage of the law, at which point motorboat use ended and full wilderness conditions were restored to that particular lake. Similarly, the Dugger Mountain Wilderness Act of 1999 gave the Forest Service two years to use mechanical equipment and transport to remove an historic fire tower after which time the road to the tower must be permanently closed.

b) *Limit the impacts from non-conforming uses allowed in the Wilderness Act and that might not be phased-out over time.* For example, livestock grazing and associated management should be limited in accordance with the Wilderness Act and not the more permissive language of the Grazing Guidelines. *If the Grazing Guidelines* are incorporated in a bill, then it should be made clear that the special allowances are expected to be rare and carefully regulated. Similarly, where *commercial services* like outfitting and guiding occur the use of permanent structures and motorized equipment and transport should be strictly prohibited.

c) *Place the non-conforming uses outside of the wilderness boundary if possible.* Often an area just outside of wilderness boundaries can serve the non-conforming use just as well as a location inside Wilderness. For example, if a political concern that must be dealt with involves watering facilities for either grazing or wildlife, try to place the water tanks or “guzzlers” in locations outside of the wilderness boundaries, so that the roads, motor vehicle use, and structures associated with these facilities remain outside the wilderness boundaries. In some cases a slight modification of the proposed wilderness boundary can exclude the non-conforming use.

**4. Consider alternative designations if special provisions that compromise the ability to manage the area as Wilderness can't be avoided and where the goal to prevent other uses such as logging or ATVs can be achieved with another classification.** For example, if the goal is to prevent logging or off-road vehicle use, but allowing mountain bikes, unregulated numbers of day-use hikers, and/or significant manipulation of natural processes is desired or inevitable,

then consider other existing protective classifications such as national scenic area, national conservation area, national recreation area, national monument, wildlife preserve, etc. Such classifications are not new, and have worked well to protect areas' undeveloped qualities while allowing some activities or levels of use that would not be appropriate if managing for protection of wilderness values. For example, 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. The entire area is off-limits to resource extraction and road building, but only the more remote 30,000 acres are managed specifically to preserve Wilderness character.

## 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 units in the NWPS. We must seize opportunities to stem the erosion of wilderness standards and the gradual degradation of the system that is occurring 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 founders of the Wilderness Act sought to preserve and that future generations deserve to enjoy.

As Wilderness Act author Howard Zahniser once wrote:

*“There is little hope for preserving wilderness by simply resisting here and there the particular projects that would destroy it; in other words, by only attacking the threats as such. Rather it must be defended in recognized, designated areas in accordance with a preservation policy and program that positively protect it, rather than by opposing, negatively, the forces threatening wilderness. Wilderness must be valued as such.”*

— from “Introduction” in Arthur Carhart, *Planning for America's Wildlands*, 1961.

Wilderness advocates must lead in this effort. Let us all commit to being the spirited people who, in the words of Bob Marshall, “will fight for the freedom of the wilderness” and for the integrity of the National Wilderness Preservation System.