Introduction
Forty years after passage of the 1964 Wilderness Act, it is increasingly clear that, despite the best intentions of the law, many lands within the National Wilderness Preservation System (NWPS) are degrading. One of the greatest emerging challenges to protecting the wild character of these lands is the preponderance of special provisions or nonconforming uses that have been included in subsequent 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 special provisions threatens to diminish the core values that distinguish wilderness from other public lands.

Overview: Wilderness Has Its Own Meaning and Worth
To understand the manner in which wilderness conditions are being eroded and wilderness character degraded, we must first understand what wilderness is, what wilderness character means and symbolizes, and then we can determine what standards are necessary for protecting wilderness as a unique resource.

1. Wilderness—legal definition. The statutory definition for wilderness in the United States 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: 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.”

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 untrammeled by man, where man himself is a visitor who does not remain [emphases added]. (1964 Wilderness Act, Sec. 2[c]).

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, expressly prohibiting commercial enterprises and permanent roads. With only very narrow exceptions it prohibits temporary roads, motor vehicles, motorized equipment, motorboats, aircraft landings, mechanical transport, structures, or installations in wilderness. These incompatible activities are prohibited because allowing their intrusion blurs the distinction between wilderness and modern civilization, diminishing wilderness character and the unique values that set it apart.
Congress also specified that wilderness would be *untrammeled*, meaning free of the human intent to manipulate, alter, control, or subjugate nature. In wilderness, the forces of nature would be allowed to shape the landscape and the interplay of plants and animals without intentional human interference. In this definition, Congress defined the core qualities of wilderness. It 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.

2. Wilderness Character—what the law seeks to preserve. The overarching statutory mandate in the Wilderness Act is to preserve the wilderness character of each wilderness within the NWPS. Numerous courts have found that preserving wilderness character is the purpose of the Wilderness Act. See, for example, Wilderness Watch v. Mainella (2004, 11th Circuit Court of Appeals) and High Sierra Hikers Assn. v. Blackwell (2004, 9th Circuit Court of Appeals). 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 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. (1964 Wilderness Act, Sec. 4[b])

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 involves intangible qualities as well. These components include outstanding opportunities for solitude and primitive and unconfined recreation, and the associated experience of freedom, self-reliance, risk, adventure, discovery, and mystery. Wilderness is a place set apart—both physically and psychologically—from modern civilization and its commercial and material distractions.

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 refo-cuses our perception of nature and our relationship to it. It embodies an attitude of humility and restraint that lifts our connection to a landscape from the utilitarian, commodity orient-ation that often dominates our relationship with nature to the symbolic realm serving other human needs. We pre-serve wilderness character by our compliance with wilderness legislation and regulation, but also by imposing limits upon ourselves.” (2001, p. 3714)

### How Nonconforming Uses Are Degrading Wilderness

The unique values that characterize lands within the National Wilderness Preservation System are being steadily degraded. The reasons can be broadly categorized as (1) increased motorized use, (2) commercialization, (3) manipulation of natural processes, and (4) changing types and levels of recreational use.
Special provisions in new wilderness bills exacerbate these problems and are becoming paramount in the overall threats to wilderness nationwide.

**Nonconforming Uses Diminish Wilderness Character**

Nonconforming uses diminish an area’s wilderness character and the opportunity for present and future generations to experience the unique benefits of authentic wilderness. Section 4(d) of the Wilderness Act is titled “Special Provisions.” These so-called nonconforming uses are compromises that diminish wilderness character, but were nonetheless written into the original law. These special exceptions are qualified to various degrees so as to provide federal wilderness managers with the ability to regulate these uses to minimize their impacts on wilderness.

With the exception of honoring private existing rights and for fire management, the Wilderness Act requires that the other activities be administered to protect wilderness character. For instance, the exception for commercial outfitting and guiding, a Wilderness Act exception that itself is limited to the order to facilitate commercial services for supporting activities including fences, line cabins as part of livestock grazing operations in Wilderness. Photo by George Nickas.

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The Central Idaho Wilderness Act (CIWA), which designated the River of No Return Wilderness (later named the Frank Church-River of No Return Wilderness), is a case in point. When that law was passed in 1980 there were eight airplane landing 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. This provision effectively precluded closing any of the existing strips and in fact has resulted in far worse conditions. Under pressure from pilots and the state, the Forest Service recently recognized four more 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 was a relatively small number of jetboats using the main Salmon River. The upper 40 miles (64.5 kilometers) of designated Wild River received less than one jetboat trip per day in 1978. Today, the Forest Service permits 18 commercial companies unlimited trips for hauling rafters, hunters, anglers, and sightseers up and down the entire length of the 85-mile-long (137-kilometer-long) Salmon River. In 2003 the agency also tripled (to 40 boat-days per 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 landing strips and 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.

One of the most widespread examples of the unanticipated consequences of special provisions is the Congressional Grazing Guidelines (CGG) that Congress first included in a Colorado national forest wilderness bill in 1980. The Guidelines have been
included in most national forest and Bureau of Land Management (BLM) wilderness bills since that time. Livestock grazing was “grandfathered” into 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 opened 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.” The CGG 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.

Most wilderness advocates at the time felt the impact of the guidelines would be minor and result in motor vehicle incursions only under the most rare of circumstances. Most wilderness areas 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 nonexistent. To many, the impact of the CGG seemed very minor at the time. In the late 1990s, as part of an appeal challenging a U.S. 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 was able to identify a single instance where the Forest Service had permitted motorized access in a Wilderness for grazing purposes.

That situation is changing because 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 or sheep. Ranchers have become increasingly accustomed to using off-road vehicles in these areas. The BLM in particular, which now administers about one-quarter of all wildernesses, has proven woefully lenient in allowing ranchers to drive off-road vehicles in wilderness. For example, in administering the Steens Mountain Wilderness in eastern Oregon, the BLM allows ranchers unrestricted use of motor vehicles for tending their cattle. The Congressional Grazing Guidelines are more restrictive than the BLM’s implementation of them on Steens Mountain. However, environmentalists have been unsuccessful in trying to prevent unlimited driving, whereas local congresspeople have consistently pressured the BLM to interpret the Guidelines in the most lenient fashion. The BLM relies on ambiguous language in the Steens Act to justify its actions.

Further damage to 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 Arizona in order to protect domestic livestock (Forest Guardians v. Animal & Plant Health Inspection Serv., 2002, No. 01-15239, U.S. Court of Appeals for the Ninth Circuit, 309 F.3d 1141).

These examples represent just a few of the threats presented by special provisions in wilderness bills, and they also highlight the unintended consequences that arise from making such exceptions. Most managers have been unable or unwilling to regulate or limit these nonconforming uses. Thus even when discretionary safeguards have been included in legislation, they have proven ineffective for protecting wilderness character from the harm that results from special provisions.

This array of nonconforming uses decreases the recognizable core qualities that define wilderness across the system. It brings about a gradual decline in the overall wilderness standards that govern the NWPS. Some nonconforming 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 (42.9 million hectares). But each nonconforming 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 nonconforming uses is significant.

Precedence in Nonconforming Uses

Nonconforming uses allowed in one wilderness bill are replicated—and often expanded—in subsequent wilderness bills. Once an exception is made in one bill, it becomes harder to exclude similar exceptions in future wilderness bills. Whereas some may argue that there are no binding precedents, that each bill is a unique situation, history argues otherwise.
Three noteworthy examples of provisions that have become troublesome precedents for other bills include (1) the Congressional Grazing Guidelines discussed above, (2) motorized access for state fish and game departments, and (3) access to private land inholdings (nonfederal lands) within wilderness.

Special language allowing for vehicle use for wildlife management first appeared in the 1984 Wyoming Wilderness Act. The exception was very narrow and for a specific purpose: allowing motorized access to a specific location in the Fitzpatrick Wilderness for capturing bighorn sheep. The provision applied only to a 6,000-acre (2,409-hectare) 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.

Six years later, Congress greatly expanded motorized access and other wilderness-damaging activities under the guise of wildlife management in 39 new wildernesses designated in the Arizona Desert Wilderness Act. The Arizona Desert Wilderness Act of 1990 referred to a memorandum of understanding (MOU) between the BLM, the Forest Service, and the International Association of Fish and Wildlife Agencies 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 nonnative fishes, and, in many cases, the use of motor vehicles and motorized equipment in carrying out these activities. Although the federal land managers retain authority to regulate or limit any activity under the MOU, they are often unable or unwilling 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.

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 the numbers of bighorn sheep and other game species. 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), the 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.

Access to 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 for federally owned land in the same state of approximately equal value” (Section 5[a]). An opinion from the U.S. attorney general in 1980 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). (43 Op. Attorney Gen. 243, 269, 1980)

It was an excellent solution to a problem with dangerous potential to degrade wilderness. Within the 106-million-acre (42.9-million-hectare) NWPS, there are well over one-half million acres (202,345 hectares) 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 the Alaska National Interest Lands Conservation Act (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." Whereas 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. The U.S. Department of Agriculture has codified this interpretation in its regulations applying to all national forest wildernesses. For its part, the BLM has also applied the access language of ANILCA to all lands under its jurisdiction. Whether or not the agencies have correctly interpreted this special provision in ANILCA, it has severely hampered the ability to protect wilderness by allowing a land exchange in lieu of allowing potentially harmful access. 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 (CDPA) 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 of the language used in the CDPA.

As a result of access provisions included in the above-mentioned laws, the BLM and Forest Service have begun approving motorized access (and related road development and improvements) to inholdings for a variety of inappropriate uses in wilderness. These include 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).

### Protecting Wilderness Character in Legislation

It is imperative that wilderness advocates oppose 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 the Wilderness condition.

- **Avoid nonconforming uses in new wilderness designations.** Wilderness advocates should keep proposals for designating new wildernesses clean of nonconforming uses, while working to remove such provisions from bills introduced in Congress.
- **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. The simplest and most straightforward way to address this problem is to eschew special language and instead include a statement saying the area is to be managed in accordance with the Wilderness Act.
- **Minimize the impacts of any new nonconforming uses in wilderness legislation.** Phase out the nonconforming uses over time. Congress included motorboat phaseouts for specific lakes in the 1978 Boundary Waters Canoe Area Wilderness Act. Limit the impacts from nonconforming uses allowed in the Wilderness Act that might not be phased out over time. Examples of such use include livestock grazing and some commercial services. Place the nonconforming uses outside of the wilderness boundary if possible.
- **Consider alternative designations if special provisions that compromise the ability to manage the area as wilderness can’t be avoided and if protection is needed for an area from other uses such as logging or ATVs.** In the 60,000-acre (24,096-hectare) 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 more remote upper half as the Rattlesnake Wilderness.

### 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 NWPS units. 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 nonconforming uses we can ensure that we pass on to future generations the “enduring resource of wilderness” that the framers of the Wilderness Act sought to preserve and that future generations deserve to inherit. **IJW**

### REFERENCES


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