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TO: Interested Parties
FROM: Andy Kerr
RE: Further Expanding of the Grazing Loophole in The Wilderness Act (The Wyden Wilderness Weakenings): The Proposed Malheur Community Empowerment Act (S.2828)
DATE: 21 January 2020

Senator Ron Wyden’s (D-OR) proposed “Malheur Community Empowerment for the Owyhee Act ([S.2828; 116th](#)), aka the Malheur County bill, would further erode the Wilderness Act by allowing, encouraging and/or requiring:

- even more livestock grazing in wilderness areas;
- the planting of non-native vegetation in wilderness areas; and
- chemical, biological, and mechanical manipulation of vegetation in wilderness areas.

These Wyden wilderness weakenings would go far beyond the original livestock grazing language in the Wilderness Act of 1964 and the Congressional Grazing Guidelines that Congress has incorporated into recent wilderness bills in areas with livestock grazing—the latter being the congressional status quo since 1980.

The Wyden wilderness weakenings would have the effect of the establishment of wilderness areas that, in terms of livestock grazing, would the color on the map, but would make livestock-in-wilderness management even worse on the ground.

While the Wyden wilderness weakenings are supported by the Oregon Natural Desert Association, it should not be supported by other public lands conservation organizations.

While invasive species are a major problem through the arid American west, it’s not just limited to wilderness areas. Existing statutes, regulations, and policy are adequate to address the problem in wilderness areas. It is a combination of a lack of bureaucratic will and congressional funding.

Ironically, the single most important factor in the [spread of cheatgrass and other invasive species is livestock grazing](#).

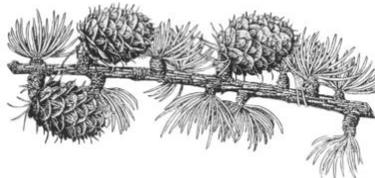
In past legislation pertaining to the Cascade-Siskiyou and Oregon Caves national monuments, Sen. Wyden has been a champion of statutory voluntary livestock grazing permit retirement facilitation language.

Appendix A is a side-by-side listing of the offensive wilderness management language and explanation and analysis.

Appendix B is the Congressional Grazing Guidelines.

Here are two relevant law review articles pertaining to livestock grazing in wilderness areas:

- Appel, Peter A. and Christopher Barns, [Grazing in the National Wilderness Preservation System](#), 53 IDAHO L. REV. 465 (2017).
- Squillace, Mark, [Grazing in Wilderness Areas](#), 44 Envtl. L. 415 (2014)



DEDICATED TO THE CONSERVATION AND RESTORATION OF NATURE, THE LARCH COMPANY IS A NON-MEMBERSHIP FOR-PROFIT ORGANIZATION THAT REPRESENTS SPECIES THAT CANNOT TALK AND HUMANS NOT YET BORN, A DECIDUOUS CONIFER, THE WESTERN LARCH HAS A CONTRARY NATURE.

Appendix A
Dangerous Wilderness “Management” Provisions in S.2828 (116th Congress)

(3) MANAGEMENT.—	
(A) IN GENERAL.—Subject to valid existing rights, the wilderness areas shall be administered by the Secretary in accordance with—	This is necessary and innocuous boilerplate language standard with all wilderness bills.
(i) this subsection;	
(ii) the Wilderness Act (16 U.S.C. 1131 et seq.), except that— (I) any reference in that Act to the effective date of that Act shall be considered to be a reference to the date of enactment of this Act; and	
(II) any reference in that Act to the Secretary of Agriculture shall be considered to be a reference to the Secretary; and	
(iii) section 6340 of the Bureau of Land Management Manual (Management of Designated Wilderness Areas) (as in effect on the date of enactment of this Act).	The language is not innocuous. It has the effect of enacting the current BLM Manual 6340 into permanent congressional statute. If the BLM manual provision were ever to be improved, it would not apply to the wilderness areas established in this legislation.
(B) GRAZING.—The Secretary shall allow the continuation of the grazing of livestock in the wilderness areas, if established before the date of enactment of this Act, in accordance with—	This language simply restates existing statutory language and intent. U.S.C. 1133(d)(4) says: “the grazing of livestock, where established prior to September 3, 1964, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture.” The Federal Land Policy and Management Act of 1976 extended this provision to BLM wilderness areas administered by the Secretary of the Interior.
(ii) section 4(d)(4) of the Wilderness Act (16 U.S.C. 1133(d)(4));	
(iii) the guidelines set forth in Appendix A of the report of the Committee on Interior and Insular Affairs of the House of Representatives accompanying H.R. 2570 of the 101st Congress (H. 18 Rept. 101–405); and	
(iv) any other Federal law that applies to livestock grazing on Federal public land.	This language is absolutely dangerous. It effectively elevates the importance of livestock grazing in wilderness above and beyond the original statutory language in 1964 and the CCG by making “any law that applies to livestock grazing on Federal public land” to be co-equal with earlier congressional direction. Many such laws promote, rather than attempt to regulate, livestock grazing.

(C) FIRE MANAGEMENT AND RELATED ACTIVITIES.—	
(i) IN GENERAL.—The Secretary may carry out any activities in the wilderness areas that the Secretary determines to be necessary for the control of fire, insects, and diseases, in accordance with—	
(I) this Act;	The vast majority of the text “this Act” elevates the importance of livestock grazing on Federal public lands in Malheur County
(II) section 4(d)(1) of the Wilderness Act (16 U.S.C. 1133(d)(1)); and	This simply refers to the 1964 statutory language : “such measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable.”
(III) the report of the Committee on Interior and Insular Affairs of the House of Representatives accompanying H.R. 1437 of the 98th Congress (House Report 98–40).	<p>House Report 98-40 (available upon request) pertains—as the report itself says—to “the arid climate, high seasonal temperatures and buildup of fuel that exists in so many California roadless areas, especially in Southern California.” It is inappropriate to apply to the sagebrush steppe of southeast Oregon.</p> <p>In contrast, Senator Wyden has this language, which is much preferable, in his proposed Oregon Recreation and Enhancement Act (S1262; 116th Congress):</p> <p><i>The Secretary may take such measures within the Wilderness additions as the Secretary determines to be necessary for the control of fire, insects, and disease, in accordance with section 4(d)(1) of the Wilderness Act</i></p> <p>This language has been approved by the Senate Committee on Energy and Natural Resources.</p>
(ii) INCLUSIONS.—Authorized activities under clause (i) shall include the use of mechanical treatments in the wilderness areas by first responders.	First responders means firefighters, not restoration crews that might be characterized as “second responders.” “Mechanical treatments”? Does it mean “the manipulation of vegetation... to control nonnative species; or” unnatural restoration activities noted in the language below? Firefighters would be not be fighting fires, but invasive species?
(D) INVASIVE SPECIES MANAGEMENT AND RELATED ACTIVITIES.—In accordance with section 4(d)(1) of the Wilderness Act (16 U.S.C. 1133(d)(1)), the Secretary may carry out any activities in the wilderness areas that the Secretary determines to be necessary for the control and manipulation of invasive species, including—	This language is unprecedented and dangerous. The referenced current statutory provision says: “such measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable.” The Wilderness Act language makes no reference to invasive species.

<p>(i) the use of nonnative species in areas in which native species cannot be grown to adequately compete with non-native species; and</p>	<p>This language is unprecedented and dangerous.</p>
<p>(ii) the manipulation of vegetation, including through chemical, biological, and mechanical means—</p>	<p>It opens the floodgates to the use of crested wheatgrass seeding and other highly unnatural species suited best for livestock and suited worse for wilderness.</p>
<p>(I) to control nonnative species; or</p>	
<p>(II) as part of restoration activities, if natural processes alone cannot recover the ecological health of an area, as determined by the Secretary.</p>	<p>Wilderness character and quality become totally subservient to any and all vegetation manipulation by chemical, biological and mechanical means.</p>
<p>(E) MAINTENANCE OF LIVESTOCK STRUCTURES.—The Secretary may carry out any activities in the wilderness areas that the Secretary determines to be necessary for the maintenance of structures and installations used for livestock management in existence on the date of enactment of this Act, in accordance with—</p>	<p>This language goes beyond the original statutory language of 1964 and the Congressional Grazing Guidelines.</p>
<p>(i) section 4(d)(1) of the Wilderness Act (16 U.S.C. 1133(d)(1)); and</p>	
<p>(ii) the report of the Committee on Interior and Insular Affairs of the House of Representatives accompanying H.R. 1437 of the 98th Congress (House Report 98–40).</p>	
<p>(F) SETBACK FOR ROADS ADJACENT TO WILDERNESS AREAS.—The Secretary may determine, in accordance with an applicable travel management plan for the Federal land adopted not later than 1 year after the date of enactment of this Act and section 6340 of the Bureau of Land Management Manual (Management of Designated Wilderness Areas) (as in effect on the date of enactment of this Act), that the boundary of a wilderness area adjacent to a road may be up to 300 feet from the centerline of a road if—</p>	<p>This language is unprecedented and dangerous. An Act of Congress establishing a wilderness area, which does not allow recreational motorized travel, should not be subservient to a travel management plan developed by the administering agency before the enactment by Congress.</p>
<p>(i) the setback is determined by the Secretary to be appropriate for the use of the Federal land; and</p>	
<p>(ii) no existing boundary road will be closed.</p>	

Appendix B
The Congressional Grazing Guidelines (CGG)

(From House Report [96-117](#) as Reprinted in House Report [101-405](#))

There is a fiction clung to tightly by some of the most zealous wilderness advocates that the Wilderness Act of 1964 has never been amended by Congress. While technically true that the [Wilderness Act](#) of 1964 (Public Law 88-577) is still codified today at [16 U.S.C. 1131-1136](#) with the same exact words enacted into law in 1964, Congress has effectively modified the Wilderness Act several time, including pertaining to livestock grazing.

In 1980, Congress enacted the Colorado National Forest Wilderness Act ([H.R.5487;96th Congress](#)), which includes this clause:

Sec. 108. The Congress hereby declares that, without amending the Wilderness Act of 1964, with respect to livestock grazing in National Forest wilderness areas, the provisions of the Wilderness Act relating to grazing shall be interpreted and administered in accordance with the guidelines contained under the heading "Grazing in National Forest Wilderness" in the House Committee Report (H. Report 96-617) accompanying this Act.

In 1990, Congress enacted the Arizona Desert Wilderness Act ([H.R.2570; 101st Congress](#)), which said:

(f) LIVESTOCK- (1) Grazing of livestock in wilderness areas designated by this title, where established prior to the date of the enactment of this Act, shall be administered in accordance with section 4(d)(4) of the Wilderness Act and the guidelines set forth in Appendix A of the Report of the Committee on Interior and Insular Affairs to accompany H.R. 2570 of the One Hundred First Congress (H. Rept. 101-405).

H. Rept. 101-405 reprints verbatim what are now known as the “congressional grazing guidelines” (CGG). Any pretense of not “amending the wilderness Act” has been dropped. Every wilderness area established by Congress, where livestock grazing is extant, has including this effective amendment to the Wilderness Act.

The CCG:

1. There shall be no curtailments of grazing in wilderness areas simply because an area is, or has been designated as wilderness, nor should wilderness designations be used an excuse by administrators to slowly "phase out" grazing. Any adjustments in the numbers of livestock permitted to graze in wilderness areas should be made as a result of revisions in the normal grazing and land management planning and policy setting process, giving consideration to legal mandates, range condition, and the protection of the range resource from deterioration.

It is anticipated that the number of livestock permitted to graze in wilderness would remain at the approximate levels at the time an area enters the wilderness system. If land management plans reveal conclusively that increased livestock numbers or animal unit months (AUMs) could be made available with no adverse impact on wilderness values such as plant communities, primitive recreation, and wildlife populations or habitat, some increases in AUMs may be permissible. This

is not to imply, however, that wilderness lends itself to AUM or livestock increases and construction of substantial new facilities that might be appropriate for intensive grazing management in non-wilderness areas.

2. The maintenance of supporting facilities, existing in an area prior to its classification as wilderness (including fences, line cabins, water wells and lines, stock tanks, etc.), is permissible in wilderness. Where practical alternatives do not exist, maintenance or other activities may be accomplished through the occasional use of motorized equipment. This may include, for example, the use of backhoes to maintain stock ponds, pickup trucks for major fence repairs, or specialized equipment to repair stock watering facilities. Such occasional use of motorized equipment should be expressly authorized in the grazing permits for the area involved. The use of motorized equipment should be based on a rule of practical necessity and reasonableness. For example, motorized equipment need not be allowed for the placement of small quantities of salt or other activities where such activities can reasonably and practically be accomplished on horseback or foot. On the other hand, it may be appropriate to permit the occasional use of motorized equipment to haul large quantities of salt to distribution points. Moreover, under the rule of reasonableness, occasional use of motorized equipment should be permitted where practical alternatives are not available and such use would not have a significant adverse impact on the natural environment. Such motorized equipment uses will normally only be permitted in those portions of a wilderness area where they had occurred prior to the area's designation as wilderness or are established by prior agreement.

3. The replacement or reconstruction of deteriorated facilities or improvements should not be required to be accomplished using "natural materials", unless the material and labor costs of using natural materials are such that their use would not impose unreasonable additional costs on grazing permittees.

4. The construction or new improvements or replacement of deteriorated facilities in wilderness is permissible if in accordance with these guidelines and management plans governing the area involved. However, the construction of new improvements should be primarily for the purpose of resource protection and the more effective management of these resources rather than to accommodate increased numbers of livestock.

5. The use of motorized equipment for emergency purposes such as rescuing sick animals or the placement of feed in emergency situations is also permissible. This privilege is to be exercised only in true emergencies, and should not be abused by permittees.

In summary, subject to the conditions and policies outlined in this report, the general rule of thumb on grazing management in wilderness should be that activities or facilities established prior to the date of an area's designation as wilderness should be allowed to remain in place and may be replaced when necessary for the permittee to properly administer the grazing program. Thus, if livestock grazing activities and facilities were established in an area at the time Congress determined that the area was suitable for wilderness and placed the specific area in the wilderness system, they should be allowed to continue. With respect to areas designated as wilderness prior to the date of this Act, these guidelines shall not be considered as a direction to reestablish uses where such uses have been discontinued.