Wilderness: Legislation and Issues in the 112th Congress

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Summary

The Wilderness Act established the National Wilderness Preservation System in 1964 and directed that only Congress can designate federal lands as part of the system. Free-standing bills to designate wilderness areas are typically introduced and considered in each Congress; such bills are not amendments to the Wilderness Act, but typically refer to the act for management guidance and sometimes include special provisions. Several wilderness bills have been introduced in the 112th Congress.

Wilderness designation can be controversial. The designation generally prohibits commercial activities, motorized access, and human infrastructure from wilderness areas, subject to valid existing rights. Advocates propose wilderness designations to preserve the generally undeveloped conditions of the areas. Opponents see such designations as preventing certain uses and potential economic development in rural areas where such opportunities are relatively limited.

Most bills direct management of designated wilderness in accordance with the Wilderness Act. However, proposed legislation also often seeks a compromise among interests by allowing other activities in the area. Typically, pre-existing uses or conditions are allowed to continue. Sometimes this authority is temporary, with nonconforming uses to be halted and/or nonconforming conditions to be rectified. At other times, the authority is permanent, with limited access permitted for specific areas, uses, and times, or with the authority to operate and maintain pre-existing infrastructure. Wilderness bills often contain additional provisions, such as prohibiting buffer zones around the wilderness, or providing special access for particular purposes, such as border security or Native American religious needs. Water rights possibly associated with wilderness designations have also been controversial, and many existing statutes have addressed wilderness water rights in various ways.

Other controversies regarding wilderness have focused on management by federal agencies, such as how and when an agency releases a wilderness study area that is not recommended as wilderness. Successful litigation over Forest Service wilderness recommendations in 1980 led Congress to develop "release language" in legislation. This provision excused the Forest Service from reviewing wilderness potential and from protecting wilderness conditions in the initial land management plans for national forests.

The issue of agency management is more contentious for Bureau of Land Management (BLM) lands, for two reasons. First, BLM is required by law to protect the wilderness characteristics of its wilderness study areas (WSAs) until Congress determines otherwise. Second, in contrast to Forest Service planning, the BLM planning process is not cyclical and BLM planning guidance has not required wilderness consideration in planning. A 1996 attempt by the agency to expand the original WSAs was challenged in court, and a 2003 settlement agreement resulted in different BLM wilderness guidance prohibiting additional administrative WSA designations and protections. In December 2010, however, Interior Secretary Ken Salazar issued an order directing BLM to maintain a wilderness inventory, to consider wilderness potential in planning, and to protect wilderness characteristics of the inventoried areas unless alternative management is deemed appropriate. This policy has received both praise and objections from some members of Congress, as well as various interest groups.

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Background

The Wilderness Act (16 U.S. C. §§ 1131-1136) established the National Wilderness Preservation System in 1964 and directed that only Congress can designate federal lands as part of the system.[1] This authority is based on what is known as the Property Clause of the Constitution, which gives to Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[2] Many believe that special areas should be designated to protect and preserve their unique values and characteristics, and bills are usually introduced in each Congress to designate wilderness areas. Others oppose such legislation because commercial activities, motorized access, and roads, structures, and facilities generally are prohibited in wilderness areas. Debate over wilderness legislation in the 112th Congress is likely to follow this pattern. In addition, a December 2010 change to the Interior Department policy for wilderness inventory may stimulate debate in the 112th Congress over the timing and nature of wilderness reviews.

This report presents background information on wilderness protection, a discussion and table showing the status of pending wilderness legislation in the 112th Congress, and a discussion of issues in the wilderness debate—the pros and cons of wilderness designation generally; possible considerations for specific bills; and the possible discussion of wilderness study area designation and protection.

The Wilderness Act established a National Wilderness Preservation System of federal lands, initially with 54 wilderness areas containing 9.1 million acres of federal land within the national forests. It reserved to Congress the authority to add areas to the system, although agencies were given the authority to review the wilderness potential of certain lands.

The Wilderness Act and 117 subsequent laws have designated wilderness areas. As of December 31, 2010, the National Wilderness Preservation System totaled 759 areas, with 110 million acres.[3] The wilderness areas are part of the existing units of federal land administered by the several federal land management agencies—the Forest Service (USFS) in the Department of Agriculture, and the National Park Service (NPS), Fish and Wildlife Service (FWS), and Bureau of Land Management (BLM) within the Department of the Interior. Thus, statutory provisions for these agencies' lands, as well as the Wilderness Act and the subsequent wilderness statutes, govern the administration of the designated wilderness areas.

Wilderness designations can be controversial because the Wilderness Act restricts uses that are allowed within designated areas. In general, the Wilderness Act prohibits commercial activities, motorized access, and roads, structures, and facilities in wilderness areas. Specifically, § 4(c) states:

> Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for

[1] This report does not address the administrative, legislative, and judicial actions related to national forest roadless areas, which some observers believe were an administrative attempt to create wilderness; see CRS Report RL30647, *National Forest System (NFS) Roadless Area Initiatives*, by Kristina Alexander and Ross W. Gorte.

[2] Art. IV, § 3, cl. 2.

[3] See CRS Report RL31447, *Wilderness: Overview and Statistics*, by Ross W. Gorte.

> the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

This section thus prohibits most commercial resource exploitation (such as timber harvesting) and motorized entry (via cars, trucks, off-road vehicles, aircraft, or motorboats) except for "minimum requirements" to administer the areas and in emergencies. However, § 4(d) provides numerous exceptions, including (a) possible continued use of motorboats and aircraft; (b) measures to control fires, insects, and diseases; (c) mineral prospecting conducted "in a manner compatible with the preservation of the wilderness environment;" (d) water projects; (e) continued livestock grazing; and (f) commercial recreation activities. Subsequent wilderness statutes have included additional provisions for administering those wilderness areas, including exceptions to the general Wilderness Act prohibitions.[4]

Valid existing rights established prior to the designation of an area as wilderness remain valid, unless expressly modified by the wilderness statute. The phrase *valid existing rights* means that the designation does not alter *property* rights, and does not suggest that all uses prior to the designation are allowed. There must be a property right, rather than a general right of use. Courts have consistently interpreted "subject to valid existing rights" to mean that the wilderness designation is not intended to take property in violation of the Fifth Amendment of the Constitution.[5] Ownership of land within a wilderness area would confer existing rights.

While most *uses*—timber harvesting, livestock grazing, motorized recreation—are not *rights* to the lands and resources, the mining and mineral leasing laws do provide a process for establishing rights to the mineral resources. The Wilderness Act allowed implementation of these laws through 1983 for the original areas designated; many subsequent laws explicitly withdrew the designated areas from availability under these laws. Three statutes—P.L. 97-466, P.L. 101-628, and P.L. 103-77—directed that mineral leases within the wilderness be acquired through exchanges for mineral leases elsewhere.

Wilderness Legislation

Numerous bills to designate wilderness areas are usually introduced in each Congress. For example, 33 bills that would have designated wilderness areas (plus 13 companion bills) were introduced in the 111th Congress.[6] Only one was enacted—the Omnibus Public Land Management Act of 2009, P.L. 111-11—but it included 16 subtitles (many of which had been introduced in wilderness bills in the 110th and 111th Congresses) designating 2,050,964 acres of wilderness in various locales, as well as including numerous land, water, and other provisions.

[4] For more information, see CRS Report RL33827, *Wilderness Laws: Permitted and Prohibited Uses*, by Ross W. Gorte.

[5] See *Stupak-Thrall v. United States*, 89 F.3d 1269, 1280 (6th Cir. 1996), and *Utah v. Andrus*, 486 F. Supp. 995, 1010 (D. Utah 1979).

[6] For information on these bills, see CRS Report R40237, *Federal Lands Managed by the Bureau of Land Management (BLM) and the Forest Service (FS): Issues in the 111th Congress*, coordinated by Ross W. Gorte and Carol Hardy Vincent.

Bills introduced in the 112th Congress to designate wilderness areas are listed alphabetically in **Table 1**. The table also shows the state and acreage of the bill, as well as the most recent action on the bill.

Table 1. 112th Congress: Bills to Designate Wilderness Areas

Bill Title	Bill No.	State	Acreage[a]	Most Recent Action
Angeles and San Bernardino National Forests Protection Act	H.R. 113	CA	18,208 acres[b]	Introduced 1/5/11
Beauty Mountain and Agua Tibia Wilderness Act of 2011	H.R. 41	CA	21,431 acres	Introduced 1/5/11
California Desert Protection Act of 2011	S. 138	CA	394,441 acres[c]	Introduced 1/25/11
Central Idaho Economic Development and Recreation Act	H.R. 163	ID	332,928 acres	Introduced 1/5/11
Manzano Mountain Wilderness (no official title)	H.R. 490	NM	(unspecified)	Introduced 1/26/11
Pinnacles National Park Act	S. 161	CA	2,715 acres	Introduced 1/25/11
Sleeping Bear Dunes National Lakeshore Conservation and Recreation Act	S. 140	MI	32,557 acres	Introduced 1/25/11
Udall-Eisenhower Arctic Wilderness Act (S. 33 has no official title)	H.R. 139/ S. 33	AK[d]	1,559,538 acres	H.R. 139 Introduced 1/5/11 S. 33 introduced 1/25/11
(text not yet available)	S. 268	MT	666,260 acres	Introduced 2/3/11

Source: CRS acreage calculation from the pertinent legislation in LIS.

Notes: Excludes legislation with minor boundary adjustments of wilderness areas.

a. Estimated acreage as identified in the latest version—as introduced, reported, passed, or enacted.

b. The Forest Service has estimated the area as 17,724 acres.

c. Includes 48,333 acres of potential wilderness in four areas.

d. Designates land in the Arctic National Wildlife Refuge.

To date, no legislation to modify wilderness management more generally has been introduced in the 112th Congress.

Issues for Congress

In general, Congress addresses several issues when drafting and considering new wilderness bills. These issues include the general pros and cons of wilderness designation and specific provisions included in a bill designating wilderness areas. An issue that could draw attention in the 112th Congress is a new Interior Department policy on wilderness inventory and consideration for BLM lands, issued in December 2010.

General Wilderness Considerations

Proponents of wilderness generally seek designations of specific areas to preserve the areas in their current condition and to prevent development activities from altering their wilderness character. Most areas protected as or proposed for wilderness are undeveloped, with few (if any) signs of human activity, such as roads and structures. The principal benefit of a wilderness designation is to maintain such undeveloped conditions and the values that such conditions generate—clean water, undisturbed wildlife habitats, natural scenic views, opportunities for nonmotorized recreation (e.g., backpacking), unaltered research baselines, and for some, the simple knowledge of the existence of such pristine places. These conditions and values may be constrained by existing rights and other exceptions and exemptions provided for specific areas by Wilderness Act prohibitions and restrictions on development and access.

Opponents of wilderness generally seek to retain development options for federal lands. The potential use of lands and resources can provide economic opportunities in extracting and developing the resources, especially in the relatively rural communities in and around the federal lands. The principal cost of a wilderness designation is the lost opportunity for economic activity resulting from resource extraction and development. While some economic activities, such as grazing and outfitting, are allowed to continue within wilderness areas, many are prohibited. The potential losses (opportunity costs) for some resources, such as timber harvesting, can be determined with relative accuracy, since the quality and quantity of the resource can be measured. However, for other resources, particularly minerals, the assessments of the quality and quantity of the unavailable resources are more difficult to determine, and thus the opportunity costs are less certain.

The potential benefits and opportunity costs of wilderness designation can rarely be fully quantified and valued. Thus, decisions about wilderness generally cannot be based on a clear cost-benefit or other economic analysis. Rather, deliberations commonly focus on trying to maximize the benefits of preserving pristine areas and minimize the resulting opportunity costs. However, the individuals and groups who benefit from wilderness designations may differ from those who may be harmed by the lost opportunities, increasing conflict and making compromise difficult. Wilderness designations are not necessarily permanent. Congress has statutorily deleted lands from 18 wilderness areas, commonly to adjust boundaries to delete private lands or roads included inadvertently in the original designation. Thus, changes can be made if subsequent information shows a wilderness designation should be altered.

Considerations for a Wilderness Bill

For legislation to designate wilderness areas, the first choice is which areas (if any) to designate. While the Wilderness Act required areas of at least 5,000 acres for future designations,[7] no minimum size is required for designations made under new legislation. As a result, wilderness areas have taken all shapes and sizes; the smallest is the Pelican Island Wilderness in Florida, with only 5½ acres, while the largest is the Mollie Beattie Wilderness (Arctic National Wildlife Refuge) in Alaska, with 8.0 million acres. Many wilderness statutes have designated a single area, or even a single addition to an existing area. Others have designated more than 70 new areas or additions in a single statute. Some bills address a particular area, while others address all likely

[7] 16 U.S.C. § 1132(c).

wilderness areas for a state or sub-state region (e.g., the California desert), usually for one agency's lands, although occasionally for two or more agencies' lands in the vicinity. Typically, the bill references a particular map for each area, and directs the agency to file a map (with minor corrections, if necessary) with the relevant committees of Congress after enactment, and to retain a copy in relevant agency offices (commonly a local office and/or the DC headquarters).

Management in Accordance with the Wilderness Act

Most bills direct that the areas are to be managed in accordance with the Wilderness Act, meaning human impacts, such as commercial activities, motorized and mechanical access, and infrastructure developments, are generally prohibited in the areas. The Wilderness Act does allow some activities that affect the natural condition of the property. Exceptions and exemptions include access for emergencies and for minimum management requirements; activities to control fires, insects, and diseases; livestock grazing; and presidentially authorized water projects. Subject to valid existing rights, the areas are withdrawn from the public land laws and the mining and mineral leasing laws. Acquisition of nonfederal lands is authorized from willing sellers, and "reasonable access" to nonfederal lands within the wilderness area must be accommodated. State jurisdiction over and responsibilities for fish and wildlife and water rights are unaffected.

Non-Conforming Uses or Conditions

Lands do not have to be untouched by humans to be eligible for statutory designation as wilderness. Provisions could be included to terminate or accommodate any non-conforming uses or conditions in the areas included in the bill. Existing wilderness statutes have directed immediate termination of non-conforming uses or have allowed such uses to continue for a specified period. Similarly, existing statutes typically have provided the agencies a specified period for removing, remediating, or restoring non-conforming conditions or infrastructure. Alternatively, many non-conforming uses and conditions have been permitted to remain in designated wilderness areas. The Wilderness Act explicitly allowed continued motorized access by aircraft and motorboats in areas where such uses were already established. Numerous wilderness statutes have permitted existing infrastructure (e.g., cabins, water resource facilities, telecommunications equipment) to remain, and have authorized occasional motorized access to operate, maintain, and replace the infrastructure. A few statutes have also allowed new infrastructure developments (e.g., telecommunications equipment and a space energy laser facility) within designated wilderness areas. While such authorizations are usually for a specific area, some statutes have provided more general exemptions, such as for maintaining grazing facilities or for fish and wildlife management by a state agency in all areas designated in the statute.

Courts have looked narrowly at these exceptions, however. Accordingly, legislative language to continue these uses should be precise. For example, in one case, the law creating a wilderness specifically allowed the management agency to "upgrade, maintain and replace" one structure. The court held that did not mean that Congress intended preservation of other structures in that wilderness.[8] In another case, the Eleventh Circuit stated that unless the enabling legislation permitted it, maintenance and preservation of structures, even those deemed historic, could not be permitted: "Congress wrote the wilderness rules and may create exceptions as it sees fit. Absent

[8] *Olympic Park Associates v. Mainella*, 2005 WL 1871114 (W.D. Wash. Aug. 1, 2005).

these explicit statutory instructions, however, the need to preserve historical structures may not be inferred from the Wilderness Act nor grafted onto its general purpose."[9]

Other Provisions

Many existing wilderness statutes have included various other provisions addressing wilderness. Some have included sections with findings and purposes for the designation; these are more common in statutes that include designations or management direction for areas other than wilderness (e.g., directing cooperative management of an area or designating a national recreation area). Many have also included provisions that prohibit buffer zones around the wilderness. Such provisions direct that non-conforming activities can occur up to the wilderness boundary, and that the ability to see or hear a non-conforming activity from within the wilderness is not a reason to prohibit the activity.

Some statutes have contained additional wilderness management provisions. While these may address non-conforming uses or conditions, as discussed above, sometimes the provisions include additional guidance to supplement the management provisions of the Wilderness Act. Specific references to certain wilderness statutes and/or to the accompanying committee reports have been included in many statutes for additional guidance on livestock grazing. Also, several statutes have contained additional guidance on appropriate and acceptable state fish and wildlife management activities within the wilderness areas.

Numerous statutes have contained provisions addressing specific issues, as discussed below: special access considerations; release language; and reserved water rights.

Special Access Considerations

Various existing wilderness statutes have included special access provisions for particular needs. For example, statutes designating wilderness areas abutting or adjacent to the Mexican border have commonly allowed motorized access for law enforcement and border security. Similarly, several statutes have included provisions addressing possible military needs in and near the designated areas, particularly for low-level military training flights. Other statutes have contained provisions allowing particular access for tribal, cultural, or other local needs. Several statutes have included provisions authorizing the agencies to prevent public access, usually temporarily and for the minimum area needed, to accommodate these and other particular needs.

Release Language

Many areas must be managed to preserve their wilderness characteristics. For example, § 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA) directed BLM to administer the lands it reviewed as potential wilderness "until Congress has determined otherwise … in a manner so as not to impair the suitability of such areas for preservation as wilderness."[10] Thus, BLM must protect the wilderness character of all of its wilderness study areas, until Congress releases the areas from this management direction. When Congress considers which areas to designate as wilderness, and chooses not to designate some areas as wilderness, it commonly

[9] *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1092 (11th Cir. 2004).

[10] P.L. 94-579, § 603(c); 43 U.S.C. § 1782(c).

includes release language to allow BLM to administer the lands not designated under the general public land management provisions of FLPMA. (This issue is discussed further below.)

Reserved Water Rights

Under the so-called *Winters* doctrine, when Congress reserves federal land for a particular purpose, it also reserves enough water to fulfill the purpose of the reservation.[11] Initial wilderness designations were seen as having a minimal effect on water rights, as they were made in national forests, which are congressional reservations of federal land; in § 4(d)(7), the Wilderness Act explicitly stated that the wilderness designations did not "constitute an express or implied claim or denial … as to exemption from State water laws." This is particularly an issue for BLM lands, since many BLM lands are public domain lands (acquired by the federal government from a foreign sovereign) that were not reserved by Congress. Furthermore, as BLM lands often do not contain the headwaters of streams (in contrast to the national forests), upstream diversions can affect the water flowing through a wilderness area. As discussed elsewhere (see CRS Report RL33827, *Wilderness Laws: Permitted and Prohibited Uses*), wilderness statutes have taken various approaches to water rights. Addressing federal water rights might be warranted in wilderness legislation, especially for places that have constraints on the amount of water available.

Wilderness Review and Release of Possible Wilderness

One particular issue that might arise in the 112th Congress is when (and whether) the agencies can and must review the wilderness potential of their lands. Order 3310, issued by Interior Secretary Ken Salazar on December 22, 2010, changed BLM policy established by the previous Secretary in September 2003 to inventory potential wilderness resources and to protect the wilderness characteristics of those inventoried areas. This policy change may stimulate debate over this issue in the 112th Congress.

Background

The Wilderness Act and other statutes have directed the review of the wilderness potential of certain federal lands. The Multiple Use Sustained Yield Act of 1960[12] and the National Forest Management Act of 1976 (NFMA)[13] provide for periodic review of potential national forest wilderness areas in the USFS planning process for the national forests.[14] In 1977, the USFS chose to accelerate the wilderness review portion for the initial plans, issuing the Second Roadless Area Review and Evaluation (RARE II) final environmental impact statement and wilderness recommendations in January 1979. A successful judicial challenge to those recommendations by the state of California[15] led to uncertainty over the validity of the RARE II recommendations, to

[11] *Winters v. United States*, 207 U.S. 564 (1908). See also CRS Report R41081, *The Wild and Scenic Rivers Act (WSRA): Protections, Federal Water Rights, and Development Restrictions*, by Cynthia Brougher, for a discussion of federal reserved water rights in similarly protected areas.

[12] P.L. 86-517; 16 U.S.C. §§ 528-531.

[13] P.L. 94-588; 16 U.S.C. §§ 1600-1614.

[14] Under § 6(f)(5) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (P.L. 93-378), as amended by NFMA, management plans for the national forests must be revised at least every 15 years.

[15] California v. Block, 690 F.2d 753 (9th Cir. 1982) (holding that USFS had not satisfied the National Environmental (continued...)

ambiguity over the timing of future wilderness reviews, and to disputes over the need to protect the wilderness characteristics of the areas reviewed. Congress developed "release language" for wilderness legislation to release the USFS from reviewing wilderness potential in the initial NFMA plans (essentially redoing RARE II) and from preserving the wilderness characteristics of areas not recommended for wilderness designation. Such provisions were enacted in 30 state-by-state USFS wilderness statutes between 1980 and 1990.[16] Release language is no longer significant for national forest wilderness legislation because review of potential wilderness is now part of the NFMA planning process.

BLM Wilderness Review

For BLM lands, § 603 of FLPMA requires the agency to review the wilderness potential of "those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 201(a) of this Act as having wilderness characteristics." The agency was required to present its wilderness recommendations to the President within 15 years of October 21, 1976, and the President then had two years to submit his wilderness recommendations to Congress. BLM presented its recommendations by October 21, 1991, and Presidents George H. W. Bush and William Clinton submitted wilderness recommendations to Congress. In response, Congress has enacted several statutes designating BLM wilderness areas, but many of the wilderness recommendations for BLM lands remain pending. There are two continuing issues for potential BLM wilderness: protection of the wilderness study areas; and future BLM wilderness reviews.

Protection of BLM Wilderness Study Areas

BLM has a continuing obligation to identify the resources on its lands, giving priority to areas of critical environmental concern.[17] An additional obligation required a review of roadless areas greater than 5,000 acres to determine suitability for wilderness.[18] In 1977-1979, BLM identified suitable wilderness study areas (WSAs) from those roadless areas in its initial resource inventory under § 201. Section 603(c) of FLPMA directs the agency to manage those lands "until Congress has determined otherwise … in a manner so as *not to impair* the suitability of such areas for preservation as wilderness." Thus, BLM must protect the WSAs like they were wilderness until Congress enacts legislation that releases BLM from that responsibility. This is sometimes referred to as a nonimpairment obligation.

Legislation to broadly modify WSA nonimpairment protection under § 603 of FLPMA was offered in earlier Congresses (106th, 107th, and 108th). The legislation typically provided release for all remaining BLM WSAs 10 years after enactment, to provide time for Congress to consider wilderness legislation for BLM lands, meaning that if Congress had not acted by that time, the areas would no longer be treated as WSAs. However, no hearings were held on the bills and none was enacted. Similar bills have not been introduced since the 108th Congress.

(...continued)

Policy Act or NFMA in producing the recommendations).

[16] See, e.g., P.L. 98-321 (Wisconsin).

[17] FLPMA § 201; 43 U.S.C. § 1711.

[18] FLPMA § 603; 43 U.S.C. § 1782.

WSAs have been subject to litigation challenging BLM's protection. In the early 2000s, BLM was sued for not adequately preventing impairment of WSAs from increased off-road vehicle use. The issue was whether the nonimpairment obligation was discretionary and therefore unenforceable by litigation. In *Norton v. Southern Utah Wilderness Alliance*, the U.S. Supreme Court ruled that it was not enforceable by suit.[19] The Court held that while WSA protection was mandatory, it was a broad programmatic duty and not a discrete agency obligation. The Court also concluded that the relevant FLPMA land use plans (indicating that WSAs would be monitored) constituted only management goals that might be modified by agency priorities and available funding, and were not a basis for enforcement under the Administrative Procedure Act (APA). Therefore, it appears that although BLM actions that would harm WSAs could be enjoined, as with any agency enforcement obligation,[20] forcing BLM to take protective action is difficult at best.

Future BLM Wilderness Reviews

It is unclear whether BLM is required to review its lands specifically for wilderness potential after the initial review required within 15 years in § 603(a) of FLPMA.[21] In contrast to the USFS, which must revise its land and resource management plans at least every 15 years, BLM is not required to revise its plans on a specified cycle; rather it must to revise its land and resource management plans "when appropriate." And BLM is required under § 201 to maintain an inventory of the resource values of its lands, prioritizing those of critical environmental concern. Furthermore, while NFMA includes wilderness in the planning process, both directly and by reference to the Multiple Use Sustained Yield Act of 1960, FLPMA is silent on wilderness in the definitions of multiple use and sustained yield and in the guidance for the BLM planning process. Thus, the potential for future BLM wilderness reviews is less certain than for future USFS wilderness reviews.

In 1996, then-DOI Secretary Bruce Babbitt used the authority to inventory lands and resources in § 201 of FLPMA to identify 2.6 million acres in Utah as having wilderness qualities. This was in addition to the lands inventoried and reviewed in the 1970s and 1980s. The state of Utah challenged the inventory as violating the review required by § 603, and in September 2003, then-DOI Secretary Gale Norton settled the case.[22] She issued new wilderness guidance (Instruction Memoranda Nos. 2003-274 and 2003-275) prohibiting further reviews and limiting the term "wilderness study areas" and the nonimpairment standard to areas designated for the original § 603 review.[23] This changed the interpretation of how BLM would review for wilderness potential, essentially eliminating such consideration in practice. Instruction Memorandum 2003-

[19] 542 U.S. 55 (2004).

[20] See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *United States v. Batchelder*, 442 U.S. 114, 123-124 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion").

[21] Which would mean by October 21, 1991. 43 U.S.C. § 1782(a): "within fifteen years after October 21, 1976...."

[22] *Utah v. Norton* (no written decision is available).

[23] BLM Assistant Director, Instruction Memorandum 2003-275, "Consideration of Wilderness Characteristics in Land Use Plans (Excluding Alaska)," p. 1 (Sept. 29, 2003)("It is, therefore, no longer BLM policy to continue to make formal determinations regarding wilderness character, designate new WSAs through the land use planning process, or manage any lands—except WSAs established under Section 603 of the FLPMA and other existing WSAs—in accordance with the non-impairment standard prescribed in the [Interim Management Policy].") Available at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction.html.

274 advised that because the § 603 authority expired, "there is no general legal authority for the BLM to designate lands as WSAs for management pursuant to the non-impairment standard prescribed by Congress for Section 603 WSAs." The Wilderness Inventory and Study Procedures Handbook was rescinded by these memoranda.

On December 22, 2010, DOI Secretary Ken Salazar issued Order No. 3310, addressing how BLM would manage wilderness.[24] This order indirectly modifies the 2003 wilderness guidance without actually overturning the direction (or even acknowledging it). The order "affirms that the protection of the wilderness characteristics of public lands is a high priority." It relies on the authority in § 201 to inventory lands with wilderness characteristics that are "outside of the areas designated as Wilderness Study Areas and that are pending before Congress" and designates these lands as "Wild Lands." It also directs BLM to consider the wilderness characteristics in land use plans and project decisions, "avoiding impairment of such wilderness characteristics" unless alternative management is deemed appropriate. While Instruction Memorandum 2003-274 (which was issued by the BLM Director) indicated that, except for § 603 WSAs, the nonimpairment mandate did not apply, Order No. 3310 appears to require an affirmative decision that impairment is appropriate in a § 201 wilderness resource area, or otherwise must be avoided. Forthcoming revisions to the BLM Manual (directed by the order) are expected to explain how that standard will be carried out.

The chair of the House Natural Resources Subcommittee on National Parks, Forests, and Public Lands, Representative Rob Bishop, "said one of his top priorities will be grilling Interior Secretary Ken Salazar" on the new policy.[25] Uintah County and the Utah Association of Counties have expressed similar opposition to the policy change, while others have praised the change.[26]

Concluding Remarks

Legislation is typically introduced in each Congress to add areas to the National Wilderness Preservation System. Many interests favor wilderness designations as a means of preserving the existing pristine nature of the areas; others oppose wilderness because it may prevent the development and use of the resources contained in the areas. Wilderness legislation commonly refers to the 1964 Wilderness Act for management direction, but many bills contain additional provisions with special guidance to allow limited, nonconforming access or infrastructure within the designated areas.

A policy change announced by the Secretary of the Interior in December 2010 would require the BLM to maintain an inventory of potential wilderness and to consider preserving the wilderness characteristics of those areas in its land and resource management planning process. This change may stimulate additional attention to and oversight of wilderness during the 112th Congress.

[24] Secretary of the Interior, Order No. 3310, "Protecting Wilderness Characteristics on Lands Managed by the Bureau of Land Management," (December 22, 2010). Available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.26564.File.dat/sec_order_3310.pdf.

[25] Phil Taylor, "Public Lands: House Chairman to Target BLM 'Wild Lands' Policy," *Environment & Energy Daily*, January 5, 2011.

[26] Scott Streater, "Public Lands: 'Wild Lands' Policy Stokes Flames of Dissent in Utah County," *Land Letter*, January 6, 2011.

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