

# CRS Report for Congress

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## Bureau of Land Management (BLM) Wilderness Review Issues

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### Summary

Congress has directed the federal land management agencies to evaluate the suitability of certain federal lands for possible inclusion in the National Wilderness Preservation System, a System that provides a high level of protection to lands within it. Section 603 of the Federal Land Policy and Management Act of 1976 directed the Secretary of the Interior to review the wilderness potential of certain BLM lands and to recommend areas by 1991. Most of the recommendations are still pending. Section 603 also required that the wilderness suitability of the areas studied (known as wilderness study areas or WSAs) not be impaired until Congress has decided whether to include them in the System. BLM wilderness issues are controversial, in part because both sides have an interest in the status of the WSAs, views differ as to whether new wilderness reviews can still be done and new wilderness study areas created in BLM planning, *aside from* §603, and because BLM land use plans are not required to be revised on a definite cycle. Recent modifications of related past agency guidance have highlighted the controversy. Legislation to designate wilderness areas and to end WSA status has been introduced. This report will be revised as circumstances warrant.

The 1964 Wilderness Act<sup>1</sup> created the National Wilderness Preservation System, units of which must be designated by Congress. Following earlier reviews of lands managed by other agencies, §603 of the Federal Land Policy and Management Act of 1976 (FLPMA)<sup>2</sup> directed the Secretary of the Interior to review the wilderness potential of “those roadless areas of five thousand acres or more and roadless islands” administered by the BLM and to make recommendations to the President, who then made

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<sup>1</sup> Act of Sept. 3, 1964, P.L. 88-577; 16 U.S.C. §§1131-1136.

<sup>2</sup> Act of Oct. 21, 1976, P.L. 94-579; 43 U.S.C. §§1701-1782. Section 603 is 43 U.S.C. §1782.

recommendations to Congress. The BLM inventoried its lands, designated potentially suitable areas as Wilderness Study Areas (WSAs) for full study, and made recommendations from among them.<sup>3</sup>

In language referred to as *the non-impairment standard*, §603(c) also directs that “until Congress has determined otherwise” the lands under review be managed so as not to impair their suitability as wilderness. Therefore, WSAs must remain in this protected status indefinitely until Congress takes action to “release” them. Following earlier wilderness recommendations for the national forests (overseen by the Department of Agriculture), Congress enacted many state-by-state national forest wilderness acts containing release language that allowed but did not mandate preserving the wilderness characteristics of areas not designated by Congress, and also provided that wilderness suitability would again be reviewed as part of the cyclical forest planning process. This language was a compromise that resolved the issues of whether release should compel uses other than wilderness, and whether wilderness reviews were a part of the normal planning processes or were a one-time occurrence — issues that are now occurring in connection with BLM lands.

In addition to the WSAs BLM created pursuant to §603, BLM also designated some areas as WSAs pursuant to its authorities under other sections of FLPMA. Section 201 (43 U.S.C. §1711) directs that inventories of BLM lands and their resources be conducted on a continuing basis; § 202 (43 U.S.C. §1712) directs the development of land use plans based on those inventories; and §302 (43 U.S.C. §1732) elaborates on land uses and directs that the Secretary prevent unnecessary or undue degradation of the public lands. Additional WSAs, known as §202 WSAs, were designated under these authorities.

BLM wilderness reviews and WSAs involve several current issues, including 1) congressional action on the §603 BLM wilderness recommendations; 2) management of §603 and §202 WSAs and BLM protection of those areas; 3) release language for BLM lands; 4) WSAs and wilderness reviews under authorities other than §603; and 5) recent changes in agency guidelines.

## **Congressional Action on BLM Recommendations**

By 1991, the Department of the Interior had recommended to the President that nearly 10 million BLM acres (of more than 26 million acres reviewed) be designated as wilderness,<sup>4</sup> and Presidents George H.W. Bush and Bill Clinton made recommendations to Congress (with few changes) by 1993. However, to date, Congress has enacted a statewide BLM wilderness statute only for Arizona (1990), and made other significant designations in the California desert (1994), Colorado (2000), and New Mexico (1987). Proposals for state-by-state wilderness designation have generated controversy.

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<sup>3</sup> Congress has also designated some WSAs, typically specifying areas to be reviewed and a deadline for completing the reviews.

<sup>4</sup> This excludes an additional 2 million acres in Arizona that were reviewed, but for which no recommendations were made, because the Arizona Desert Wilderness Act of 1990 (P.L. 101-628) was enacted prior to BLM making wilderness recommendations to the President.

## Management of Wilderness Study Areas

The Wilderness Act does not provide express management direction for WSAs, but §603(c) of FLPMA provides for the non-impairment of WSAs:

... until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: *Provided*, That in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

In 1979, BLM provided an Interim Management Policy (IMP) for managing the WSAs.<sup>5</sup> This guidance, revised in 1983, 1987, and most recently in 1995, repeats the Wilderness Act definition of *wilderness* as “undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected so as to preserve its natural conditions ....”

The IMP identifies *non-impairment criteria* to implement the provisions of §603 of FLPMA. It specifies that any use, facility, or activity must be temporary, not disturb the surface or permanently establish facilities, and be easily terminated upon designation of the area. Also, wilderness values must not be degraded so far as to significantly constrain the area’s suitability for preservation as wilderness. The IMP also identifies five permitted exceptions to the non-impairment rules: 1) emergencies, such as wildfire suppression or search and rescue; 2) reclamation efforts to minimize the impacts of violations and emergency activities; 3) uses and facilities grandfathered by the IMP or under valid existing rights; 4) uses and facilities to protect or enhance wilderness values or public health and safety; and 5) reclamation of pre-FLPMA impacts. Grandfathered uses are generally limited to grazing, mining, and mineral leasing that existed when FLPMA was enacted (October 21, 1976). Similarly, valid existing rights are those in existence on the date of FLPMA’s enactment.

The IMP also makes a distinction between §603 and §202 WSAs. The IMP notes that FLPMA does not require non-impairment of §202 WSAs, but asserts that “the Bureau has the authority under Section 302 of FLPMA to manage these lands similarly.” The principal differences relate to mineral activities. The IMP states that *new* mining activities in §603 WSAs must meet the non-impairment standard, but valid existing mineral operations must be allowed to continue — even if they impair the area — if non-impairment “would unreasonably interfere with the enjoyment of the benefit of the rights” (p. 13). In §202 WSAs, however, “mining operations under the 1872 Mining Law will be regulated ... only to prevent unnecessary and undue degradation of the lands, not to prevent impairment of wilderness suitability” (p. 7).

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<sup>5</sup> 44 *Fed. Reg.* 72014 (Dec. 12, 1979). This guidance was expected to be temporary, until Congress acted upon the BLM recommendations. It is now found in BLM Handbook H-8550-1, *Interim Management Policy for Lands Under Wilderness Review*, available from BLM.

Some interests alleged that the BLM was not preventing impairment of WSAs and filed suit to compel the BLM to do more to protect WSAs from increased off-road vehicle use. In *Norton v. Southern Utah Wilderness Alliance* (124 S. Ct. 2373 (2004)), the U.S. Supreme Court ruled that, although the protection of WSAs was mandatory, it was a programmatic duty and not the type of discrete agency obligation that could be enforced under the Administrative Procedure Act (APA; 5 U.S.C. §706(1)). Also, the Court concluded that language contained in 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 was not a basis for enforcement under the APA. Therefore, it appears that although BLM actions that would harm WSAs could be enjoined, forcing the agency to take protective action is difficult.

## Release Language

**Release Language — National Forests.** Wilderness release language was developed in the context of statutes designating national forest wilderness areas.<sup>6</sup> The term refers to provisions that address how an agency is to manage areas that were found to have wilderness characteristics, but were not legislatively designated as wilderness. Issues had arisen as to whether suitable areas not designated as wilderness had to be managed for non-wilderness uses, or if some lands could continue to be managed in their natural state through the planning process, such as for habitat or scenic values. A second issue was whether wilderness review was a one-time event or if remaining roadless areas would again be reviewed as part of the cyclical planning process. Compromise language expressly *released* non-designated lands from the requirement that the wilderness characteristics of such lands be protected during the development and implementation of subsequent forest management plans, but also allowed such protection in plans. Release language also specified that remaining areas with wilderness characteristics would be reviewed again as part of the cyclical Forest Service planning process, and new wilderness recommendations for possible inclusion of lands in the National System could be made at that time.

**Release Language — BLM.** The issue of release differs somewhat for BLM. As noted above, §603(c) of FLPMA requires the BLM to maintain the wilderness character of WSAs “until Congress has determined otherwise.” Some form of release language would be one way of addressing management of BLM lands not designated as wilderness by Congress.

Seven statutes have been enacted with provisions releasing BLM areas from the non-impairment requirements of §603(c). The release language in these statutes notes the adequacy of existing studies for meeting congressional needs *under §603 of FLPMA*, and states that areas not designated as wilderness are not *subject to the requirements of §603(c)* to maintain their wilderness characteristics. The provisions do not specify whether future wilderness reviews may occur as part of the BLM inventory and planning processes under §§ 201 and 202 (rather than §603) of FLPMA.

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<sup>6</sup> See archived CRS Report 93-280, *Wilderness Legislation: History of Release Language, 1979-1992*, by Ross W. Gorte and Pamela Baldwin. Available upon request from the authors.

The BLM release language does not clearly state the management Congress intended for the areas not designated. Clearly they are no longer subject to the non-impairment requirements of §603(c), but Congress did not state, as it did with respect to the national forest lands, that these released WSA lands could be managed to retain their wilderness characteristics through the planning process. Committee reports indicate that Congress believed it had directed that released lands be managed for multiple use under FLPMA.<sup>7</sup> Various uses are allowed under FLPMA that could result in maintaining lands in a natural state, and §302 of the Act directs the Secretary to prevent undue degradation of all public lands.<sup>8</sup> Whether Congress intended that the lands could either be developed or not, as indicated through the planning process — a position similar to that enacted to resolve the same issue when it arose in the context of the national forests — is a matter of debate.

## Future BLM WSAs and Wilderness Reviews

Section 201 of FLPMA directs continuing inventories of BLM lands and resources appropriate for the land use plans required under §202. The IMP indicates that these inventory and planning processes could include creating and protecting WSAs, known as §202 WSAs, and that BLM would also make future recommendations to Congress in connection with them. It is not clear how the recommendation process would work.

Unlike the Forest Service, which must revise its land and resource management plans “at least every fifteen years” (16 U.S.C. §1604(f)(5)), BLM is not required to revise its plans on a specified cycle. BLM is required to revise its land and resource management plans “when appropriate” (43 U.S.C. §1712(a)). Therefore, there is no definite planning revision cycle that would provide a consistent opportunity to review BLM lands for their possible suitability for wilderness designation.

## Recent Events and Changed Administrative Guidance

The ambiguities surrounding BLM wilderness issues have been heightened by recent events. In 1996, following debate over additional wilderness areas proposed in legislation for Utah, then-Secretary of the Interior Babbitt used the §201 FLPMA inventory authority to identify an additional 2.6 million acres in Utah as having wilderness qualities. Although the stated purpose of the inventory was only to ascertain which lands had wilderness characteristics, the State of Utah filed suit alleging various flaws in the process and that the inventory was illegal, even under §201. The district court enjoined the inventory preliminarily, but the 10<sup>th</sup> Circuit remanded to the district court to dismiss (on various grounds) all but the claim that related to de facto wilderness management of the inventoried lands (*Utah v. Babbitt*, 137 F. 3d 1193 (10<sup>th</sup> Cir. 1998)). The Department, under Secretary Gale Norton, subsequently settled the case, and on September 29, 2003, issued new wilderness guidance (Instruction Memoranda No. 2003-274 and 2003-275).

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<sup>7</sup> See, for example, S.Rept. 101-359 at 16 (1990) on the Arizona wilderness designations and H.Rept. 103-498 at 56 (1994) on the California wilderness designations.

<sup>8</sup> The Multiple-Use Sustained-Yield Act of 1960, governing National Forest System lands, expressly mentions administrative wilderness management (16 U.S.C. § 529), but FLPMA does not. However, various uses such as fish and wildlife habitat, primitive recreation, scenic protection, watershed protection, Areas of Critical Environmental Concern, permit maintaining BLM lands in a natural state.

These directives apply to BLM lands nationwide, except for Alaska and certain categories of lands, and state that 1) the §603 authority terminated following presidential recommendations in 1993; 2) BLM cannot conduct further wilderness reviews; 3) BLM cannot administratively create more WSAs under §603 or other authority; and 4) the §603(c) nonimpairment standard cannot be applied to non-WSA lands. The directives further indicate that protective management of remaining BLM roadless areas can occur only through designation of lands as part of the planning process for uses that preserve their natural state, such as Areas of Critical Environmental Concern.

Critics disagree with these positions, noting that wilderness guidance under *all* other Administrations since 1978 (Carter, Reagan, Bush, and Clinton) allowed wilderness reviews, designation of new §202 WSAs, and wilderness recommendations as part of planning. These issues are currently in litigation<sup>9</sup> and their importance is accentuated by the emphasis of the current Bush Administration on energy development on the federal lands, and by the promulgation of new regulations on *disclaimers of interest* that may facilitate the validation of highway rights-of-way in roadless areas, thereby disqualifying additional lands from further consideration.<sup>10</sup>

## Legislation

Various bills are introduced in every Congress to designate wilderness areas. Several would designate wilderness areas administered by the BLM, but only two (companion bills in the House and Senate) include release language for BLM areas. No wilderness designation bills have been reported or passed in either chamber in the 108<sup>th</sup> Congress.

Bills have also been introduced in House in the 106<sup>th</sup>, 107<sup>th</sup>, and 108<sup>th</sup> Congresses to place time limits on Wilderness Study Area status. H.R. 1153 in the 108<sup>th</sup> Congress would terminate WSAs 10 years after enactment, or 10 years after establishment of new WSAs, regardless of which federal agency administers the area. This would end the §603(c) protection for all existing BLM WSAs not designated as wilderness within 10 years of enactment. The bill would also prohibit future wilderness reviews of all released WSAs, and would define WSA broadly, possibly precluding subsequent §202 wilderness reviews, and those in the national forests as well. The House Committee on Resources reported bills in the 106<sup>th</sup> and 107<sup>th</sup> Congresses, but the bills did not see floor action. No action on this legislation has occurred in the 108<sup>th</sup> Congress.

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<sup>9</sup> Utah v. Norton, 96-CV-870 (D.Ut. 204).

<sup>10</sup> See CRS Report RL32142, *Highway Rights of Way on Public Lands: R.S. 2477 and Disclaimers of Interest*, by Pamela Baldwin.