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# Wilderness: Issues and Legislation

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## Summary

The Wilderness Act of 1964 established the National Wilderness Preservation System 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. The 114<sup>th</sup> Congress considered many bills to add to the wilderness system and enacted one into law—P.L. 114-46—designating three additional wilderness areas totaling 275,665 acres.

Wilderness designations can be controversial. The designation generally prohibits commercial activities, motorized access, and human infrastructure from wilderness areas; however, there are several exceptions to this general rule. 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. The potential benefits or costs of wilderness designations are difficult to value or quantify. Thus, wilderness deliberations commonly focus on trying to maximize the benefits of preserving pristine areas while minimizing potential opportunity costs. Wilderness debates also focus on the extent of the National Wilderness Preservation System and on whether it is of sufficient size or if additional lands should be added or subtracted.

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. Pre-existing uses or conditions are often allowed to continue, sometimes temporarily, with nonconforming uses to be halted and/or nonconforming conditions to be rectified. More commonly, 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 providing special access for particular purposes, for example, border security. Water rights associated with wilderness designations have also proved controversial; many statutes have addressed water rights in specific wilderness areas.

Controversies regarding management of existing wilderness areas also have been the subject of legislation. In previous Congresses, bills have been introduced to expand access to wilderness areas for border security; to guarantee access for hunting, fishing, and shooting; to release wilderness study areas from wilderness-like protection; and to limit agency review of the wilderness potential of their lands. The latter two issues have been contentious for Bureau of Land Management (BLM) lands because BLM is required by law to protect the wilderness characteristics of its wilderness study areas (WSAs) until Congress determines otherwise.

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The 1964 Wilderness Act (16 U.S.C. §§1131-1136) established the National Wilderness Preservation System and directed that only Congress can designate federal lands as part of the system. Many believe that special areas should be designated to protect and preserve their unique value 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. Another area of concern is how prohibited activities affect law enforcement in wilderness areas along U.S. national borders.

This report presents information on wilderness protection and a discussion of issues in the wilderness debate—the pros and cons of wilderness designation generally; possible considerations for specific legislation; and a discussion of possible wilderness study area designation and protection. This report is updated periodically to track the status of legislation introduced in the 115<sup>th</sup> Congress to designate new wilderness or to release wilderness study areas (WSAs). Tables of legislation from the 114<sup>th</sup> Congress are provided in **Appendix A** of this report.

## The Wilderness Act and Subsequent Designations

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. This congressional authority is based on 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.”<sup>1</sup>

The Wilderness Act and more than 100 subsequent laws have designated wilderness areas.<sup>2</sup> As of January, 1, 2017, the National Wilderness Preservation System totaled 765 areas, spanning nearly 110 million acres.<sup>3</sup> The 114<sup>th</sup> Congress added approximately 275,655 acres to the system by designating three new wilderness areas.<sup>4</sup> Wilderness areas are part of existing units of federal land administered by the four federal land management agencies—the Forest Service (FS), 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 (DOI). 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 (and subsequent laws) restricts the allowed uses of the land within designated areas. In general, the Wilderness Act prohibits commercial activities, motorized access, and roads, structures, and facilities in wilderness areas. Specifically, Section 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

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<sup>1</sup> Art. IV, §3, cl. 2.

<sup>2</sup> Subsequent wilderness statutes have not designated wilderness areas by amending the Wilderness Act; instead, they are independent statutes that typically direct management in accordance with the Wilderness Act, but also may provide for unique management guidance.

<sup>3</sup> See CRS Report RL31447, *Wilderness: Overview, Management, and Statistics*, by (name redacted)

<sup>4</sup> See P.L. 114-46 designating three wilderness areas in Idaho: the Hemingway-Boulders Wilderness (67,998 acres), Jim McClure-Jerry Peak Wilderness (116,898 acres), and the White Clouds Wilderness (90,769 acres).

designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for 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.<sup>5</sup>

This section thus prohibits most commercial resource exploitation (such as timber harvesting) and motorized entry (with cars, trucks, off-road vehicles, aircraft, or motorboats) except for “minimum requirements” to administer the areas and in emergencies. However, Section 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.<sup>6</sup>

*Valid existing rights* established prior to the designation of an area as wilderness remain, 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.<sup>7</sup> 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.

## Debate Surrounding Wilderness Designations

Proponents of adding 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.

<sup>5</sup> 16 U.S.C. §1133(c).

<sup>6</sup> For more information, see CRS Report RL31447, *Wilderness: Overview, Management, and Statistics*, by (name redacted)

<sup>7</sup> See *Stupak-Thrall v. United States*, 89 F.3d 1269, 1280 (6<sup>th</sup> Cir. 1996), and *Utah v. Andrus*, 486 F. Supp. 995, 1010 (D. Utah 1979).

Opponents of wilderness designations generally seek to retain development options for federal lands. The potential use of lands and resources can provide economic opportunities through 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 (opportunity costs) for economic activity resulting from resource extraction and development. While some economic activities—such as grazing and some recreation—are allowed to continue within wilderness areas, many are prohibited. The potential losses 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 solely 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, individuals and groups who benefit from wilderness designations may differ from those who may be harmed by lost opportunities, increasing conflict and making compromise difficult.

Wilderness designations are not necessarily permanent. Congress has statutorily deleted lands from several wilderness areas, commonly to adjust boundaries to delete private lands or roads included inadvertently in the original designation.

## Issues for Congress

In general, Congress addresses several issues when drafting and considering wilderness bills. These issues include the general pros and cons of wilderness designation and specific provisions regarding management of wilderness areas to allow or prohibit certain uses.

## Bills Designating Wilderness Areas

The first step in developing legislation to designate wilderness areas is to identify which areas to designate. The Wilderness Act specified that wilderness areas are “at least 5,000 acres of land or is of sufficient size to make practicable its preservation and use in an unimpaired condition,”<sup>8</sup> but 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.<sup>9</sup> 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 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 the relevant committees of Congress after enactment, and to retain a copy in relevant agency offices (commonly a local office and/or the Washington, DC, headquarters).

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<sup>8</sup> 16 U.S.C. §1131(c).

<sup>9</sup> For more information on issues regarding the Arctic National Wildlife Refuge, see CRS Report RL33872, *Arctic National Wildlife Refuge (ANWR): A Primer for the 114th Congress*, by (name redacted) and (name redacted)

Numerous bills to designate wilderness areas usually are introduced in each Congress. For example, 33 bills that would have designated wilderness areas (plus 13 companion bills) were introduced in the 111<sup>th</sup> Congress.<sup>10</sup> One was enacted—the Omnibus Public Land Management Act of 2009, P.L. 111-11. It included 16 subtitles (many of which had been introduced in individual wilderness bills in the 110<sup>th</sup> and 111<sup>th</sup> Congresses) designating 2,050,964 acres of wilderness in various locales, as well as including numerous land, water, and other provisions. The 112<sup>th</sup> Congress was the first in decades not to designate additional wilderness; the only wilderness law that was enacted reduced the size of a wilderness area in the state of Washington and transferred the land to the Quileute Indian Tribe.<sup>11</sup> The 113<sup>th</sup> Congress added 247,152 acres to the system.<sup>12</sup> In the 114<sup>th</sup> Congress, more than 30 wilderness bills were introduced, and one was enacted: P.L. 114-46, which designated three new wilderness areas in Idaho.<sup>13</sup> See **Appendix A** for an alphabetical list of legislation introduced and the bill enacted into law in the 114<sup>th</sup> Congress.

## Management in Accordance with the Wilderness Act

Most bills direct that the designated 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. The land management agency may allow an otherwise prohibited use in order to meet the minimum requirements necessary for administration of the area.<sup>14</sup> The Wilderness Act does allow some activities that affect the natural condition of the property, such as 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, wilderness 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.

## Hunting, Fishing, and Recreational Shooting

The Wilderness Act provides that the area will be managed, in part, for recreational use, but it does not specifically address hunting, fishing, or recreational shooting (although motorized vehicles, which may be helpful in removing big game from remote areas, are typically forbidden).<sup>15</sup> Wilderness areas are generally open to hunting, fishing, and recreational shooting, subject to the management provisions of the underlying federal land. For example, hunting is prohibited in many NPS units; subsequently, hunting is also prohibited in any wilderness areas

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<sup>10</sup> For information on these bills from the 111<sup>th</sup> Congress, 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 (name redacted) and (name redacted).

<sup>11</sup> Although 41 bills to designate wilderness were introduced in the 112<sup>th</sup> Congress, no new wilderness areas were created, for the first time since the 89<sup>th</sup> Congress (1965-1967). P.L. 112-97 reduced the wilderness area in Olympic National Park by 222 acres, transferring the land to the Quileute Indian Tribe.

<sup>12</sup> P.L. 113-87 and P.L. 113-291 §§3060-3062, 3064-3066.

<sup>13</sup> The 114<sup>th</sup> Congress enacted two additional laws that affected existing wilderness areas but did not add or delete any acreage. P.L. 114-272 changed the name of one wilderness area. P.L. 114-328 specified that certain state lands already located within a designated wilderness area in Utah may be included in an exchange of land between the state and federal government. If the exchange is necessary, the land would be added to the Cedar Mountains Wilderness.

<sup>14</sup> 16 U.S.C. §1133(c).

<sup>15</sup> 16 U.S.C. §1133(b).

within those units. However, hunting, fishing, and recreational shooting are generally permitted on FS or BLM lands and, subsequently, on wilderness areas within those areas. Legislation introduced in the 114<sup>th</sup> Congress would have altered management of wilderness areas for those activities. For example,

- H.R. 528 (114<sup>th</sup> Congress), the Recreational Fishing and Hunting Heritage and Opportunities Act, would have changed the standard used by the administering agency to determine when wilderness areas should be closed to certain activities. H.R. 528 would have prohibited the land management agency from closing lands except where closure is supported by the best scientific evidence and through a transparent public process, a different standard than required by the Wilderness Act.<sup>16</sup>
- H.R. 2406 (114<sup>th</sup> Congress), the Sportsmen’s Heritage and Recreational Enhancement (SHARE) Act, and S. 556 (114<sup>th</sup> Congress), the Bipartisan Sportsmen’s Act of 2015, both included provisions that would have specified that wilderness areas managed by the FS and BLM would be open to recreational fishing, hunting, and recreational shooting, unless a land management agency had acted to close the land to the activity. The agencies would have been permitted to close an area, if determined to be necessary and supported by facts and evidence, for specified purposes, which included the protection of resources, public safety, and private property rights, among others. The effect of either bill on the use of motorized vehicles in wilderness areas was uncertain.<sup>17</sup> H.R. 2406 passed the House on February 26, 2016; S. 556 was reported by the Senate Committee on Energy and Natural Resources on December 16, 2015. No further legislative action was taken on either bill prior to the conclusion of the 114<sup>th</sup> Congress.

Similar bills were introduced in the 112<sup>th</sup> and 113<sup>th</sup> Congresses. Additionally, three of the wilderness areas designated or expanded by P.L. 113-291 authorize periods when or zones where the wilderness may be closed to hunting, fishing, and trapping for safety and administrative reasons.<sup>18</sup> This or similar language has been included in several previous wilderness designations and also is authorized under the Wilderness Act in general, which directs agencies to preserve the wilderness character of the areas, leaving them unimpaired for future generations.

### **Nonconforming Uses or Conditions<sup>19</sup>**

Lands do not have to be untouched by humans to be eligible for statutory designation as wilderness. Designating legislation could terminate or accommodate any existing nonconforming uses or conditions. Many existing wilderness statutes have directed immediate termination of nonconforming uses or have directed the agencies to remove, remediate, or restore nonconforming conditions or infrastructure within a specified timeframe.

<sup>16</sup> H.R. 528, §4(a)(3).

<sup>17</sup> For more information on S. 556, see CRS Report R44102, *Hunting and Fishing: Analysis of S. 556 and S. 659*, by (name redacted)

<sup>18</sup> The wilderness areas are the Columbine-Hondo, Pine Forest Range, and Wovoka wilderness areas. P.L. 113-291 §3061(g); §3064(e); and §3066(d), respectively.

<sup>19</sup> For a discussion on uses in wilderness statutes, see CRS Report RL31447, *Wilderness: Overview, Management, and Statistics*, by (name redacted)



Alternatively, many nonconforming uses and conditions have been permitted to remain in designated wilderness areas. The Wilderness Act explicitly allows continued motorized access by aircraft and motorboats in areas where such uses were already established. The Wilderness Act also permits motorized access for management requirements and emergencies, and for fire, insect, and disease control. 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.

Various existing wilderness statutes have included special access provisions for particular needs. For example, statutes designating wilderness areas along the Mexican border commonly have allowed motorized access for law enforcement and border security. (See “Wilderness and U.S.-Mexican Border Security” below.) 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 particular needs.

## **Wilderness and U.S.-Mexican Border Security**

One issue that has received attention from some Members of Congress in recent years is the impact of the Wilderness Act and other federal laws governing land and resource management on border security.<sup>20</sup> Many are concerned that wilderness areas abutting and near the Mexican border are conduits for illegal aliens and drug trafficking because limitations on motorized access may restrict apprehension efforts.

There are 15 designated wilderness areas within about 20 miles of the Mexican border. However, only 5 wilderness areas actually abut the border (for a total of approximately 96 linear miles).<sup>21</sup> As noted above, the Wilderness Act authorizes motorized access for emergencies and administrative needs, but does not describe what is meant by “administrative needs.” The act is silent on access specifically for border security, but some actions related to controlling drug trafficking and illegal immigration might be considered administrative needs or emergencies. Language within a specific enabling statute may be more specific.

The first explicit language on the issue of wilderness access for border security was in Title III of the Arizona Desert Wilderness Act of 1990 (P.L. 101-628). Section 301(g) directs that

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<sup>20</sup> Other laws commonly cited as potentially impeding efforts to halt drug traffic and illegal aliens include the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) because they require an assessment of impacts prior to an agency action.

<sup>21</sup> Of the five wilderness areas that abut the border with Mexico, two are in California—the Otay Mountain Wilderness (3.25 linear miles) and Jacumba Wilderness (9.5 linear miles), both managed by BLM—and three are in Arizona—the Cabeza Prieta Wilderness (37.5 linear miles), managed by FWS; the Organ Pipe Cactus Wilderness (42 linear miles), managed by NPS; and the Pajarita Wilderness (3.75 linear miles), managed by the Forest Service. Mileage calculated by CRS from the National Atlas.

Nothing in this title, including the designation as wilderness of lands within the Cabeza Prieta National Wildlife Refuge shall be construed as (1) precluding or otherwise affecting continued border operations ... within such refuge, in accordance with any applicable interagency agreements in effect on the date of enactment of this Act; or (2) precluding ... new or renewed agreements ... concerning ... border operations within such refuge, consistent with management of the refuge for the purpose for which such refuge was established.

The California Desert Protection Act of 1994 (P.L. 103-433) also contains explicit guidance on border security for all designated areas, including one abutting the Mexican border and six others within about 20 miles of the border. Section 103(g) directs that

Nothing in this Act, including the wilderness designations ... may be construed to preclude Federal, State, and local law enforcement agencies from conducting law enforcement and border operations as permitted before the date of enactment of this Act, including the use of motorized vehicles and aircraft, on any lands designated as wilderness by this Act.

The most recent statute designating a border wilderness area, the Otay Mountain Wilderness Act of 1999 (P.L. 106-145), also addresses border security. The act requires the southern boundary of the wilderness to be at least 100 feet from the border. Also, Section 6(b) allows border operations to continue consistent with the Wilderness Act:

Because of the proximity of the Wilderness Area to the United States-Mexico international border, drug interdiction [and] border operations ... are common management actions throughout the area.... This Act recognizes the need to continue such management actions so long as such management actions are conducted in accordance with the Wilderness Act and are subject to such conditions as the Secretary considers appropriate.

Concerns about access limitations to wilderness areas (and other legal constraints that apply more broadly to federal lands) have persisted through several Congresses. In 2010, the Government Accountability Office (GAO) noted that most border officials reported that any delays and restrictions reported in border security operations did not affect security:

[D]espite the access delays and restrictions experienced by these [Border Patrol] stations, 22 of the 26 patrol agents-in-charge reported that the overall security status of their jurisdiction had not been affected by land management laws. Instead, factors such as the remoteness and ruggedness of the terrain have had the greatest effect on their ability to achieve operational control in these areas. Four patrol agents-in-charge reported that delays and restrictions had affected their ability to achieve or maintain operational control, but they either had not requested resources for increased or timelier access or their requests had been denied by senior Border Patrol officials because of higher priority needs of the agency.<sup>22</sup>

## Legislative Action

The 114<sup>th</sup> Congress considered legislation to reduce the potential restrictions of the Wilderness Act and other federal statutes on border security activities. For example, the Arizona Borderlands Protection and Preservation Act (S. 750/H.R. 1412) would have provided U.S. Customs and

<sup>22</sup> U.S. Government Accountability Office, *Southwest Border: Border Patrol Operations on Federal Lands*, GAO-11-573T, April 15, 2011, at <http://www.gao.gov/new.items/d11573t.pdf>. See also GAO, *Southwest Border: More Timely Border Patrol Access and Training Could Improve Security Operations and Natural Resource Protection on Federal Lands*, GAO-11-38, October 2010, at <http://www.gao.gov/new.items/d1138.pdf>; and GAO, *Border Security: Additional Actions Needed to Ensure a Coordinated Federal Response to Illegal Activity on Federal Lands*, GAO-11-177, November 2010, at <http://www.gao.gov/new.items/d11177.pdf>.

Border Protection personnel immediate access to all federal lands, including designated wilderness areas. The bills also contained a provision that would have authorized the Secretary of Homeland Security to determine how “to best protect the natural and cultural resources on federal lands.” Similar bills were also introduced in the 112<sup>th</sup> and 113<sup>th</sup> Congresses. (See **Appendix B** for a discussion.) Legislation to address these issues has not been introduced in the 115<sup>th</sup> Congress as of the publication date of this report.

## Wilderness Study Areas and Reviews for Wilderness Potential

The DOI and FS have different requirements to assess the wilderness characteristics and potential of the lands they manage. Some believe that these wilderness study areas and roadless areas are improperly managed as wilderness, restricting development opportunities, despite lacking congressional designation as wilderness. Others note that the Federal Land Policy and Management Act (FLPMA)<sup>23</sup> and regulations dictate that certain areas must be managed to preserve their wilderness potential.

A controversial DOI order from December 2010, perceived by some as expanding wilderness protection by BLM to non-designated lands, stimulated debate in the 112<sup>th</sup> Congress.<sup>24</sup> The order directed BLM to protect wilderness characteristics through land use planning. Funding for the policy was removed in the FY2011, FY2012, FY2014, FY2015, and FY2016 annual appropriations acts,<sup>25</sup> despite the order being formally revoked by the Secretary of the Interior in June 2011.<sup>26</sup>

## Forest Service Wilderness Considerations and Inventoried Roadless Areas

The FS is required to review the National Forest System for potential wilderness areas during the development and revision of land and resource management plans (also known as forest plans), approximately every 15 years.<sup>27</sup> In the 1970s and 1980s, the agency conducted two reviews—known as the Roadless Area Review and Evaluation (RARE) I and II; RARE I resulted in some, but not all, of these inventoried roadless areas being recommended for a wilderness designation in January 1979.<sup>28</sup> However, a successful judicial challenge to those recommendations led to uncertainty over the validity of the recommendations and to disputes over the need to protect the wilderness characteristics of the reviewed areas.<sup>29</sup>

Review of potential wilderness is now part of the forest planning process; however, management of FS inventoried roadless areas has been controversial. The Clinton and George W. Bush Administrations each proposed different roadless area policies. Both were heavily litigated;

<sup>23</sup> P.L. 94-579, 43 U.S.C. §§1701 et seq.

<sup>24</sup> DOI Secretary Order No. 3310 (Dec. 22, 2010).

<sup>25</sup> FY2011: P.L. 112-10, §1769; FY2012: P.L. 112-74, §125; FY2014: P.L. 113-76, Division G, Title I, §124; FY2015: P.L. 113-235, Division F, Title I, §115; and FY2016: P.L. 114-113 Division G, Title I, §112.

<sup>26</sup> Memorandum from Secretary, Department of the Interior, to Director, Bureau of Land Management, *Wilderness Policy* (June 1, 2011), <http://www.doi.gov/news/pressreleases/upload/Salazar-Wilderness-Memo-Final.pdf>. For more information, see CRS Report RL31447, *Wilderness: Overview, Management, and Statistics*, by (name redacted)

<sup>27</sup> Under Section 6(f)(5) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (P.L. 93-378), as amended by the National Forest Management Act of 1976 (NFMA, P.L. 94-588), management plans for the national forests must be revised at least every 15 years.

<sup>28</sup> Forest Service Roadless Area Conservation, Final Environmental Impact Statement, Volume II. 2000.

<sup>29</sup> *California v. Block*, 690 F.2d 753 (9<sup>th</sup> Cir. 1982) (holding that the Forest Service had not satisfied the National Environmental Policy Act or NFMA in producing the recommendations).

however, the Clinton policy to prohibit many activities on roadless areas—with significant exceptions—remains intact after the Supreme Court refused to review a lower court’s decision in 2012.<sup>30</sup>

### **BLM Wilderness Review**

The Federal Land Policy and Management Act (FLPMA) required BLM to review and present its wilderness recommendations to the President within 15 years of October 21, 1976, and the President then had two years to submit wilderness recommendations to Congress.<sup>31</sup> BLM presented its recommendations within the specified timeframe, and Presidents George H. W. Bush and William Clinton submitted wilderness recommendations to Congress. Although these areas have been reviewed and Congress enacted several statutes designating BLM wilderness areas, 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 whether BLM has a continuing obligation under FLPMA to conduct wilderness reviews.

### ***Protection of BLM Wilderness Study Areas***

Starting in 1977 through 1979, BLM identified suitable wilderness study areas (WSAs) from roadless areas identified in its initial resource inventory. 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.”<sup>32</sup> Thus, BLM must protect the WSAs as if they were wilderness until Congress enacts legislation that releases BLM from that responsibility. This is sometimes referred to as a nonimpairment obligation.

### ***BLM Reviews for Wilderness Potential***

Despite BLM’s continuing obligation under Section 201 of FLPMA to identify the resources on its lands, giving priority to areas of critical environmental concern,<sup>33</sup> it is unclear whether BLM is required to review its lands specifically for wilderness potential after expiration of the reviews required by Section 603.<sup>34</sup> In contrast to the FS, 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 revise its land and resource management plans “when appropriate.”<sup>35</sup> Furthermore, while the FS is directed to include wilderness in the planning process, FLPMA is silent on wilderness in the definitions of multiple use and sustained yield and in the guidance for the BLM planning process. Thus, BLM wilderness reviews are less certain than future FS wilderness reviews.

### **Legislative Action**

Previous Congresses have considered legislation to more broadly release WSAs. The Wilderness and Roadless Area Release Act of 2011 (H.R. 1581/S. 1087, 112<sup>th</sup> Congress) would have released

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<sup>30</sup> Wyoming v. Department of Agriculture, 133 S.Ct. 417 (2012).

<sup>31</sup> Federal Land Policy and Management Act (FLPMA; P.L. 94-579; 43 U.S.C. §1782(a)).

<sup>32</sup> FLPMA §603; 43 U.S.C. §1782(c).

<sup>33</sup> FLPMA §201; 43 U.S.C. §1711.

<sup>34</sup> FLPMA §603; 43 U.S.C. §1782 (requiring a review within 15 years [by 1991] of roadless areas greater than 5,000 acres to determine suitability for wilderness).

<sup>35</sup> 43 U.S.C. §1712(a).

certain BLM WSAs—those not designated as wilderness by Congress and those identified by the BLM as not suitable for wilderness designation—from the nonimpairment requirement of Section 603(c) of FLPMA. The bill also would have terminated the Clinton and George W. Bush Forest Service roadless area rules. A similar bill in the 114<sup>th</sup> Congress—S. 193, the Inventoried Roadless Area Management Act—proposed to terminate the Clinton roadless area rule on national forests in Wyoming but did not address WSAs.

See **Appendix A** for an alphabetical list of wilderness release legislation of the 114<sup>th</sup> Congress.

## Appendix A. 114<sup>th</sup> Congress Wilderness Legislation

The 114<sup>th</sup> Congress added 277,665 acres to the wilderness system by either adding new wilderness areas or expanding existing areas. Many other bills to designate additional wilderness areas were introduced and considered (see **Table A-1**). See **Table A-2** for 114<sup>th</sup> Congress legislation that would have released BLM WSAs.

**Table A-1. 114<sup>th</sup> Congress: Bills to Designate Wilderness Areas**

Bill Title	Bill No.	State	Acreage <sup>a</sup>	Last Action in the 114 <sup>th</sup> Congress
America's Red Rock Wilderness Act of 2015	H.R. 2430 S. 1375	UT	8,654,040	H.R. 2430 introduced 5/19/15 S. 1375 introduced 5/19/15
Arizona Sonoran Desert Heritage Act of 2015	H.R. 2926	AZ	290,823	H.R. 2926 introduced 6/25/15
California Desert Conservation and Recreation Act of 2015	S. 414	CA	398,497	S. 414 introduced 2/9/15
California Desert Conservation, Off-Road Recreation, and Renewable Energy Act of 2015 <sup>b</sup>	S. 2568	CA	378,167	S. 2568 introduced 2/23/16
California Minerals, Off-Road Recreation, and Conservation Act	H.R. 3668	CA	430,658	H.R. 3668 hearing 12/9/15
Central Coast Heritage Protection Act	H.R. 1865 S. 1423	CA	288,788	H.R. 1865 introduced 4/16/15 S. 1423 hearing 4/21/16
Cerros del Norte Conservation Act	S. 1240	NM	21,410	S. 1240 placed on Senate Calendar 9/9/15
Clear Creek National Recreation Area and Conservation Act	H.R. 1838	CA	21,000	H.R. 1838 passed House 7/15/16
Colorado Wilderness Act of 2015	H.R. 3336	CO	715,825	H.R. 3336 introduced 7/29/15
Continental Divide Wilderness and Recreation Act	H.R. 2554	CO	39,460	H.R. 2554 introduced 5/21/15
Douglas County Conservation Act of 2015/Douglas County Conservation and Economic Development Act of 2016	H.R. 925 S. 472 H.R. 4688	NV	12,330	H.R. 925 introduced 2/12/15 S. 472 hearing 5/21/15 H.R. 4688 introduced 3/3/16
Gold Butte National Conservation Area Act	H.R. 856 S. 199	NV	221,558	H.R. 856 introduced 2/10/15 S. 199 introduced 1/20/15
Imperial Valley Desert Conservation and Recreation Act of 2015	H.R. 4060	CA	49,300	H.R. 4060 introduced 11/18/15
Jay S. Hammond Wilderness Act	S. 873	AK	2,600,000	S. 873 placed on Senate Calendar 9/9/15
Northern Rockies Ecosystem Protection Act	H.R. 996	ID, MT, OR, WA, WY	24,526,000	H.R. 996 introduced 2/13/15
Oregon and California Land Grant Act of 2015	S. 132	OR	86,640	S. 132 hearing 7/16/15
Oregon Wildlands Act	S. 1699	OR	56,700	S. 1699 hearing 4/21/16

Bill Title	Bill No.	State	Acreage <sup>a</sup>	Last Action in the 114 <sup>th</sup> Congress
Saint Francis Dam Disaster National Memorial and Castaic Wilderness Act	H.R. 3153	CA	70,432	H.R. 3153 introduced 7/22/15
San Juan County Settlement Implementation Act of 2016	S. 2681	NM	9,492	S. 2681 hearing 9/22/16
Sawtooth National Recreation Area and Jerry Peak Wilderness Additions Act	H.R. 1138 S. 583	ID	275,665	P.L. 114-46, 8/7/15
Sutton Mountain and Painted Hills Area Preservation and Economic Enhancement Act of 2015	S. 1255	OR	57,465	S. 1255 introduced 5/7/2015
Tennessee Wilderness Act	H.R. 4545 S. 755	TN	19,556	H.R. 4545 introduced 2/11/16 H.R. 4545 hearing 7/16/15 S. 755 hearing 7/16/15
Udall-Eisenhower Arctic Wilderness Act	H.R. 239 S. 2341	AK	1,559,538	H.R. 239 introduced 1/9/15 S. 2341 introduced 12/2/15
Wild Olympics Wilderness and Wild and Scenic Rivers Act of 2015	H.R. 2665 S. 1510	WA	126,554	H.R. 2665 introduced 6/4/15 S. 1510 hearing 4/21/16

**Source:** CRS.

**Notes:** Many of the bills contain multiple designations of new wilderness areas and/or multiple additions to existing wilderness areas.

- a. Estimated acreage as identified or derived from the latest version of the legislation—as introduced, reported, passed, or enacted.
- b. S. 2568 and S. 414 contained nearly identical wilderness designation provisions, except that S. 414 would have designated additional acreage in one wilderness area not included in S. 2568 and would have designated more acreage in another wilderness area.

**Table A-2. 114<sup>th</sup> Congress: Bills to Release Wilderness Study Areas (WSAs)**  
(areas would have no longer been managed as wilderness)

Bill Title	Bill No.	State	Name of WSA (acreage to be released)	Last Action in the 114 <sup>th</sup> Congress
California Desert Conservation and Recreation Act of 2015	S. 414	CA	Lists 6 WSAs to be released, specific acreage not provided	S. 414 hearing 10/8/15
California Desert Conservation, Off-Road Recreation, and Renewable Energy Act	S. 2568	CA	Lists 6 WSAs to be released (identical to S. 414), specific acreage not provided	S. 2568 introduced 2/23/16
California Minerals, Off-Road Recreation, and Conservation Act	H.R. 3668	CA	Lists 12 WSAs to be released (including all 6 of the WSAs in S. 414), specific acreage not provided	H.R. 3668 hearing 12/9/15
Cerros del Norte Conservation Act	S. 1240	NM	San Antonio (7,050)	S. 1240 placed on Senate Calendar 9/9/15
Clear Creek National Recreation Area and Conservation Act	H.R. 1838	CA	San Benito Mountain (1,500)	H.R. 1838 ordered to be reported from the House Committee on Natural Resources 3/16/16
Douglas County Conservation Act of 2015	H.R. 925 S. 472	NV	Burbank Canyons (1,065)	H.R. 925 introduced 2/12/15 S. 472 hearing 5/21/15
Gold Butte National Conservation Area Act	H.R. 856 S. 199	NV	Specific WSAs and acreage not listed <sup>a</sup>	H.R. 856 introduced 2/10/15 S. 199 introduced 1/20/15
Luna and Hidalgo Counties Wilderness Study Area Research Act of 2015	H.R. 3478	NM	9 WSAs, specific acreage not provided	H.R. 3478 introduced 9/21/15
Sawtooth National Recreation Area and Jerry Peak Wilderness Additions Act	H.R. 1138 S. 583	ID	4 WSAs, specific acreage not provided	P.L. 114-46, 8/7/15

**Source:** CRS.

- a. The bill would have released any land within the Gold Butte National Conservation Area that the bill did not designate as wilderness.



## **Appendix B. Border Security Bills Related to Wilderness**

See the “Legislative Action” section under “Wilderness and U.S.-Mexican Border Security,” above, for a discussion of bills considered by the 114<sup>th</sup> Congress to address wilderness and border security issues.

### **113<sup>th</sup> Congress**

The Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744), as introduced in the 113<sup>th</sup> Congress, would have affected wilderness area management along the U.S. border with Mexico. The bill would have authorized the Secretary of Homeland Security to waive all laws in order to expedite construction activities along the border, including roads and barriers.<sup>36</sup> To the extent that those construction activities are in a wilderness area, the Wilderness Act could be waived, as it otherwise would limit such projects. An additional provision of S. 744, Section 1105, would have addressed border patrol activities along the Arizona-Mexico border. That area includes wilderness comprising most of the Cabeza Prieta National Wildlife Refuge and the Organ Pipe Cactus National Monument. Section 1105 would have required the land management agencies to allow “immediate” access for certain border patrol activities. That apparently would have precluded the land management determination of whether an activity was necessary to meet the minimum requirements to administer the area, as typically is made for wilderness areas.<sup>37</sup>

### **112<sup>th</sup> Congress**

The National Security and Federal Lands Protection Act (H.R. 1505) would have allowed “immediate access” for border security activities on FS and Interior lands, “including access to maintain and construct roads, construct a fence, use vehicles to patrol, and set up monitoring equipment.” The act also explicitly would have applied the April 1, 2008, waiver of the Secretary of Homeland Security (under Section 102(c)(1) of P.L. 104-208) for border security actions within 100 miles of the border from many federal land and resource management and protection laws, including the Wilderness Act.

The Border Security Enforcement Act of 2011 (H.R. 1507 and S. 803) also addressed border security and wilderness by directing the Secretaries of Agriculture and the Interior to “authorize and provide ... immediate access to Federal lands for security activities, including (I) routine motorized patrols; and (II) the deployment of temporary tactical infrastructure.” This would apply to all federal lands, including designated wilderness areas, within 150 miles of the border.

The FY2012 Homeland Security authorization bill (H.R. 3116, §606) would have authorized routine motorized patrols and deployment of temporary tactical infrastructure by U.S. Customs and Border Protection, “notwithstanding any other provision of law.” This provision would have applied to all federal lands, including wilderness areas, within 100 miles of an international border. Similar legislation in the Senate (S. 1546, §513) would have authorized routine motorized patrols within 100 miles of the U.S.-Mexican border.

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<sup>36</sup> S. 744, §3(d).

<sup>37</sup> See, for example, *Wilderness Watch, Inc. v. U.S. Fish and Wildlife Service*, 629 F.3d 1024 (9<sup>th</sup> Cir. 2010).

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