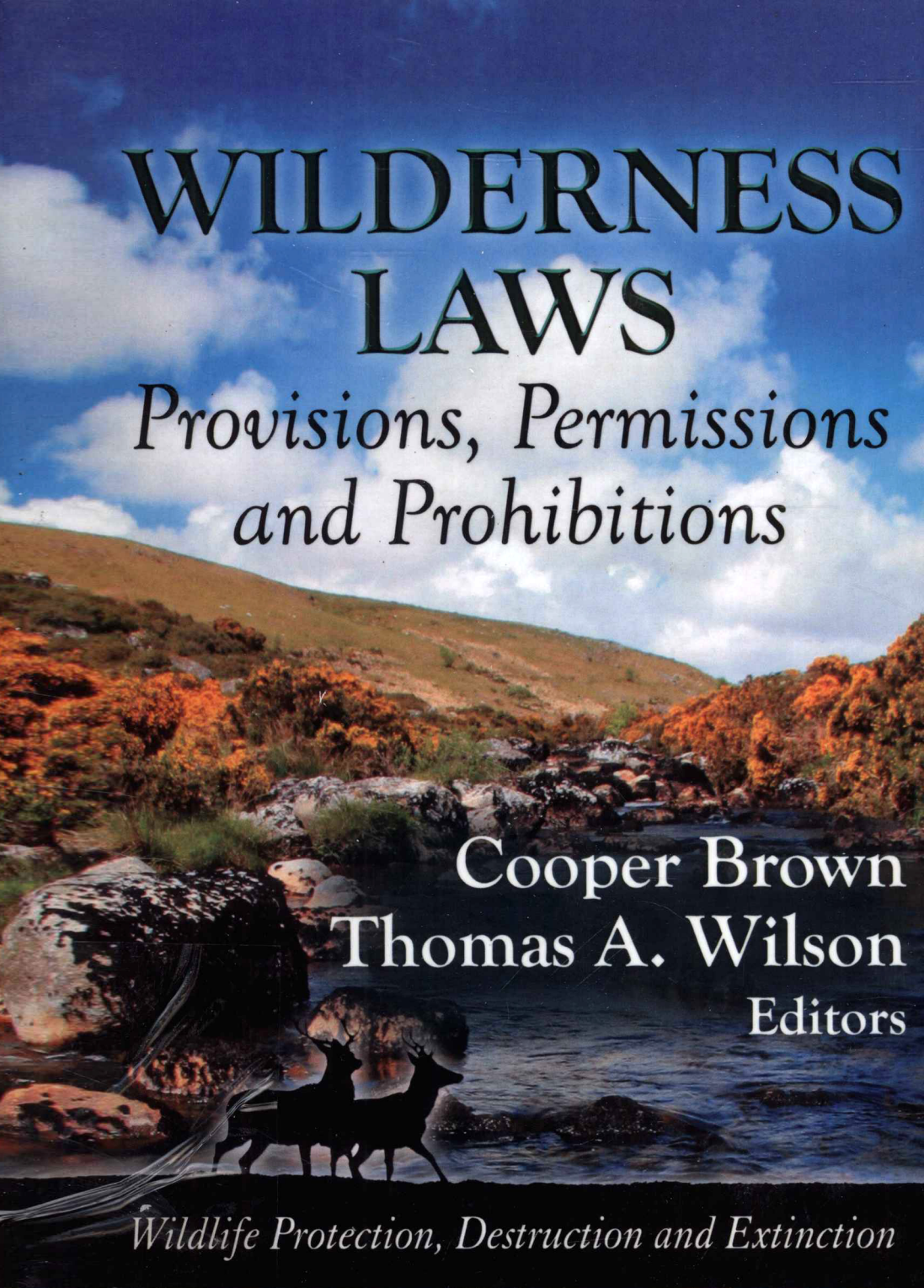
# WILDERNESS LAWS

## *Provisions, Permissions and Prohibitions*



Cooper Brown
Thomas A. Wilson
Editors

*Wildlife Protection, Destruction and Extinction*

NOVA

# WILDERNESS LAWS: PROVISIONS, PERMISSIONS AND PROHIBITIONS



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# PREFACE

Congress enacted the Wilderness Act in 1964. It established a National Wilderness Preservation System of federal lands "where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." The act designated 54 wilderness areas containing 9.1 million acres of federal land within the national forests. It also reserved to Congress the authority to add areas to the system, although it also directed agencies to review the wilderness potential of certain lands. This book summarizes the various statutory provisions and provisions on prohibited and permitted uses within wilderness areas.

Chapter 1- The 1964 Wilderness Act established a National Wilderness Preservation System of federal lands "where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." The act designated 54 wilderness areas with 9.1 million acres within the national forests and reserved to Congress the authority to add areas to the system. Congress has enacted 117 subsequent statutes designating wilderness areas (including one with 16 wilderness-related subtitles) and 8 other statutes requiring wilderness study or otherwise significantly affecting wilderness areas. Many of these statutes provide management direction for designated areas that differs from the Wilderness Act provisions. As of December 31, 2010, the system totaled 759 wilderness areas with 109.7 million acres of federal land.

Chapter 2- Congress enacted the Wilderness Act in 1964. This act created the National Wilderness Preservation System, reserved to Congress the authority to designate wilderness areas, and directed the Secretaries of Agriculture and of the Interior to review certain lands for their wilderness

potential. The act also designated 54 wilderness areas with 9 million acres of federal land. Congress began expanding the Wilderness System in 1968, and today, there are 759 wilderness areas, totaling nearly 110 million acres, in 44 states. Numerous bills to designate additional areas and to expand existing ones are introduced and considered in every Congress.

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*Chapter 1*

# WILDERNESS LAWS: STATUTORY PROVISIONS AND PROHIBITED AND PERMITTED USES*

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## SUMMARY

The 1964 Wilderness Act established a National Wilderness Preservation System of federal lands "where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." The act designated 54 wilderness areas with 9.1 million acres within the national forests and reserved to Congress the authority to add areas to the system. Congress has enacted 117 subsequent statutes designating wilderness areas (including one with 16 wilderness-related subtitles) and 8 other statutes requiring wilderness study or otherwise significantly affecting wilderness areas. Many of these statutes provide management direction for designated areas that differs from the Wilderness Act provisions. As of December 31, 2010, the system totaled 759 wilderness areas with 109.7 million acres of federal land.

The Wilderness Act and other wilderness statutes have contained many provisions related to the administration of the areas. All but three

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direct *management in accordance with the Wilderness Act*. Provisions prohibiting *buffer zones* around designated areas are common. Many also preserve existing *state jurisdiction and responsibilities over fish and wildlife*, while some preserve *other jurisdictions and authorities*, such as for law enforcement and cooperation with other federal, state, and local agencies. *Water rights* has been a controversial issue—some statutes have neither claimed nor denied water rights, some have reserved water rights, and others have directed no claim to water. Several statutes have directed *wilderness study* of potentially qualified lands, and have designated *intended or potential wilderness*, contingent upon some future condition or event. Concern about protection of the study areas has led Congress to include provisions addressing *interim management and release* of areas during and after the studies.

The Wilderness Act generally prohibits commercial activities within wilderness areas, although it allows commercial activities related to wilderness-type recreation. The act also generally prohibits motorized and mechanical access, and roads, structures, and other facilities within wilderness areas. Although wilderness is generally open to other public uses, some wilderness statutes have authorized temporary closures for various reasons. Also, many statutes have withdrawn the designated areas from the public land disposal laws, the mining and mineral leasing laws, and from the laws authorizing the disposal of common mineral materials. However, valid existing rights are not terminated, and can be developed under reasonable regulations.

The Wilderness Act and many subsequent wilderness statutes have also allowed various nonconforming uses and conditions. Motorized access has generally been permitted for *management requirements and emergencies*, for *nonfederal inholdings*, and for *fire, insect, and disease control. Continued motorized access* and *livestock grazing* have also generally been permitted where they had been occurring prior to the area's designation as wilderness. Construction, operations, and maintenance, and associated motorized access, have also been permitted for *water infrastructure* and for *other infrastructure* in many instances. Motorized access for state agencies for *fish and wildlife management activities* has sometimes been explicitly allowed. *Low-level military overflights* of wilderness areas have been permitted in several statutes. Access for *minerals activities* has been authorized in some specific areas and for valid existing rights; the Wilderness Act specifically allowed for mineral prospecting and for establishing mineral rights for 20 years after enactment. Finally, several statutes have allowed access for *other specific activities*, such as access to cemeteries within designated areas or for tribal activities.

## INTRODUCTION

Congress enacted the Wilderness Act (P.L. 88-577; 16 U.S.C. §§ 1131-1136) in 1964. It established a National Wilderness Preservation System of federal lands "where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." The act designated 54 wilderness areas containing 9.1 million acres of federal land within the national forests. It also reserved to Congress the authority to add areas to the system, although it also directed agencies to review the wilderness potential of certain lands.

The Wilderness Act and the 132 subsequent laws[1] designating wilderness contain numerous statutory provisions addressing management of wilderness areas as well as many provisions addressing prohibited and permitted uses, both generally and in specific areas.[2] This report summarizes the various statutory provisions and the provisions on prohibited and permitted uses within wilderness areas. Appendix A is a list of provisions in each relevant law discussed in the sections below. Appendix B includes a complete chronological list of laws designating wilderness areas, with a summary of or quotation from all the wilderness-related provisions in each law.[3] As of December 31, 2010, the National Wilderness Preservation System totaled 759 areas, with 109.7 million acres.[4] The wilderness areas are part of and within 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.

The subsequent wilderness statutes have not designated wilderness areas by amending the Wilderness Act. Instead, they are independent statutes. While nearly all direct management in accordance with the Wilderness Act, as discussed below, most also provide unique management guidance for the areas designated in that statute. Thus, altering management direction for the entire National Wilderness Preservation System, for example to modify land acquisition authority, might require amending all the wilderness statutes, not just the Wilderness Act.

## STATUTORY PROVISIONS

The Wilderness Act and subsequent wilderness laws contain several provisions addressing management of wilderness areas. These laws designate wilderness areas as part of and within existing units of federal land, and the management provisions applicable to those units of federal land, particularly those governing management direction and restricting activities, also apply. For example, hunting is prohibited in many NPS units, but not on USFS or BLM lands, and thus would be prohibited in wilderness areas in those NPS units but generally not in USFS or BLM wilderness areas, absent specific language.

### Manage in Accordance with the Wilderness Act

The Wilderness Act identified the purposes of wilderness in § 2. Specifically, § 2(a) stated that the purpose was to create a National Wilderness Preservation System of federal lands

> administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness...

The act goes on to further define wilderness area management in § 2(c):

> A wilderness, in contrast to those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also

contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

All but three of the subsequent wilderness statutes—P.L. 90-532, P.L. 90-544, and P.L. 92-476— direct management of the designated areas in accordance with or consistent with the Wilderness Act. Thus, virtually all areas within the National Wilderness Preservation System must be managed under the purposes described above and under the various management directions included in the Wilderness Act, as described below. In addition, four statutes require management plans for the designated wilderness areas. For all other designated areas, management must be included in management plans for the unit or area which encompasses the designated wilderness.

## Buffer Zones

The Wilderness Act is silent on the issue of buffer zones around wilderness areas to protect the designated areas. However, language in subsequent wilderness bills has prohibited buffer zones restricting uses and activities on federal lands around the wilderness areas. The first explicit language was enacted in 1980 in P.L. 96-550; § 105 states:

> Congress does not intend that the designation of wilderness areas ... lead to the creation of protective perimeters or buffer zones around each wilderness area. The fact that nonwilderness activities or uses can be seen or heard from areas within the wilderness shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area.

Virtually identical language has been included in 30 other wilderness statutes enacted since 1980.

## State Fish and Wildlife Jurisdiction and Responsibilities

The Wilderness Act explicitly directed that the wilderness designations had no effect on state jurisdiction or responsibilities over fish and wildlife; § 4(d)(8) states that "nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests."[5] Comparable language, sometimes only referring to state jurisdiction (not responsibilities), has been included in 31 wilderness

statutes, beginning in 1978. Such provisions seem to be more common in recent legislation; for example, 8 of the 16 wilderness subtitles of P.L. 111-11 and five of the six wilderness statutes enacted in the 109th Congress included such language. Concern over state wildlife and fish management in wilderness areas persists, and several statutes have included additional specific provisions over permissible access and activities for fish and wildlife management; these are discussed under "Nonconforming Permitted Uses," below.

## Jurisdiction and Authorities of Other Agencies

Several wilderness statutes have directed that other agencies' specific authorities, jurisdiction, and related activities be allowed to continue. Three—P.L. 101-628 (AZ), P.L. 103-433 (CA), and P.L. 106-145 (CA)—directed no effect on U.S.-Mexico border operations. P.L. 103-433 added no effect on law enforcement generally, and allowed motorized access for law enforcement and border operations. P.L. 106-145 added no effect on drug interdiction, and allowed motorized access subject to conditions established by the Secretary. Two other laws—P.L. 106-65 (AZ) and P.L. 111-11, Subtitle K (NM)—directed no effect on military training, for current and future aviation training and for an adjacent training center respectively. In addition, P.L. 95-495 directed cooperation with the State of Minnesota generally, while P.L. 98-550 directed cooperation with the State of Wyoming on cultural resource management. P.L. 107-282 directed no effect on Park Service management of the Lake Mead National Recreation Area. Finally, P.L. 111-11, Subtitle L, directed no effect on management of existing utilities outside the designated wilderness areas.

## Land and Rights Acquisition

The Wilderness Act authorizes the acquisition of land within designated wilderness areas (called inholdings). Section 5(c) authorizes acquisition, subject to appropriations, "if (1) the owner concurs in such acquisition or (2) the acquisition is specifically authorized by Congress." In addition, § 5(a) authorizes acquisition of inholdings by exchange for other federal land of approximately equal value, but the exchange can grant mineral interests only if the landowner relinquishes mineral interests in the inholding. Section 6(a) authorizes the acceptance of gifts or bequests of land within or adjacent to the

wilderness, and after 60 days notice to Congress shall become part of the designated wilderness.

Several subsequent wilderness statutes have provided specific directions on acquisitions within the areas designated in those statutes.[6] P.L. 93-622, the Eastern Wilderness Act, authorized acquisition through condemnation, as well as by purchase, gift, or exchange. P.L. 97-466 (WV) directed the acquisition of coal and other mineral interests, with detailed provisions on the valuation procedures and the use of credits for other federal mineral rights elsewhere; P.L. 104- 333 authorized the acquisition of mineral leases by exchange. P.L. 98-425 (CA) directed

negotiations for acquisition via an exchange, and P.L. 98-574 (TX) directed an expeditious land exchange with a forest products company. P.L. 100-184 (MI) explicitly required concurrence of the landowner for land acquisition. P.L. 101-628 (AZ) directed the acquisition of mineral rights by exchange, and P.L. 103-77 (CO) directed mineral right acquisition only by exchange or donation.

## Water Rights

In contrast to the preceding statutory provisions, where Congress has been relatively consistent in the language used or has been silent on the particular issue, wilderness statutes have provided different directions concerning federal reserved water rights associated with the designated wilderness areas. Under the *Winters* doctrine, when Congress reserves federal land for a particular purpose, it also reserves enough water to fulfill the purpose of the reservation.[7] Congress also has repeatedly deferred to state law in the regulation of water allocation and use.[8]

### *State Authorities and Water Agreements*

Numerous wilderness statutes direct that they are to have no effect on various water agreements and state jurisdiction over water rights. The first was P.L. 95-495, the Boundary Waters Canoe Area Wilderness Act, which directed no effect on Minnesota's jurisdiction or responsibilities over water rights and management. P.L. 96-550 directed no effect on management of a particular municipal watershed. Five statutes—P.L. 107-282 (NV), P.L. 108-424 (NV), P.L. 109-94 (CA), P.L. 109-432 (NV), and P.L. 111-11, Subtitle O (UT)—direct no effect on state water jurisdiction. These five statutes, plus P.L. 103-77 (CO) and P.L. 106-353 (CO), also direct that the statutes are not to be

"construed as limiting, altering, modifying, or amending any interstate compacts or equitable apportionment decrees that apportion water among and between" the states. In addition, these five statutes, plus P.L. 111-11, Title II, Subtitle E (NM), direct that any water rights be secured under state law. Two statutes—P.L. 101-628 (AZ) and P.L. 104-433 (CA)—direct no effect on state, interstate, federal, or international jurisdiction, agreements, or treaties pertaining to the Colorado River. Finally, P.L. 108-447 (WI) directs the preservation of existing treaty rights and management of Lake Superior waters.

***Neither Claim Nor Denial of Claim***

The Wilderness Act, in § 4(d)(7), states that "nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws." Comparable language—neither claiming nor denying reserved water rights for the wilderness designations outside of the state legal system for allocating water—has been used in five subsequent wilderness statutes—P.L. 96-312 (ID), P.L. 98-406 (AZ), P.L. 98-428 (UT), P.L. 98-550 (WY), and P.L. 106-399 (OR).

***Reserved Water Rights***

In contrast to the Wilderness Act, several subsequent wilderness statutes have expressly reserved federal water rights associated with the designated wilderness areas. Statutes with such an express reservation include P.L. 100-668 (WA), P.L. 101-195 (NV), P.L. 101-628 (AZ), P.L. 102-301 (CA), P.L. 103-433 (CA), and P.L. 107-370 (CA). Another four wilderness statutes (P.L. 107-282 (NV), P.L. 108-424 (NV), P.L. 109-94 (CA), and P.L. 109-432 (NV)) indirectly protect wilderness water flows by prohibiting federal funds, assistance, authorization, or permits for new water resource projects or facilities within the wilderness areas (except "water guzzlers" for wildlife in P.L. 109-94).

***No Claim on Water***

Also in contrast to the Wilderness Act and to the statutes identified above, several wilderness statutes have explicitly denied claims to water associated with the designated wilderness areas. As discussed below, this denial of water rights has taken two different forms, each in several statutes: the direction to have no effects on water rights in specific geographic areas; and the denial of a reserved water right for all the areas designated in the statute.

### Area-Specific Provisions

Several wilderness statutes have specified that they are not to have any effect on water claims or rights in a particular location. Three statutes—P.L. 95-237, P.L. 96-560, and P.L. 103-77—have directed that the claims or rights to water and water projects on the Hunter and Fryingpan Rivers and their tributaries are to be unaffected by the wilderness designations in the laws. Two statutes designating wilderness areas along the lower Colorado River—P.L. 101-628 (AZ) and P.L. 103- 433 (CA)—specified that no right to Colorado River water was "expressly or impliedly" reserved. Two other statutes—P.L. 98-425 (CA) and P.L. 98-550 (WY)—specified no effect on water rights in one particular river and one specific river basin, respectively.

### General Provisions

The explicit denial of reserved water rights associated with the wilderness designations has been included in 10 wilderness statutes. In four statutes—P.L. 103-433 (CA), P.L. 106-76 (CO), P.L. 111-11, Subtitle F (ID), and P.L. 111-11, Subtitle N (CO)—the denial of the reserved right is the extent of the provision. In the other six, the statutes also direct no effect on water agreements and/or state authorities. One additional statute—P.L. 103-77 (CO)—does not deny a reserved water right, but does prohibit federal assertion of and administrative and judicial consideration of any water claims.

## Wilderness Study and Release

### *Intended or Potential Wilderness*

Beginning with P.L. 94-357, the Alpine Lakes Area Management Act of 1976 (WA), Congress has enacted 17 wilderness statutes with intended or potential wilderness. These are areas within or adjoining designated wilderness areas that are to become wilderness when certain conditions have been met. In at least five statutes, areas are to be added to the designated wilderness when the specified nonfederal lands have been acquired. In all cases but one, the areas are to become wilderness when current prohibited or inconsistent uses have ceased and/or when incompatible conditions have been remediated. In all but two of the statutes, a *Federal Register* notice that the statutory conditions have been met is required before the area is officially added to the designated wilderness.

***Wilderness Study and Review***

A substantial number of wilderness statutes have directed the agencies to review the wilderness potential of certain lands and to present recommendations of wilderness designations to the President and to Congress. The Wilderness Act directed the Secretary of Agriculture to review the administratively identified national forest primitive areas within 10 years, with a third of the reviews completed within three years and the second third completed within seven years.[9] The act also directed the Secretary of the Interior to review all roadless areas of 5,000 acres or more within National Park System and National Wildlife Refuge System lands; recommendations were to be completed within 10 years, with a third done within three years and another third within seven years. A similar direction to review the wilderness potential of BLM lands was enacted in § 603 of the Federal Land Policy and Management Act of 1976 (FLPMA);[10] BLM wilderness recommendations were to be presented to the President within 15 years (i.e., by 1991) and to Congress not more than two years later. Questions have been raised about the legitimacy of BLM wilderness reviews of areas not originally identified as wilderness study areas (WSAs) under FLPMA.[11]

A total of 27 additional statutes directed the review of the wilderness potential of identified lands. About two-thirds of the statutes specified a deadline for presenting recommendations, commonly two, three, or five years. Two of the laws were only wilderness review statutes, and did not designate any wilderness areas. Two additional statutes repealed previously enacted wilderness study provisions, after the studies were completed, thus effectively providing release from the interim management guidelines (discussed below). The statutorily required wilderness reviews have all been completed, and recommendations have been presented to Congress; some agency wilderness recommendations remain pending.

Wilderness reviews of national forest lands have been and continue to be controversial. The Multiple-Use Sustained-Yield Act of 1960[12] explicitly identifies "wilderness" as an acceptable use for national forest lands. The National Forest Management Act of 1976 (NFMA)[13] requires periodically revised land management plans for the national forests that:

> provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960, and, in particular, include coordination or outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness. (16 U.S.C. § 1604(e)(1))

The periodic review of potential national forest wilderness in NFMA planning was modified in 1977 to accelerate the wilderness review portion of the planning process. In January 1979, the USFS issued nationwide recommendations on more than 60 million acres of land—some areas were recommended for wilderness, some for non-wilderness uses, and some to be examined further in the ongoing planning. The Roadless Area Review and Evaluation (RARE II)[14] was successfully challenged by the State of California on procedural grounds and vacated, raising questions about the management of lands that had been recommended for non-wilderness uses.[15]

***Management During and after a Wilderness Review***

The Wilderness Act and most of the initial statutory wilderness review provisions were silent on the management of the areas during and after the review. The Eastern Wilderness Act, P.L. 93- 622, and two other statutes (P.L. 94-577 and P.L. 105-277) directed that the wilderness characteristics of the areas under review were to be protected "until Congress determined otherwise," but only for a specified period after the recommendations were submitted (one through the third succeeding Congress, one for four years, and one until December 21, 2003). P.L. 94-199 simply directed that the wilderness character of the areas be protected. P.L. 96-550 was the first wilderness statute to require protection until Congress determined otherwise, without limitation, following the language in § 603(c) of FLPMA for the BLM wilderness study areas (WSAs). This language was used in seven other wilderness statutes. One law, P.L. 96-560, was particularly complicated—it provided the "until Congress determines otherwise" language for 10 areas, but directed grazing and mineral activities under laws generally applicable to national forests; it also limited the "until Congress determines otherwise" language to two years for one area, but directed that the Wilderness Act provisions on minerals apply to that area.

Because of the successful litigation over RARE II, many were concerned that, for areas recommended for non-wilderness uses, planned activities might be prevented if they were inconsistent with the Wilderness Act management guidelines (discussed below). A legislative provision, called *release language*, was developed to address this concern.[16] In general, release language provided that RARE II was sufficient for congressional deliberations over wilderness designation and that, in developing the first NFMA plan for a national forest, the USFS was not required to protect the wilderness characteristics of areas not designated. RARE II wilderness bills with release language were generally developed to address all the national forest lands (and occasionally some other