

Committee Reports

103d Congress

Senate Rept. 103-123

103 S. Rpt. 123

COLORADO WILDERNESS ACT OF 1993

DATE: August 4, 1993. Ordered to be printed

SPONSOR: Mr. Johnston, from the Committee on Energy and Natural Resources, submitted the following

REPORT

(To accompany H.R. 631)

TEXT:

The Committee on Energy and Natural Resources, to which was referred the Act (H.R. 631), to designate certain lands in the State of Colorado as components of the National Wilderness Preservation System, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the Act do pass.

Purpose of the Measure

H.R. 631, as amended, would designate approximately 611,700 acres in Colorado managed by the Forest Service and Bureau of Land Management as wilderness and would specify the future management of other national forest and public lands in that State.

Background and Need

In 1979, after years of analysis, the Forest Service released its second Roadless Area Review and Evaluation (RARE II). Of the 62 million acres of roadless land it studied nationwide, the Forest Service recommended that approximately 15 million acres be designated as wilderness, 11 million acres be studied further and 36 million acres be released for nonwilderness uses. With the completion of RARE II, the Forest Service anticipated that it could finally begin multiple-use management on a significant portion of the vast roadless acreage on the National Forests.

However, a 1982 Federal district court decision, *California v. Block*, held that the environmental impact statement (EIS) accompanying RARE II was inadequate, and once again opened the debate over the National Forest roadless lands. Subsequently, the Forest Service began the process of incorporating detailed wilderness studies of roadless areas into its already complex and much delayed land management planning process.

Seeking a more expeditious resolution to the roadless dispute, Congressional delegations introduced and won passage of individual statewide wilderness bills, which made large additions to the National Wilderness Preservation System and "released", or made available to multiple-use management, the remaining roadless acreage. These bills also insulated the RARE II recommendations in the EIS from further judicial review.

In 1980, Congress enacted a statewide RARE II wilderness bill for Colorado (Public Law 96-560) which designated approximately 1.4 million acres of National Forest lands in the State as wilderness. That law also designated approximately 475,000 acres as congressionally designated study areas. Additional congressionally designated study areas were also designated in 1977 (Public Law 95-237) and in 1983 (Public Law 98-141).

H.R. 631 represents the first time that, on a statewide basis, additional National Forest lands would be designated as wilderness within a state already covered by statewide RARE II wilderness legislation. For the most part, the areas to be designated as wilderness by H.R. 631 are the congressionally designated study areas identified above along with additional lands which, although not retained in a formal wilderness study status, have nevertheless retained their wilderness characteristics.

Legislative History

H.R. 631 passed the House on July 19, 1993, by a voice vote. A Senate companion bill, S. 206 was introduced by Senators Campbell and Brown on January 26, 1993. A hearing before the Subcommittee on Public Lands, National Parks and Forests was held on S. 206 on February 25, 1993.

In the 102d Congress, both the House and Senate passed differing versions of Colorado wilderness legislation. Prior to adjournment, an agreement was reached on a compromise proposal, but the Congress adjourned sine die before action could be completed. H.R. 631 incorporates the provisions of that agreement.

At the business meeting on August 3, 1993, the Committee on Energy and Natural Resources ordered H.R. 631 favorably reported.

Committee Recommendations and Tabulation of Votes

The Committee on Energy and Natural Resources, in open business session on August 3, 1993, by a unanimous vote of a quorum present, recommends that the Senate pass H.R. 631 as described herein.

The roll call vote on reporting the measure was 20 yeas, 0 nays.

Section-by-Section Analysis

Section 1 provides a short title, the "Colorado Wilderness Act of 1993", and a definition for the term "Secretary".

Areas designated as wilderness

Section 2(a) would designate 19 areas to be managed as wilderness (either as separate components of the National Wilderness Preservation System or as additions to existing units of that System). These areas are as follows:

Areas/Acreage

American flats (additions to existing wilderness) 3,390

Bill Hare/Larson Creek (addition to existing wilderness; transfer to Forest Service from BLM) 815

Bowen Gulch (addition to existing wilderness) 6,990

Buffalo Peaks 43,410

Davis Peak (addition to existing wilderness) 20,750

Fossil Ridge 33,060

Greenhorn Mountain 22,040

Lost Creek (addition to existing wilderness) 14,700

Oh-Be-Joyful (addition to existing wilderness) 5,500

Powderhorn (part managed by BLM) 60,100

Ptarmigan Peak 13,175

Sangre De Cristo 226,455

Sarvis Creek 47,140

South San Juan (addition to existing wilderness) 31,100

Spruce Creek (addition to existing wilderness) 8,330

St. Louis Peak (renamed "Byers Peak") 8,095

Vasquez Peak 12,300

West Needle Weminuche (additions to existing wilderness) 28,740

Wheeler (addition to existing wilderness) 25,640

maps and legal descriptions

Subsection 2(b) provides for preparation and appropriate filing of maps and legal descriptions of the areas the bill would designate as wilderness.

administrative provisions

Section 3 includes a number of administrative provisions providing for appropriate management of the areas designated as wilderness (including the management of livestock grazing), making clear that the bill will not affect the jurisdiction or responsibilities of the State of Colorado relating to wildlife, and changing the name of the Big Blue Wilderness as designated by Public Law 96-560 to the "Uncompahgre Wilderness".

Under subsection 3(f), the Big Blue Wilderness, as designated by Public Law 96-560 and as it would be expanded by additions made by this bill, would be renamed as the "Uncompahgre Wilderness," as originally provided in the State version of that 1980 legislation and in recognition that much of these lands were part of the Uncompahgre Primitive Area prior to enactment of Public Law 96-560.

wilderness study release

Section 4 would repeal the provisions of Public Law 96-560 dealing with areas included in this bill.

fossil ridge and bowen gulch

Section 5 would designate 43,900 acres of National Forest land as the "Fossil Ridge Recreation Management Area." The area would be established to conserve, protect, and enhance its scenic, wildlife (subject to valid existing rights) from mineral entry and from mineral and geothermal leasing; would be closed to timber harvesting to the same extent as if the area were designated as wilderness; and would be closed to construction of developed campgrounds and new roads or trails. Nonemergency motorized travel would be limited to existing trails or routes where such travel was permitted as of July 1, 1991, as identified on a map to be made available within 1 year after enactment of the Act. Motorized use of these identified routes and trails could be curtailed for resource protection or public safety. Designation of the area would not prohibit or change the administration of livestock grazing on the lands involved.

Section 6 would designate 11,600 acres of National Forest lands as the "Bowen Gulch Protection Area". The area would be withdrawn from mineral entry and from mineral and geothermal leasing; would be closed to new developed campgrounds, roads, and trails,

would be closed to timber harvesting to the same extent as if designated a wilderness; and would be closed to motorized travel except for snowmobile use on designated trails and routes in existence on July 1, 1991, during periods of adequate snow cover (but open to mechanized, non-motorized travel, e.g. mountain bikes). The Forest Service would be required to develop a management plan for the area during revision of the relevant National Forest plan.

Section 7 provides that nothing in the bill will affect ownership or use of lands or interests therein not owned by the United States or access to such lands available under other applicable law.

water

Section 8 addresses water and water resource facilities. Subsection 8(a) recites findings upon which the section is based, states the sections purpose, and provides a definition of the term "water resource facility" as used in the section.

As stated in the findings, section 8 is entirely premised on certain specific characteristics of the lands designated as wilderness by section 2(a) of the bill, namely

- (1) these lands are located at the headwaters of the streams and rivers located on those lands, with few, if any, opportunities for diversion, storage, or other uses of water that could occur outside these areas that would adversely affect the wilderness values of the areas;
- (2) these lands are not suitable for use for development of new water resource facilities or the expansion of existing water resource facilities; and
- (3) therefore, proper management and protection of the wilderness values of the specific area covered by section 2(a) can be provided for in ways different from those employed with regard to wilderness lands not sharing these particular attributes.

This being the case, section 8 is intended to protect the wilderness values of the lands described in section 2(a) by means other than those based on a Federal reserved water right.

Paragraph 8(b)(1) would prohibit any person (including the Secretary of Agriculture or any other person) from acting as the agent of the United States in asserting in any court or agency any claim for water or water rights in Colorado based on construing any portion of the bill (or the designation by the bill or any lands as wilderness) as constituting either an express or implied reservation of water or water rights. It also would deny any court or agency any statutory jurisdiction to consider any such claim; a restriction encompassing any jurisdiction otherwise available under any Act of Congress. (Of course, nothing in this Act could have the effect of altering the original jurisdiction of the Supreme Court of the United States under clause 2 of section 2 of Article III of the Constitution, which could be altered or restricted only through an amendment of the Constitution itself.)

The effect of enactment of paragraph 8(b)(1) will be to deny anyone (including but not limited to a person holding an established office of the national government) the authority to assert on behalf of the United States, and to deny a court or agency any statutory jurisdiction to consider, a claim that the bills designation as wilderness of the lands described in subsection 2(a) has the effect of reversing to the United States any water or water right with respect to those lands. The scope and applicability of paragraph 8(b)(1) has been carefully limited in order that the withdrawal of statutory jurisdiction over a particular type of claim will in all other respect leave completely undisturbed the general body of law regarding the jurisdictions of U.S. and State courts and agencies with respect to water.

Paragraph 8(b)(2) clarifies several aspect of the bills effects with regard to water or water rights. Subparagraph (b)(2)(A) states that nothing in this Act constitutes or is to be construed as either an express or implied reservation of any water or water right with respect to the Piedra, Roubideau, and Tabeguache areas identified in section 9, the Bowen Gulch Protection Area identified in section 5, or the Fossil Ridge Recreation Management Area identified in section 6. These areas are not designated as wilderness.

Subparagraph (b)(2)(B) states that nothing in this Act is to be construed as a creation, recognition, disclaimer, relinquishment, or reduction of any water rights of the United States in Colorado existing before the bills enactment, except as provided in subsection 8(g)(2).

Subparagraph (b)(2)(C) provides that with the exception of subsection 8(g)(2), nothing in this Act is to be construed as constituting an interpretation of any other Act or any designation made by or pursuant thereto; and subparagraph (b)(2)(D) provides that nothing in section 8 is to be construed as establishing a precedent with regard to any future wilderness designations.

Subsection 8(c) deals with water resource facilities (meaning irrigation and pumping facilities, reservoirs, water conservation works, aqueducts, canals ditches, pipelines, wells, hydropower projects, transmission and other ancillary facilities, and other water diversion, storage, and carriage structures).

This subsection would prohibit any U.S. officer, employee, or agent (including the President) from funding, assisting, authorizing, licensing, or permitting the development of any new water resource facility or the enlargement of any existing water resource facility within any of the areas described in sections 2, 5, 6, or 9; that is, the Fossil Ridge Recreation Management Area, the Bowen Gulch Protection Area, the Piedra, Roubideau, and Tabeguache Areas, and the lands the bill designates as wilderness. This prohibition would apply notwithstanding any other provision of law (e.g., 16 U.S.C. 1133(d)(4)).

Subsection 8(d) addresses access to and operation of existing water resource facilities within the areas described in sections 2, 5, 6, and 9 of the bill. Paragraph (d)(1) would direct the relevant Secretary to allow reasonable access to such facilities in existence on

the date of enactment of the bill, including motorized access where necessary and customarily employed on routes in existence on that date, subject to the provisions of this subsection.

Paragraph (d)(2) specifies that existing access routes within the areas described in sections 2, 5, 6, and 9 customarily employed as of the date of the bills enactment may be used, maintained, repaired and replaced to the extent necessary to maintain their present function, so long as such activities have no greater adverse effect on the areas resources and values.

Paragraph (d)(3) provides, that subject to subsections 8(c) and 8(d), the relevant Secretary is to allow water resource facilities in existence on the date of the bills enactment within the areas described in sections 2, 5, 6, and 9 to be used, operated, repaired, maintained, and replaced to the extent necessary for the continued exercise, in accordance with Colorado law, of vested water rights adjudicated prior to the bills date of enactment by a court of competent jurisdiction for use in connection with such facilities. The paragraph also specifies that the impact of an existing facility within an area described in section 2, 5, 6, or 9 on the water resources and values of such an area shall not be increased as a result of any change (as compared with the type of use adjudicated as of the date of enactment of the bill), in the adjudicated type of use of such a facility.

Paragraph (d)(4) provides that water resource facilities, and access routes serving such facilities, in existence on the date of the bills enactment within the areas described in sections 2, 5, 6, and 9 shall be maintained and repaired when and to the extent necessary to prevent increased adverse impacts on the resources and values of those areas.

savings clause

Subsection 8(e) is a savings clause, stating that except as provided in subsection 8(c) and 8(d), neither the provisions of the bill related to the Fossil Ridge Recreation Management Area, the Bowen Gulch Protection Area, the Piedra, Roubideau, and Tabeguache Areas, and the lands designated as wilderness by section 2(a) nor the wilderness status of the lands so designated by section 2(a), are to be construed to affect or limit the use, operation, maintenance, repair, modification, or replacement of water resource facilities in existence on the date of the bills enactment within the boundaries of any of these areas.

monitoring and implementation

Subsection 8(f) provides that the Secretaries of Agriculture and the Interior are to monitor the operation of an access to water resource facilities within the areas described in sections 2, 5, 6, and 9 of the bill and are to take all steps necessary to implement the provisions of section 8 of the bill.

interstate compacts and the north platte river

Subsection 8(g) has two paragraphs. Paragraph 8(g)(1) provides that nothing in the bill or in any previous Act designating any lands as wilderness is to be construed as limiting, altering, modifying, or amending any of the interstate compacts or equitable apportionment decrees that apportion water among and between the State of Colorado and other States. This paragraph also states that except as expressly provided in section 8, nothing in the bill will affect or limit the development or use of Colorado's full apportionment of such waters by existing and future holders of vested water rights.

Paragraph 8(g)(2), like paragraph 8(b)(1), would withdraw statutory jurisdiction of courts and agencies to consider certain water-related claims, but this paragraph relates solely to the Platte River Wilderness established by Public Law 98-550, which is located on the boundary between Colorado and Wyoming. This paragraph provides that no person (including the Secretary of Agriculture or any other officer, employee, or agent of the United States) shall assert in any court or agency (of the United States or other jurisdiction) any rights, and no U.S. court or agency shall consider any claim or defense based on such rights, which may be determined to have been established for waters of the North Platte River for purposes of such wilderness area, to the extent that such rights would limit the use or development of water within Colorado by present and future holders of vested water rights in the North Platte River and its tributaries to the full extent allowed under interstate compact or applicable U.S. Supreme Court equitable decree. The paragraph also provides that any such U.S. rights are to be exercised so as not to prevent the use or development of Colorado's full entitlement to interstate waters of the North Platte and its Colorado tributaries allowed under interstate compact or U.S. Supreme Court equitable decrees.

pedra, roubideau, and tabeguache areas

Section 9 provides management requirements for the Piedra area (62,550 acres) in the San Juan National Forest and two areas Roubideau (19,650 acres) and Tabeguache (17,240 acres) in the jointly-managed Grand Mesa, Uncompahgre, and Gunnison National Forests. Each of these areas is withdrawn from all forms of location, leasing, patent, and disposition under the public land laws, the mining laws, and the mineral and geothermal leasing laws. Section 9 specifies that no future study for possible wilderness designations is required to any of these areas, but that until Congress determines otherwise, activities within these areas are to be managed so as to maintain the present wilderness character of the areas and their potential for inclusion in the National Wilderness Preservation System. The section specifies that livestock grazing will be permitted and managed in the areas to the same extent and in the same manner as of the date of the bills enactment. The section specifies that except as provided elsewhere in the bill (i.e., in section 8) mechanized or motorized travel generally will not be permitted in the areas. The section also provides that motorized travel on a specified trail in the general Piedra area (but omitted from the "Piedra Area" described on the referenced map) will be limited to snowmobiles and may be allowed only when there is adequate snow cover.

spanish peaks area

Section 10 would require the Secretary of Agriculture to continue to manage the Spanish Peaks Area (as defined by an appropriate map reference) as provided by the Colorado Wilderness Act of 1980 (i.e., as a wilderness study area) for 3 years after the bills enactment, notwithstanding the provisions of section 4(a) of the bill. It would also require the Secretary, before the end of this 3-year period, to report as to the location, acreage, and nature of all private property interests located within the Spanish Peaks area, and the Secretary's views as to whether the owners of these interests would be willing to transfer them to the United States (by sale or exchange) for fair market value. Subsection 10(c) clarifies that nothing in the bill is to be construed as a grant of new authority for Federal acquisition of property by eminent domain. It does not affect any existing authority for such acquisitions.

Section 11 would rename the existing Bureau of Reclamation Granby pumping plant (part of the Colorado-Big Thompson Project) as the "Farr Pumping Plant".
cost and budgetary considerations

The following estimate of the cost of this measure has been provided by the Congressional Budget Office:

U.S. Congress,

Congressional Budget Office,

Washington, DC, August 4, 1993.

Hon. J. Bennett Johnston,

Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 631, the Colorado Wilderness Act of 1993, as ordered reported by the Senate Committee on Energy and Natural Resources on August 3, 1993. CBO estimates that enactment of H.R. 631 would result in additional costs of \$2 million to \$3 million over the next five years, assuming appropriation of the necessary amounts. Enactment of H.R. 631 could affect direct spending by reducing offsetting receipts, and therefore the act would be subject to pay-as-you-go procedures under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985. We do not expect such reductions in receipts to be significant.

H.R. 631 would designate over 611,000 acres of National Forest System land and Bureau of Land Management holdings in Colorado as part of the National Wilderness Preservation System. Three additional units of federal land totaling about 155,000 acres would be permanently protected under conservation plans that are less restrictive than wilderness designations. The legislation would require the Forest Service to report on the status of private property within the Spanish Peaks further planning area. Finally, the act would rename the Granby Pumping Plant in Colorado as the Farr Pumping Plant.

Based on information from the Forest Service and the Bureau of Land Management, CBO estimates that costs for creating and executing wilderness area management plans

would total about \$300,000 annually. Surveying and boundary work would cost from \$50,000 to \$250,000 per year for up to ten years.

The National Wilderness Preservation System Act stipulated that all timber located in units of the National Wilderness Preservation System is no longer available for timber harvesting. Because most of the land specified in this act is not currently available for timber harvest, and much of the timber that is available would likely be replaced by timber in other areas, we would not expect a significant reduction in timber receipts over the next five years.

Lands designated as wilderness are also no longer available for mineral exploration and development. We expect that no significant loss of mineral receipts would result from this legislation because H.R. 631 provides that mineral resources could be removed under valid existing rights. The act would bar new claims, but any effect of that prohibition would be minor because there have been few mining claims in the affected areas in recent years.

Enactment of this legislation would not impose significant costs on state and local governments. If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Theresa Gullo, who can be reached at 226-2860.

Sincerely,
Robert D. Reischauer, Director.

Regulatory Impact Evaluation

In compliance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out H.R. 631. The Act is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of H.R. 631, as ordered reported.

Executive Communications

On February 10, 1993, the Committee on Energy and natural Resources requested legislative reports from the Department of Agriculture and the Office of Management and Budget setting forth Executive agency recommendations on S. 206, the Senate companion measure. These reports had not been received at the time the report on H.R. 631 was filed. When the reports become available, the Chairman will request that they be

printed in the Congressional Record for the advice of the Senate. The testimony provided by the Forest Service at the Subcommittee hearing follows:

Statement of Mark Reimers, Deputy Chief, Forest Service, Department of Agriculture

Mr. Chairman and members of the subcommittee, thank you for the opportunity to provide the Subcommittee with the Department of Agriculture's views on the bills being discussed today.

s. 206, the "Colorado wilderness act of 1993"

This bill would designate National Forest System lands in the State of Colorado as components of the National Wilderness Preservation System.

Mr. Chairman, we commend the Committee and the Colorado delegation for their efforts to complete the wilderness designation process for National Forests in the State of Colorado. We are committed to cooperating in developing legislation acceptable to both the Congress and the Administration. The Department of Agriculture recommends enactment of S. 206, if amended as we suggest. We defer to the Department of the Interior regarding the BLM areas included in S. 206. We are informed that the Department of the Interior will be providing written comments on the legislation in the near future.

S. 206 would designate about 578,670 acres of National Forest System lands as wilderness. The bill also would create two special management areas on National Forest System lands, totaling 50,700 acres. Three "downstream" areas, the Piedra, Roubideau, and Tabeguache areas would be withdrawn from mineral entry and would be managed to retain their wilderness character for possible consideration as future wilderness, pending resolution of water rights questions. One area, the Spanish Peaks, is identified for further planning and study.

The remainder of the wilderness study areas and further planning areas in Colorado established in previous wilderness bills would be released to nonwilderness uses under the Forest Plans. Water rights for the designated wilderness would also be addressed.

I will briefly address some specific provisions in the bill, and then I would be pleased to answer your questions.

Proposed wilderness areas

There are 14.4 million acres of National Forest System lands in Colorado, of which approximately 2.6 million acres (18 percent) are already designated as wilderness. Acts creating existing wilderness also provided for studies of several areas, with recommendations to be made to Congress regarding their suitability as wilderness. The recommendations regarding these areas have been provided, either through the Forest planning process or separate wilderness studies subsequently adopted in Forest Plans.

Of the wilderness studies required by Congress, all or portions of 10 areas were found to be suitable for wilderness designation. The study areas and recommended acreages in this category area: Sangre de Cristo (190,629 acres), Greenhorn Mountain (22,300 acres), Piedra (41,500 acres), West Needle (28,740 acres), Vasquez Peak (12,800 acres), Buffalo Peaks (36,060 acres), Spruce Creek (8,000 acres), Cannibal Plateau (13,599 acres), Davis Peak (8,100 acres), and Service Creek (39,860 acres). These recommendations total 401,593 acres.

Significant differences exist between the location of some boundaries proposed in S. 206 and recommendations in Forest Plans. In addition, S. 206 would designate some areas for wilderness which were not recommended in Forest Plans.

We endorse wilderness designations in the bill which match Forest Plan recommendations, and prefer that new wilderness designations be limited to these recommendations, which were developed through an extensive planning process with full public involvement.

At the same time, we believe that completing the wilderness allocation process is important, and we are committed to working with the Committee and the delegation toward that end. Therefore, we reviewed the additional areas which would be designated by S. 206 to assess the resource tradeoffs and degree of change from Forest Plan management prescriptions which would result if these areas were designated as wilderness. We do not object to designation of additional areas which have the following characteristics:

- (1) Have appropriate wilderness attributes.
- (2) Are managed under Forest Plan prescriptions which provide for nonmotorized, dispersed recreation opportunities, and basically retain the natural character of the area.
- (3) Have minor resource tradeoffs.
- (4) Contain a minimum of nonconforming uses, such as mining claims, private land inholdings, water diversions, and roads.

Recommendations regarding individual areas (section 2)

We support wilderness designation for the following National Forest System areas which match Forest Plan recommendations: Greenhorn Mountain, Powderhorn/Cannibal Plateau, Spruce Creek, and West Needle (Weminuche).

We do not object to designation of additional acreage beyond Forest Plan recommendations in the following areas: Buffalo Peaks, Davis Peak, Sangre de Cristo, Vasquez Peak, Service Creek, and Bowen Gulch.

The Fossil Ridge, Lost Creek, Oh-Be-Joyful, South San Juan, Byers Peak (St. Louis Peak), Farr (Williams Fork), and Wheeler Geologic Area were evaluated through the Forest Plan process. These areas were not recommended for wilderness because of some resource tradeoffs, or the presence of existing or proposed nonconforming uses which present difficulties in managing the areas as wilderness. However, we recognize that there has been public support for designating these areas and do not object.

Two name changes would be made as well. The Big Blue Wilderness would be renamed the "Uncompahgre Wilderness." We do not object to the name change, but only wish to point out the effects if a change were made. Changing this name would cause some confusion and would result in expenditures of tax dollars for changes to signs, maps, and other documents. There is already abundant use of the name "Uncompahgre" in the area in the names of a river, a National Forest, a 14,000-foot mountain peak, plateaus, and other features.

We normally follow the policy of the U.S. Board of Geographic Names to not name areas for living persons. To be consistent with this policy, we do not recommend renaming the Fossil Ridge area.

Administrative provisions (section 3)

The bill includes standard administrative provisions concerning State jurisdiction for management of fish and wildlife, buffer zones around wilderness, and grazing. We have no objection to the standard administrative provisions included in the bill. However, we feel these provisions are restatements of existing law and are unnecessary.

Wilderness release language (section 4)

We support the release language in S. 206. This language is helpful in determining status of areas not explicitly addressed elsewhere in the bill.

Special management areas (section 5 and section 6)

We do not believe designation of special management areas in the bill (Fossil Ridge and Bowen Gulch) is necessary. We believe appropriate management direction for these areas can be provided through the Forest Planning process. Most of the Fossil Ridge area (about 25,000 acres) was released to nonwilderness uses in the Colorado Wilderness Act of 1980 and has since been allocated in the Forest Plan to nonwilderness management prescriptions such as livestock grazing, wildlife habitat improvement, and recreation.

Furthermore, S. 206 would prohibit construction of new trails in the Fossil Ridge and Bowen Gulch areas. This prohibition could prevent new trail construction, even to relocate segments of existing trails which are causing resource damage. In general, whether or not designated as special management areas, we believe the appropriate trail system should be determined through forest management planning that is sensitive to actual conditions on the ground, rather than through legislation.

If the areas are established under this bill, we have concerns about the language addressing timber harvest in both Sections 5 and 6. The language is ambiguous and subject to varying interpretations, and is more restrictive than similar language in the Wilderness Act. We recommend that the language be consistent with the Wilderness Act.

We also have concerns about the language addressing "Development" in Sections 5 and 6. The term "developed campground" is undefined and may conflict with needed management actions on the ground. We suggest that the term be defined so as to not conflict with actions that may be necessary to protect resources. Management practices such as designating campsites or providing toilet facilities have been found to be necessary even in designated wilderness. We can provide suggested language.

Wilderness water resource (section 8)

The Administration has not completed its review of the provisions of Section 8. We will provide written comments to the Subcommittee in the near future. Language dealing with water resources in the proposed wilderness additions addresses many of the concerns the Department of Agriculture expressed in previous hearings on Colorado wilderness. Narrowing the scope of wilderness designations to "headwaters" areas and effectively limiting development of new or expanded water projects should provide adequate protection for wilderness water resources in those areas. This action would also complement existing Forest Service authorities.

The Forest Service is responsible for assuring that water and other resources on National Forest System lands are managed in accordance with applicable legal authority. This authority is derived from numerous statutes, including but not limited to: the Organic Act of 1897, the Organic Act of 1944, the Multiple-Use Sustained-Yield Act of 1960, the Wilderness Act of 1964 and subsequent wilderness acts, the Federal Land Policy and Management Act of 1976, and the National Forest Management Act of 1976.

The Forest Service has several mechanisms to protect water resources in accordance with our management responsibilities. These are:

- (1) Administrative control over placement of water diversion, storage and transmission structures on National Forest System lands;
- (2) Appropriation of water rights under State water laws;
- (3) Reserved water right claims under Federal law;
- (4) Acquisition of land or water rights; and as a last resort,
- (5) Condemnation of lands or water rights.

We do not object to the provisions of S. 206 which would protect water rights under existing interstate compacts and which would provide reasonable access to existing water diversion facilities.

Piedra, Roubideau, and Tabeguache Areas (section 9)

This section places certain management constraints on these three downstream areas. The Administration supports the provisions of this section which represents a compromise of the Senators of Colorado.

The Forest Service is directed to manage these areas "to maintain the areas presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System. During the last session of Congress, we began a cooperative effort with the Colorado Water Conservation Board to quantify water rights essential to management of the Piedra area as wilderness. A joint report has been prepared which identifies the water rights needed, and the rationale for those recommended water rights.

To date, these recommendations for water rights filings have not been acted on by the Colorado Water Conservation Board. If the recommended claims are filed by the Water Conservation Board, and approved by the Colorado Water Court in Division 7, these water rights would protect water resources in the Piedra Area. A similar procedure could be used to deal with the Roubideau and Tabeguache Areas. We recommend this process be part of the data collection specified in Section 9(c). As currently written, this paragraph would only provide for data collection without addressing the purpose of collecting the data.

It is unlikely the Forest Service could protect the water-related values of these areas without water rights to maintain instream flows. If we cannot satisfactorily provide water rights sufficient to protect wilderness-related values for these three areas, then we cannot assure the areas potential future wilderness designation can be maintained.

Spanish Peaks Further Planning Area (sec. 10)

The Spanish Peaks area has already been evaluated through the Forest Planning process and wilderness designation was not recommended. This recommendation was based primarily on the presence of significant private land inholdings, oil and gas leases, and mining claims, both patented and unpatented. The scope of the additional study that would be required by this bill is limited to addressing the question of the existing rights within the area. We do not object to clarifying the private property rights in this area.

The Forest Service is very concerned about its ability to preserve wilderness values where other existing rights are found within wilderness boundaries. The Conundrum and West Elk controversies in Colorado have underscored this concern. The Forest Service has been limited options when attempting to balance private rights with the wilderness resource.

Summary

In summary, we strongly support the effort to resolve issues associated with wilderness designation of National Forest System lands in Colorado. We generally support S. 206, but as we stated, we have some concerns with certain provisions. We would like to continue to work with the Colorado delegation and the Subcommittee to perfect this legislation. This completes my comments related to S. 206.

U.S. Department of Justice,

Office of Legislative Affairs,

Washington, DC, July 16, 1993.

Hon. J. Bennett Johnston,

Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

Dear Mr. Chairman: This presents the views of the Department of Justice on S. 206, the "Colorado Wilderness Act of 1993." The following recommendations are offered to further refine the bills approach in addressing water rights issues. The Department defers to the Departments of Agriculture and the Interior regarding the advisability of this bills limited provisions for the protection of wilderness values.

Section 8 of the bill is intended to protect the wilderness values of the lands designated as Wilderness by means other than those based on a Federal reserved water right. In section 8(a) Congress specifically finds that these areas are located at the headwaters with few, if any, actual or proposed water resources facilities upstream of these areas and few, if any, opportunities for development of water resources. This language implies that actual or proposed water resource facilities could adversely affect the wilderness values of the designated areas. Therefore, the federal governments ability to protect wilderness attributes should be carefully defined.

Two provisions in section 8 of the bill raise possible constitutional problems. Section 8(b)(1) would foreclose any claims for water rights in Colorado which are "based on any construction of any portion of this Act, as constituting an express or implied reservation of water or water rights." The bill seeks to achieve this end by: (1) prohibiting any person, including any official acting on behalf of the United States, from asserting (emphasis added) such claims "in any court or agency"; and (2) prohibiting "any court or agency"; from considering such a claim. Section 8(g)(2) would impose similar prohibitions with respect to claims based on certain water rights in the North Platte River. Both of these restrictions are of doubtful constitutionality.

While Congress may freely legislate the rules which govern the disposition of federal water rights, it may not constitutionally prohibit persons from asserting whatever claims they choose in courts or agencies. U.S. Const. amend. I, V. As the Supreme Court has recognized, "(T)he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnsons Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983). Nor is Congress free to prohibit officials of the Executive Branch from asserting, on behalf of the United States, such claims as the

President deems necessary under this constitutional power to "take Care that the Laws be faithfully executed." U.S. Const. art. II, 3.

The provisions purporting to bar "any court" from even considering specified categories of claims raise additional constitutional difficulties. Federal reserved water rights may be at issue in an interstate stream adjudication before the Supreme Court. *Arizona v. California*, 373 U.S. 546, 564 (1963). Congress has the power to reserve water rights under its powers to regulate navigable waters under the Commerce Clause and to regulate government lands under Article IV, 3, of the Constitution. *Id.*, at 597-598. However, Congress cannot withdraw the Supreme Courts original jurisdiction over disputes between the States, which is provided by the constitution. U.S. Const. art. III, 2, cl. 2.

These issues could be avoided by substituting provisions that would foreclose federal statutory jurisdiction over the water claims at issue. If a jurisdictional solution is desired, section 8(b)(1) could be amended to read as follows:

Notwithstanding any provision of law, including the McCarran Amendment, 43 U.S.C. 666, no jurisdiction provided by any Act of Congress shall extend any claim to or for water or water rights in the State of Colorado which involves the construction of an express or implied reservation of water or water rights by this Act, or the designation of any lands as wilderness by this Act.

While this amendment will not assure that arguments regarding reserved water rights will not be made, it should dispose of those arguments and ensure that the protection of wilderness values will be left to other means, addressed in sections 8(c) and 8(d).

Section 8(c) protects the designated wilderness and other management areas by removing federal authority to fund, assist, authorize, or issue a license or permit for a new water resource facility within these areas or for the enlargement of an existing facility within these areas. Section 8(d) further protects these areas by limiting access to existing water resource facilities to existing routes and by limiting the operation and maintenance of these facilities to the extent necessary for the continued exercise of vested water rights adjudicated prior to the bills enactment. The impact of an existing facility on the water resources and values of these areas cannot be increased and the facilities and their access routes must be maintained to prevent increased adverse impacts.

These provisions should also make clear that they do not supersede existing agency authority to control the impacts of water resource facilities. We recommend addition of the following proviso to the end of section 8(d)(3):

Provided, further, That under the laws and regulations generally applicable to the National Forest System the Secretary may administer the areas described in sections 2, 5, 6 and 9 of this Act to prevent an increased impact of an existing facility on these areas by reason of a change effected in its operation, maintenance, repair, or replacement.

In the absence of this proposed clarifying language, issues may arise regarding the authority of the Forest Service to regulate existing projects with vested water rights within the newly designated areas to avoid increased impacts on wilderness values resulting from changes in the operation, maintenance, repair or replacement of the projects.

Section 8(g) governs the effect of this bill on interstate compacts and the North Platte River. Section 8(g)(2) includes language similar to that found in section 8(b)(1) to ensure that no water right will be asserted or considered for the Platte River Wilderness Area, to the extent such rights would limit the use or development of water within Colorado by present and future holders of water rights in the North Platte River and its tributaries. For the reasons stated above, this sentence should be redrafted in accordance with changes to section 8(b)(1), as follows:

Notwithstanding any other provision of law, including the McCarran Amendment, 43 U.S.C. 666, no jurisdiction provided by any Act of Congress shall extend to any claim to rights to waters of the North Platte River for purposes of the Platte River Wilderness Area established by Public Law 98-550, located on the Colorado-Wyoming State boundary, to the extent that such rights would limit the use or development of water within Colorado by present and future holders of vested water rights in the North Platte River and its tributaries to the full extent allowed under interstate compact or United States Supreme Court equitable decree.

We look forward to continuing to work with you on this legislation. If we may be of further assistance, please do not hesitate to call on us.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administrations program.

Sincerely,
Sheila F. Anthony,
Assistant Attorney General.

Changes in Existing Law

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by the Act H.R. 631, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

AN ACT To designate certain endangered public lands for preservation as wilderness, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Endangered American Wilderness Act of 1978".

statement of findings and policy

Section 1. (a) The Congress finds that

* * * * *

designation of wilderness areas

Sec. 2. In furtherance of the purposes of the Wilderness Act, the following lands (hereinafter referred to as "wilderness areas"), as generally depicted on maps appropriately referenced, dated January 1978, are hereby designated as wilderness and, therefore, as components of the National Wilderness Preservation System

(a) * * *

* * * * *

(e) certain lands in the White River National Forest, Colorado, which comprise approximately seventy-four thousand four hundred and fifty acres, are generally depicted as area "A" on a map entitled "Hunter-Fryingpan Wilderness Area Proposed", and shall be known as the Hunger-Fryingpan Wilderness. The area commonly known as the "Spruce Creek Addition", depicted as area "B" on said map and comprising approximately eight thousand acres, shall, in accordance with the provisions of subsection 3(d) of the Wilderness Act, be reviewed by the Secretary as to its suitability or nonsuitability for preservation as wilderness. The Secretary shall complete his review and report his findings to the President and the President shall submit to the United States Senate and the House of Representatives his recommendation with respect to the designation of the Spruce Creek area as wilderness not later than two years from the date of enactment of this Act. Subject to valid existing rights, the wilderness study area designated by this subsection shall, until Congress determines otherwise, be administered by the Secretary so as to maintain presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System. No right, or claim of right, to the diversion and use of the waters of Hunter Creek, the Fryingpan or Roaring Fork Rivers, or any tributaries of said creeks or rivers, by the Fryingpan-Arkansas Project, Public Law 87-590, Eighty-seventh Congress, and the reauthorization thereof by Public Law 93-493, Ninety-third Congress, under the laws of the State of Colorado, shall be prejudiced, expanded, diminished, altered, or affected by this Act. Nothing in this Act shall be construed to expand, abate, impair, impede, or interfere with the construction, maintenance, or repair of said Fryingpan-Arkansas Project facilities, nor the operation thereof, pursuant to the Operating Principles, House Document Numbered 130, Eighty-seventh Congress, and pursuant to the water laws of the State of Colorado.

* * * * *

Act of December 22, 1980

AN ACT To designate certain National Forest System lands in the States of Colorado, South Dakota, Missouri, South Carolina, and Louisiana for inclusion in the National Wilderness Preservation System, and for other purposes.

TITLE I

* * * * *

Sec. 105. (a) The Secretary of Agriculture shall review and within three years after the date of enactment of this Act, shall report to the President and the Congress in accordance with subsections 3(c) and 3(d) of the Wilderness Act of 1964 (78 Stat. 892), his recommendations on the suitability or unsuitability for inclusion in the National Wilderness Preservation System of the following lands:

- (1) the Buffalo Peaks Wilderness Study Area, consisting of approximately fifty-six thousand nine hundred acres in the San Isabel National Forest, as generally depicted on a map entitled "Buffalo Peaks Wilderness Study Areas Proposal", dated June 1980;
- (2) the Fossil Ridge Wilderness Study Area, consisting of approximately fifty-four thousand seven hundred acres in the Gunnison National Forest, as generally depicted on a map entitled "Fossil Ridge Wilderness Study Area Proposal", dated December 1979;
- (3) the Greenhorn Mountain Wilderness Study Area, consisting of approximately twenty-two thousand three hundred acres in the San Isabel National Forest, as generally depicted on a map entitled "Greenhorn Mountain Wilderness Study Area Proposal", dated June 1980;
- (4) the South San Juan Wilderness Expansion Study Area, consisting of approximately thirty-two thousand eight hundred acres in the San Juan National Forest, as generally depicted on a map entitled "Montezuma Peak-V Rock Trail Wilderness Study Area", dated June 1980;
- (5) the Piedra Wilderness Study Area, consisting of approximately forty-one thousand five hundred areas in the San Juan National Forest, as generally depicted on a map entitled "Piedra Wilderness Study Area Proposal", dated June 1980;
- (6) the Sangre de Cristo Wilderness Study Area, consisting of approximately two hundred and twenty-one thousand acres in the Rio Grande and San Isabel National Forests, as generally depicted on a map entitled "Sangre de Cristo Wilderness Study Area Proposal", dated June 1980;

(7) the Spanish Peaks Wilderness Study Area, consisting of approximately nineteen thousand six hundred acres in the San Isabel National Forest, as generally depicted on a map entitled "Spanish Peaks Wilderness Study Area Proposal", dated June 1980;

(8) the Vasquez Peak Wilderness Study Area, consisting of approximately twelve thousand eight hundred acres in the Arapaho National Forest, as generally depicted on a map entitled "Vasquez Peak Wilderness Study Area Proposal", dated September 1980; and

(9) the West Needle Wilderness Study Area, consisting of approximately fifteen thousand eight hundred acres in the San Juan National Forest, as generally depicted on a map entitled "West Needle Wilderness Study Area Proposal", dated June 1980.

(b) The Secretary of the Interior and the Secretary of Agriculture shall review jointly the Wheeler Geologic Study Area consisting of approximately fourteen thousand acres in the Gunnison National Forest, as generally depicted on a map entitled "Wheeler Geologic Study Area Proposal", dated November 1980, and within three years following the date of enactment of this Act shall report to the President and to Congress their recommendations for management of the lands in such study area. In making such review and report, such Secretaries shall consider

(1) the natural, historical, cultural, scenic, economic, educational, scientific, energy, mineral, and geologic values of the study area;

(2) the management and protection of fragile geologic resources within the area;

(3) possible land management options or designations including national park, national monument, or national recreation area designation; addition to the National Wilderness Preservation System; special administrative designations; and management under the general laws and regulations applicable to the National Forest System;

(4) the effect of possible land management options on consumers, national security, and national, State and local economies, including timber harvest, tourism, grazing, energy, water, mineral, and other commercial activities;

(5) the need for additional mineral exploration in such area; and

(6) the suitability and desirability of permanent or temporary road or other mechanized access into the study area, with special attention to access by the elderly and the handicapped.

(c) Subject to valid existing rights, the study areas designated by subsections (a) and (b) of this section shall, until Congress determines otherwise, be administered by the Secretary of Agriculture so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System: Provided, That with respect to grazing of livestock and oil, gas, or mineral exploration and

development activities, such study areas shall be administered according to the laws generally applicable to the National Forest System.

Sec. 106. (a) The Secretary of Agriculture shall review and within three years after the date of enactment of this Act, shall report to the President and the Congress in accordance with subsections 3(c) and 3(d) of the Wilderness Act of 1964 (78 Stat. 892), his recommendations on the suitability or unsuitability for inclusion in the National Wilderness Preservation System of the following area:

(1) the Oh-Be-Joyful Wilderness Study Area, consisting of approximately five thousand five hundred acres in the Gunnison National Forest, as generally depicted on a map entitled "Oh-Be-Joyful Wilderness Study Area Proposed", dated November 1980.

(b) Subject to valid existing rights, the Oh-Be-Joyful Wilderness Study Area shall be administered by the Secretary of Agriculture so as to maintain its presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System: Provided, That such management requirement shall not extend beyond a period of two years from the date of submission to Congress of the Presidents recommendation that such area be designated as wilderness, or beyond the date of submission to Congress of the Presidents recommendation that such area not be designated as wilderness: Provided further, That, with respect to oil, gas and mineral exploration and development operations in such study area, the terms of the Wilderness Act of 1964 shall apply.

Sec. 107. (a) * * *

(b) On the basis of such review, the Congress hereby determines and directs that

(1) without passing on the question of the legal and factual sufficiency of the RARE II Final Environmental Statement (dated January 1979) with respect to National Forest System lands in States other than Colorado, such statement shall not be subject to judicial review with respect to National Forest System lands in the State of Colorado;

(2) with respect to the National Forest System lands in the State of Colorado which were reviewed by the Department of Agriculture in the second Roadless Area Review and Evaluation (RARE II), except those lands remaining in further planning upon enactment of this Act, areas listed in sections 105 and 196 of this Act, or previously congressional designated wilderness study areas, that review and evaluation shall be deemed for the purposes of the initial land management plans required for such lands by the Forest and Range Land Renewable Resources Planning Act of 1974 as amended by the National Forest Management Act of 1976 to be an adequate consideration of the suitability of such lands for inclusion in the National Wilderness Preservation System and the Department of Agriculture shall not be required to review the wilderness option prior to the revision of the initial plans and in no case prior to the date established by law for completion of the initial planning cycle;