Congressional Research Service

MEMORANDUM April 13, 2012

To: Rep. Martin Heinrich
Attention: Maya Hermann

From: Kristina Alexander
Legislative Attorney

Subject: **H.R. 4089 Section 104(e) and Its Impacts on Wilderness Management**

You have asked for a brief memorandum on how Section 104(e) of H.R. 4089 might affect wilderness management. The Sportsmen's Heritage Act of 2012, H.R. 4089, is a bill that addresses hunting and fishing on all federal lands, but does not include lands held in trust for Indian tribes[1] or federal property on the Outer Continental Shelf.[2] Because of time constraints, this memorandum will take a narrow look at Section 104(e) by itself, and not in the context of other provisions of the bill. Because of imprecise wording in the bill, the full extent of the bill's impact on the Wilderness Act is unclear. However, it appears that Section 104(e) would not only allow any activity related to fishing, hunting or wildlife conservation to be conducted in wilderness areas, but it may also obviate the primacy of wilderness values in determining permissible activities in wilderness areas.

Background

Section 104(e) pertains to hunting and fishing in wilderness areas. Wilderness areas are governed by the Wilderness Act[3] and by any specific statute establishing a wilderness area.[4] The Wilderness Act, with few exceptions, prohibits commercial enterprises, mechanized transportation and equipment, structures, and roads.[5] Wilderness areas occur in national forests, national parks, national wildlife refuges, and on public lands managed by the Bureau of Land Management (BLM).

Section 104(e) has two subsections: 1) addressing hunting and fishing as it relates to administering wilderness areas; and 2) interpreting how Section 4(a) of the Wilderness Act applies to federal management of wilderness areas. Because of relatively vague wording in this section, including what appears to be a typographical error, the impact this bill might have on wilderness areas, not just for hunting and fishing, but for overall wilderness management is not clear.

[1] H.R. 4089, § 103(1)(B).

[2] H.R. 4089, § 104(d)(1).

[3] P.L. 88-577; 16 U.S.C. §§ 1131-1136.

[4] For details on wilderness, see CRS Report RL31447, *Wilderness: Overview and Statistics*, by Kristina Alexander.

[5] P.L. 88-577, § 4(c); 16 U.S.C. § 1133(c).

Section 104(e)(1)

Section 104(e)(1) reads as follows:

> The provision of opportunities for hunting, fishing and recreational shooting, and the conservation of fish and wildlife to provide sustainable use recreational opportunities on designated wilderness areas on Federal public lands[6] shall constitute measures necessary to meet the minimum requirements for the administration of the wilderness area.

You indicated that this section may have been intended to allow construction of watering facilities to attract game. According to a Ninth Circuit decision, construction of watering structures in a wilderness area by the Fish and Wildlife Service to attract bighorn sheep lacked consistency with the Wilderness Act despite conservation of bighorn sheep being a historical purpose of the area.[7]

The Section 104(e)(1) phrase "necessary to meet the minimum requirements for the administration of the wilderness area" is almost a direct quote from the Wilderness Act, P.L. 88-577, § 4(c), which states that "no commercial enterprise[s] and no permanent road[s]" are allowed in a wilderness area except "as necessary to meet the minimum requirements for the administration of the area."[8] That section of the Wilderness Act continues: "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."

The language of Section 104(e)(1) would appear to change the meaning of minimum requirements in the Wilderness Act, by making the term *minimum* to appear to allow any activity related to hunting, fishing and wildlife conservation. The subsection would also deem the "provision of opportunities for hunting, fishing and recreational shooting, and the conservation of fish and wildlife" a necessary measure under the Wilderness Act. The language could be construed as opening wilderness areas to virtually any activity related to hunting and fishing, even if otherwise inconsistent with wilderness values. Despite the Wilderness Act's explicit ban on temporary and permanent roads, if H.R. 4089 were passed, roads arguably could be constructed in wilderness areas if they provided opportunity for hunting, fishing, and wildlife conservation. Off-road vehicles and other machines might be authorized under this provision, as well as additional commercially guided tours. Because application of the National Environmental Policy Act is effectively barred by H.R. 4089, Section 104(c), the potential impairment of wilderness values by those actions might not be considered.

Section 104(e)(2)

Section 104(e)(2) appears to have a broader impact. It states:

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[6] *Federal public lands* are defined within H.R. 4089, § 103(1)(a) as "any land or water that is — (i) owned by the United States; and (ii) managed by a Federal agency (including the Department of the Interior and the Forest Service) for purposes that include the conservation of natural resources." This encompasses more lands than the definition of *public lands* from the Federal Land Policy and Management Act (FLPMA), P.L. 94-579 § 103(e): *public lands* are defined as "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management ... except — (1) lands located on the Outer Continental Shelf; and (2) lands held for the benefit of Indians, Aleuts, and Eskimos."

[7] Wilderness Watch, Inc. v. U.S. Fish and Wildlife Service, 629 F.3d 1024 (9th Cir. 2010).

[8] 16 U.S.C. § 1133(c).

> The 'within and supplemental to' Wilderness purposes, as provided in Public Law 88-577, section 4(c), means that any requirements imposed by that Act shall be implemented only insofar as they facilitate or enhance the original or primary purpose or purposes for which the Federal public lands or Federal public land unit was established and do not materially interfere with or hinder such purpose or purposes.

The "within and supplemental to" language appears in P.L. 88-577, Section 4(a), not Section 4(c), in what appears to be a typographical error in H.R. 4089.

Section 4(a) of the Wilderness Act states: "The purposes of this chapter are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered..." The Ninth Circuit has interpreted "within and supplemental" to mean that the land management agency must comply with both the Wilderness Act and the act governing that type of land.[9]

In 1985, another court, after reviewing the legislative history of the Wilderness Act, rejected the argument that wilderness purposes were secondary to the purposes of the other land management acts. The court held that the Wilderness Act purposes came first, stating: "both the legislative history and the Wilderness Act itself are replete with statements expressing Congress' intent that each of the purposes of the Act are primary and 'crucial.'"[10] Those purposes included conservation as well as public enjoyment.[11]

The language proposed by Section 104(e)(2) would appear to obviate the primacy of the Wilderness Act purposes, meaning wilderness values would apply only to the extent that they did not conflict with other land management statutes. This language may not apply to BLM areas, however, as Section 4(a) of the Wilderness Act appears to apply only to national forests, national parks, and national wildlife refuges.

While Section 104(e)(2) of H.R. 4089 appears broad, it is not clear how far the language could be applied, especially with regard to the Wilderness Act Section 4(c)'s limitations on commercial and mechanized activities in Section 4(c) of the Wilderness Act. For example, while it appears that timber harvests could be allowed,[12] it would seem difficult to harvest timber without roads or machines.

Section 104(e)(2) appears contrary to considerable legal precedent in wilderness management. Taken in conjunction with the proposed revisions of Section 104(e)(1), it appears that any activity related to hunting, fishing, and wildlife conservation would be permitted, despite any potential conflict with wilderness values, provided the law for the national park, national forest, or national wildlife refuge allowed such activity. This might mean that cabins or other structures in wilderness areas that otherwise were deemed inconsistent with wilderness values[13] could be replaced, although current case law does not

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[9] Wilderness Watch, Inc. v. U.S. Fish and Wildlife Service, 629 F.3d 1024, 1027 (9th Cir. 2010).

[10] Sierra Club v. Block, 622 F. Supp. 842, 861 (D.C. Colo. 1985).

[11] Id.

[12] Although the Wilderness Act states that the act will not interfere with the purpose for which national forests are established ("securing favorable conditions of water flows, and to furnish a continuous supply of timber"), legislative history reveals that the forest units selected in the act to be wilderness areas were not eligible for timber harvest: "There is no timber harvest today from the lands being considered for inclusion in the wilderness system under [the bill that became P.L. 88-577] ... The national forest lands affected by [the bill that became P.L. 88-577] are not now subject to exploitation for timber. Timber sales were barred by executive regulation, with rare exceptions, when the 14.3 million acres of national forests were set aside in the twenties and thirties for preservation as wilderness. Actually, because of their inaccessibility, there was little need for such a regulation. Most of the areas were, as they always had been, and still are, too inaccessible for exploitation." S. Rep. 88-109 at 4 (1963).

[13] See Olympic Park Associates v. Mainella, 2005 WL 1871114 (W.D. Wash. Aug. 1, 2005) (replacing shelters would violate the Wilderness Act); Wilderness Watch v. Mainella, 375 F.3d 1085 (11th Cir. 2004) (buildings in wilderness area could not be (continued...)

allow repairs or replacement. Dams that were built to facilitate fishing prior to the area's designation as wilderness could be maintained,[14] and new dams possibly could be constructed. Potentially, the commercial salmon stocking project that the Ninth Circuit deemed to violate the Wilderness Act[15] would be allowed, as well as other commercial activities such as pack tours.[16] Thus, Section 104(e)(2) could potentially be interpreted to conflict with the Wilderness Act's stated purpose of establishing areas "where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."[17]

(...continued)

maintained).

[14] See High Sierra Hikers v. U.S. Forest Service, 436 F. Supp. 2d 1117, 1131 (E.D. Cal. 2006) (holding that replacement of historic dams was inconsistent with the wilderness values of the area).

[15] Wilderness Society v. U.S. Fish and Wildlife Service, 353 F.3d 1051 (9th Cir. 2003).

[16] High Sierra Hikers v. Moore, 561 F. Supp. 2d 1107 (N.D. Cal. 2008) (holding that reduction of guided pack tours was consistent with wilderness values).

[17] P.L. 88-577, § 1(c); 16 U.S.C. § 1131(c).