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The Omnibus Public Land Management Act of 2008: Senate Amendment 5662 as Submitted on September 26, 2008

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Nic Lane, Coordinator, Nicole T. Carter, Betsy A. Cody, M. Lynne Corn, Peter Folger, Ross W. Gorte, Carol Hardy Vincent, Pervaze A. Sheikh, and David L. Whiteman
Resources, Science, and Industry Division
Kristina Alexander, Cynthia Brougher, and Carol Toland
American Law Division
Gail McCallion, Roger Walke
Domestic Social Policy Division
Sandra L. Johnson
Knowledge Services Group

Congressional Research Service

Prepared for Members and Committees of Congress

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Summary

Senate Amendment 5662, the Omnibus Public Land Management Act of 2008, was submitted as an amendment intended to be proposed to H.R. 5151 on September 26, 2008. Two existing packages have been paired to form S.Amdt. 5662: S. 3213 is a collection of over 90 individual bills which is on the Senate calendar, was combined with an additional 53 bills that were approved by a unanimous vote of the Senate Committee on Energy and Natural Resources on September 11, 2008.

Given the large number of individual bills that make up this omnibus amendment, it has numerous supporters and detractors. Proponents may praise what they view as protection of natural resources such as wilderness and national trails, while detractors' criticisms may see these same actions as limiting access to natural resources such as oil and gas. Debate over provisions in the amendment generally focus on decisions to authorize federal funding; land use priorities; and the appropriateness of divesting federal ownership in federal lands, among others.

This document provides an overview of key policy issues and debates associated with the subject of each of the amendment's 12 Titles. Additionally, it highlights specifically controversial provisions within each Title. Most provisions within S.Amdt. 5662 concern public lands measures, federal land management agencies, and other federal land management issues. However several Titles focus on the Bureau of Reclamation's projects, water settlements, and other natural resources issues. This report is not intended to be a complete summary of each issue or provision represented by the amendment. The 12 Titles of S.Amdt. 5662 are:

Title I — Additions to the National Wilderness Preservation System
Title II — Bureau of Land Management Authorizations
Title III — Forest Service Authorizations
Title IV — Forest Landscape Restoration
Title V — Rivers and Trails
Title VI — Department of the Interior Authorization
Title VII — National Park Service Authorizations
Title VIII — National Heritage Areas
Title IX — Bureau of Reclamation Authorizations
Title X — Water Settlements
Title XI — United States Geological Survey Authorizations
Title XII — Miscellaneous

Contributing CRS Staff

Staff Member	Area of Expertise	CRS Division	Phone
Kristina Alexander	Legal Issues — Public Lands, Natural Resources	American Law Division	7-8597
Cynthia Brougher	Legal Issues — Water Law	American Law Division	7-9121
Nicole T. Carter	Water Policy	Resources, Science, and Industry Division	7-0854
Betsy A. Cody	Bureau of Reclamation, Water Policy	Resources, Science, and Industry Division	7-7229
M. Lynne Corn	Department of the Interior Authorizations	Resources, Science, and Industry Division	7-7267
Peter Folger	Unites States Geological Survey	Resources, Science, and Industry Division	7-1517
Ross W. Gorte	Forest Service, Wilderness Lands, National Park Service	Resources, Science, and Industry Division	7-7266
Carol Hardy Vincent	Department of the Interior, National Heritage Areas	Resources, Science, and Industry Division	7-8651
Sandra L. Johnson	Rivers and Trails	Knowledge Services Group	7-7214
Nic Lane	Bureau of Reclamation, Aging Infrastructure	Resources, Science, and Industry Division	7-7905
Gail McCallion	Historic Preservation Fund	Domestic Social Policy	7-7758
Pervaze A. Sheikh	Ecosystem Issues	Resources, Science, and Industry Division	7-6070
Carol Toland	Legal Issue — Budget and Appropriations	American Law Division	7-4659
Roger Walke	Native American Water Settlements	Domestic Social Policy	7-8641
David L. Whiteman	National Park Service	Resources, Science, and Industry Division	7-7786

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The Omnibus Public Land Management Act of 2008: Senate Amendment 5662 as Submitted on September 26, 2008

Background and Introduction[1]

Senate Amendment 5662, the Omnibus Public Land Management Act of 2008, was submitted as an amendment intended to be proposed to H.R. 5151 on September 26, 2008;[2] it includes nearly 150 public lands and natural resources bills. The amendment itself is a combination of two other packages of bills. The primary contributor to the amendment, providing the basis of roughly two-thirds of the language, is S. 3213 which itself is a collection of over 90 individual bills that had been placed on the Senate calendar.[3] The balance of legislative language in S.Amdt. 5662 is derived from the 53 bills approved by a unanimous voice vote of the Senate Committee on Energy and Natural Resources, on September 11, 2008.[4]

The intent of this report is to provide an overview of policy issues and controversies commonly associated with the subject of each Title, as well as to highlight any specifically controversial provisions within each Title. This document is not, however, a complete summary of each issue or provision represented by the amendment. The majority of the provisions under the twelve titles of S.Amdt. 5662 are public lands measures related to wilderness areas, the land management agencies such as the Bureau of Land Management, the National Park Service, the Forest Service, and other federal land management issues. However there are also sections focused on the Bureau of Reclamation's projects, water settlements, and other natural resources issues.

Supporters and critics of provisions within S.Amdt. 5662 appear to disagree broadly in their positions regarding the role of the federal government in land management,[5] and decisions about land management priorities such as whether to

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[1] Prepared by Nic Lane, Analyst in Natural Resources Policy; Kristina Alexander, Legislative Attorney; and Carol Toland, Legislative Attorney.

[2] *Congressional Record* (September 26, 2008), p. S9731.

[3] *Congressional Record* (June 26, 2008), pg\. S6292.

[4] See [http://energy.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1632d80e-b5cc-4c41-b791-06557240313e&Month=9&Year=2008&Party=0].

[5] Western Business Roundtable, *Roundtable Says Land Bill Will Give Feds the Ability to Further Restrict Access to Millions of Acres in West* (October 22, 2008). Available at [http://www.westernroundtable.com/detail+view.aspx?selectmoduleid

(continued...)

leave federal lands open to energy development and other commercial activities versus making land use designations that restrict or prohibit some activities.[6] Proponents may praise what they view as protection of natural resources such as wilderness and national trails, funding authorizations for programs which they support, capital outlays for aging infrastructure, and water settlements, as examples.

Some have expressed concerns focused on land use priorities such as leaving federal lands open to energy development versus other management decisions which may limit the types of activities that are authorized on federal land. Some opponents to provisions within S.Amdt. 5662 have cited limitations on energy exploration and development specifically.[7] It may well be the case that limitations on commercial activities such as energy development are an inherent characteristic of specific actions, such as wilderness designations, which by their very nature limit or prevent some commercial activities. Broad ideological controversies associated with activities under any of the amendment's twelve titles are discussed within the relevant sections below. As an overview of the amendment, this report is not intended to be an analysis of the specific effects of S.Amdt. 5662 on energy exploration or production, but rather to note this issue as a concern which has been raised regarding the amendment. As S.Amdt. 5662 has no specific "Energy" title, any direct or indirect effect on energy activities arise through the numerous provisions under titles such as those under Title I — Additions to the National Wilderness Preservation System.

In response to concerns by property owners near the affected federal lands, this amendment includes many assurances that private property will not be taken by condemnation, that access rights will continue, and that regulatory schemes will not extend beyond the boundaries of the protected land. Nonetheless, not all private landowner interests may be mollified by these assurances.

Additionally some may have concerns regarding the authorization of federal funding which may fall into two general categories: that a specific authorization of funding is inappropriate for the federal government; or that a low perceived benefit to cost ratio for a given program would provide little value for federal dollars expended.

In general, the funding figures associated with specific provisions that make up S.Amdt. 5662 do not represent physical outlays of Treasury funds, but rather are authorizations for appropriation. The formal appropriations process consists of two sequential steps: (1) enactment of an authorization measure that may create or continue an agency or program as well as authorize the subsequent enactment of

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[5] (...continued)
=4892&ArticleID=115&reftab=2099&title=Roundtable_Says_Land_Bill_Will_Give_Feds_the_Ability_to_Further_Restrict_Access_to_Millions_of_Acres_in_West].

[6] New West, *Senate May Take Up Broad Public Lands Bill in November (* October 5, 2008). See [http://www.newwest.net/topic/article/senate_may_take_up_broad_public_lands_bill_in_november/C559/L559/].

[7] Western Business Roundtable, *Roundtable Says Land Bill Will Give Feds the Ability to Further Restrict Access to Millions of Acres in West*, October 22, 2008.

appropriations; and (2) enactment of appropriations to provide funds for the authorized agency or program.[8] While funding figures presented in the amendment indicate what some may recommend for a specific provision or program, the actual funding appropriated may be more, less, or none at all.

When appropriations are made outside of the aforementioned two step process, that is, when appropriations are made in an act other than an appropriations act, it is known as direct spending. The Congressional Budget Office (CBO) analyses pending legislation and may make a number of determinations regarding the bill, including whether it contains direct spending provisions. Although CRS does not make determinations on direct spending, we have included a description of the criteria for direct spending to provide context for those interested in the funding authorizations within S.Amdt. 5662.

Direct spending, also known as mandatory spending, has been defined as entitlement authority or budget authority[9] provided by law other than appropriation acts.[10] Direct spending may be "temporary or permanent... [and] definite or indefinite" with respect to the authority's duration and the amount of funding authorized,[11] but the defining factor is that the budget authority is made available in an act other than an appropriations act.[12] Direct spending allows Congress to control spending "indirectly rather than directly through appropriations acts" by "defining eligibility and setting the benefit or payment rules" for the spending.[13]

Another issue is the appropriateness of divesting federal ownership in federal lands. Many of the provisions in this amendment surrender federal ownership in lands, giving property to states, local interests, or private entities. In general, federal policy has been against divestiture. The enactment of the Federal Land Policy and Management Act of 1976 (FLPMA) formally ended the previous disposal policy, expressly declaring that the national policy generally was to retain the remaining lands in federal ownership. Section 102(a) of FLPMA states: "The Congress declares

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[8] For more information on the appropriations process see CRS Report RS20371, *Overview of the Authorization-Appropriations Process*, by Bill Heniff Jr.

[9] See United States Government Accountability Office, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP, at 20-24 (2005), available at [http://www.gao.gov/new.items/d05734sp.pdf].

[10] The Government Accountability Office provided a definition of direct spending in its most recent glossary of federal budget terminology, which was published in 2005. See *supra* note 9, at 44-45. Congress codified the definition of direct spending in 2 U.S.C. § 900(c)(8) which has now expired. According to the "Effective and Termination Dates" Note to § 900, the direct spending provision expired on September 30, 2006. Direct spending originally was defined in the Budget Enforcement Act of 1990 (P.L. 101-508), which amended the Balanced Budget and Emergency Deficit Control Act of 1985 (P.L. 99-177).

[11] See *supra* note 9, at 45.

[12] See Office of Management and Budget, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2009, p.* 394 (2008), available at [http://www.whitehouse.gov/omb/budget/fy2009/pdf/spec.pdf].

[13] See *supra* note 9, at 66.

that it is the policy of the United States that — (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this act, it is determined that disposal of a particular parcel will serve the national interest."

Senate Amendment 5662, Titles I — XII

This section describes each of the Amendment's 12 Titles including a description of broad policy issues associated with the subject of each Title, as well as a highlight of specifically controversial provisions within each Title.

Title I — Additions to the National Wilderness Preservation System[14]

The 1964 Wilderness Act[15] established the National Wilderness Preservation System and directed that only Congress can designate federal lands as part of the national system. Proponents argue that these relatively pristine areas warrant protection from development. The lands' undeveloped nature can result in high-quality water, habitat for rare wildlife species, and recreational opportunities unavailable on other lands. Opponents respond that the restrictions on most commercial activities, motorized access, and roads, structures, and facilities in wilderness areas is unnecessary and can be harmful to local economies.[16] Commercial timber harvesting, mining, and oil and gas leasing and development are generally prohibited in congressionally designated wilderness areas.[17] However, the Wilderness Act explicitly authorized continued livestock grazing in wilderness created from national forests,[18] and allowed commercial recreational services.[19] The act also allowed continued aircraft and motorboat access to areas,[20] and authorized the President to allow certain water projects and related facilities.[21] Finally, the act allowed exceptions to the prohibitions "as necessary to meet minimum requirements for the administration of the area ... (including measures required in emergencies involving the health and safety of persons within the area)" and "as may be necessary

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[14] Prepared by Ross W. Gorte, Specialist in Natural Resources Policy.

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

[16] See CRS Report RL33827, *Wilderness Laws: Permitted and Prohibited Uses*, by Ross W. Gorte.

[17] Most wilderness statutes provide for these restrictions "subject to valid existing rights." Thus, where mining claims or oil or gas (or other) leases existed prior to the designation of the area, and are maintained as provided for in mineral law, those claims or leases can be developed "subject, however, to such reasonable rules governing ingress and egress as may be prescribed by the Secretary ..." (16 U.S.C. § 1133(d)(3)).

[18] 16 U.S.C. § 1133(d)(4)(2).

[19] 16 U.S.C. § 1133(d)(5).

[20] 16 U.S.C. § 1133(d)(1).

[21] 16 U.S.C. § 1133(d)(4)(1).

in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable."[22]

Every Congress since the 90th has added to the System, including the 110th, which added 106,000 acres of wilderness in Washington in P.L. 110-229. Today, the National Wilderness Preservation System includes 107.55 million acres in 44 states. Title I of S.Amdt. 5662 includes 14 subtitles that add to the Wilderness System. In total, the 14 subtitles would designate 1,775,275 acres of wilderness in 8 states — CA, CO, ID, MI, NM, OR, VA, and WV — in 35 new areas and additions to 25 existing wilderness areas. (Section 2403, in Title II, would add another 66,280 acres in a new wilderness area in Colorado.)

Wilderness bills commonly contain additional provisions, designating lands for other purposes (recreation areas, wild rivers, etc.), directing land exchanges, modifying boundaries, and more. The 14 subtitles of S.Amdt. 5662 are no exception; but none of these provisions, nor the wilderness designations themselves, seem to have generated substantial controversy. However, undoubtedly, there are some interests who oppose enactment of each (or even of all) of the provisions and designations.

Title II — Bureau of Land Management Authorizations[23]

Title II of S.Amdt. 5662 contains diverse provisions related to the Bureau of Land Management (BLM) in the Department of the Interior. A focus of congressional attention has been on provisions to establish legislatively, within BLM, the National Landscape Conservation System (NLCS). Subtitle A states that it is not intended to alter the way the areas within the NLCS are currently managed. The BLM created the NLCS administratively in 2000 to focus management and public attention on its specially protected conservation areas. According to BLM, the mission of the System is to conserve, protect, and restore for present and future generations the nationally significant landscapes that have been recognized for their outstanding archaeological, geological, cultural, ecological, wilderness, recreation, and scientific values.[24] The System consists today of about 27 million acres of land, with more than 850 federally recognized units. These units include national monuments, national conservation areas, wilderness areas, and wilderness study areas, as well as thousands of miles of national historic and scenic trails and wild and scenic rivers.

There are mixed views on whether the NLCS should be established legislatively. Supporters, including the BLM, assert that this will provide legislative support and direction to the BLM and formalize and strengthen the agency's conservation system within the context of its multiple use mission. Opponents have expressed concern

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[22] 16 U.S.C. § 1133(c) and 16 U.S.C. § 1133(d)(1).

[23] Prepared by Carol Hardy Vincent, Specialist in Natural Resources Policy; Cynthia Brougher, Legislative Attorney; and Kristina Alexander, Legislative Attorney.

[24] U.S. Dept. of the Interior, Bureau of Land Management, *Budget Justifications and Performance Information, Fiscal Year 2009*, p. I-78.

that it could effectively establish new, standardized requirements for disparate areas of the system. Other provisions of S.Amdt. 5662 would establish new national monuments, national conservation areas, or wilderness areas,[25] and some of these provisions make explicit that the areas are to be managed as part of the NLCS. Additional support for the NLCS, and for establishing such areas, centers on a desire for additional federally protected areas. Opposition stems from concern that areas would be removed from multiple uses, possibly including oil and gas development, motorized recreation, and livestock grazing.

An issue that often arises with federally protected areas involves the water rights related to those areas. S.Amdt. 5662 includes a provision that addresses the management of federal water rights in a designated area of Colorado. That water rights provision states that no reserved water rights are created and provides that the federal government would acquire any necessary water rights for the purposes of the designated area through Colorado state law, not by federal reservation. However, Colorado water is overallocated, meaning that some users already holding water rights cannot fulfill those rights. The proposed legislation provides that if the state's conservation board modifies some water rights such that existing rights to the designated area are insufficient to fulfill the purposes of designation, the Secretary would pursue water rights under state law to fulfill those purposes. Because the proposed legislation does not reserve federal water rights for the area and because Colorado's water is overallocated, it would likely be very difficult for the Secretary to pursue sufficient rights to fulfill the purposes of the designation.

Other provisions of S.Amdt. 5622 would provide for the disposal of BLM or other federal lands to cities, private entities, and other recipients. In some cases, the provisions provide for an exchange of lands between the federal government and non-federal land owner. Currently, BLM can dispose of its public lands under several authorities. A primary means for BLM to both dispose of and acquire lands is through exchanges under the Federal Land Policy and Management Act of 1976 (FLPMA).[26] These authorities impose conditions or requirements on the land transactions. For instance, under FLPMA, BLM can sell certain tracts of public land that meet specific criteria for not less than their fair market value. Further, the agency can exchange land if it serves the public interest, and the federal and non-federal lands in the exchange are located in the same state and are of roughly equal value, among other requirements.

Each Congress tends to consider many legislative proposals providing for specific land disposals and exchanges, as in S.Amdt. 5622. Such proposals have

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[25] Still another provision of the Senate amendment (§ 2608) would release certain BLM lands in Nevada from being managed without impairing their suitability for designation as wilderness. For a discussion of the controversies surrounding wilderness designation, see the summary of Title I in this report.

[26] Information on BLM authorities to dispose of land and to exchange land is included in CRS Report RL34273, *Federal Land Ownership: Current Acquisition and Disposal Authorities*, by Ross W. Gorte and Carol Hardy Vincent. Information on BLM land exchanges, including associated controversies, is included in CRS Report RS21967, *Land Exchanges: Bureau of Land Management Process and Issues*, by Carol Hardy Vincent.

been supported as authorizing land transactions to worthy recipients that may not be allowed under existing authorities. In other cases, they have been supported as directing or expediting particular transactions that are allowed under law but that are not being accomplished by the BLM in the time frame desired by Congress. More broadly, land disposals have been favored by those who assert that the federal government owns and manages too much land, and that federal holdings should be conveyed to state or private ownership. By contrast, such legislative proposals have been opposed on the grounds that they are not in the public interest, as land is removed from federal ownership through conveyance to nonfederal entities. They have further been opposed on the assertion that the federal government does not consistently adhere to requirements in law, such as by obtaining the fair market value for land it sells.

In one particular instance, regarding the Southern Nevada Limited Transition Area Conveyance, the proposed amendment appears to allow the city of Henderson, NV to use the property in a manner inconsistent with the act, and then sell the property if the Secretary of the Interior fails to act on the right to enforce a reversion. However, there is no provision of time in this section, making unclear how much time is given for the Secretary to consider the reversion before the city can sell the property. Taken to the extreme, it could allow the sale before the Secretary was even aware of the inconsistent use.

Title III — Forest Service Authorizations[27]

The Forest Service, in the Department of Agriculture, administers 192 million acres of federal land for sustained yields of multiple uses. Boundaries of these national forests were largely determined by presidential proclamations, but now can only be changed by an act of Congress, and agency authority to dispose of lands by sale or exchange is limited.[28] Many of the authorities for protecting and managing the lands and regulating the uses are permanent; others are temporary, often created for a test period. Title III of S.Amdt. 5662 has five subtitles, though none of them appear to be broadly controversial, disputes may arise when conflicting uses can occur on the same site, or when sites are reserved for some uses and excluded from others.

The five subtitles in Title III are related only by the fact that they affect Forest Service lands or management. Subtitle A makes permanent the authority to reach agreements with other governments, private landowners, or other entities on cooperative efforts to restore or enhance watersheds for fish and wildlife habitat, water quality management, and public safety from natural disasters. Subtitle B requires an annual report to Congress on practices and training to improve the safety of wildland firefighters, because of continuing fatalities (generally 10 to 30 deaths annually over the past two decades).

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[27] Prepared by Ross W. Gorte, Specialist in Natural Resources Policy.

[28] See CRS Report RL34273, *Federal Land Ownership: Current Acquisition and Disposal Authorities, by* Ross W. Gorte and Carol Hardy Vincent.

Subtitle C withdraws (makes unavailable) certain lands in the Wyoming Range of the Bridger-Teton National Forest (WY) from mining claims or mineral leases, "subject to valid existing rights." It also allows for donations of valid existing rights. Subtitle D makes several land conveyances, generally for public purposes (e.g., a cemetery, a fire and rescue station, a public shooting range), and directs two land exchanges. Finally, Subtitle E directs a study of possibilities that could "assist in maintaining the open space characteristics of land that is part of the mountain backdrop of communities" for a portion of the Front Range of the Rocky Mountains in Colorado.

Title IV — Forest Landscape Restoration[29]

Wildfires on Forest Service lands seem to have been getting more severe; acres burned annually in 2005, 2006, and 2007 were more than in any other years since recordkeeping began in 1960.

Many assert that the threat of severe wildfires and the cost of suppressing wildfires have grown because many forests have unnaturally high fuel loads (e.g., dense undergrowth and dead trees).[30] Restoring forests to more historically natural conditions (fewer but larger trees, with less undergrowth) is widely perceived as desirable to reduce wildfire severity, and thus wildfire damages and suppression costs.[31] However, despite the enactment of the Healthy Forests Restoration Act of 2000[32] and implementation of President Bush's Healthy Forests Initiative, many are concerned that restoration treatments are still delayed by procedural hurdles.

Title IV of S.Amdt. 5662 establishes a program for forest landscape restoration. It creates a collaborative (diverse, multi-party) process for geographically dispersed, long-term (10-year), large-scale (at least 50,000 acres) strategies to restore forests, reduce wildfire threats, and utilize the available biomass. The authorization is $40 million annually for 10 years, and requires multi-party monitoring of and annual reporting on activities.

Title V — Rivers and Trails[33]

Subtitle A concerns additions to the National Wild and Scenic Rivers System. The Wild and Scenic Rivers Act[34] established the System and a policy of preserving designated free-flowing rivers for the benefit and enjoyment of present and future

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[29] Prepared by Ross W. Gorte, Specialist in Natural Resources Policy.

[30] Another reason is the increasing numbers of homes in and near forests; see CRS Report RS21880, *Wildfire Protection in the Wildland-Urban Interface*, by Ross W. Gorte.

[31] See CRS Report RL34517, *Wildfire Damages to Homes and Resources: Understanding Causes and Reducing Losses*, by Ross W. Gorte.

[32] P.L. 108-148; 16 U.S.C. §§ 6501 et al.

[33] Prepared by Sandra L. Johnson, Information Research Specialist; and Cynthia Brougher, Legislative Attorney.

[34] 16 U.S.C. §§ 1271-1287.

generations. The act requires that designated river units be classified as wild, scenic, or recreational rivers, based on the condition of the river, the amount of development in the river or on the shorelines, and the degree of accessibility by road or trail at the time of designation. Instead of mandatory conservation measures, the designation is to preserve the character of a river. The act neither prohibits development nor gives the federal government control over private property. The act specifically: (1) prohibits federal dams and other water projects that would harm river values; (2) protects outstanding natural, cultural, or recreational values; (3) ensures water quality is maintained; and, (4) requires a comprehensive river management plan that addresses resource protection and development of lands and facilities.

Designation and management of lands within river corridors have been controversial in some cases, with debates over the effect of designation on private lands within the river corridors, the impact of activities within a corridor on the flow or character of the designated river segment, and the extent of local input in developing management plans. Since 1968, 166 rivers with 11,434 miles in 38 states and Puerto Rico, have been designated. Under Subtitle A, three rivers are designated — Fossil Creek, AZ; Snake River Headwaters, WY; and Taunton River, MA — totaling 461 miles. Under Subtitle B, a study of the Missisquoi and Trout Rivers (70 miles) is proposed for possible inclusion.

Previous designation of the Snake River Headwaters in Wyoming proved to be a controversial addition to the Wild and Scenic Rivers System. Questions were raised regarding the impact that designation would have on existing water rights, particularly for Jackson Lake. S.Amdt. 5662 would address those questions by providing that the designation would not affect existing rights and would not affect the management and operation of Jackson Lake or Jackson Lake Dam.

Subtitle C focuses on additions to the National Trails System. On October 2, 1968, the National Trails System Act[35] became law and established the Trails System. The act authorized a national system of trails to provide additional recreation opportunities and to promote the preservation of access to outdoor areas and historic resources of the nation. Since the designation of the Appalachian and Pacific Crest National Scenic Trails as the first two components, the system has grown to include 26 national trails. Under Subtitle C, six additional trails are designated to the system. Also, under Subtitle C, proposed legislation directs the National Park Service to update the feasibility studies of the Oregon, Pony Express, California, and Mormon Pioneer National Historic Trails to include shared routes, cutoff trails, and other trail segments.

Land acquisition for resource protection has been controversial in some cases. Legislation to give federal land management agencies the authority to purchase land from willing sellers has been considered, but not enacted, during the last five Congresses. Subtitle D would amend the National Trails System Act to provide authority to purchase land from willing sellers for designated trails that currently lack such authority. This proposal does not commit the federal government to purchase

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[35] 16 U.S.C. §§ 1241-1249.

any land or spend any money, but seeks to allow managers to purchase land to protect the national trails as opportunities arise and funds are appropriated.

Title VI — Department of the Interior Authorizations[36]

This Title covers a disparate collection of issues in six subtitles relating to topics such as watershed management, livestock predation control, and the employment status of some federal employees in Alaska. Subtitles B, C, D, and F do not appear to be significantly controversial. However, Subtitle A may be viewed as too expensive by some, and there has been considerable controversy associated with Subtitle E.

Subtitle B amends the Alaska National Interest Lands Conservation Act (ANILCA)[37] and appears to clarify that some federal employees hired under this act have competitive status in the same manner as other federal employees in the competitive service. Subtitle C includes a provision to encourage preservation of historic water rights at a Colorado national wildlife refuge (NWR). Legislation that involves water rights on federal lands has the potential to be controversial, as new uses of water may affect existing rights. S.Amdt. 5662 would provide that water rights in the Refuge be used as they have been used historically, presumably to avoid these controversial effects on water users. Subtitle D increases penalties for damage to and illegal collection of paleontological resources on federal lands and does not appear to be controversial. Subtitle F concerns a federal matching program to be administered by states and tribes for non-lethal wolf control and for compensation for livestock loss. It does not appear to be widely controversial though some may believe that federal funds should not be authorized for such a program.

Subtitle A would establish a new cooperative watershed grant program in the Department of the Interior. Some may be opposed to the nearly $180 million authorization for the program for FY2008-FY2020, as well as its possible duplication of other federal watershed programs and initiatives. Programs of this type generally involve as many stakeholders as possible and endeavor to create an agreed upon plan for conserving/improving/restoring the resource, in this case, a watershed. After the plan is established, the planning group would assess particular projects proposed for, or affecting, the watershed and make recommendations.

Subtitle A authorizes grants to establish a cooperative planning group and specifies criteria for additional implementation grants. It may be controversial to those who oppose multi-interest environmental planning and management, or who want one set of criteria to control the planning/management process.

Subtitle E concerns the controversial transfer of certain federal lands in Izembek NWR and Sitkinak Island-Alaska Maritime NWR in return for certain state lands and lands owned or claimed by an Alaska Native Corporation. The purpose of the transfer is to build a road through the refuge, from King Cove to Cold Bay, AK, to

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[36] Prepared by M. Lynne Corn, Specialist in Natural Resources Policy; Kristina Alexander, Legislative Attorney; and Cynthia Brougher, Legislative Attorney.

[37] P.L. 96-487.

provide additional medical access for King Cove's citizens through the airport at Cold Bay. The chief controversies concerning the exchange have been (a) the high ecological value of the Izembek lands to be relinquished compared to the lands to be acquired; and (b) questions about any superiority of road access between the two communities, vis-a-vis a hovercraft supplied through earlier federal legislation intended to address the access problem.

Some additional controversies may be generated by the specific language of this exchange. Some language could be construed that the proposed amendment seeks to restrict the environmental review under the National Environmental Policy Act (NEPA), by listing some contents of an environmental impact statement, but leaving out a significant portion of such a document — the alternatives analysis.

Title VII — National Park Service Authorizations[38]

Every Congress considers proposals to establish new park units or to study the appropriateness and practicality of potential additions to the National Park System. Other legislation includes initiatives to convey or exchange lands, modify boundaries, and make technical corrections and other changes to the laws authorizing the 391 diverse units that comprise the National Park System. Enacting stand-alone parks and recreation bills can be daunting, especially in periods of fiscal constraint and competing critical national priorities. While local economies may benefit from new or expanded park units, others object to the loss of taxable land from federal land purchases. Some are also concerned about adding to the System when fiscal limitations make it difficult to adequately maintain the existing units. One organization has estimated that the National Park Service (NPS) has been operating with approximately two-thirds of the funding needed annually — or approximately $600 million less than annual funding estimates.[39] Beyond the funding concerns, the individual park provisions are mostly routine and have not generated any substantial or sustained controversy.

Title VII of S.Amdt. 5662 includes provisions that would establish three new national park units, enact changes to 17 existing units, and authorize studies of 12 sites for potential addition to the System. Also included are provisions to reauthorize the American Battlefield Protection Program for another four fiscal years and the NPS Advisory Board and the NPS Concessions Management Advisory Board each for one year.

One provision, the Save America's Treasures Program, § 7303, was criticized in the past for an alleged lack of geographic diversity. As a result, legislation enacted in FY2001[40] required that project recommendations be subject to formal approval by the House and Senate Committees on Appropriations prior to the distribution of

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[38] Prepared by Ross W. Gorte, Specialist in Natural Resources Policy; Gail McCallion, Specialist in Social Policy; and David L. Whiteman, Analyst in Natural Resources Policy.

[39] See the National Parks Conservation Association website at [http://www.npca.org/media_center/reports/analysis.html].

[40] P.L. 106-291.

funds. These projects require a 50% cost share, and no single project can receive more than one grant from the program. Section 7303 maintains notification requirements for House and Senate Committees prior to disbursement of grants.[41] S.Amdt. 5662, would authorize the program at $50 million for each fiscal year (the authorization term is not clearly specified), with funds to remain available until expended. Additionally, the Preserve America Program, § 7302, was established to complement Save America's Treasures grants. Preserve America grants also require a 50% match from nonfederal funds. These grants are provided as one-time seed money to fund research and documentation, interpretation and education, planning, marketing, and training to encourage community preservation of cultural, historic, and natural heritage through education and heritage tourism. This program does not appear to have been subject to the criticism noted above regarding Save America's Treasures.

Title VIII — National Heritage Areas[42]

Currently, there are 40 National Heritage Areas (NHAs) that were established by Congress to commemorate, conserve, and promote areas that include important natural, scenic, historic, cultural, and recreational resources. NHAs are partnerships among the NPS, states, and local communities, where the NPS supports state and local conservation through federal recognition, seed money, and technical assistance. NHAs are not part of the National Park System, where lands are federally owned and managed. Rather, lands within heritage areas typically remain in state, local, or private ownership or a combination thereof. There is no comprehensive statute that establishes criteria for designating NHAs or provides standards for their funding and management. Instead, particulars for each area are provided in its enabling legislation. NHAs might receive funding from a wide variety of sources, including through the NPS.[43]

Title VIII of S.Amdt. 5662 seeks to establish ten new NHAs, study two areas for possible heritage designation, and amend four existing heritage areas in 8 states (AK, AL, CO, MA, MD, MS, and NH). For each area, the amendment contains provisions to address concerns about potential loss of, and restrictions on use of, private property as a result of NHA designation. Among the provisions, the amendment states that it does not abridge the right of any property owner; require any property owner to permit public access to the property; alter any land use regulation; or diminish the authority of the state to manage fish and wildlife, including the regulation of fishing and hunting within the NHA. The amendment requires the Secretary of the Interior, within three years of the date on which federal funding terminates, to evaluate each new area and report thereon to the congressional authorizing committees.

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[41] For more information on the Preserve America, Save America's Treasures, and related programs see CRS Report RL33617, *Historic Preservation: Background and Funding*, by Susan Boren.

[42] Prepared by Carol Hardy Vincent, Specialist in Natural Resources Policy.

[43] For more information on NHAs, see CRS Report RL33462, *Heritage Areas: Background, Proposals, and Current Issues*, by Carol Hardy Vincent and David L. Whiteman.

There is a difference of opinion as to the merits of congressional designation and federal support of NHAs. Heritage supporters believe that the benefits of heritage areas are considerable and thus Congress should expand its assistance for creating and sustaining them. Supporters view NHAs as important for protecting lands and traditions; promoting a spirit of cooperation and a stewardship ethic among the general public; and fostering community revitalization, tourism, and regional economic development. Some see NHAs as generally more desirable than other types of land conservation, because the lands typically remain in nonfederal ownership to be administered locally. They view establishing and managing federal areas, such as units of the National Park System, as too costly, and observe that small federal investments in heritage areas have been successful in attracting funding from other sources. Some proponents see NHAs as flexible enough to encompass a diverse array of initiatives and areas, because the heritage concept lacks systemic laws or regulations.

Some opponents believe that NHAs present numerous problems and challenges and that Congress should oppose efforts to designate new areas or extend support for existing ones. Property rights advocates have taken a lead role in opposing heritage areas. Concerns include that some NHAs lack significant local support, the NPS could exert federal control over nonfederal lands by influencing zoning and land-use planning, heritage area management plans are overly prescriptive in regulating private property use, private property protections in legislation might not be adhered to, and NHA lands may be targeted for federal purchase and management. The lack of a general statute providing a framework for heritage area establishment, management, and funding has prompted a different concern — that the process is inconsistent and fragmented. The Bush Administration has expressed opposition to the designation of new areas until systemic legislation is enacted. Others are concerned that the enactment of additional heritage bills could substantially increase the administrative and financial obligations of the NPS. Still other observers recommend caution in creating NHAs, because in practice NHAs may face an array of challenges to success. For instance, heritage areas may have difficulty providing the infrastructure that increased tourism requires.

Title IX — Bureau of Reclamation Authorizations[44]

The Reclamation Act of 1902,[45] as amended, authorizes the Bureau of Reclamation (Reclamation), in the Department of the Interior, to construct hundreds of dams, canals, and power facilities throughout the West. The historical emphasis of Reclamation's operations was to provide water for irrigation in the arid and semi-arid areas of the western states. However, more recent project authorizations have focused on assisting rural areas with municipal and industrial (M&I) water supply, settling Indian water rights claims, assisting project sponsors with water reuse and other water supply augmentation projects (e.g., conjunctive use), and supporting watershed or ecosystem restoration projects.

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[44] Prepared by Betsy A. Cody, Specialist in Natural Resources Policy.

[45] 43 U.S.C. 391 et seq.

Reclamation is authorized to conduct initial studies (investigations) of water resource problems; however, since the mid-1960s, congressional authorization has been required to conduct more in-depth "feasibility studies" for project construction. Once a feasibility study is approved, the agency is authorized to thoroughly examine the feasibility of the proposed project, including conducting any necessary environmental documentation, benefit-cost analyses, and engineering studies. Generally, if a project is found to be feasible, Reclamation and/or project sponsors then seek congressional authorization for project construction.

Subtitles A and C[46] of Title IX do not appear to be broadly controversial. Subtitle A authorizes feasibility studies for water projects in 3 states (AZ, CO, and ID), at a total CBO estimated cost of $7.3 million. The California project is somewhat unusual in that it authorizes the study of a water tie-in system for four local, nonfederal reservoirs. Subtitle C authorizes transfer of title to two Reclamation projects, and to clear title of lands related to a third project. None of the provisions of Subtitle C appear to be particularly controversial, nor would they result in a significant outlay of federal funds, although some may view such title transfers as a gift of federal assets.

Subtitle B provisions authorize Reclamation to participate in 14 water projects in four western states (CA, CO, NM, and OR), as well as in an endangered fish recovery program for the Upper Colorado and San Juan River Basins. Most of the water projects are estimated to cost or receive appropriations of less than $25 million. The major exception is the Eastern New Mexico Rural Water System, which is estimated by CBO to cost $384 million over five years. Another item which some may view as costly is the Upper Colorado endangered fish recovery program. Because of the high cost of the Eastern New Mexico Rural Water System, the Bush Administration testified in April 2008 that it could not support the original legislation from which this provision is derived (S. 2814).

Subtitle D[47] specifies a 35% nonfederal matching requirement for federal funds made available under the act. It requires the San Gabriel Basin Water Quality Authority and the Central Basin Municipal Water District to provide the 35% nonfederal match for specified water quality projects. Under P.L. 106-554, a total of $85 million was authorized for the San Gabriel Basin Restoration Fund, with the requirement that no funds would be obligated unless at least 35% of the funds are provided by nonfederal interests. Sec. 9301 increases the authorization to $146.2 million, and subjects the remainder of the funds after the $85 million has been appropriated to the 35% nonfederal matching requirement. Sec. 9301 also limits the total appropriations that can be made available to the Central Basin Water Quality Project to be no more than $21.2 million.

The Executive Branch indicates that it has not budgeted for the San Gabriel Basin Restoration Fund in the past, and that it does not support an increased cost ceiling. In testimony before the Senate Energy and Natural Resources Committee's

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[46] Prepared by Betsy A. Cody, Specialist in Natural Resources Policy.

[47] Prepared by Peter Folger, Specialist in Energy and Natural Resources Policy; and Pervaze A. Sheikh, Specialist in Natural Resources Policy.

Subcommittee on Water and Power, Reclamation Commissioner Robert Johnson stated that he believes resources should be allocated to other priorities. He indicated that Reclamation's role should be limited to assisting concerned parties, when possible and within its mission scope and budget, to advance the goal of groundwater cleanup in the San Gabriel Basin.[48]

Subtitle E[49] concerns the Lower Colorado Multi-Species Conservation Program (MSCP), a multi-stakeholder initiative[50] to conserve 26 species[51] along the Lower Colorado River while maintaining water and power supplies for farmers, tribes, industries, and urban residents. The MSCP took effect in 2005 and has a 50-year term. The expected total cost of the program is estimated at $626 million (in 2003 dollars), to be split 50-50 between federal and nonfederal entities.

S.Amdt. 5662 would authorize appropriations to cover the federal share of costs, authorize the Secretary of the Interior to implement MSCP in accordance with the program documents, and waive sovereign immunity of the U.S. government to allow non-federal parties to enforce program documents.

The issue of whether the United States should waive its sovereign immunity so that the other parties to the MSCP can sue to enforce it has been controversial since the legislation was first proposed. The Implementing Agreement of the MSCP contains no express waiver of sovereign immunity by the federal government. Without the waiver, it appears likely that nonfederal parties would not be able to pursue specific performance or declaratory judgment actions against the federal parties to get them to comply with the agreement. Notably, the MSCP affects states all located in the Ninth Circuit, which has held that those types of actions cannot be brought in any court without an express waiver of sovereign immunity. This provision would allow the nonfederal parties to sue to enforce the agreement, but not to obtain monetary damages.

Many contend that this legislation is an important legislative authorization for an administratively approved program to ensure water supplies and deliveries from the Lower Colorado River while maintaining compliance with the Endangered Species Act. Some express concerns that this legislation might be unnecessary since the project is already underway and the authority for federal participation in the project already exists.

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[48] Robert W. Johnson, Commissioner, Bureau of Reclamation, U.S. Dept. of the Interior,, Statement before the Senate Energy and Natural Resources, Subcommittee on Water and Power, (Washington, DC: April 24, 2008), at [http://www.usbr.gov/newsroom/testimony/detail.cfm?RecordID=1221].

[49] Prepared by Pervaze A. Sheikh, Specialist in Natural Resources Policy; and Kristina Alexander, Legislative Attorney.

[50] The stakeholders include six federal and state agencies, six tribes, and 36 cities and water and power authorities. Stakeholders serve more than 20 million residents in the region, and irrigate two million acres of farmland.

[51] There are six federally listed species under the Endangered Species Act and two candidate species. The listed species are: the bonytail chub, razorback sucker, humpback chub, Yuma clapper rail, desert tortoise (Mojave population), and southwestern willow flycatcher.

Subtitle F[52] of Title IX is quite broad in the issues it covers on the effect of climate change on hydropower, threatened and endangered species, and stream flow data collection, and more. However, it may also be restrictive since it does not appear to provide an overall strategy to address the possible effects of climate change on water availability and agency responses. Subtitle F does not address water quality or activities of the Environmental Protection Agency, which may be fundamental to water availability. This omission limits how the bill is applied to many of the water issues and may result in duplicative or non-complementary activities.

Programmatic provisions that make broad changes to an agency's authority, especially those that may change its relationship and interactions with Congress, can be controversial. For example, § 9503(d) would provide programmatic feasibility authority for climate change mitigation strategies, including the study of new dams, reservoirs, canals, etc. This authority may be controversial in states that have complex water storage and transport systems, conflicts over water quality and quantity, or stakeholder interests in expanding surface storage and conveyance. It also could be controversial since it would reverse a congressional decision from 1965 to revoke Reclamation's programmatic feasibility authority.[53] Additionally, legislation proposing changes to water resources management is often controversial.

Subtitle G[54] concerns Reclamation's aging infrastructure. It would require the Commissioner of Reclamation to carry out, among other things, annual inspections Reclamation-owned and -operated facilities, as well as Reclamation facilities operated and maintained by water users. Additionally, the Subtitle would require the Secretary to develop a national priorities list of infrastructure maintenance needs and establish standards and guidelines for the maintenance of these facilities.

This Subtitle addresses an issue that has been and will likely continue to be controversial: prioritizing a finite budget for asset management objectives. There are instructions for a specific structure and approach to aging infrastructure assessment outlined in Subtitle G. When this direction is considered along with the cost sharing requirements, repayment terms, and other details of different provisions addressing Reclamation infrastructure such as § 9105 and § 9106 that appear to vary by project;. some may view this as evidence of the need for a more transparent, standardized approach to addressing Reclamation's infrastructure needs. As an example, § 9106(d) appears in some cases to require no contributions from project beneficiaries or the state. A requirement of some cost-sharing contribution is common, although the percentage may vary as indicated above. As Reclamation's infrastructure continues to age, these conflicts may arise more frequently. Additionally, more expensive recapitalization projects may exceed the financial means of local operators

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[52] Prepared by Nic Lane, Analyst in Natural Resources Policy; and Nicole T. Carter, Specialist in Natural Resources Policy.

[53] Section 8 of P.L. 89-72 (16 U.S.C. § 460l-19).

[54] Prepared by Nic Lane, Analyst in Natural Resources Policy.

in the case of transferred works and could drive those entities to seek congressional support for project funding.[55]

Title X — Water Settlements[56]

Subtitle A, regarding the San Joaquin River Restoration Settlement, would authorize implementing a settlement in a long-standing dispute and lawsuit over management of waters in the San Joaquin River Basin in the Central Valley of California. The legislation has been very controversial both for its direct spending provisions, potential impacts on downstream interests, and loss of agricultural water, as well as for impacts on Delta and ocean fisheries, and water users if the legislation is not approved. S.Amdt. 5662 reduces the initial direct spending compared to the original legislation — S. 27 and H.R. 24 — to $88 million, which is expected to be offset by early payment of water user repayment obligations. Another $250 million in discretionary funding is also authorized. Settlement opponents fear water may be required to be released without a guarantee of adequate funding to implement projects to protect property owners and other third parties to the settlement. Total restoration costs are estimated to range from $250 million to $1.1 billion. Settlement proponents argue that further funding can be secured and that delay risks putting the issue back before a federal judge for remedy in a case that had already been decided in favor of restoring river flows to re-establish salmon populations.[57]

Subtitle B concerns rural water projects involving the Navajo Nation in northwestern New Mexico. The federal government is considered to have a trust responsibility to protect Indian water rights. Settlements of Indian water rights claims require federal approval, and when a settlement requires federal expenditures, Congress must approve. Congress has enacted 20 Indian water rights settlements during the past three decades, but federal funding for the settlements is a recurring issue. The Administration has often opposed Indian water rights settlements for cost-related reasons: that nonfederal parties were not paying their fair share, or that the federal expenditure exceeded the calculated federal liability. Some tribes and other nonfederal parties argue, on the other hand, that funding for Indian water rights settlements is insufficient, especially for water infrastructure authorized in the settlements, and that the use, and uncertainties, of discretionary appropriations makes settlements harder. They propose an ongoing, dedicated source of funding for Indian water rights settlements. All but one of the 20 settlements used only discretionary appropriations.[58]

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[55] For more information on Reclamation's aging infrastructure, see CRS Report RL34466, *The Bureau of Reclamation's Aging Infrastructure*, by Nic Lane.

[56] Prepared by Betsy A. Cody, Specialist in Natural Resources Policy; and Roger Walke, Specialist in American Indian Policy.

[57] For more information on the controversies associated with the Settlement legislation see CRS Report RL34237, *San Joaquin River Restoration Settlement*, by Betsy A. Cody, et al.

[58] The one exception, the Arizona Water Settlements Act (P.L. 108-451), used part of the income of the Colorado River Lower Basin Development Fund (which is funded by repayments from the Central Arizona Project) to pay for water infrastructure costs of several

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Subtitle B would make use of the Reclamation Fund, which is financed partly through Reclamation water and power project revenues, to pay costs of water infrastructure required in certain Indian water rights settlements. It would set aside $120 million annually from Reclamation Fund revenues during FY2019-FY2028 for deposit in a new "Reclamation Water Settlements Fund" for expenditure, without further appropriation. These funds, with congressional approval, would go toward Reclamation activities to implement prioritized Indian water rights settlements. Construction of the Navajo-Gallup Water Supply Project, which is integral to one of the settlements specified, would be the first priority. None of the 20 Indian water rights settlements has been funded by such a set-aside from the Reclamation Fund. The Bush Administration opposed this provision because the new fund's expenditures would be excluded from the appropriations process, which would prevent future presidents or Congresses from setting their own appropriations priorities.

This Subtitle also specifically approves a water rights settlement between the Navajo Nation and New Mexico. Costs of the Navajo-Gallup Water Supply Project, necessary to the settlement, would chiefly be funded through the Reclamation Water Settlements Fund (as noted above). The Bush Administration opposed this settlement, because the United States is not a signatory to the settlement; the total cost was excessive; certain infrastructure costs were not yet known; cost-sharing was too limited; and federal legal liabilities were still uncertain. Proponents argue that the settlement is fair, settles 30-year-old litigation, and delivers badly needed water, and that the new Reclamation Water Settlements Fund provides certainty that the settlement will be implemented.

Title XI — United States Geological Survey Authorizations[59]

Section 11001 would reauthorize the National Geologic Mapping Act of 1992 which was last reauthorized in 1999. The act established a cooperative geologic mapping program between the U. S. Geological Survey (USGS) and the geological surveys of each state acting through the Association of American State Geologists (AASG). This program has not been controversial in the past.

Section 11002 concerns the New Mexico Water Resources Study and may be controversial. This section directs the Secretary of the Interior, acting through the USGS, in coordination with the State of New Mexico, to study water resources in several basins in New Mexico. The study would focus on groundwater resources, and include an analysis of the salinity, recharge potential, groundwater-surface water interaction, the susceptibility of aquifers to contamination, and the amount of water available for human use. The Secretary must submit a report of the study results within two years of enactment.

Concerns about § 11002 include the cost and possible duplication of previous and existing federal efforts to study water resources in New Mexico; in particular

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[58] (...continued)
Indian water rights settlements in Arizona.

[59] Prepared by Peter Folger, Specialist in Energy and Natural Resources Policy.

groundwater studies of the middle Rio Grande Basin. The USGS has several ongoing programs that study the Nation's groundwater resources.

Title XII — Miscellaneous[60]

This Title contains six apparently unrelated provisions covering the following issues: management and distribution of North Dakota trust funds; amendments to the Fisheries Restoration and Irrigation Mitigation Act of 2000 including that funding provided by the Bonneville Power Administration be credited toward the nonfederal share of project costs; amendments to the Alaska Natural Gas Pipeline Act affecting personnel matters; the creation of an additional Assistant Secretary of Energy for electricity delivery and reliability; land conveyance for the Lovelace Respiratory Research Institute; and authorization of appropriations for national tropical botanical gardens.

The question of altering the governing provisions of a trust fund established by a state's enabling act is controversial, largely due to the perceived sanctity of enabling acts. States are restricted in how they can manage the trust funds set up by the enabling acts. Because the provisions of enabling acts are required to be codified within that state's constitution, a modification requires action by the state and the federal government. Section 12001, Management and Distribution of North Dakota Trust Funds, would give North Dakota additional flexibility in managing its trust funds. The provision appears to satisfy both aspects of altering a trust fund by addressing the federal statutory changes needed and referencing that the state constitutional change has been effected.

While none of the remaining provisions appear to be broadly controversial, each likely has its proponents and opponents.

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[60] Prepared by Nic Lane, Analyst in Natural Resources Policy; and Kristina Alexander, Legislative Attorney.