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Hunting and Fishing: Analysis of S. 556 and S. 659

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Summary

Hunting, fishing, trapping, and recreational shooting, particularly on federal lands, have been the subjects of various bills for several Congresses. In general, federal land management agencies work with state fish and game agencies in setting quotas, bag or size limits, and other specifics of management. Some agencies currently open more than 90% of their acreage to hunting and fishing. Yet there has been criticism in recent years that insufficient federal land is open to hunting. In the 114th Congress, attention has focused on a pair of companion bills, S. 556 and S. 659. While both are entitled the “Bipartisan Sportsmen’s Act of 2015,” each addresses different issues.

S. 556 is intended to create or reinforce an “open until closed” management policy regarding these activities as well as for trapping and recreational shooting on federal lands. The bill describes criteria for federal land management agencies to consider in closing federal lands to fishing, hunting, or recreational shooting, and it directs that management is subject to existing law. Ambiguities in the text leave some doubt as to which federal lands are subject to the bill’s provisions, which may result in the inclusion of lands managed by the Department of Defense, National Aeronautics and Space Administration, and Department of Energy. Those agencies typically are not considered land management agencies. The Bureau of Land Management (BLM), Fish and Wildlife Service (FWS), National Park Service (NPS), and Forest Service (FS) generally are considered land management agencies.

S. 556 would change land management practices on some federal lands and require additional or different analyses, reports, or notices. For some agencies and some of the defined activities, modification may only add or change steps in the planning process. In addition, by including trapping under the definition of hunting, the practice of trapping may be added or encouraged on federal lands where it currently is not encouraged or permitted. Other provisions of the bill specify new procedures for small film crews to operate on federal lands, permit the carrying of bows and crossbows in national parks, and set aside a portion of appropriations under the Land and Water Conservation Fund (LWCF) for promoting physical access to federal lands for recreationists. The bill also would require reporting of expenditures under the Equal Access to Justice Act (EAJA; 5 U.S.C. §504) and of payments under the federal government’s judgment fund in litigation against the federal government.

S. 659 also addresses matters related to wildlife but is less focused on federal lands. It would exempt lead shot and ammunition and fishing sinkers from the provisions of the Toxic Substances Control Act (TSCA; 15 U.S.C. §2602(2)(B)) and allow territories and states to use more of the funds allocated to them under the Pittman-Robertson Wildlife Restoration Act (16 U.S.C. §669) for projects involving public target ranges for firearms or archery. The bill would allow hunters to import polar bear trophies taken in Canada before the species was listed as threatened under the Endangered Species Act (ESA; P.L. 93-205). In addition, it would redefine what constitutes hunting waterfowl over a baited field and allow the possession of loaded firearms at Army Corps of Engineers projects in areas open to the public. Finally, the bill would reauthorize or amend seven statutes relating to international wildlife conservation.

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Introduction

Various bills in the 114th Congress address issues related to hunting, fishing, and recreational shooting on federal and state lands. Hunting and conservation have been linked in federal wildlife legislation since the passage the Lacey Act of 1900¹ (the first federal wildlife law, making it a federal crime to ship game killed in violation of one state's laws to another state) and then the Migratory Bird Treaty Act of 1918² (regulating the killing, hunting, buying, or selling of migratory birds). Currently, hunting and fishing are allowed on the majority of federal lands (as measured in acres).

Some believe that federal lands are unnecessarily restricted by protective designations, barriers to physical access, or burdensome agency planning processes. Others question whether opening more lands to hunting, fishing, and recreational shooting is fully consistent with good game management, public safety, other recreational uses, resource management, and the statutory purposes of the lands. Two recent bills, S. 556 and S. 659, address giving hunting and fishing activities a higher priority in land management.³ Although both bills address hunting, fishing, and other forms of outdoor recreation, S. 556 is focused on federal lands while S. 659 covers diverse topics such as the regulation of lead shot, imports of polar bear trophies, the funding of land acquisition for recreation, and the reauthorization of certain international wildlife conservation laws.

Under current law, federal land managers balance hunting, fishing, and recreational shooting with good game management, public safety, resource management, and the statutory purposes of the lands. The resulting balance point will vary among agencies based on the statutory requirements of the agency, land classification, location, and other factors. The four traditional land management agencies—the Bureau of Land Management (BLM), Fish and Wildlife Service (FWS), and National Park Service (NPS), all in the Department of the Interior (DOI), and the Forest Service (FS) in the Department of Agriculture—do not maintain data on how many acres of land are currently open to hunting, fishing, and/or recreational shooting.⁴ However, BLM “estimates that over 99 percent of BLM-managed public lands are open to hunting, and 99 percent of BLM-managed public lands are open to recreational target shooting.”⁵ FS estimates that more than 95% of its lands are currently open to these activities.⁶ Among the FWS's 594

¹ Lacey Act of May 25, 1900, §3; 31 Stat. 187.

² Migratory Bird Treaty Act of July 3, 1918, c. 128, §2; 40 Stat. 755.

³ In addition, H.R. 2406 has been introduced in the House. It has a number of provisions similar to those in these two bills.

⁴ Personal communication between Laura Comay of the Congressional Research Service (CRS) and Chris Powell, Senior Congressional Affairs Specialist of the National Park Service (NPS,) and the Bureau of Land Management's (BLM's) Division of Legislative Affairs, February 2014; Personal communication between Katie Hoover of CRS and Tony Edwards, Legislative Affairs Specialist in the Forest Service (FS), February 2014; Personal communication between Lynne Corn of CRS and Martin Kodis, Deputy Chief, Division of Congressional and Legislative Affairs in the Fish and Wildlife Service (FWS), February 2014.

⁵ Testimony of BLM Deputy Director of Operations Steve Ellis, in U.S. Congress, Senate Committee on Energy and Natural Resources, *Legislative Hearing on S. 556, Bipartisan Sportsmen's Act of 2015*, hearing, 114th Cong., 1st sess., March 12, 2015.

⁶ Personal communication between Katie Hoover of CRS and Tony Edwards, FS Legislative Affairs Specialist, February 2014.

wildlife refuges and waterfowl production areas, more than 360 are open to some form of hunting, and more than 300 units offer fishing opportunities.⁷ As of February 2014, hunting was permitted in 61 of the 401 NPS units, and fishing was permitted in 200 units.⁸

Other federal agencies have various policies on the activities covered in these two bills. The Bureau of Reclamation (BOR), for example, allows recreational shooting but actively discourages “repeated recreational target shooting.”⁹ At the same time, BOR allows hunting, fishing, and trapping on its lands, subject to regulation.¹⁰ Roughly half of the Army Corps of Engineers’ (Corps’) land is open to hunting.¹¹ In addition, many military bases offer access to hunters and fishers, including Camp Pendleton, California (hunting and fishing); Camp LeJeune, California (hunting, fishing, and trapping); and Camp Bullis, Texas (hunting, fishing, and target shooting). Various rules may limit participation at these bases to members of the military, veterans, and their families.

Lands under the jurisdiction of other federal agencies may be managed for purposes that include the conservation of natural resources, including wildlife, even if conservation is not the primary purpose of these lands. Moreover, multiple executive orders direct all agencies with land to preserve the environment, and these orders apply whether the agency currently offers hunting, fishing, trapping, or even public access. (See “Definition of Federal Public Land,” below.) Examples of agencies that limit access to their lands include the Department of Energy and the National Aeronautics and Space Administration.

This report focuses on two bills that have received considerable attention in the 114th Congress: S. 556 and S. 659. Both are titled “the Bipartisan Sportsmen’s Act of 2015.” S. 556 was referred to the Senate Committee on Energy and Natural Resources, and S. 659 was referred to the Senate Committee on Environment and Public Works. In addition to its provisions affecting federal lands, S. 556 contains a provision amending the Equal Access to Justice Act (EAJA; 5 U.S.C. §504) and affecting the Judgment Fund in the Department of Justice from which claims against the United States are paid (31 U.S.C. §1304). The two bills contain a number of provisions found in bills in previous Congresses.¹²

⁷ FWS, “National Wildlife Refuge System: Recreation,” March 2015, at <http://www.fws.gov/refuges/about/pdfs/NWRSRecreationFactSheetMar2015.pdf>. In testimony on S. 556, Steve Ellis, Deputy Director of BLM, cited a figure of 335 refuges open to hunting, and 271 refuges open to fishing. The reason for the difference is unclear, but may be explained by the inclusion of Waterfowl Production Areas in the FWS figures, but not the BLM figures. In addition, many refuges are managed as complexes, and it may be unclear what is being counted.

⁸ Personal communication between Laura Comay of CRS and Chris Powell, NPS Senior Congressional Affairs Specialist, February 21, 2014. Units may be completely open to hunting or fishing, or these activities may be permitted only in portions of the unit.

⁹ See the Bureau’s *Reclamation Manual* at <http://www.usbr.gov/recman/env/env02-07.pdf>.

¹⁰ 43 C.F.R. 423.32.

¹¹ See CRS Report R42602, *Firearms at Army Corps Water Resource Projects: Proposed Legislation and Issues in the 113th Congress*, by Nicole T. Carter.

¹² Topics in these two bills that appeared in previous bills—often with identical wording—include the following: changing federal land access and planning, filming on federal lands, funding for recreation access, federal land transfers, lead in sinkers and ammunition, use of federal funds for shooting ranges, imports of polar bear trophies, and hunting over baited fields. Provisions from the bills in previous congresses were analyzed in CRS Report R42569, *Hunting, Fishing, and Recreational Shooting on Federal Lands: H.R. 4089 and Related Legislation*, coordinated by Kristina Alexander; CRS Report R42751, *Hunting, Fishing, Recreational Shooting, and Other Wildlife Measures: S. 3525*, coordinated by M. Lynne Corn; and CRS Report R43629, *Hunting and Fishing: Issues and Legislation in the 113th Congress*, by M. Lynne Corn.

Both bills use definitions of *federal land* or similar terms in various sections in a manner that leaves some doubt as to the land under consideration. **Table 1** shows the terms used and the land classifications that appear to be included, possibly are included, and explicitly are excluded under the definitions.

Table 1. Definitions and Use of Federal Land and Related Terms in S. 556 and S. 659
(variations among sections)

Term	Included	Possibly Included	Explicitly Excluded
S. 556			
Federal public land (§101)	Any land or water owned by the United States and managed by a federal agency for purposes including natural resource conservation, with stated exclusions.	Lands owned by federal agencies whose <i>primary</i> purpose may not be conservation but that include conservation among their purposes: Army Corps of Engineers, NASA, DOD, BOR, DOE, etc. (But see §202, below.)	Lands or waters of NPS, FWS, fish hatcheries, private lands with federal easements, and lands or waters held in trust for Indian tribes or individuals.
Federal land or waterways (§102)	Not defined, but with addition of “under the jurisdiction of the Secretary” or “administered by the Secretary,” section is limited to DOI—largely lands under the jurisdiction of NPS, FWS, BOR, BLM.		FS and all non-DOI lands and waters.
Federal public land management agency (§202)	Named as NPS, FWS, BLM, and FS		All lands other than those of these four agencies
S. 659			
Federal land to host shooting ranges (§3)	Not defined, but specified to include FS and BLM	Not specified; might include nonfederal lands meeting the specified conditions for a shooting range	Not specified

Source: Derived by CRS from relevant sections of S. 556 and S. 659.

Notes: BLM = Bureau of Land Management; BOR = Bureau of Reclamation; DOD = Department of Defense; DOE = Department of Energy; DOI = Department of the Interior; FS = Forest Service; FWS = Fish and Wildlife Service; NASA = National Aeronautics and Space Administration; NPS = National Park Service.

Provisions of S. 556

S. 556 is titled the “Bipartisan Sportsmen’s Act of 2015.” It was referred to the Senate Committee on Energy and Natural Resources, which held hearings on the bill on March 12, 2015. The witnesses were

- Steve Ellis, Deputy Director for Operations, BLM;
- Leslie Weldon, Deputy Chief, National Forest System, FS;

- Jeffrey S. Crane, President, Congressional Sportsmen’s Foundation; and
- Whit Fosburgh, President and CEO, Theodore Roosevelt Conservation Partnership.

Issues raised during the hearing included the availability of hunting, fishing, and shooting opportunities on federal lands, particularly those of BLM and FS; the use of the Land and Water Conservation Fund (LWCF) to purchase lands to support access for recreation; the appropriate use of funds derived from the sale of federal land; and the effect of the bill on wilderness management, among other matters. Each of these issues is discussed below.

Hunting, Trapping, Fishing, and Recreational Shooting

Section 101 of S. 556 addresses hunting, trapping, fishing, and recreational shooting on federal land. It would create an “open until closed” management policy for federal lands. It specifies the factors a land management agency would need to consider to justify closing federal lands to hunting, trapping, fishing, or recreational shooting. The steps to do so would include meeting specific criteria for closure determinations, revising planning documents, and filing reports with Congress.

Definitions

Definition of Federal Public Land

Section 101 defines *federal public land* (FPL) broadly as “any land or water that is ... owned by the United States; and ... managed by a Federal agency (including the Department of the Interior and the Forest Service) for purposes that include the conservation of natural resources.” The definition specifically exempts (1) lands or waters held in trust for the benefit of Indian tribes or individual Indians; (2) lands under the jurisdiction of NPS or FWS; (3) fish hatcheries; and (4) conservation easements on private land. (See **Table 1**.)

While there is no existing statutory definition of FPL, the Federal Land Policy and Management Act (FLPMA; P.L. 94-579) defines *public lands* as BLM lands.¹³ The Section 101 definition is broader than the FLPMA definition, and some may interpret it to include all federal lands except those explicitly excluded. As a result, even though most of the bill appears to target only BLM and FS, some provisions could be interpreted to include federal lands under other agencies, such as BOR, the Department of Defense¹⁴ (including the Army Corps of Engineers),¹⁵ the Department

¹³ Federal Land Policy and Management Act (FLPMA) §103(e); 43 U.S.C. §1702(e): “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.”

¹⁴ The Department of Defense (DOD) owns 20.8 million acres of the 27.9 million acres it controls. DOD, *Base Structure Report: Fiscal Year 2011 Baseline*, at <http://www.acq.osd.mil/ie/download/bsr/bsr2011baseline.pdf>.

¹⁵ The Army Corps of Engineers owns 8.8 million acres in fee, and its reservoirs’ surfaces and waterways represent an additional 26 million acres. While the agency’s primary missions are flood damage reduction, navigation, and ecosystem restoration (16 U.S.C. §3956), many of the agency’s water resources facilities are operated for multiple purposes, including fish and wildlife (16 U.S.C. §661, 16 U.S.C. §460l-12), recreation (16 U.S.C. §460l-12), and water supply storage (43 U.S.C. §390b, 33 U.S.C. §708). For information on Corps management, see CRS Report R41243, *Army Corps of Engineers: Water Resource Authorizations, Appropriations, and Activities*, by Nicole T. Carter and (continued...)

of Energy, and the Department of Commerce, all of which count natural resource conservation among their purposes. A similar, inclusive definition of *federal lands* was used in the Energy Policy Act of 2005 (P.L. 109-58), which referred to a number of departments as being necessary to establish rights-of-way on federal lands: Agriculture, Commerce, Defense, Energy, and the Interior.¹⁶ Also, as multiple executive orders direct all agencies with land to preserve the environment, some could argue that any such agency has as one of its purposes the conservation of natural resources¹⁷ and could meet the standard specified in Section 101.

Naming specific land management agencies in the Section 101 definition would explicitly limit the federal lands to which this legislation applies. This approach is used in other legislation; the Federal Lands Recreation Enhancement Act (FLREA; P.L. 108-447), for example, defines *federal land management agency* as “the National Park Service, the United States Fish and Wildlife Service, the Bureau of Land Management, the Bureau of Reclamation, or the Forest Service.”¹⁸

Definition of Hunting

Section 101(a) defines *hunting* to mean the “use of a firearm, bow, or other authorized means in the lawful (i) pursuit, shooting, capture, collection, trapping, or killing of wildlife; or (ii) attempt to pursue, shoot, capture, collect, trap, or kill wildlife.”¹⁹

The definition includes trapping, an activity that traditionally is not included in the definition of hunting.²⁰ Trapping currently is allowed under some circumstances on some federal lands, but the use of traps (particularly a design called leghold traps) has been controversial and is less common than traditional hunting on federal lands.

Although the definition in Section 101 concerns hunting, the provision addressing licensing in Section 101(b)(9)(B)(i) refers to “fish, hunt, and trap.” The reference to trapping may be unnecessary, because the bill defines hunting to include trapping. In addition, Section 101(b)(6) refers to “activities relating to fishing or hunting,” potentially expanding the allowed activities.²¹

(...continued)

Charles V. Stern.

¹⁶ P.L. 109-58, §368(a); 42 U.S.C. §15926(a).

¹⁷ See, for example, Executive Order 11990, “Protection of Wetlands,” 42 *Federal Register* 26961, May 24, 1977 (each agency shall take action to protect against harming wetlands); Executive Order 13112, “Invasive Species,” 64 *Federal Register* 6183, February 8, 1999 (directing agencies to stop actions that would spread invasive species); Executive Order 13186, “Responsibilities of Federal Agencies to Protect Migratory Birds,” 66 *Federal Register* 3853, January 17, 2001 (directing each agency to protect against harming migratory birds); Executive Order 11514, “Protection and Enhancement of Environmental Quality,” 35 *Federal Register* 4247, March 5, 1970 (each agency shall develop programs to enhance environmental quality).

¹⁸ P.L. 108-447, §802; 16 U.S.C. §6801 note. Typically, the Bureau of Reclamation is not included in lists of federal land management agencies.

¹⁹ While “Bearing Arms at Corps of Engineers Projects” addresses possession of firearms on Corps projects, the issue of possessing firearms on federal lands generally is outside the scope of this report. For information on that topic, see CRS Report RL32842, *Gun Control Legislation*, by William J. Krouse.

²⁰ For example, see 36 C.F.R. §1.4(a): “Hunting means taking or attempting to take wildlife, except trapping” (NPS). Also see 36 C.F.R. §219.10 (FS) and 43 C.F.R. §24.4 (BLM), both of which treat *hunting* and *trapping* as distinct activities.

²¹ The additional activities could be various and might include construction and maintenance of additional trails, shooting blinds, boat ramps, or additional campgrounds; greater access for pack animals or mechanical equipment; (continued...)

Definition of Recreational Fishing

Section 101(a)(4) defines *recreational fishing* as “an activity for sport or pleasure that involves the lawful ... catching, taking, or harvesting of fish; or ... attempted catching, taking, or harvesting of fish; or ... any other activity for sport or pleasure that can reasonably be expected to result in the lawful catching, taking, or harvesting of fish.”

Definition of Recreational Shooting

Section 101(a) defines *recreational shooting* as “any form of sport, training, competition, or pastime, whether formal or informal, that involves ... the discharge of a rifle, handgun, or shotgun, or ... the use of a bow and arrow.” The definition appears to include hunting; shooting ranges; informal target practice; and war reenactments, both formal and informal. However, unlike the definition of hunting and recreational fishing, the word *lawful* is not included in this definition. Under Section 101(b)(1), managers are to “facilitate use of and access” to FPLs for this activity.²² Recreational shooting, including shooting ranges, on some lands besides those of FS and BLM that might be included in this bill likely would be controversial. Recreational shooting, generally allowed on most FS and BLM lands, has been controversial in some specific areas, due to conflicts with adjacent property owners, the presence of debris such as spent shells or damaged targets, or resource damage.²³ Because controversy over the continued existence of shooting ranges has focused on FS or BLM lands, where shooting ranges usually have been allowed by regulation, it may be that only those lands were intended to be affected by the promotion of shooting ranges.²⁴

Management of Federal Lands

Section 101(b) would direct the heads of FPL management agencies to facilitate use of and access to lands for hunting (defined to include trapping), fishing, and recreational shooting. Section 101(b)(2) would require that each FPL management agency act (1) in a manner that supports and facilitates hunting, fishing, and recreational shooting opportunities; (2) to the extent authorized under applicable state law; and (3) in accordance with applicable federal law. This provision may raise questions because state law does not *authorize* actions on federal land. Instead, federal lands generally are managed for these activities consistent with state law, which establishes hunting seasons, game species, fishing licenses, etc.

Although agencies would be required to manage public lands to facilitate those activities, Section 101(b)(7) states that the title does not require “a Federal agency to give preference to recreational fishing, hunting, or shooting over other uses of Federal public land.” This provision is an example

(...continued)

placement of ice fishing houses; or other activities.

²² See “Definition of Federal Public Land” (FPL), above.

²³ For a controversy on FS land in Nevada, see Benjamin Spillman, “Truckee residents fired up over makeshift gun range,” *Reno Gazette-Journal*, May 22, 2014. For a controversy on FS land in Colorado, see Charlie Brennan, “Forest Service closes 4 areas in Boulder County foothills to target shooting,” *Boulder County News*, May 8, 2014.

²⁴ Use of certain public lands for shooting ranges is not necessarily a cause of controversy. For example, certain BLM public lands in Wyoming have been used as a shooting range for more than 30 years under a special-use permit for a private club. S. 2015 in the 112th Congress would have transferred title to the land conditionally to the club. BLM supported the transfer; the bill passed the Senate but was not considered in the House.

of the apparent tension in the bill between directing federal agencies generally to allow more hunting, fishing, and shooting and to facilitate such activities procedurally, on the one hand, and seeking to maintain some existing management structures and policies, on the other.

The sections preceding Section 101(b)(4) provide directives to all FPL agencies. However, Section 101(b)(4)(C) applies to BLM and FS lands only, and it specifies that the heads of the two agencies may use existing authorities to lease or permit use of lands for shooting ranges and to designate specific lands for recreational shooting activities. Although Section 101(b)(4) applies explicitly to BLM and FS, Section 101(b)(4)(C) also directs the “head of each Federal public land agency,” the general term used in the rest of Section 101, to address recreational shooting. As a result, clarification may be needed for whether that particular provision is limited to BLM and FS.

A separate management directive appears in Section 101(b)(8) that would require agency heads to consult with advisory councils established in two executive orders. The first, Executive Order 12962,²⁵ established a recreational fisheries council. The second, Executive Order 13443,²⁶ did not create an advisory council but referred to the Sporting Conservation Council that DOI had established a year earlier.²⁷

Section 101(b)(3)(B) would direct that, on BLM and FS lands where hunting is prohibited by law, federal land planning documents must allow skilled volunteers to assist in culling and other management of wildlife populations. The existing practice uses employees of Wildlife Services of the Department of Agriculture instead of skilled volunteers. However, this section provides that the current policy can continue if the head of the agency demonstrates, based on the best scientific evidence or applicable federal law, that skilled volunteers should not be used for this purpose.

Closing or Limiting Lands to Hunting, Fishing, or Recreational Shooting

S. 556 provides that lands will be open unless closed, and Section 101 would establish processes for when and how those lands can be closed to hunting, fishing, or recreational shooting. Some criteria required by Section 101(b)(3)(A) may not have been used in developing current land plans by BLM, FS, or the other federal lands that may be covered in Section 101.²⁸ (See **Table 1**.) As a result, S. 556 could affect existing plans that have not considered all the activities contained in the definitions of hunting, fishing, and recreational shooting. The bill is silent as to how those existing plans should be treated. For example, the plans could remain in place until they are revised; they could be required to be revised immediately; or all lands could be open to hunting, fishing, and recreational shooting upon the bill’s enactment, regardless of restrictions in existing plans, until new plans are finalized using the new criteria.

²⁵ Executive Order 12962, “Recreational Fisheries,” 60 *Federal Register* 30769, June 9, 1995.

²⁶ Executive Order 13443, “Facilitation of Hunting Heritage and Wildlife Conservation,” 72 *Federal Register* 46537, August 20, 2007.

²⁷ Department of the Interior, “Norton Names 12 to New Sporting Conservation Council; Will Advise Interior on Hunting, Wildlife Resource Issues,” press release, March 23, 2006, at http://www.doi.gov/news/archive/06_News_Releases/060323b.htm.

²⁸ References to “Federal public land management officials” or “Federal public land management agency” within Section 101 could be interpreted to include any agency that owns land, except for those specifically excluded; see “Definition of Federal Public Land,” above.

General Criteria for Closing Federal Lands

Section 101(b)(1) directs officials in FPL agencies to “exercise the authority of the official under existing law ... to facilitate use of and access to Federal public land.” It would create a three-prong test for when agencies may close lands:

- existing law, “including regulation,” authorizes limits for reasons of national security, public safety, or resource conservation;²⁹
- existing law specifically precludes recreational fishing, hunting, or recreational shooting on specific lands or waters; or
- discretionary limitations on hunting, fishing, and recreational shooting are determined to be necessary and reasonable as supported by the best scientific evidence and advanced through a transparent public process.

The last prong, Section 101(b)(1)(C), would appear to establish new criteria for closing lands, rather than using existing statutory authority. As a result, all agencies’ planning processes could require an additional step to determine land uses if limits on those activities are imposed.

In addition, Section 101(b)(1) would require an evaluation to curtail activities based on three phrases:

- “necessary and reasonable”;
- “supported by the best scientific evidence”;³⁰ and
- “advanced through a transparent public process.”

These three phrases would require interpretation by the agencies incorporating them into their land planning practices. They also could require interpretation by courts if groups disagree with an agency’s interpretation or application.

Criteria for Closing BLM and FS Lands

Currently, wilderness, wilderness study areas, and areas administratively classified as eligible or suitable for wilderness designation, solely as a result of such designation, are not closed to fishing, hunting, and recreational shooting.³¹ Section 101(b)(4), applying only to BLM and FS lands, explicitly directs that those lands “shall be open to recreational fishing, hunting, and recreational shooting unless the managing Federal public land agency acts to close the land to the activity.” This language differs from the Section 101(b)(1) language that directs land management agencies to “facilitate use of and access to” lands for those activities. Moreover, the provision explicitly includes units of the National Wilderness Preservation System, wilderness study areas,

²⁹ Both BLM and FS have authorizing statutes directing conservation of resources: FLPMA for BLM and the National Forest Management Act (P.L. 94-588) for FS. Other lands that may be included in this bill depending on the interpretation of *federal public lands* may not have such statutes.

³⁰ Typically, this phrase includes the term *available* to set an achievable limit on the science. This is how the term is used in Section 104(c)(2), for example.

³¹ However, these lands may be closed temporarily or permanently for reasons such as fire danger, public safety, resource conservation, etc., or because the relevant agency (e.g., NPS or FWS) does not permit that activity on that particular land for other reasons, including statutory prohibitions.

and areas administratively classified as eligible or suitable for wilderness designation as subject to this provision. Although Section 101(b)(4)(A)(ii) further specifies that nothing in the subparagraph authorizes motorized access, it does so only for “wilderness study areas and areas administratively classified as eligible or suitable for wilderness designation” and does not apply the same savings provision to designated wilderness. In testimony regarding S. 556, Leslie Weldon, FS Deputy Chief stated

We are concerned that section 101(b)(4)(A)(ii) could be read to open [designated] wilderness areas administered by the Forest Service to temporary roads, motor vehicles, motorized equipment, motorboats, and other forms of mechanized transport in furtherance of recreational hunting, shooting, and fishing. Further, this provision only mentions motorized vehicles but is silent on other prohibited uses under section 4(c) of the Wilderness Act (16 U.S.C. 1133(c)), such as mechanical transport, structures, and installations. As a result, this provision creates uncertainty as to whether such uses, when in furtherance of recreational hunting, shooting, and fishing, would remain prohibited under the Wilderness Act.³²

Although Section 101(b)(1) applies to FPLs generally, it may be that the more specific criteria in Section 101(b)(4) would supersede application of Section 101(b)(1) to BLM or FS. However, it also may be interpreted that Section 101(b)(4) would provide additional criteria for BLM and FS closures or give managers a choice of criteria. Unlike Section 101(b)(1), it could be found that the criteria used in Section 101(b)(4) would be consistent with existing land planning practices.³³

Under Section 101(b)(4), the head of the agency could close or limit lands available for hunting, fishing, or shooting when it is necessary and reasonable and supported by facts and evidence. Lands may be limited for purposes including the following:

- resource conservation,
- public safety,
- energy or mineral production,
- energy generation or transmission infrastructure,
- water supply facilities,
- protection of other permittees,
- protection of private property rights or interests,
- national security, or
- compliance with other law.

This provision appears to allow BLM and FS to base land closure decisions on something other than the “best scientific evidence” and “transparent public process” required by Section 101(b)(1).

³² Testimony of FS Deputy Chief For National Forest System Leslie Weldon, in U.S. Congress, Senate Committee on Energy and Natural Resources, *Legislative Hearing on S. 556, Bipartisan Sportsmen’s Act of 2015*, hearing, 114th Cong., 1st sess., March 12, 2015.

³³ Because somewhat different procedures are specified for BLM and FS lands specifically, the general definition of *federal public land* in S. 556 may encompass more than the lands under these two agencies. (See **Table 1.**)

While adding the criteria listed above, Section 101(b)(4) does not repeal the existing management criteria dictated by federal land management laws—for example, FLPMA and the National Forest Management Act (NFMA; P.L. 94-588)³⁴—and would add to agencies’ planning responsibilities.

Criteria for Closing Lands 1,280 Acres or More Excluding BLM or FS Lands

Section 101(b)(6) would require a process for the “permanent or temporary withdrawal, change of classification, or change of management status ... that effectively closes or significantly restricts 1,280 or more contiguous acres of Federal public land or water to access or use for recreational fishing or hunting.”³⁵ Unlike most provisions in Section 101, Section 101(b)(6) does not include recreational shooting as an activity that triggers coverage. Additionally, it would exclude closures made under Section 101(b)(4), meaning it excludes those closures on BLM and FS lands. Closures, except for emergency closures, must follow this procedure:

- publish appropriate notice;
- demonstrate that coordination has occurred with a state fish and wildlife agency; and
- submit written notice to the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources.

Most short-term closures, such as for a day or a week, are not exempted. (See “Criteria for Closing Lands in an Emergency,” below.)

Aggregation of Closure Areas

Section 101(b)(6) would address aggregate effects of multiple closures for areas that are smaller than 1,280 acres each. It states that if the effect of “separate withdrawals or changes effectively closes or significantly restricts or affects 1,280 or more acres of land or water, the withdrawals and changes shall be treated as a single withdrawal or change for purposes of [Section 101(b)(6)(A)].” It does not specify whether this provision would apply to the cumulative closures among all agencies or whether a geographical link among the closures would be required. Therefore, closures of 200-acre plots in 10 different states, for example, could amount to a closure that required reporting and publication. It appears that this section may not apply to BLM or FS lands.³⁶ Currently, there is no coordinating body among federal land agencies to manage the requirements of Section 101(b)(6).

Criteria for Closing Lands in an Emergency

Section 101(b)(6)(C) would allow an agency in an emergency to close “the smallest practicable area of Federal land to provide for public safety, resource conservation, national security, or other purposes authorized by law.” *Emergency* is not defined. The emergency closures terminate “after a reasonable period of time.” Although emergency closures are allowed, Section 101(b)(6)(C) is

³⁴ 16 U.S.C. §§1601-1606.

³⁵ This figure is 2 square miles; 640 acres is 1 square mile and is a unit of measurement used in federal land management since the late 1700s.

³⁶ Only Section 101(b)(6)(A) explicitly excludes BLM and FS lands. (See **Table 1**.)

silent as to whether agencies still must follow the notice and reporting requirements established elsewhere in the section.

Planning Documents

The bill would require that decisions affecting the opportunities for hunting, fishing, and recreational shooting be part of an agency's planning document. Section 101(b)(3) would require that each planning document "include a specific evaluation of the effects of the plans on opportunities to engage in recreational fishing, hunting, or recreational shooting." Although many federal lands, especially those of BLM, FWS, and FS, already are open to hunting and fishing, recreational shooting is somewhat less common. In addition, because of the breadth of activities included under the bill's definition of recreational shooting, agencies may not have evaluated recreational shooting in light of all of the included activities when making existing land use plans. Moreover, some of the potentially affected lands may not have planning documents analogous to those of BLM and FS.

Because Section 101 would not establish any deadlines for instituting most of these practices, it is unclear if all planning documents would need to be changed immediately or if management changes could be incorporated when the document is next revised. In the case of some agency plans, those revisions may not occur for 15 years. Another interpretation is that the lands would be open upon the law's enactment regardless of the current plan. This reading appears possible in the instance of BLM and FS lands, in light of the directive in Section 101(b)(4) that those lands "shall be open ... unless the managing Federal agency acts to close lands."

Additionally, it is not clear what parts of S. 556 would trigger a plan revision. For example, the definition of hunting, which includes trapping, could require revision of land management plans that allowed hunting but not trapping. Agencies would incur costs to revise existing plans because the plans are subject to public review processes.³⁷

Reports to Congress

Two provisions of S. 556 would require federal land management agencies to notify Congress of restrictions on hunting, fishing, and recreational shooting. If an agency closes federal land to those activities, Section 101(b)(5) would require the agency heads to submit a report every two years to the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources. Despite the biennial reporting requirement, the bill directs the reports to describe only those closures happening in the previous year.

An additional reporting mandate appears in Section 101(b)(6) and would require notice to congressional committees of closures affecting 1,280 acres or more. Although no deadline is established, the areas could not be closed until those committees are given notice.

The bill does not state whether the reporting requirements within Section 101 would replace or supplement the reporting requirements in FLPMA. Section 202 of FLPMA already requires BLM

³⁷ FLPMA requires a review. 43 U.S.C. §1712(f). The Forest Service Appeals Reform Act (16 U.S.C. §1612(a)), and National Forest Management Act (16 U.S.C. §1604(d)) require public reviews.

to report to Congress when it closes land to principal or major uses when the land is 100,000 acres or more and if that land will be closed for two or more years.³⁸

Limitation of Liability for Shooting Ranges

Section 101(b)(4)(C) includes a waiver of liability for the federal government for claims related to shooting ranges established under this paragraph. Because Section 101(b)(4)(C) refers to the term “Federal public land,” the limitation of liability may apply to many agencies and not only to BLM and FS lands. The liability limitation does not apply to recreational shooting activities occurring elsewhere, however.

State Authority

Section 101(b)(9) states that nothing in the section “interferes with, diminishes, or conflicts with the authority, jurisdiction, or responsibility of any State to manage, control, or regulate fish and wildlife under State law (including regulations) on land or water within the State, including on Federal public land.” Other provisions also indicate that the bill is not intended to interfere with state law, as discussed above: Section 101(b)(2)—management of federal lands would be to the extent authorized by state law; Section 101(b)(3)(B)—use of volunteers to cull animals would be in cooperation with state agencies; and Section 101(b)(6)—closures of lands with a total area of 1,280 acres or more would be made in coordination with state agencies.

Federal Licenses and Fees

Section 101(b)(9) states that the section does not authorize imposing a federal “license, fee, or permit to fish, hunt, or trap” on federal lands, excluding the Migratory Bird Stamp. (Recreational shooting is not included.) This provision could prevent the *creation* of license or permit requirements based on this title rather than revoke existing authorizations for license, fees, and permits. Land agencies already have permit requirements for some activities mandated in Section 101.³⁹ Because nearly all federal lands require a type of permit for activities that otherwise would be prohibited, this directive may require land management agencies to revise their regulations.

Although Section 101(b)(9) would not authorize new fees for fishing, hunting, or trapping, it would not prohibit continued application of the Federal Lands Recreation Enhancement Act (FLREA). Applying FLREA could allow agencies to impose a type of recreation fee for activities other than fishing, hunting, or trapping—such as shooting ranges or war reenactments, for example—subject to that act’s restrictions.⁴⁰

³⁸ 43 U.S.C. §1712(e)(2).

³⁹ For a general discussion of land management policies and practices in the four federal land management agencies (BLM, FWS, NPS, and FS), see Appendix in CRS Report R42569, *Hunting, Fishing, and Recreational Shooting on Federal Lands: H.R. 4089 and Related Legislation*, coordinated by Kristina Alexander.

⁴⁰ For discussion of the act, see CRS Report RL33730, *Recreation Fees Under the Federal Lands Recreation Enhancement Act*, by Carol Hardy Vincent.

Filming on Federal Lands

In many cases, Section 102 of S. 556 would reduce fees and facilitate access to “Federal land and waterways” for commercial film crews of up to five people.⁴¹ It specifies that such crews could obtain a permit for \$200, good for one year, for commercial filming in areas and times that are open to public use. No additional fees could be charged. The agency could deny access if resources might be damaged and the damage could not be mitigated; if public use would be unreasonably disrupted; if the public would face health or safety risks; or if the filming would use “models or props that are not part of the natural or cultural resources or administrative facilities of the Federal land.” Currently, such fees are variable and must generate a “fair return” based on the number of days of use, size of the crew, and amount and type of equipment.⁴² The fee structure for federal agencies is being standardized across DOI and FS, as directed by P.L. 106-206. Concerns about the measure include (1) whether it opens up wilderness areas to commercial filming; (2) whether the new fee of \$200 provides access to all federal lands for a year or whether each unit or agency issues a permit; and (3) whether the proposed fee generates the fair return to the taxpayer directed by P.L. 106-206 or results in a loss to the federal government.

Equal Access to Justice Act Reporting⁴³

Section 103 would amend provisions of the Equal Access to Justice Act (EAJA), a general fee-shifting statute that allows a “prevailing party” to recover costs and attorneys’ fees against the United States in both administrative and judicial proceedings, if the position of the United States was not substantially justified.⁴⁴ EAJA’s provisions are codified at Title 5, Section 504 of the *United States Code* (agency adjudication) and Title 28, Section §2412(d) of the *United States Code* (judicial proceedings). EAJA contained congressional reporting requirements, both of which were eliminated in 1995.⁴⁵ For fees awarded under agency adjudication, the Chairman of the Administrative Conference of the United States (ACUS) was required to report annually to Congress the amount of fees awarded during the preceding fiscal year.⁴⁶ For fees awarded by the court, the Attorney General was required to report annually to Congress on such payments.

Section 103 would reinstitute the reporting requirements eliminated in 1995 and make the Chairman of ACUS responsible for issuing annual reports to Congress and establishing searchable online databases of fees and other expenses awarded in *both* agency adjudications and judicial proceedings. The requirements for the information to be included in the congressional reports and in the online databases are similar for both agency-awarded fees and court-awarded

⁴¹ When a film crew is very small, the use is very brief, or the impact on staff and resources is very low, it is possible that the proposed fee structure would be an increase over current fees.

⁴² For more on the recent regulatory actions on commercial filming on federal lands, see CRS Report R43267, *Commercial Filming and Photography on Federal Lands*, by Laura B. Comay.

⁴³ This section was prepared by Vivian Chu, Legislative Attorney, American Law Division, CRS.

⁴⁴ If there is a more specific fee-shifting provision applicable, then a claim or award of attorneys’ fees would be made pursuant to that statute.

⁴⁵ Federal Reports Elimination and Sunset Act of 1995, P.L. 104-66 (1995).

⁴⁶ The Administrative Conference of the United States (ACUS) was defunded in FY1996 but was refunded in FY2010. In 2013, ACUS voluntarily collected information on agency-awarded and court-awarded attorneys’ fees and costs for FY2010. See ACUS, *Report of the Chairman on Agency and Court Awards in FY2010 Under the Equal Access to Justice Act*, January 9, 2013, at <https://www.acus.gov/sites/default/files/documents/FY%202010%20EAJA%20Report.pdf>.

fees. The reports must include “the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information that may aid Congress in evaluating the scope and impact of such awards.” Payments of attorneys’ fees and other expenses made pursuant to a settlement also would be reported, regardless of whether the settlement agreement is sealed or otherwise subject to a nondisclosure provision. Specifically for reports on court-awarded fees, the Chairman would be required to identify (1) any amounts paid under Title 31, Section 1304 of the *United States Code*; (2) the amount of the award of fees and other expenses; and (3) the statute under which the plaintiff filed suit. The online databases for agency-awarded and court-awarded fees would be required to include specific information, including

- the case name and number, and if available, a hyperlink to the case;
- the name of the agency involved;
- a description of the claims at issue;
- the name of each party to whom the award was made;
- the amount of the award; and
- the basis for finding that the position of the agency concerned was not substantially justified.

The heads of each agency would be required to provide relevant information to the Chairman of ACUS in a timely manner.

Judgment Fund Reporting⁴⁷

Section 103 also would amend Title 31, Section 1304 of the *United States Code*, the provision that establishes and governs payments from the Judgment Fund, which is a permanent and indefinite appropriation generally used to pay all judgments against the United States not otherwise covered by a specific appropriation. In 2011, the House Committee on Appropriations report that accompanied P.L. 112-34 directed the Secretary of the Treasury to make available online an annual report about payments made from the Judgment Fund for the fiscal year.⁴⁸ Unless information had been prohibited by law or court order, the committee wanted the report to include (1) the name of the plaintiff or claimant; (2) the name of the counsel for the plaintiff or claimant; (3) the name of the agency that submitted the claim; (4) a brief description of the facts that gave rise to the claim; and (5) the amount paid representing principal, attorney fees, and interest, if applicable. The Bureau of the Fiscal Service⁴⁹ within the Department of the Treasury issued reports for FY2011 and FY2012 to Congress with a majority of this information, and it has made available online in a nearly identical format all payments made from the Judgment Fund for each fiscal year beginning with FY2003.⁵⁰

⁴⁷ This section was prepared by Vivian Chu, Legislative Attorney, American Law Division, CRS.

⁴⁸ H.Rept. 112-136, p. 6 (July 7, 2011).

⁴⁹ The Bureau of the Fiscal Service was established on October 7, 2012, with the consolidation of two Treasury Department bureaus, one of which—the Bureau of Financial Management Service—had administered the Judgment Fund prior to 2012.

⁵⁰ The reports do not include a brief description of the facts giving rise to the claim. For the congressional reports, see Department of the Treasury, Bureau of the Fiscal Service, “Judgment Fund,” at <http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/congress-reports.htm>. For payment data beginning FY2003, see Department of the (continued...)

Section 103 would appear to codify this committee directive by amending Title 31, Section 1304 of the *United States Code*. As with the previous House committee directive, Section 103 would require the Secretary of the Treasury to post the following on a publicly accessible website: the agency; the name of the plaintiff/claimant; the name of the counsel for plaintiff/claimant; the principal amount paid and any other costs or attorneys' fees; and a summary of facts for each claim. The Secretary would be required to post this information within 30 days after the payment was made unless such information is prohibited from disclosure by law or a court order.

Bows in National Parks

Section 104 would allow the carrying of a bow or crossbow in a vehicle across NPS lands if the arrows are stored for transport and the crossbow is not cocked. The provision would set three conditions for this transport: the individual is not prohibited by law from possessing the bows or crossbows; the bows or crossbows remain in the vehicle while on NPS lands; and the possession of the bows or crossbows is legal in the state. By requiring that the bows or crossbows remain in the vehicle, issues arising from their possession inside a visitor center, historic building, or other structure would be avoided.⁵¹ The three conditions set by Section 104 appear consistent with current NPS regulations,⁵² which permit the carrying of inoperable weapons on NPS lands if the carrying is consistent with state law.

Funding to Acquire Lands for Recreation Access

Sometimes the best access to federal land is across private property. At least two federal land management agencies, BLM and FS, have authority to acquire property to provide easier access to federal lands.⁵³ The authority includes eminent domain.

Section 201 of S. 556 would amend the Land and Water Conservation Fund (LWCF) Act⁵⁴ by directing the Secretaries of the Interior and of Agriculture to devote a portion of the appropriations from the fund to federal acquisitions that secure access for recreational activities. Specifically, the bill provides that the greater of \$10 million or 1.5% of the annual appropriation for LWCF would go to the acquisition of lands, rights of way, or other interests from willing sellers to improve access for these activities.⁵⁵ Section 201 does not specify how the moneys are to be divided among agencies. In contrast, annual appropriations laws typically specify an amount

(...continued)

Treasury, Bureau of the Fiscal Service, "Judgment Fund Payment Search," at <https://jfund.fms.treas.gov/jfundSearchWeb/JFPymtSearchAction.do>.

⁵¹ The Credit CARD Act of 2009 (P.L. 111-24) included a provision that allows private persons to carry firearms in national parks and wildlife refuges, as long as the open or concealed carry of such firearms is in compliance with state and local laws (effective February 22, 2010).

⁵² 36 C.F.R. §2.4.

⁵³ 43 U.S.C. §1715(a).

⁵⁴ 54 U.S.C. §200303. For more on the Land and Water Conservation Fund (LWCF), see CRS Report RL33531, *Land and Water Conservation Fund: Overview, Funding History, and Issues*, by Carol Hardy Vincent.

⁵⁵ Over the past decade (FY2006-FY2015), the largest total appropriation from LWCF was \$450.4 million in FY2010. For that year, 1.5% of the total would have been \$6.8 million. Thus, \$10 million would have been set aside under this bill in each of the last 10 fiscal years.

of acquisition funding for each of the four major federal land management agencies (BLM, FWS, NPS, and FS).

The extent to which the agencies and Congress historically have prioritized appropriations for recreation access is unclear. However, for FY2016 the Administration seeks a portion of the overall acquisition budget of each of the four agencies for acquisitions that would facilitate recreational access.

In addition to the explicit directive in this section, Section 101(b)(1) also could be read as encouraging agencies to exercise their statutory authority to facilitate access to federal lands by acquiring property, such as easements, from adjoining property owners.

The term *federal public land* is not defined for this section. (See **Table 1**.)

Study of Hunting, Fishing, and Other Recreational Access to Federal Land

Section 202 would direct federal public land management agencies to study federal lands on which hunting, fishing, and other recreation is allowed but for which the public's access is difficult or nonexistent. For this section, *federal public land management agency* is defined as FWS, NPS, BLM, or FS. This roster of just four agencies implies a different definition of *federal public land* than that provided in Section 101, where NPS and FWS lands are excluded but various other categories of federal lands are included. (See **Table 1**.) The study is to be updated at intervals and must provide a priority list of lands over 640 acres with restricted public access. It also must state whether access to those lands could be resolved by gaining an easement, right of way, or fee title from a federal agency; a state, tribal, or local government; or a private landowner. The study is to consider both motorized and nonmotorized access. Section 202 also would require reports to House and Senate Committees.

Federal Land Transaction Facilitation Act

Section 203 of S. 556 would reauthorize and amend the Federal Land Transaction Facilitation Act (FLTFA).⁵⁶ FLTFA expired on July 25, 2001. The law had provided for the sale or exchange of BLM land that had been identified for disposal under BLM land use plans. Proceeds were split between the state with the disposed lands (4%) and a separate Treasury account (96%). While BLM alone disposed of land, funds in the account were used by all four major federal land management agencies to acquire land. The agencies could acquire inholdings and other nonfederal lands (or interests therein) that are adjacent to federal lands and contain “exceptional resources.” Under the law, BLM raised \$117.4 million through sale of 330 parcels totaling 27,249 acres. Federal agencies acquired 37 parcels totaling 18,535 acres at a cost of \$50.4 million.⁵⁷

Currently, BLM retains authority to dispose of land under the FLPMA. Proceeds from these land sales are deposited in the General Fund of the Treasury. According to BLM, the agency undertook

⁵⁶ Section 2(a)(4) also corrects a typographical error in current law (43 U.S.C. §2305) that incorrectly refers to P.L. 96-568 rather than P.L. 96-586.

⁵⁷ These figures are taken from the testimony of Steve Ellis before the Senate Committee on Energy and Natural Resources, March 12, 2015, p. 8.

relatively few sales before the enactment of FLTFA due to the costs to the agency of selling lands.⁵⁸

Section 203 would permanently reauthorize FLTFA. It also would allow for updated BLM land management plans to be used as the basis for identifying lands for sale and exchange, and it would allow for the acquisition of lands within or adjacent to federally designated areas regardless of when they were established. The section specifies that it does not apply to land sales in six particular locations that are governed under other laws.⁵⁹ Finally, it would provide for an annual transfer (for each of FY2016 through FY2025) of \$1 million from the FLTFA account to the General Fund of the Treasury.⁶⁰

Provisions of S. 659

This bill is also titled “the Bipartisan Sportsmen’s Act of 2015.” Its provisions concern regulating lead shot and sinkers, funding shooting ranges, importing polar bear trophies, hunting over baited fields, carrying loaded arms at Army Corps of Engineers water resource project areas open to the public, and reauthorizing seven wildlife statutes. It was introduced on March 5, 2015, and referred to the Senate Committee on Environment and Public Works; the Subcommittee on Fisheries, Water, and Wildlife held hearings on March 17, 2015. The three witnesses represented

- Ducks Unlimited, supporting provisions relating to the North American Wetlands Conservation Act (16 U.S.C. §4406(c)(5));
- Humane Society of the United States, opposing provisions related to lead shot and sinkers, imports of polar bear trophies, and hunting over baited fields; and
- Congressional Sportsmen’s Caucus, supporting provisions regarding lead shot and sinkers, additional funds for shooting ranges, imports of polar bear trophies, carrying of firearms at Corps projects, and international conservation grants.

Each of these provisions is discussed below.

Excluding Ammunition Components and Sport Fishing Equipment from Regulation Under the Toxic Substances Control Act

Section 2 of S. 659 would expand the existing statutory exclusion of shells and cartridges (and preserve its exclusion of pistols, revolvers, other firearms) from potential regulation as chemical

⁵⁸ Ibid, p. 8.

⁵⁹ These lands and the other laws governing them are White Pine County, Nevada (Conservation, Recreation, and Development Act of 2006; P.L. 109-432); Lincoln County, Nevada (Conservation, Recreation, and Development Act of 2004; P.L. 108-424); Owyhee Wilderness, Nevada (Subtitle F of Title I of the Omnibus Public Land Management Act of 2009; P.L. 111-11, §1501); lands in Washington County, Utah (Subtitle O of Title I of the Omnibus Public Land Management Act of 2009; P.L. 111-11, §1971); Carson City, Nevada, exchanges (Section 2601 of the Omnibus Public Land Management Act of 2009; P.L. 111-11, §2601); and Douglas County, Washington, exchanges (Section 2606 of the Omnibus Public Land Management Act of 2009; P.L. 111-11, §2606).

⁶⁰ For more on FLTFA, see CRS Report R41863, *Federal Land Transaction Facilitation Act: Operation and Issues for Congress*, by Carol Hardy Vincent.

substances under the Toxic Substances Control Act (TSCA; P.L. 94-469).⁶¹ The exclusion would be expanded to encompass specific components of these items including shot, bullets and other projectiles, propellants, and primers. Additionally, the exclusion would be expanded to encompass “sport fishing equipment” (primarily lead sinkers⁶²) as referenced in the Internal Revenue Code and sport fishing equipment components.⁶³

Over the past 20 years, several citizens’ organizations have submitted multiple petitions to the Environmental Protection Agency (EPA) requesting that the agency evaluate the risks of lead in ammunition and in fishing sinkers for regulation under TSCA. Most recently, in 2011 and 2012, petitions were submitted again to EPA. One petition addressed lead ammunition.⁶⁴ EPA denied that petition because of the existing statutory exclusion under TSCA. EPA’s denial of that petition was later upheld in litigation.⁶⁵ The other petition addressed lead fishing tackle.⁶⁶ EPA denied that petition because the threshold of risk for warranting federal regulation was not demonstrated by the petitioners.⁶⁷

Adoption of Section 2 would prevent federal regulation through TSCA but not through other statutory authorities. Lead shot has been banned in the United States for the hunting of migratory waterfowl since 1991 under authority of the Migratory Bird Treaty Act and the Endangered Species Act (ESA; P.L. 93-205).⁶⁸ Although these two statutes address the use of lead shot in hunting migratory waterfowl, TSCA more broadly applies to the lifecycle of a chemical substance, excluding lead in ammunition or fishing equipment from the definition of a chemical substance. Consequently, the provision would protect continued use of lead shot in hunting of upland game birds (such as turkeys or grouse) or fishing practices that use lead sinkers, but it would not affect the use of lead shot in waterfowl hunting, where it is already banned.

Use of Pittman-Robertson Funds for Shooting Ranges

Section 3 of S. 659 would allow territories and states to use more of the funds allocated to them under the Pittman-Robertson Wildlife Restoration Act⁶⁹ (16 U.S.C. §669) for projects involving land acquisition, construction, and expansion of public target ranges for firearms or archery. A

⁶¹ 15 U.S.C. §2602(2)(B). This provision cross-references these articles in the Internal Revenue Code (26 U.S.C. §4181).

⁶² A sinker is a small weight, usually lead, attached near the end of a fishing line to make it sink to a lower depth to catch fishes that do not feed at the surface.

⁶³ 26 U.S.C. §4162(a). H.R. 2406, S. 225, and S. 405 also include provisions that have a similar purpose. H.R. 1735 would only expand the existing statutory exclusion to encompass ammunition components.

⁶⁴ U.S. Environmental Protection Agency (EPA), “Lead in Shot and Bullets,” last updated April 14, 2015, at <http://www.epa.gov/opptintr/chemtest/pubs/petitions.html#petition12>.

⁶⁵ For more on the legal history of this issue, see CRS Report WSLG1155, *D.C. Circuit Rejects Use of the Toxic Substances Control Act to Regulate Spent Lead Bullets and Shot*, by Robert Meltz.

⁶⁶ EPA, “Fishing Tackle Containing Lead; Disposition of Petition Filed Pursuant to TSCA Section 21,” *77 Federal Register* 10451, February 22, 2012. Although EPA proposed to regulate lead in fishing tackle in 1994 in response to a citizens’ petition, it did not finalize this regulation because of the development of state and local programs that address these risks, thereby reducing the level of risk over time.

⁶⁷ *Ibid.*

⁶⁸ 50 C.F.R. §20.21(j).

⁶⁹ See <http://wsfrprograms.fws.gov/home.html> for more information about the FWS Wildlife Restoration Program. Also see “Interest on Pittman-Robertson Fund,” below, for a second provision affecting interest from this Fund.

state's allocation of federal funds currently may be used to support a maximum of 75% of any project, with the remainder coming from nonfederal sources. Section 3 would amend 16 U.S.C. §669h-1(a), with the effect of increasing the maximum federal share from the Pittman-Robertson (P-R) program from 75% to 90% for projects acquiring land for, expanding, or constructing target ranges. However, the bill also contains a provision stating that "a State may pay up to 90 percent of the cost of acquiring land for, expanding, or constructing a public target range." No other grant program administered by FWS places an upper limit on the fraction of funding that may be provided by the grant recipient. Instead, other FWS grant programs place upper limits only on the federal share of the grant.⁷⁰

Section 3 would define a *public target range*, for the purposes of P-R, as a location identified by a government agency that is open to the public; may be supervised; and can accommodate archery or rifle, pistol, or shotgun shooting.

Importing Polar Bear Trophies

Before May 15, 2008, when the listing of polar bears as a threatened species under the ESA took effect, it was permissible under U.S. law to import polar bear trophies legally taken in Canada. After that date, import was not allowed. Once the proposed rule to list polar bears as a threatened species was published in January 2007, FWS conducted an extensive campaign to alert hunters to the potential impact of an eventual ESA listing on their ability to import polar bear trophies. However, FWS continued to authorize the import of polar bear trophies under existing law until the ESA listing became final. The permitting process was truncated by court order, making the listing effective immediately rather than after 30 days.⁷¹

Section 4 would amend the Marine Mammal Protection Act (MMPA; P.L. 92-522)⁷² to allow hunters with polar bear trophies legally hunted in Canada to import these trophies to the United States.⁷³ It would direct FWS to issue permits for importing these sport-hunted trophies if a permit was sought before May 15, 2008. It would further amend the MMPA to provide that the permits may be issued regardless of the polar bear's status as a depleted species under MMPA, which is the basis on which the permits were denied.

In 2011, FWS testified that it did not oppose similar legislation allowing importation of polar bear trophies by hunters who both applied for an import permit and completed their legal hunt prior to the ESA listing.⁷⁴ Others oppose allowing these permits, believing it would encourage hunting of

⁷⁰ There may be a conflict between the proposed separation of funding in a new 16 U.S.C. §669g(b)(1) and (2), and a cross-reference in 16 U.S.C. §669h-1(a)(2). Section 669h-1(a)(2) currently limits states to "the amount described in Section 669g(b) ... for the construction, operation and maintenance of public target ranges." However, the revised Section 669g, as proposed in Section 4, breaks expenses into two components: operation and maintenance (669g(b)(1)); and acquiring land for, expanding, or constructing (669g(b)(2)), seemingly with a 75% limit for the former and a new 90% limit for the latter. Thus, a conforming amendment to §669h-1(a)(2) also may be necessary to clarify which of the two limits applies.

⁷¹ Center for Biological Diversity v. Kempthorne, No. C 08-1339, 2008 WL 1902703 (N.D. Cal. April 28, 2008).

⁷² 16 U.S.C. §§1361 et seq.

⁷³ According to agency records, between 41 and 44 hunters would be eligible for the permit.

⁷⁴ Testimony of FWS Acting Director Rowan Gould, in U.S. Congress, House Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs, *Hearing on H.R. 991, a Bill to Amend the Marine Mammal Protection Act of 1972 to Allow Importation of Certain Polar Bear Trophies Taken in Sports Hunts in Canada*, hearing, 112th Cong., 1st sess., May 12, 2011, available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hrg66361/html/CHRG-112hrg66361.htm>.

a species when a listing is imminent. The Humane Society of the United States testified in the 112th Congress that allowing polar bear imports would “would roll back polar bear conservation efforts and set a dangerous precedent for gutting the protections provided under the Marine Mammal Protection Act and the Endangered Species Act.”⁷⁵ A federal court has upheld the current permit ban, finding that there was no procedural flaw in blocking permits as of the day the bear was listed as threatened.⁷⁶

Migratory Birds: Regulating Baiting

Hunting migratory game birds over baited fields is forbidden by the Migratory Bird Treaty Act⁷⁷ and its implementing regulations. There is little controversy over whether such hunting is an unsportsmanlike practice that should be prohibited. There is, however, controversy over precisely what constitutes *baiting*, how long hunters should wait after an agricultural field has been harvested to avoid the baiting prohibition, and whether the effects of natural disasters might affect whether a field is considered baited. Section 105 addresses these issues by allowing hunting over crops under certain circumstances.

Section 5 defines a *baited area* as an area where there has been the placement of salt grain or feed to attract game birds and an area where there has been manipulation of unharvested cropland (e.g., through mowing or discing), unless the manipulation is a normal agricultural practice. It would explicitly exclude from the definition any areas with (1) a treatment that is a normal agricultural practice, (2) unmanipulated standing crops, or (3) standing crops that are or were flooded. The last provision appears to exclude flooded cropland, whether naturally or artificially flooded.

The section defines *normal agricultural practice*. Some features of this long definition are particularly noteworthy. First, the practice would be considered normal if recommended by the state office of the Cooperative Extension System of the Department of Agriculture.⁷⁸ Second, the section would require that the applicable state game department be consulted and, if requested, be asked to concur. It does not specify who may do the requesting and what the effect would be if the applicable state game department did not concur. A normal agricultural practice is defined to include the destruction of crops as required by the Federal Crop Insurance Corporation to obtain a crop insurance payment after a natural disaster. Section 5 also would require an annual report from the Secretary of Agriculture to the Secretary of the Interior on any changes to normal agricultural practices.

There has been controversy regarding limits on hunting over baited fields and what constitutes a normal agricultural practice. An amendment similar to this provision was offered in the House

⁷⁵ Testimony of Humane Society of the United States Chief Program and Policy Office Michael Markarian, U.S. Congress, House Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs, *Hearing on H.R. 991, a Bill to Amend the Marine Mammal Protection Act of 1972 to Allow Importation of Certain Polar Bear Trophies Taken in Sports Hunts in Canada*, hearing, 112th Cong., 1st sess., May 12, 2011, at <http://www.humanesociety.org/assets/pdfs/legislation/testimony-michael-markarian-h-r-1054.pdf>.

⁷⁶ *In re Polar Bear Endangered Species Act Listing and §4(d) Rule Litigation*, 818 F. Supp. 2d 240 (D.D.C. 2011).

⁷⁷ 16 U.S.C. §§703-712.

⁷⁸ The U.S. Department of Agriculture changed the name of the Cooperative Extension System to the National Institute of Food and Agriculture in 2008.

during the 113th Congress.⁷⁹ At issue in particular was a practice among rice farmers in Arkansas of managing a drought-damaged rice crop. When rains caused a rare second rice crop to spring up later, that second crop was considered bait, and hunting over it was considered illegal. With this change, farmers could hunt legally or charge other hunters for access to hunt over any fields if local officials deemed a particular agricultural practice to be normal. Neither the farmer nor other hunters would be held to the Migratory Bird Treaty Act's strict liability standards because the bill would prevent such practices from being considered baiting.

Bearing Arms at Corps of Engineers Projects

For areas open to the public at Corps water resource projects, Section 6 would ban the Secretary of the Army from promulgating or enforcing regulations that prohibit individuals from possessing loaded firearms; loaded firearms currently are restricted for use in hunting or shooting in areas designated for such activities.⁸⁰ The proposed language would require that possession comply with state law and that the individual not be otherwise prohibited from possessing firearms.

This language would allow private individuals to carry loaded and/or concealed firearms consistent with state law at all Corps water resource project areas that are open to the public. However, individuals still would be prohibited from possessing a firearm at a federal facility (as identified under 18 U.S.C. §930)⁸¹ or areas not open to the public. Individuals would be responsible for knowing and complying with all applicable concealed carry laws of the state or states in which the water resources development project is located. The legislation does not distinguish between handguns and other firearms, such as long guns (rifles and shotguns).

Supporters of the proposed legislation see enactment as part of a larger, ongoing effort to improve the consistency of laws and regulations concerning firearms on federally managed lands. They also see the proposed legislation as providing for consistent treatment of open and concealed firearms possession within a state, providing for recreational shooting and self-defense, and protecting the right to bear arms under the Second Amendment of the Constitution. Other stakeholders have raised concerns that the proposed legislation ignores implementation challenges that are not generally faced on other federal lands and by other federal land management agencies (e.g., presence of critical facilities or hydropower structures and limited Corps law enforcement authority) and that enactment could produce unintended public safety and infrastructure security issues.

⁷⁹ Rep. Crawford, "Sportsmen's Heritage and Recreational Enhancement Act of 2014," remarks in the House, *Congressional Record*, daily edition, vol. 160 (February 4, 2014), pp. H1579-H1580.

⁸⁰ For more on this issue, see CRS Report R42602, *Firearms at Army Corps Water Resource Projects: Proposed Legislation and Issues in the 113th Congress*, by Nicole T. Carter. Of the Corps' fee-owned land, roughly half is open to hunting. The other half is closed to hunting, often due to its close proximity to developed or urban areas.

⁸¹ 18 U.S.C. §930 restricts firearms at federal facilities; *federal facility* is "a building or part thereof owned or leased by the federal government, where Federal employees are regularly present for the purpose of performing their official duties." Some Corps facilities, such as locks, levees, exposed hydropower elements, improved-recreational facilities, may not qualify as a building under 18 U.S.C. §930. *Building* was not defined in proposed Corps firearms legislation, raising questions about whether standard Corps construction qualified as buildings. There are other definitions of *federal facility* used in federal law that more clearly incorporate buildings and other construction (e.g., 15 U.S.C. §205c(9)). There is also a standard definition of *public building* (not just building) that can apply broadly at 40 U.S.C. §3301(5)(B).

Reauthorization of North American Wetlands Conservation Act

Section 7 would reauthorize the North American Wetlands Conservation Act through FY2020.

Multinational Species Conservation Fund Reauthorizations

Section 8 would reauthorize the five current laws that together form the Multinational Species Conservation Fund:

- African Elephant Conservation Act (16 U.S.C. §4245(a));
- Rhinoceros and Tiger Conservation Act of 1994 (16 U.S.C. §5306(a));
- Asian Elephant Conservation Act of 1997 (16 U.S.C. §4266(a));
- Great Ape Conservation Act of 2000 (16 U.S.C. §6305); and
- Marine Turtle Conservation Act of 2004 (16 U.S.C. §6606)

All five laws would be reauthorized through FY2020. In addition, the Great Ape Conservation Act (GACA) would be modified to allow both annual and multiyear grants and to clarify the duties of the panel of experts created under GACA. Among other things, to the extent practicable such panels are to include experts from range states. The panels are directed to identify conservation priorities, taking into account conservation plans and scientific research. The Marine Turtle Conservation Act would be amended to make not only foreign countries but also territories of the United States eligible for grants.

Interest on Pittman-Robertson Fund

The Pittman-Robertson Wildlife Restoration Fund provides grants to states for projects to conserve wildlife, as well as to support hunter education. Funding is derived from excise taxes on firearms and ammunition, and it is mandatory spending (that is, available without further appropriation). Under Title 16, Section 669b of the *United States Code*, those funds not required for spending in the current year must be invested in interest-bearing U.S. obligations. Further, that interest is then made available for use under the North American Wetlands Conservation Act (NAWCA; P.L. 101-233). Authority to transfer the interest to NAWCA expires at the beginning of FY2016. Section 9 would extend the authority for this transfer to the beginning of FY2026.⁸²

⁸² Also see “Use of Pittman-Robertson Funds for Shooting Ranges,” above, for another provision affecting uses of the fund itself.

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