



THE WILDLIFE CONSERVATION FUND OF AMERICA

To protect the Heritage of the American Sportsman to hunt, to fish and to trap.

April 3, 2000

Honorable Jamie Clarke
Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, D.C. 20240

Dear Jamie:

The Wildlife Conservation Fund of America (WCFA), its Sportsmen's Legal Defense Fund, the Arizona Desert Bighorn Sheep Society, and WCFA members and affiliates in Arizona and elsewhere are deeply concerned about unwarranted and illegal restrictions on wildlife management activities within the Cabeza Prieta and Kofa National Wildlife Refuges. It appears that some persons within the Service mistakenly believe that Wilderness designations within these refuges have the effect of (1) trumping the basic wildlife conservation purposes of these two units and (2) prohibiting accepted, and Congressionally approved, conservation activities and projects, including the development of water catchments for desert bighorn sheep. We urge you to reject this position and immediately reestablish longstanding management practices (i.e., reinstate the legal status quo), which are and always have been consistent with applicable law. These Congressionally approved practices (and other aspects of refuge management) can then be reexamined in the pending comprehensive conservation plan (CCP).

The fundamental purposes of the Cabeza Prieta and Kofa units are wildlife conservation, as reflected in the original 1939 Executive Orders creating the two Refuges and emphasized anew in the National Wildlife Refuge System Improvement Act of 1997 (NWRISA) (P.L. 105-57). Congress enacted this latter statute, creating for the first time a comprehensive organic act for the refuge system, subsequent to both the 1964 Wilderness Act (P.L. 88-577) and the 1990 Arizona Desert Wilderness Act (ADWA) (P.L. 101-628) (which created the wilderness designations in the two refuges). Wilderness designations within refuges are an overlay and provide only supplemental purposes to guide management. See 16 U.S.C. § 1133(a).

Cabeza Prieta and Kofa were both subject to wilderness management restrictions commencing in the early 1970's. During this period, which lasted until formal wilderness occurred in 1990 with passage of the ADWA, the Service authorized the construction, operation, and maintenance of water catchment projects and other wildlife conservation and enhancement activities within these de facto wilderness areas. Congress expressly approved and ratified this kind of wilderness management for

these two units when it enacted the ADWA. A policy change to the contrary would violate the ADWA and NWRSIA.

Objective review of applicable law demonstrates that the Service has more than sufficient authority to fulfill clear Congressional intent and manage the wilderness portions of these two Refuges primarily for wildlife conservation purposes. The Service may authorize and approve the construction, operation, and maintenance of water catchments and other wildlife enhancements, and approve the related use of motorized vehicles and equipment within wilderness areas. All available evidence demonstrates that these enhancements are beneficial to wildlife and have no adverse effects on wilderness values. Failure to approve such activities, with subsequent adverse impacts on unit wildlife populations, would likely violate of the purposes of Cabeza Prieta and Kofa and of the refuge system mission.

Refuges Established for Wildlife Conservation

The 1939 Executive Orders establishing Cabeza Prieta and Kofa each specify that the units are "reserved and set apart for conservation and development of natural wildlife resources," and further specify that "improvement of . . . natural forage resources" is another purpose for the units. Executive Orders 8038, 8039, Jan. 25, 1939 (emphasis added), Attachment 1. From the beginning, these units have existed for the conservation, development, and improvement of wildlife and related habitat.

Consistent with these express purposes, the Service acted to establish wildlife related developments and improvements, such as water catchments, throughout both Refuges. Through 1994, approximately three dozen of these improvements were constructed in wilderness managed sections in Cabeza Prieta and in Kofa. These improvements involved access on established (and in most cases still existing) roads by motorized vehicle and use of motorized equipment, including cement mixers, pumps, generators, and power tools. Importantly, most of these developments or improvements were installed during the period of de facto wilderness status from 1974 to 1989. These management activities produced beneficial conservation results as populations of desert bighorn sheep within Cabeza Prieta rose to a peak of 478 estimated animals in the early 1990's.

In 1997, enactment of NWRSIA enhanced and emphasized anew the wildlife conservation purposes of the two Refuges. The Act defined the terms "purposes of the refuge" and "purposes of each refuge" to be the "purposes specified in or derived from the . . . executive order . . . establishing, authorizing, or expanding a refuge." 16 U.S.C. § 668ee(10). It also defined the term "conservation" to include "habitat management." *Id.* § 668ee(4). This important statute reaffirmed that conservation, development and improvement of wildlife and habitat are the basic purposes of Cabeza Prieta and Kofa.

The 1997 Organic Act also set forth for the first time an overarching mission for the refuge system, including these two units:

The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans. [16 U.S.C. § 668dd(a)(2).]¹

In fulfilling this mission, and the specific purposes of each unit (e.g., Cabeza Prieta and Kofa), the Secretary and the Service are mandated to “provide for conservation of . . . wildlife” and “ensure” (1) biological integrity, (2) fulfillment of the mission, (3) that “the purposes of each refuge are carried out” with priority assigned to specific unit purposes in cases of conflicts with other goals, and (4) cooperation and collaboration with state fish and wildlife agencies. 16 U.S.C. § 668dd(a)(4) (emphasis added). The federal courts have determined that these mandates require the Service to “actively manage refuge lands and fauna and flora contained therein.” *Wyoming v. United States*, 61 F. Supp.2d, 1209, 1220 n.9 (D. Wyo. 1999).

NWRSIA’s mandate is clear: Congress has expressly directed The Service to ensure (i.e., guarantee) that the specified purposes of Cabeza Prieta and Kofa (i.e., conservation, development, and improvement) are implemented. Any goals or limitations arising from the 1964 Wilderness Act are supplemental and not intended to trump or thwart achievement of wildlife conservation purposes.

The Arizona Desert Wilderness Act Ratifies Wildlife Management Practices

Wilderness management of Cabeza Prieta and Kofa commenced in the early 1970’s following legislative recommendations from the President for wilderness designations within the two units.² It has been long established practice that areas specifically proposed for wilderness status or being studied for such status are to be managed as wilderness pending Congressional action on the areas.³ De facto wilderness status and management came to these units in 1973 and 1974 and continued until the 1990 ADWA formalized this wilderness overlay designation.

¹ The Service’s “Director’s Priorities, FY 1999-2000” cites this passage as the “Vision” for the National Wildlife Refuge System.

² See Statement of Michael J. Spear, Regional Director, Region 2, U.S.F.W.S., (“Spear Statement”) reprinted in S. Rep. 359, 101st Cong., 2d Sess., at 34-35 (July 10, 1990) (noting that Cabeza Prieta and Kofa had been managed as “de facto” wilderness since 1974), Attachment 2.

³ See *Parker v. United States*, 448 F.2d 793, 797 (10th Cir. 1971) (agency did not have discretion to destroy the wilderness values of an area considered for formal wilderness designation); Director’s Priorities, FY 1999-2000, National Wildlife Refuge System, Goal 1 (“Director will issue a memo that states . . . that proposed wilderness areas should be managed as if they were designated wilderness.”); see also Remarks of Chairman Udall, discussed later in this section.

During the decade and a half of the de facto wilderness designation, the Service determined that the development, operation, and maintenance of wildlife related improvements, including water catchments, were fully consistent with wilderness management. As a result, numerous catchments were developed during this period within wilderness portions of Cabeza Prieta and Kofa. The Arizona Desert Bighorn Sheep Society developed a number of these improvements with the approval and cooperation of the Service.

When Congress was considering the ADWA, senior Service representatives testified that within Kofa, for example, approximately 80 wildlife watering facilities had been maintained under wilderness management rules and that seven new catchments had been constructed and that similar activities had occurred on Cabeza Prieta. The Service testified that the formal designation of wilderness (i.e., extension by Congress of the de facto wilderness management restrictions) would not preclude these activities. Spear Statement, S. Rep. 359, 101st Cong., 2d Sess. at 35 (July 10, 1990), Attachment 2. Thus, Congress was aware of this issue.

The enactment of the ADWA constituted express Congressional approval and ratification of the Service's wilderness management regime that allowed the construction, operation, and maintenance of water catchments. When Congress expresses approval or ratification of an agency's interpretation of policy, that interpretation or policy becomes the will of Congress and has the force and effect of law. *E.g., Isaacs v. Bowen*, 865 F.2d 468, 473 (2nd Cir. 1989); *see also Phillips Petroleum Co. v. USEPA*, 803 F.2d 545, 547 n.3 (10th Cir. 1986) (in enacting statute, "Congress intended to ratify EPS's policy of deep well injection."). This doctrine applies particularly when Congress "indicates not only an awareness of the administrative view, but also takes an affirmative step to ratify it." *Isaacs*, 865 F.2d at 473. As discussed below, when officially designating wilderness in these two Refuges in 1990, Congress was acutely aware of (1) the Service's use of water catchment devices and mechanical equipment to create and operate these devices over the preceding 15 years, (2) the Service's management of these areas as de facto wilderness over those 15 years, and (3) the Wilderness Act's general prohibitions on the use of motorized and mechanical devices. At the same time, Congress affirmatively ratified these uses within the new wilderness areas of the Refuges.

The legislative history of the ADWA is absolutely clear that Congress expected and intended that formal wilderness status would bring no management changes in Cabeza Prieta or Kofa regarding wildlife management projects and activities:

Wilderness designation will not bring any great changes to the administration of these refuges. They were studied and positively recommended for wilderness in the administrations of Presidents Nixon and Ford and have been managed as wilderness since that time. Today we are proposing to formalize the regime that has governed the refuges for at least 15 years. [Remarks of Rep. Morris K. Udall (D-AZ), Chairman, House Committee on Interior and Insular Affairs,

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during consideration of ADWA (H.R. 2571), *Congressional Record*,
p. H1410, April 3, 1990, Attachment 3.]

Chairman Udall also spoke directly to the issue of continued wildlife management activities in the formalized refuge wilderness areas:

The administration has testified that the activities common in the refuge today - for example, donations of time and labor to construct water catchments by organizations such as the Arizona Desert Bighorn Sheep Society - will continue. [*Id.*]

Chairman Udall was not alone in expressing this clear intent to approve and ratify wilderness management practices that provided for water catchment construction. Rep. Robert Davis (R-MI), Ranking Member of the House Merchant Marine and Fisheries Committee (with jurisdiction over Service matters) also stated "[u]nder existing wilderness management policy, a wide range of wildlife management activities are, and will continue to be, allowed in the four Arizona wildlife refuges." *Id.* at H1412. Merchant Marine Committee Chairman Rep. Walter Jones (D-NC) expressed the same intent:

the wilderness designations in this bill [ADWA] will not adversely affect or unduly restrict wildlife management operations on these four desert wildlife refuges. [*Id.* at H1413.]

The U.S. Senate was similarly aware of this management history and expected that enactment of ADWA would bring no changes to traditional management practices at Cabeza Prieta and Kofa, especially as related to bighorn sheep:

In fact, management of bighorn sheep populations and habitat is one of the primary reasons for establishment of the refuge [Kofa] in 1939. The designation of wilderness is not intended to change this or any other purpose for the refuge. [S. Rep. 359, 101st Cong., 2d Sess. at 20 (July 10, 1990), Attachment 2.]

The same report also acknowledged conservation of desert bighorn sheep as a primary purpose for Kofa and Cabeza Prieta. *Id.* at 21; cf. *Schwenke v. Secretary of the Interior*, 720 F.2d 571, 577 (9th Cir 1983) (Congress wanted to transfer administration of wildlife Range to Fish and Wildlife Service because the agency's particular mission was to protect wildlife).

Congress intended that the wilderness management practices that existed during the period leading up to enactment of ADWA would be continued following formal designation of wilderness.

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These practices included construction, operation and maintenance of water catchments and other wildlife management activity and improvements. This action demonstrates conclusively that Congress not only wanted these activities to continue but was persuaded that nothing in the 1964 Wilderness Act or ADWA would adversely impact or thwart these beneficial conservation projects and activities.

1964 Wilderness Act Does Not Prohibit Construction and Maintenance of Catchments Using Motorized or Mechanical Means

The Service has had long standing policy that permits the use of motorized vehicles and equipment for wildlife management practices notwithstanding section 4(c) of the Wilderness Act, which prohibits some uses of motorized equipment in wilderness areas. Under long established, and Congressionally accepted, policy and practice, motorized equipment may be used within wilderness areas if such equipment constitutes the "minimum tool" to achieve the management objective or purpose. U.S. Fish and Wildlife Service, Refuge Manual, May 8, 1986 (6 RM 8.8.A). The minimum tool is that "combination of methods and equipment that least degrades the wilderness values of the land while meeting refuge objectives in a safe and economical manner," 6 RM 8.2.

The Service has also long recognized that the 1964 Wilderness Act, and section 4(c), is not rigid but confers a measure of "management latitude" on the administering agency (6 RM 8.7) and allows "wildlife management facilities" within wilderness areas if the facilities are "essential to accomplishing refuge management objectives." 6 RM 8.8.I. In this case, protection of desert bighorn sheep populations, as well as wildlife conservation and conservation related development and improvement, are the refuge management objectives arising from the 1939 executive orders and statutorily ratified by Congress via NWRSA in 1997.⁴ Importantly, the Refuge Manual cites the following example of a special situation where motorized equipment use may be approved within wilderness:

- (2) Activities essential to accomplishing refuge objectives. For example, if bighorn sheep tanks, [catchments] dry up and the only means of supplying water is by trucking it into the tanks. . . . [6 RM 8.8.A(2).]

These policies were in force and effect when Congress enacted the ADWA and were a basis of the representations by Service officials that wilderness designations within the two Refuges would not adversely impact or restrict the development of catchments and the improvement of wildlife

⁴ As the later enacted statute, the 1997 NWRSA takes precedence over the 1964 Wilderness Act to the extent the two conflict. See *Voyageurs Region Nat'l Park Assoc. v. Lujan*, 966 F.2d 424, 428 (8th Cir. 1992) ("Congress was certainly aware of the Wilderness Act when it enacted the Voyageurs National Park Act, and the general language of the Wilderness Act must give way to the more specific provisions of the park's enabling legislation."); *In Re Glacier Bay*, 944 F.2d 577, 583 (9th Cir. 1991) (later enacted TAPS Act preempted earlier enacted Act).

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habitat. Congress was fully cognizant of these policies and representations. They became the basis of express Congressional intent that the ADWA would not cause on-the-ground changes in the administration of the two units and the ability to engage in wildlife related development and improvement activities. That express intent, and passage of the ADWA, constitutes Congressional approval and ratification of these traditional policies and practices within Cabeza Prieta and Kofa.

Particularly in light of these Congressional actions, section 4(c) is not a significant barrier to use of motorized equipment. In enacting Chapter 23 (relating to the National Wilderness Preservation System) of the 1964 Wilderness Act, Congress expressly stated that “[t]he purposes of this chapter are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge system are established and administered” 16 U.S.C. § 1133(a). Section 4(c) allows, “as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter,” the use of motor vehicles, motorized equipment, other forms of mechanical transport, and structures and installations. *Id.* § 1133(c). As the purposes of the National Wilderness Preservation System are supplemental to the primary purposes for which the refuge units were created and administered, section 4(c) does not prohibit such uses in furtherance of the wildlife management activities of the Service in the two Refuges.

The Service must harmonize section 4(c) with the Refuges’ purposes, the general mission of the refuge system, and the specific dictates of the NWRSA. It is wrong to conclude that section 4(c) simply trumps and nullifies these other statutes.

As discussed above, the legislative history is clear: these water catchment and related activities would continue regardless of formal wilderness designation. To the extent these activities create tension with section 4(c), it must yield. Put another way, the correct interpretation is that section 4(c) does not prohibit these activities. See *National Railroad Passenger Corp. v. National Association of RRR Passengers*, 414 U.S. 453, 458 (1974) (even the plain meaning “must yield to clear contrary evidence of legislative intent”).

Improper Homage to Supplemental Wilderness Objectives is Harming Wildlife

As previously noted, the wildlife management activities, including development of water catchments, in Cabeza Prieta produced beneficial conditions for bighorn sheep, causing the population to peak in the early 1990’s. Unfortunately, this peak coincided with the beginning of the Service’s overly restrictive interpretation of wilderness management authority. The subsequent restrictions on operations and maintenance of the catchments took its toll on the desert bighorn sheep and the endangered Sonoran pronghorn. From the 1993 peak population of 478 estimated animals, numbers declined 15 percent by 1996 to 408 estimated sheep and dropped another 11 percent by 1999 to less than 365 estimated bighorns. A 25 percent decline in Cabeza Prieta’s signature species is the consequence of the Service’s misreading of the law and unwarranted restrictions on conservation management activities, and is a clear violation of NWRSA and other applicable law.

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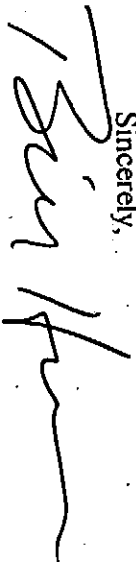
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Conclusion

The legal authorities and the intent of Congress allow, if not compel, the Service to continue creation and operation of wildlife management improvements, including water catchment devices in Cabeza Prieta and Kofa. In light of the past positive effects on the wildlife resources of the two Refuges, the Service should immediately reestablish Congressionally approved management practices regarding wildlife conservation developments and improvements. The management scheme that worked in the 1970's and 1980's should be in force and effect. Moreover, these established and ratified practices may be reinstated without awaiting completion of the CCP's for the units. We stand ready to work with the Service to continue these important wildlife management activities.

Sincerely,



William P. Horn

Counsel to
Wildlife Conservation Fund of America

Attachments

cc: (with Attachments)

The Honorable Jon Kyl

The Honorable John McCain

The Honorable J.D. Hayworth

The Honorable Jim Kolbe

The Honorable Ed Pastor

The Honorable Bob Stump

Brian Dolan

John Fugate

Paul Karres

John Kennedy

Harry Burroughs