

Fordham Environmental Law Review

Volume 12, Number 1

2000

Article 2

The National Wildlife System Improvement Act of 1997: Defining the National Wildlife Refuge System for The Twenty-First Century

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THE NATIONAL WILDLIFE SYSTEM IMPROVEMENT ACT OF 1997: DEFINING THE NATIONAL WILDLIFE REFUGE SYSTEM FOR THE TWENTY-FIRST CENTURY

*Cam Tredennick**

INTRODUCTION

[The National Wildlife Refuge System] is a system founded in faith uniquely American in its origins, founded on the notion that in a country as bountiful, diverse and large as ours, there ought to be special places that are set aside exclusively for the our common heritage of fish and wildlife Unlike other areas where wildlife is shunted aside by the relentless forces of the bulldozer, chain saw, and the plow, the conservation of wild creatures, large and small, reigns supreme in wildlife refuges.¹

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1. *H.R. 511, National Wildlife Refuge System Improvement Act and H.R. 512, New National Wildlife Refuge Authorization Act: Hearings Before the House Comm. on Res., Subcomm. on Fisheries, Wildlife and*

In an October, 1903 proclamation, President Theodore Roosevelt set aside the three-acre Pelican Island in southern Florida as the first National Wildlife Refuge.² With merely a cursory inquiry as to whether he had the power to do so, Roosevelt placed an immediate ban on hunting on the island and halted the profligate slaughter of herons and egrets that were being killed for their decorative plumes.³ Two years later, Congress authorized the President to designate areas within the Wichita National Forest as a wildlife range.⁴ Since then,

Oceans, 105th Cong. 95 (1996) (statement of Bruce Babbitt, Secretary of the Interior) [hereinafter *Hearings on H.R. 511*].

2. See Lynn A. Greenwalt, *The National Wildlife Refuge System*, in *WILDLIFE AND AMERICA* 399 (Howard P. Brokaw ed., 1978); NATHANIEL P. REED & DENNIS DRABELLE, *THE UNITED STATES FISH AND WILDLIFE SERVICE* 56 (Westview Press ed., 1984).

3. See H.W. BRANDS, T.R.: THE LAST ROMANTIC 623 (1998) (stating that Roosevelt's action kept the birds that were nesting on the island from continued decimation at the hands of hunters); U.S. FISH AND WILDLIFE SERVICE, *PELICAN ISLAND: HONORING A LEGACY* 2 (1999) (explaining that Frank Chapman, a well known ornithologist, and Paul Kroegel, an obscure local German immigrant, drew national attention to the slaughter, but their efforts at convincing Congress to pass legislation failed). Historians credit Chapman with convincing Roosevelt to issue the executive order despite this congressional failure. Kroegel, the first of the wildlife refuge wardens, subsequently operated the refuge for fifteen years with his own boat and gun. While Kroegel risked his life on several occasions, he was fortunate in avoiding a fate similar to that of Guy Bradley, a fellow warden killed by plume hunters at Cape Sable, Florida in 1905. See *id.*

4. See Act of Jan. 24, 1905, ch. 137, 33 Stat. 614 (codified at 16 U.S.C. §§ 684-686 (1994)). The following year, Congress authorized the President to designate areas within the Grand Canyon National Forest as a wildlife range. See Act of June 29, 1906, ch. 3593, 34 Stat. 607 (codified at 16 U.S.C. §§ 684-686 (1994)). In 1908, Congress established a National Bison Range in Montana by its own action. See Act of May 23, 1908, ch. 192, 35 Stat. 267 (codified at 16 U.S.C. § 671 (1994)). Although Congress never expressly validated Roosevelt's Pelican Island proclamation, these acts seem to demonstrate acquiescence. See also *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (holding that President Taft acted within his power by executing a 1909 withdrawal of lands for oil reserves despite no explicit approval from Congress). The congressional acts which followed the Pelican Island withdrawal may explain why it is generally considered the first wildlife refuge and not Afognak Island NWR, in Alaska, which was established by President Benjamin Harrison in 1892. See Proclamation No. 39, 27 Stat. 1052 (1892).

acts of Congress and executive orders have responded to a broad spectrum of needs for wildlife and habitat protection to create the federally managed National Wildlife Refuge System (“NWRS”).⁵

Comprising 93.6 million acres and 521 wildlife refuges in 50 states and several territories,⁶ and larger than the National Park System,⁷ the NWRS is the only system of federal lands committed principally to the conservation of wildlife. It is the largest system of lands so dedicated in the world.⁸ Aptly described as the “heart and soul of wildlife conservation in the United States,”⁹ the NWRS provides a critical anchor for the recovery of endangered species,¹⁰

5. See H.R. REP. NO. 105-106, at 1 (1997), *reprinted in* 1997 U.S.C.C.A.N. 1798-5, 1798-5.

6. See U.S. FISH AND WILDLIFE SERV., REPORT OF LANDS UNDER CONTROL OF THE U.S. FISH AND WILDLIFE SERVICE AS OF SEPTEMBER 30, 1999 6 (1999) [hereinafter 1999 FWS LANDS REPORT]. The Refuge System includes 77 million acres in Alaska. *Id.* at 7. Territories that include wildlife refuges range from the 23,000-acre Guam NWR to four refuges covering approximately 4,800 acres in Puerto Rico. See *id.* at 23.

7. U.S. GEN. ACCT. OFF., FEDERAL LANDS INFORMATION ON LAND OWNED AND ACQUIRED, GAO/T-RCED-96-73 2 (Feb. 1996) [hereinafter GAO LANDS REPORT]. During the 1994 fiscal year, the National Park System managed 76,600,000 acres, which is 11,000,000 acres less than the FWS. See *id.* The largest federal land management agencies, the U.S. Forest Service and the Bureau of Land Management, managed 191,600,000 acres of national forest lands, and 267,100,000 acres of mostly western rangelands, respectively. See *id.* at 3.

8. Richard J. Fink, *The National Wildlife Refuges: Theory, Practice and Prospect*, 18 HARV. ENVTL. L. REV. 1, 5-6 (1994). See also H.R. REP. NO. 105-106, *supra* note 5, at 1798-5 (recognizing the evolution of the National Wildlife Refuge System into “the world’s most comprehensive system of lands devoted to conservation and management [of wildlife]”).

9. See Fink, *supra* note 8, at 6 (citing 1991 *Hearing on the Status of Efforts to Improve the Management of the National Wildlife Refuge System Before the Subcomm. on Fisheries and Wildlife Conservation and the Env’t of the House Comm. on Merchant Marine and Fisheries*, 102d Cong., 1st Sess. 4 (1991) (statement of Rep. Gerry E. Studds)).

10. See FISH AND WILDLIFE SERVICE, FULFILLING THE PROMISE: THE NATIONAL WILDLIFE REFUGE SYSTEM 17 (1999) (explaining that the National Wildlife Refuge System (NWRS) provides habitat for 257 of the 1,107 plant and animal species listed under the Endangered Species Act as threatened and endangered as of October, 1998). Through acts of the President or Congress, fifty-six refuges have been established explicitly for

the protection of migratory birds,¹¹ and the preservation of the health of all wildlife across the nation.¹² The NWRS has become an indispensable tool for the conservation of wildlife in the face of widespread species extinction and endangerment, unprecedented human population growth, and relentless economic expansion.¹³

Early acts of Congress and various Presidents may have provided the foundation for the NWRS as a system dedicated to wildlife, but the laws that guided management of this critical system throughout the 20th Century failed to build on this foundation in many ways. According to the House Committee on Resources, the NWRS, managed by the U.S. Fish and Wildlife Service ("FWS") since 1976,¹⁴ evolved with no "basic statute providing a mission for the

the conservation of endangered species. Wildlife refuges have played an instrumental role in the recovery of endangered species including the whooping crane, the Aleutian Canada goose, the Key deer, and the American crocodile. *See id.*

11. *See id.* at 18 (noting that the NWRS includes more than 200 refuges established for migratory birds, and that the FWS manages more than one million acres of wetlands and over 3,000 waterfowl production areas for the benefit wetland dependent birds). In addition to contributing to the successful recovery and sustenance of hunted populations of waterfowl, the FWS has used refuges over the past decade to protect 700 non-game species of colonial waterbirds, birds of prey, shorebirds, seabirds and songbirds. *See id.*

12. *See id.* (stating that refuges help to conserve: interjurisdictional fish species; marine mammals, including sea otters, walruses, manatees, polar bears, seals and sea lions; and large mammals, including pronghorn antelope at the Hart Mountain Refuge, in Oregon, elk on the National Elk Refuge in Wyoming, and bison on the National Bison Range in Montana).

13. *See Fink, supra* note 8, at 5 (pointing out that suitable habitat is critical to the health of wildlife and that the twenty-three ecosystem types that once covered one-half of the lower 48 states now cover only seven percent of this land area). Wetlands, particularly important as wildlife habitats, have been reduced by half in the continental United States. *See id.*

14. *See Act of Feb. 27, 1976, Pub. L. No. 94-223, 90 Stat. 199* (codified at 16 U.S.C. § 668dd(a)(1) (1994 & Supp. III 1997)). The Act amended the National Wildlife Refuge System Administration Act of 1966 to direct the FWS to manage all units then within the NWRS. *See id.* Prior to the amendment, many "game ranges" were managed jointly by the Bureau of Land Management ("BLM") and the FWS. *See MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW* 290 (3d. ed. 1997).

System, policy direction, [or] management standards for all units.”¹⁵ Congressional and presidential failure to provide clear policy and legal guidance for the NWRS caused confusion and inconsistency in management, and resulted in a proliferation of harmful “secondary uses” including, mining, water-skiing, oil and gas operations, grazing, motorized boating and military air exercises on refuge lands across the nation.¹⁶

As early as 1968, environmental groups argued for amendments to the National Wildlife Refuge System Administration Act (“NWRSA”) of 1966.¹⁷ These amendments would combat harmful secondary uses of wildlife refuges by establishing a clear mission for the NWRS as a system of lands dedicated to the preservation of wildlife, and would provide clear guidelines for the prioritization of secondary uses consistent with this mission.¹⁸ The calls for legislation multiplied to a cacophony in the 1990s.¹⁹ After eight years of debate, amendments finally arrived when Congress passed the most significant generic public lands legislation of the decade: the National Wildlife Refuge System Improvement Act of 1997.²⁰

This Article discusses the need for the 1997 Amendments, the compromises necessary to realize final legislation, and the major provisions of the 1997 Amendments. Part I explains the legislative,

15. H.R. REP. NO. 105-106, at 3 (1997), *reprinted in* 1997 U.S.C.C.A.N. 1798-5, at 1798-7.

16. *Review of the Management of the National Wildlife Refuge System Act of 1989: Joint Hearing Before the Env't, Energy, and Natural Res. Subcomm. of the Comm. on Gov't Operations and the Subcomm. on Fisheries and Wildlife Conservation and the Env't of the Comm. on Merchant Marine and Fisheries*, 101st Cong. (1989) [hereinafter *1989 Management Review Hearings*] (statements of Hon. Gerry E. Studds, Chairman of the Env't, Energy and Natural Res. Subcomm., and Hon. Mike Synar, Chairman of the Env't, Energy and Natural Res. Subcomm.).

17. 16 U.S.C. § 668dd-ee (1994) (amended 1997).

18. ADVISORY BD. ON WILDLIFE MGMT., U.S. DEPT. OF THE INTERIOR, THE NATIONAL WILDLIFE REFUGE SYSTEM 33 (1968) [hereinafter *LEOPOLD REPORT*], *reprinted in* 1989 *Management Review Hearings*, *supra* note 16, at 215. *See also* 1 GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW, § 14A.01 (release #23, 1999).

19. *See infra* Part III.C.

20. Pub. L. No. 105-57, 111 Stat. 1252 (1997) (codified as amended in scattered sections of 16 U.S.C. § 668dd-ee (1994 & Supp. IV 1998)) [hereinafter *NWRSIA*].

judicial and administrative background of the NWRS that created a need for the 1997 Amendments. Part II traces nine years of compromise and litigation in the late 1980's and the 1990's among conservation groups, sportsmen, members of Congress and the Clinton Administration, that ultimately resulted in the 1997 Amendments. Part III of the Article discusses how the 1997 Amendments strengthened the organic act of the NWRS with (1) a mission "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;"²¹ (2) a set of planning procedures which open land management decisions to public review;²² and (3) a set of affirmative duties for the Secretary of the Interior to care for the NWRS.²³ Finally, Part IV briefly explains the legal theory of public choice, its application to public lands management, and its general relevance to the NWRS. The Article uses the public choice theory to explain the preservation in the 1997 Amendments of hunting and fishing as "general uses which shall receive priority consideration in refuge planning and management."²⁴ The Article concludes with a call for cooperation among the various constituencies of the NWRS to ensure that the 1997 Amendments achieve their full potential as organic legislation for the NWRS in the twenty-first century.

I. BACKGROUND: THE NATIONAL BUNCH OF WILDLIFE REFUGES

This section discusses the growth of the NWRS and the laws that helped shape that growth. Years of "almost random" land reservation and acquisition²⁵ resulted in a wide array of establishing acts and executive orders governing individual refuges for many different purposes.²⁶ This variety has led to inconsistency in the management

21. 16 U.S.C. § 668dd(a)(2) (1994 & Supp. IV 1998) [hereinafter NWRSAA].

22. *See id.*

23. *See id.* § 668dd(a)(4).

24. *Id.* § 668dd(a)(3)(C).

25. Fink, *supra* note 8, at 12.

26. *See id.*; *see also* George Cameron Coggins & Michael E. Ward, *The Law of Wildlife Management on the Federal Public Lands*, 60 OR. L. REV. 59, 87 (1981); Kimberley J. Priestley, *The National Wildlife Refuge System: Incompatible Recreational and Economic Uses of Refuge*

of the system, and has crippled the ability of the FWS to respond to widespread demand for recreational uses on the lands involved.²⁷ Although Congress tried to clarify management priorities by passing the Refuge Recreation Act (“RRA”) in 1962,²⁸ and the NWRSA in 1966,²⁹ the scattered and abstruse terms of the refuge system organic acts provided meager standards for managers to use in making decisions regarding secondary uses.

Lands, PAC. RIM L. & POL’Y J. 78 (1992). Individual wildlife refuges generally share a purpose dedicated to the health of wildlife, but specific purposes vary widely. For example, the NWRSA includes: fifty-four refuges which share a purpose of “development, advancement, management, conservation, and protection of fish and wildlife resources . . . [and] for the benefit of the United States Fish and Wildlife Service, in performing its activities and services,” Fish and Wildlife Act of 1956, 16 U.S.C. § 742(a)(4)-(b)(1) (1994); fifty-one refuges established for “conservation purposes,” Consolidated Farm and Rural Development Act, 7 U.S.C. § 2002 (1994); six refuges authorized under the Bankhead Jones Farm Tenant Act for fulfillment of “a land-conservation and land-utilization program,” 7 U.S.C. § 1011 (1994); forty-six refuges, containing lands of “particular value in carrying out the national migratory bird management program,” and transferred from the General Services Administration, An Act Authorizing the Transfer of Certain Real Property for Wildlife, or other purposes, 16 U.S.C. § 667b (1994); thirty-nine refuges “administered by [the Secretary of the Interior] directly or in accordance with cooperative agreements . . . [and] in accordance with such rules and regulations for the conservation, maintenance, and management of wildlife, resources . . . and . . . habitat,” the Fish and Wildlife Coordination Act, 16 U.S.C. § 664 (1994); and two refuges established to: (1) “conserve the scenery, the natural, historic, and archaeological objects, and the wildlife on [lands withdrawn or acquired for the Colorado River project], and to provide for public use and enjoyment of [these lands] and . . . water areas created by these projects . . . and (2) . . . to mitigate losses of, and improve conditions for, the propagation of fish and wildlife.” Colorado River Storage Act, 43 U.S.C. § 620g (1994). In addition, the President has established 175 wildlife refuges by executive order. See U.S. Fish and Wildlife Service, *NWRS Searchable Databases - Refuge Purposes*, at <http://refuges.fws.gov/tango3/queryfiles/purposes.taf?function=form> (last visited Apr. 5, 2001) [hereinafter *NWRS Purposes Database*].

27. See H.R. REP. NO. 105-106, at 3, reprinted in 1997 U.S.C.C.A.N. 1798-5, at 1798-7.

28. 16 U.S.C. § 460k-k-4 (1994 & Supp. III 1997).

29. 16 U.S.C. § 668dd-ee (1994) (amended 1997).

*A. Hodge-Podge Growth and the Evolution of the National Bunch of
Wildlife Refuges*

Congress or the President created each wildlife refuge individually by congressional action, executive action, or a combination of the two.³⁰ Most refuges, assembled piecemeal by the addition of lands over a period of several years,³¹ have several different authorizing acts,³² creating important consequences for management of the NWRS.³³ The federal government's use of a wide variety of methods to create or establish the refuges has also resulted in a high degree of complexity within the governing statutory and administrative structure.³⁴

The federal government established all refuges by reservation of lands from the public domain, acquisition, donation, or cooperative agreement among federal agencies.³⁵ Reserved lands set aside for various wildlife crises and for migratory birds covered 82,090,000 acres of the 93,628,302 acre NWRS.³⁶ Most of the remaining 11,000,000 acres were purchased for migratory bird management and for other conservation purposes.³⁷ This section discusses these

30. See Fink, *supra* note 8, at 10.

31. 1999 FWS LANDS REPORT, *supra* note 6, at 5.

32. For example, the Blackwater NWR in Maryland is authorized for protection: of migratory birds by the Migratory Bird Conservation Act, 16 U.S.C. § 715-715r (1994 & Supp. IV 1998); of species listed as endangered or threatened under the Endangered Species Act, 16 U.S.C. § 1534 (1994); and of "incidental fish and wildlife-oriented recreational development, the protection of natural resources, [or] the conservation of endangered species or threatened species," under the Refuge Recreation Act of 1962, 16 U.S.C. § 460k-k-4 (1994 & Supp. III 1997). See also NWRS Purposes Database, *supra* note 26.

33. See 1989 Management Review Hearings, *supra* note 16, at 96 (statement of David Olsen, Assistant Dir. for Refuges and Wildlife, FWS).

34. See Fink, *supra* note 8, at 10.

35. See *id.*

36. 1999 FWS LANDS REPORT, *supra* note 6, at 5. Through enactment of the Alaska National Interest Lands Conservation Act of 1980, Congress authorized the President to reserve approximately 73,000,000 acres for refuges out of the Alaska public lands. Pub. L. No. 96-487, § 303, 94 Stat. 2389 (1980) (codified in part at 16 U.S.C. §§ 3103-3133 (1994 & Supp. IV 1998) and in scattered sections of tits. 15, 16, 26, 30, 42, and 43) [hereinafter ANILCA].

37. See Fink, *supra* note 8, at 12. This article does not address donated lands in detail because they comprise only 669,000 acres, which is

methods of acquisition to show how the NWRS became anything but a system.³⁸ Instead, the NWRS expanded as a collection of individual wildlife refuges under one administrative umbrella.

1. Reserved Lands Set Aside for Wildlife Crises Management

President Theodore Roosevelt's withdrawal of Pelican Island from the public domain started a period of growth for the NWRS.³⁹ These types of withdrawals tended to be isolated responses to local interests, and neither legislative nor executive actions appeared to follow any concerted policy of wildlife conservation.⁴⁰ For example, the 12,800 acre refuge comprising the National Bison Range, located on the Flathead Indian Reservation in Montana, was established in 1908 as an eleventh hour attempt to avert extinction of the bison as predicted by John James Audubon over sixty years earlier.⁴¹

less than one percent of the lands in the NWRS. This method of acquisition however, provides an important foundation for the establishment of wildlife refuges. Because Congress does not require the FWS to inform it when land is received by donation, transfer or exchange by authority of the Fish and Wildlife Act of 1956, 16 U.S.C. §§ 742(a)-754 (1994 & Supp. IV 1998), the FWS has used land donations to create new wildlife refuges without congressional approval. U.S. GEN. ACCT. OFF., FISH AND WILDLIFE SERV.: AGENCY NEEDS TO INFORM CONGRESS OF FUTURE COSTS ASSOCIATED WITH LAND ACQUISITIONS, GAO/RCED-00-52, at 4 (Feb. 2000) (explaining that the agency subsequently expands the refuges with appropriated funds requested through the normal budget process) [hereinafter GAO LAND ACQUISITION REPORT]. Of the twenty-three refuges the FWS established in fiscal years 1994 through 1998, only eight used federal funds for initial acquisition. Of the remaining fifteen refuges, twelve were established with land donated to the FWS, two were the result of private land exchanges, and one was a result of a land transfer. The FWS later expanded twenty of the twenty-three refuges. *See id.*

38. *See Fink, supra* note 8, at 12.

39. *See id.*

40. *See id.*

41. *See REED & DRABBLE, supra* note 2, at 8 (pointing out that throughout the early part of the twentieth century, hunting enthusiasts' responses to the immediate needs of big game preservation led to the creation of many refuges in the western United States). For example, the Boone and Crockett Club, a hunting organization whose members included Theodore Roosevelt, established the Sheldon Antelope Range in Northwestern Nevada. *See id.* at 21. In Jackson Hole, Wyoming, local concern for wintering elk led to the creation of the National Elk Refuge. *See Greenwalt, supra* note 2, at 401. During the same period,

The most dramatic and most recent reservation of lands for inclusion in the NWRS occurred under the Carter Administration when Congress passed the Alaska National Interest Lands Conservation Act ("ANILCA") of 1980.⁴² Described as "perhaps the greatest conservation achievement of the century,"⁴³ ANILCA allocated more than 103 million acres to the federal land conservation systems, including the addition of 53.7 million acres to the NWRS, nearly tripling its size.⁴⁴ Under ANILCA, the federal government re-designated and made additions to seven existing wildlife refuges and established nine new wildlife refuges.⁴⁵ The great magnitude of the ANILCA reservations was an aberration as compared to other additions to the NWRS in the last half of the

conservationists motivated by the preservation of wildlife for wildlife's sake took risks similar to those taken by Paul Kroegel and the other early Audubon fish and wildlife wardens. *See supra* text accompanying note 3. For example, in 1907, Theodore Roosevelt designated Three Arch Rocks NWR, located on the northwestern coast of Oregon, as the first National Wildlife Refuge west of the Mississippi River because of its importance to nesting seabirds. During the California Gold Rush, egg hunters harvested millions of eggs annually to supply restaurants in San Francisco and in the gold fields. Hunters also slaughtered adult birds for target practice as weekend sport. The combination of these events resulted in the endangerment of many seabird colonies along the West Coast. In the early 1900's, naturalist and photographer William Finley and his partner Herman Bohlman visited the Oregon Coast and documented the devastation. They launched open boats through heavy surf, risking their lives to haul heavy equipment up and down steep, treacherous cliffs. Finley informed President Theodore Roosevelt of the national importance of this seabird nesting area, and convinced him to issue an Executive Order designating Three Arch Rocks as a National Wildlife Refuge. *See U.S. FISH AND WILDLIFE SERV., WESTERN OREGON NATIONAL WILDLIFE REFUGE COMPLEX: OREGON COASTAL NATIONAL WILDLIFE REFUGES 10 (1999).*

42. ANILCA, Pub. L. No. 96-487, § 303, 94 Stat. 2371 (1980) (codified in part at 16 U.S.C. §§ 3103-3133 (1994 & Supp. IV 1998)). *See generally* Glenn E. Cravez, *The Alaska National Interest Lands Conservation Act: Directing the Great Land's Future*, 10 *UCLA-ALASKA L. REV.* 33 (1980).

43. *See* GEORGE E. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW 144* (3d ed. 1993). *See also* S. REP. NO. 413, 96th Cong. 2d Sess., at 129 (1979), *reprinted in* 1980 *U.S.C.C.A.N.* 5070, 5073 (describing federal government's action as the "most significant single land conservation action in the history of our country").

44. *See* COGGINS ET AL., *supra* note 43, at 139.

45. *See* Pub. L. No. 96-487, § 303, 94 Stat. 2371, 2389-93 (1980).

twentieth century.⁴⁶ The federal government has acquired almost all of the recently established refuges gradually through purchase.⁴⁷

2. Acquisition for Migratory Bird Management

Congress passed the first statutes to provide funds for systematic refuge acquisition during a tumultuous period when, as two commentators noted, “draining marshland for agriculture and residential development became somewhat of a national mania.”⁴⁸ The Migratory Bird Conservation Act (“MBCA”) of 1929⁴⁹ and the Migratory Bird Hunting Stamp Act (“Stamp Act”) of 1934⁵⁰ fund the

46. See Fink, *supra* note 8, at 31 (explaining that the size of the Alaska refuges has led one commentator to describe the NWRS as “two systems operating under a single title”); Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 36 (1997) (providing an apt contrast between refuges in the continental United States and refuges in Alaska).

[V]ast Alaskan holdings may come closer than any other category of federal lands to constituting genuine biodiversity reserves - large enough to provide broad ecosystem-level protection and managed principally to provide prophylactic protection of their diverse biological resources--whether or not the protected species and ecosystems are presently “threatened” or “endangered.” By contrast, refuges in the lower forty-eight states are generally small habitat fragments, set aside to provide species-specific protection, often imperiled by adverse spillovers from neighboring land uses or harmful conflicting uses of the refuge itself and historically not managed under broad ecosystem-level biodiversity conservation management principles. However, because these small refuges include some of the last remaining habitat fragments for some species and communities, they are of considerable conservation value and could provide core holdings around which larger biological reserves could be assembled.

Id. at 36.

47. See Fink, *supra* note 8, at 12.

48. *Id.* at 17; see also REED & DRABBLE, *supra* note 2, at 9.

49. Migratory Bird Conservation Act of 1929 ch. 257, 45 Stat. 1223 (1929) (codified as amended at 16 U.S.C. § 715-715r (1994 & Supp. IV 1998)).

50. Act of Mar. 16, 1934, Pub. L. No. 94-215, ch. 71, 48 Stat. 451 (1934) (codified at 16 U.S.C. § 718-718h (1994 & Supp. IV (1998))).

acquisition of lands for refuges that have as their primary purpose the creation of breeding ground and habitat for migratory birds.⁵¹ The MBCA authorizes the Secretary of the Interior to acquire, develop, and maintain lands for migratory birds upon approval from the Migratory Bird Conservation Commission.⁵² The Stamp Act provides a source of funding for acquisitions by requiring all waterfowl hunters to purchase a waterfowl stamp and affix it to their state hunting license.⁵³

Today, the FWS deposits funds derived from the sale of duck stamps into the Migratory Bird Conservation Fund, established by the Stamp Act.⁵⁴ The receipts provide a major source of funding for acquisition of NWRS lands. Through September 30, 1999, the Migratory Bird Conservation Fund provided \$527 million for purchase of refuge habitat and national "Waterfowl Production Areas" ("WPAs") and \$166 million for easements and leases of private lands for preservation of migratory bird habitat.⁵⁵ Together, these contributions comprise over forty-three percent of all lands purchased by the FWS.⁵⁶ The FWS lists the MBCA as an authorizing act for 265 wildlife refuges;⁵⁷ it lists three other acts dedicated to the protection of migratory waterfowl as authorizing legislation for fifty-

51. See 16 U.S.C. § 715d (1994) (directing the Secretary of the Interior to manage lands as "inviolate sanctuaries"). A review of past documents indicates that little human use was anticipated. See Charles G. Curtin, *The Evolution of the U.S. National Wildlife Refuge System and the Doctrine of Compatibility*, 7 CONSERVATION BIOLOGY 1, 30-31 (1993).

52. See 16 U.S.C. § 715d (1994) (providing that the Commission must include the Secretary of the Interior, the Secretary of Agriculture, the Administrator of the Environmental Protection Agency, two U.S. Senators, and two U.S. Representatives from Congress). The FWS and preceding agencies have used the Migratory Bird Conservation Fund for land purchases contributing to 348 wildlife refuges. See MIGRATORY BIRD CONSERVATION COMM'N, U.S. FISH AND WILDLIFE SERV., REPORT FOR THE FISCAL YEAR 1999, at 28 (2000) [hereinafter MBCC REPORT].

53. See 16 U.S.C. § 718-718h (1994).

54. *Id.* § 718b(a).

55. See MBCC REPORT, *supra* note 52, at 31-33.

56. See 1999 FWS LANDS REPORT, *supra* note 6, at 6.

57. See NWRS Purposes Database, *supra* note 26 (stating that the Migratory Bird Conservation Act, 16 U.S.C. § 715d, is cited as authority to partially or entirely establish or acquire 304 wildlife refuges "for use as an inviolate sanctuary, or for any other management purpose, for migratory birds").

two wildlife refuges.⁵⁸ Financial contributions through duck stamp purchases have assured a NWRS keyed principally to the production of migratory waterfowl.⁵⁹ Consequently, hunting enthusiasts have traditionally been the most enthusiastic and active supporters of the NWRS.⁶⁰

3. Land Acquisition for Other Conservation Purposes

Examples of authorizing acts not dedicated to the protection of migratory birds include the Fish and Wildlife Act of 1956,⁶¹ which provides the FWS with broad authority to take action to conserve fish and wildlife resources, including the acquisition of land or water by purchase or exchange, and the Endangered Species Act, which empowers the Secretary of the Interior to acquire land under a

58. The three acts include the Emergency Wetlands Resources Act, 16 U.S.C. § 3901(b) (1994) (authorizing seventy-seven refuges with purposes including but not necessarily limited to “the conservation of the wetlands of the Nation in order to maintain the public benefits they provide and to help fulfill international obligations contained in various migratory bird treaties and conventions”); Lea Act, 16 U.S.C. § 695 (1948) (as amended) (establishing 4 refuges for the management and control of migratory waterfowl and other wildlife); and the North American Wetlands Conservation Act, 16 U.S.C. §§ 4401-4413 (1994), (authorizing seven refuges with a purpose to (1) to protect, enhance, restore, and manage an appropriate distribution and diversity of wetland ecosystems and other habitats for migratory birds and other fish and wildlife in North America; (2) to maintain current or improved distributions of migratory bird populations; and (3) to sustain an abundance of waterfowl and other migratory birds consistent with the goals of the North American Waterfowl Management Plan and the international obligations contained in the migratory bird treaties and conventions and other agreements with Canada, Mexico, and other countries). *See also* NWRS Purposes Database, *supra* note 26.

59. *See* BEAN & ROWLAND, *supra* note 14, at 281.

60. *See* Congressman Toby Roth & Stephen S. Boynton, *Some Reflections on the Development of National Wildlife Law and Policy and the Consumptive Use of Renewable Wildlife Resources*, 77 MARQ. L. REV. 71, 81 (1993) (noting that sportsmen and sportswomen also contribute to state conservation efforts through an excise tax placed on hunting equipment by the Federal Aid in Wildlife Restoration Act (codified as amended at 16 U.S.C. § 669 (1994))). Through its Federal Aid Program, the FWS collects the taxes and redistributes over \$160,000,000 annually to the states. *See id.*

61. 16 U.S.C. §§ 742(a)-754 (1994 & Supp. IV 1998).

variety of statutes to preserve species listed as endangered or threatened.⁶² Other acts of Congress, including sixty-five laws applicable only to individual refuges, have expanded the purposes of refuge acquisition to include educational, agricultural and recreational purposes.⁶³

The Land and Water Conservation Fund ("LWCF"), established by the Land and Water Conservation Act of 1964,⁶⁴ is the primary source of funding for acquisition of lands for purposes other than migratory bird habitat.⁶⁵ Receipts deposited to the fund from oil and gas lease payments, required under the Outer Continental Shelf Act, were not available to the FWS for NWRS acquisition until Congress amended the Act in 1976,⁶⁶ but the FWS has used approximately \$1.4 billion for acquisition since that time.⁶⁷ Congress often fails to appropriate receipts, allowing balances to accrue in the fund to an

62. See NWRS Purposes Database, *supra* note 26 (citing the Endangered Species Act of 1973, 16 U.S.C. § 1534 (1994), as authority to partially or entirely establish or acquire ninety-six refuges with a purpose of conservation of fish, wildlife or plants which are listed as endangered or threatened species, and the Refuge Recreation Act of 1962, 16 U.S.C. § 460k-k-4 (1994), as authority to partially or entirely establish or acquire 105 wildlife refuges for (1) incidental fish and wildlife-oriented recreational development, (2) the protection of natural resources, or (3) the conservation of endangered species or threatened species).

63. See Fink, *supra* note 8, at 14.

64. Land and Water Conservation Act, Pub. L. No. 88-578, 78 Stat. 897 (1964) (current version codified at 16 U.S.C. § 460l-4 through 460l-11 (1994 & Supp. IV 1998)).

65. See Fink, *supra* note 8, at 17.

66. 16 U.S.C. §§ 460l-9 (1994) (providing that federal funds may be used for "incidental fish and wildlife-oriented recreation purposes"). Congress viewed this provision as a limitation on the FWS's authority to use LWCF monies for refuge land acquisitions, since a refuge without developed facilities was not considered sufficient to fulfill a "recreational purpose." See S. REP. NO. 367, 94-367, at 9 (1975). In 1976, Congress amended the Act to allow the FWS to acquire refuges with LWCF funds without being obligated to develop the acquired land later. See Act of Sept. 28, 1976, Pub. L. No. 94-422, § 101(4), 90 Stat. 1313 (1976) (codified at 16 U.S.C. § 460l-9(a)(1) (1994)). Such authority is linked to that under the Fish and Wildlife Act of 1956. See Fink, *supra* note 8, at 17-18 & nn. 105-107.

67. See GAO LAND ACQUISITION REPORT, *supra* note 37, at 8. Funds include \$95 million appropriated under Title V of the FY 1998 Interior and Related Agencies Appropriation for high-priority land acquisition. See *id.* at 9.

annual amount of \$900 million,⁶⁸ however the LWCF still provides a means for the FWS to place a high priority on land acquisition for endangered species preservation, and other non-migratory bird preservation purposes.⁶⁹

4. Consequences of Hodge-Podge Growth

The establishment of units of the NWRS under several legal authorities for a wide variety of purposes has had two important consequences. First, both private rights acquired at refuge establishment and the proliferation of "overlay" refuges on lands (where another agency has primary authority) have limited the extent of FWS jurisdiction over public uses that are incompatible with wildlife welfare.⁷⁰ Second, the emphasis on migratory bird preservation in the creation of the NWRS has resulted in a large constituency of hunting groups.⁷¹ Both of these consequences influenced the 1997 Amendments to the Refuge Administration Act. The ways the authors of the amendments approached the issues arising from these consequences, and the resulting impact on the future administration and growth of the NWRS is discussed in Parts IV and V. However, this Article first turns to the history of the NWRS, and the principal act of the 1997 Amendments: the Refuge Administration Act.

68. See Fink, *supra* note 8, at 18.

69. See Coggins & Ward, *supra* note 26, at 98.

70. A 1990 review of over 5,600 uses on refuge lands documented 635 activities that were outside FWS authority to regulate and control under the Refuge Administration Act. On fifty-three national wildlife refuges, the FWS had only partial jurisdiction to work with a second party to manage 215 activities. See U.S. FISH AND WILDLIFE SERVICE, AUDUBON ET. AL. V. BABBITT FINAL REPORT: FULFILLING THE TERMS OF THE LAWSUIT SETTLEMENT AGREEMENT 8 (1994) [hereinafter FULFILLING THE TERMS]. Often, partial jurisdiction occurs when a wildlife refuge is the result of a federal water resource project where the primary authority resides in the Army Corps of Engineers, Bureau of Reclamation or Tennessee Valley Authority. See Fink, *supra* note 8, at 20.

71. See Fink, *supra* note 8, at 23.

*B. Discordant Administering Acts and the Doctrine of Compatibility*1. The Refuge Recreation Act of 1962,⁷² the National Wildlife Refuge System Administration Act of 1966,⁷³ and the Doctrine of Compatibility

Most refuge-establishing statutes and statutes authorizing acquisition of wildlife refuge lands provide broad authority for the FWS to manage lands for wildlife. Unfortunately, the authorities lack specific direction, and the statutes do not provide consistent procedures for uniform management of the acquired or reserved lands.⁷⁴ Congress attempted to provide general administrative guidance through the passage of two statutes enacted in the 1960s: the Refuge Recreation Act ("Recreation Act") of 1962, and the NWRSA of 1966.⁷⁵ Unfortunately, Congress did not effectively

72. 16 U.S.C. § 460k-k-4 (1994 & Supp. III 1997).

73. 16 U.S.C. § 668dd-ee (1994) (amended 1997).

74. Telephone Interview with Rob Shallenberger, Refuge Manager, Midway NWR, U.S. Fish and Wildlife Service (Mar. 24, 2000) [hereinafter Shallenberger Interview]. As Chief of Division of Refuges from August, 1991 to March, 1997, Mr. Shallenberger was among the first within the FWS to join Jim Waltman, then of the Audubon Society, and Robert Dewey of Defenders of Wildlife, to call for specific amendments to the Refuge Administration Act which would strengthen the compatibility sections of the Act. Not until 1994 did the FWS officially support his efforts. *See also* Coggins & Ward, *supra* note 26, at 85, 98 (stating "[f]ederal wildlife managers operate under and are constrained by a bewildering array of imprecise statutory criteria that proliferate as federal wildlife law expands. Literally hundreds of federal laws refer to wildlife . . . but very few specify the extent of consideration required or the means to be employed for protection.").

75. The FWS must manage refuges consistent with the Refuge Administration Act, the Refuge Recreation Act of 1962 and the executive order or act establishing that the particular refuge. *See, e.g.,* Schwenke v. Sec'y of the Interior, 720 F.2d 571, 577-78 (9th Cir. 1983) (holding that the Charles M. Russell NWR is governed by both NWRSA and the executive orders under which the land was withdrawn). A third administrative act, the Refuge Revenue Sharing Act of 1964, Pub. L. No. 88-523, 78 Stat. 701 (1964) (current version at 16 U.S.C. § 715s (1994 & Supp. III 1997)), requires the Secretary of the Interior to return to counties revenue from certain refuge land management activities "incidental to but not in conflict with the basic purposes for which [the refuges] were established." *Id.* Examples of activities referenced in the statute include

meet its goal, prompting one commentator to declare the laws “unworkable” because they failed to enumerate management standards and procedures that the FWS could apply system-wide.⁷⁶

The Recreation Act was Congress’s first attempt to provide comprehensive legislation for the administration of refuges. Congress passed the Recreation Act in recognition of mounting public demands for recreational opportunities on NWRS lands,⁷⁷ especially from local residents.⁷⁸ Commentators maintain that passage of the Recreation Act represented an important shift in refuge management away from dominant use for migratory birds towards the accommodation of other uses compatible with the wildlife preservation purposes of most wildlife refuges.⁷⁹ The law authorizes the Secretary of the Interior to administer areas within individual refuges “for public recreation when in his judgment public recreation can be an appropriate incidental or secondary use” of a refuge.⁸⁰ The Secretary may permit forms of recreation “not directly related to the primary purposes and functions of the individual areas” only if he determines that: “(a) such recreational use will not interfere with the primary purposes for which the areas were established, and (b) . . . funds are available for the development, operation and maintenance of these permitted forms of recreation.”⁸¹

timber harvesting, haying, and grazing. *See id.* (providing FY 1999 revenues of \$2,984,951, \$265,929, and \$686,057, respectively). *See also* THE U.S. DEP’T OF THE INTERIOR, BUDGET JUSTIFICATIONS AND ANNUAL PERFORMANCE PLAN FOR FISCAL YEAR 2001: U.S. FISH AND WILDLIFE SERVICE 438 (Feb. 2000) (noting that revenues from oil and gas exploitation provided receipts of \$2,429,557, and all revenue producing activities resulted in combined receipts of \$8,341,989, but after accounting for FWS expenses only \$5,717,989, or 20% of counties’ full entitlement under the Refuge Revenue Sharing Act, remained for payments to counties). An additional \$10 million in direct appropriations enabled the FWS to provide counties with 59% of full entitlement in FY 2000. *See id.*

76. Fink, *supra* note 8, at 30, 71-73 & nn. 510-29.

77. *See* 16 U.S.C. § 460k (1994).

78. *See* Coggins & Ward, *supra* note 26, at 99.

79. *See id.* *See also* Curtin, *supra* note 51, at 33-34 (characterizing the doctrine of compatibility as an outgrowth of the attempt to mitigate the multiple uses of a predominately single use system).

80. 16 U.S.C. § 460k (1994).

81. 16 U.S.C. § 460k(a)-(b) (1994). Most challenges to the Secretary’s authority to allow a use under the Refuge Recreation Act focus

The NWRSA of 1966, the law identified as the “organic act” of the NWRs,⁸² consolidated the disparate administrative units created to manage the lands over the sixty-year history of the system under the jurisdiction of the FWS.⁸³ Under the Refuge Administration Act, the FWS has managed the NWRs as a “dominant use” system,⁸⁴ dedicated primarily to wildlife conservation but tempered by a “compatibility doctrine” allowing for secondary public uses⁸⁵ compatible with refuge purposes.⁸⁶ Prior to the 1997 Amendments, the Act failed in many respects to provide clear direction for NWRs management because it provided the Secretary of the Interior with broad power to determine what secondary public uses may occur on

on § 460k(a). *See e.g.*, *Defenders of Wildlife v. Andrus*, 11 ERC 2098 (D.D.C. 1978), but a 1993 lawsuit on system wide compatibility also alleged violation of § 460k(b). *See Nat’l Audubon Soc’y v. Babbitt*, No. C92-1641 (W.D. Wash. filed Oct. 22, 1992); National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, § 6, 111 Stat. 1256 (1997) (codified at 16 U.S.C. § 668dd(d)(3)(A)(iii) (1994 & Supp. III 1997) (exempting the wildlife-dependent recreational uses of hunting, fishing, wildlife observation and photography, and environmental education and interpretation from § 460k(b) of the Refuge Recreation Act); H.R. REP. NO. 105-106, at 12 (1997), *reprinted in* 1997 U.S.C.A.N. 1798-5, 1798-16 (noting that one element of “sound professional judgment” which must be exercised in making a compatibility determination is the availability of resources).

82. Coggins & Ward, *supra* note 26, at 87.

83. *See* 16 U.S.C. § 668dd(a)(1) (1994 & Supp. III 1997).

84. 1 COGGINS & GLICKSMAN, *supra* note 18, § 14A.01.

85. *See* U.S. GEN. ACCT. OFF., NATIONAL WILDLIFE REFUGES: CONTINUING PROBLEMS WITH INCOMPATIBLE USES CALL FOR BOLD ACTION, GAO/T-RCED-89-196, at 17 (Sept. 1989) [hereinafter GAO COMPATIBILITY REPORT]. Secondary public uses generally fall into one of three categories: public recreational uses, economic uses, and military uses. Public recreational uses traditionally consist of: (1) consumptive wildlife-dependent uses such as hunting, fishing and recreational trapping; (2) non-consumptive wildlife-dependent uses such as wildlife observation, education and photography; and (3) non-wildlife oriented recreation such as boating, water skiing, camping and horseback riding. Economic activities mostly include grazing, haying, farming and rights-of-way; and military activities include air and ground exercises. *See also* 16 U.S.C. §§ 668dd(a)(3)(C), 668ee(2) (1994 & Supp. III 1997) (elevating the wildlife-dependent recreational uses of hunting, fishing, wildlife observation and photography, and environmental education and interpretation to “priority public uses” of the NWRs).

86. *See* Curtin, *supra* note 51, at 30.

wildlife refuges, limited only by the major purpose of a specific refuge,⁸⁷ without enumerating any biological standards or standards of review required to make this determination.⁸⁸ Congress did not include in either the Refuge Administration Act or the Recreation Act a definition for “compatible use.” Moreover, Congress failed to provide direction to the Secretary of the Interior on how to make a compatibility determination, on who could make the determination or on what types of uses may take priority over others.⁸⁹ Consequently, these details were left to the courts and to the FWS to decide.

2. Judicial Definition of Compatibility: Ruby Lake and Other Litigation

One of the first cases considering the standard for judicial review of secretarial determinations of compatible uses on wildlife refuges, alleged violation of the Recreation Act⁹⁰ on the Ruby Lake NWR in

87. See 16 U.S.C. § 668dd(d)(1)(A) (1994) (amended 1997). The statute reads in part:

[t]he Secretary is authorized, under such regulations as he may prescribe, to . . . permit the use of any area within the System for any purpose, including but not limited to hunting, fishing, public recreation and accommodations, and access whenever he determines that such uses are compatible with the major purposes for which such areas were established.

Id. The Act restricts the Secretary’s authority by restricting hunting to less than 40% of lands set aside under the Migratory Bird Conservation Act, but allows the Secretary to exceed the 40% limit if he finds that “the taking of any species of migratory game birds in more than 40 percent of such area would be beneficial to the species.” *Id.*

88. See Priestley, *supra* note 26, at 80.

89. *Id.* at 82.

90. See 16 U.S.C. § 668dd(h) (1994) (amended 1997). The Refuge Administration Act expressly preserved the Recreation Act, therefore, litigants usually allege violation of the slightly stricter standard in the latter statute. See, e.g., *Nat’l Audubon Soc’y v. Babbitt*, No. C92-1641 (W.D. Wash. filed Oct. 22, 1992); 1 COGGINS & GLICKSMAN, *supra* note 18, § 14A.02[1]. Congress preserved the Recreation Act in the 1997 Amendments, 16 U.S.C. § 668dd(i) (1994), but changed the definition of “compatibility” under the Refuge Administration Act to a use that “will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.” 16 U.S.C. § 668ee(1) (1994 &

northeastern Nevada. In *Defenders of Wildlife v. Andrus* ("Ruby I"),⁹¹ the District of Columbia District Court held that the Secretary violated the Act by issuing a special permit for power boating, motorless boating, and water-skiing on the refuge without first determining that these uses would not interfere with the refuge's primary purpose as an "inviolable sanctuary" for migratory birds.⁹² In what many commentators viewed as a landmark decision for its placement of judicially enforceable limits upon the Secretary's discretion to permit recreational uses of wildlife refuges,⁹³ the court held that the Secretary of the Interior has the burden of proof to demonstrate that a secondary use is "incidental to, compatible with and does not interfere with the primary purpose of a refuge."⁹⁴ In meeting this burden, the court ruled that the Secretary may not balance economic or political factors in his decision or utilize past use as a justification for allowing the contemporaneous use.⁹⁵

Supp. III 1997). It is too early to tell what effect this change will have on litigation.

91. *Defenders of Wildlife v. Andrus*, 11 ERC 2098 (D.D.C. 1978) [hereinafter *Ruby I*].

92. *Id.* at 2101. Congress established Ruby Lake NWR under the MBCA, which requires the Secretary of the Interior to manage refuges established under the Act as "inviolable sanctuaries" for migratory birds. 16 U.S.C. § 715d (1994); see also *supra* note 51. The concept of a NWRs comprised of "inviolable sanctuaries," with little human use, lost influence as the U.S. economy embarked on its boundless growth in the wake of World War II. See Curtin, *supra* note 51, at 31-33. As a result of higher incomes, greater mobility and an increased demand for recreation, interest in opening up refuges to recreation, especially to hunting and fishing, increased. See *id.* By 1962, the FWS was allowing widespread secondary uses of wildlife refuges. See *id.*

93. See, e.g., Coggins & Ward, *supra* note 26, at 112.

94. *Ruby I*, 11 ERC at 2101.

95. The court stated:

[n]either poor administration of the Refuge in the past, nor prior interferences with its primary purposes, nor past recreational uses, nor deterioration of its wildlife resource since its establishment, nor administrative custom or tradition alters the statutory standard [of] . . . permit[ting] recreational use only when it will not interfere with the primary purpose for which the Refuge was established.

Id. at 2101. Five days after the Ruby I decision, the Secretary promulgated substantially identical regulations allowing the uses, but this time they were accompanied by an express determination that the permitted uses

All but one of the compatibility lawsuits that followed *Ruby Lake* involved plaintiff environmental and animal rights groups seeking to end recreational and economic uses on refuges because of alleged incompatibility with wildlife conservation.⁹⁶ Most courts have

would not interfere with the primary purposes of the refuge. *See* *Defenders of Wildlife v. Andrus*, 455 F. Supp. 446, 448 (D.D.C. 1978) [hereinafter *Ruby II*]. *Defenders of Wildlife* sued again, prompting the District of Columbia District Court to find the Secretary's determination arbitrary and capricious. *See id.* at 449. In *Ruby I* the court had found that the refuge, then one of only eighteen listed in the Registry of National Landmarks as a National Natural Landmark, provided "one of the most important habitats and nesting areas for over-water nesting waterfowl in the United States," *Ruby I*, 11 ERC at 2100, but the Secretary's determination had done this distinction little justice. Public use on the refuge was already exceeding 50,000 individuals annually, including approximately 30,000 boaters, and the annual increase in boating exceeded 19%. *See Ruby II*, 455 F. Supp. at 447. The court cited evidence in the record that boating significantly harmed the vegetative productivity of the refuge, thus reducing habitat for migratory birds. Samples taken on the refuge demonstrated that the marsh produced 328% more submergent vegetation in areas where boating was prohibited. In addition, total refuge waterfowl use days showed a steady downward trend over twenty years, and most of this could be attributed to excessive recreational use of the refuge. *See id.* at 447-49. Even the former manager of the refuge testified in opposition to the regulation in the original lawsuit. *See Ruby I*, 11 ERC at 2102. The case provides an example of how public choice theory applies to National Wildlife Refuges. *See* discussion *infra* Part V. Local politicians created a problem in the late 1970's by prevailing upon Department of the Interior superiors to open *Ruby Lake NWR* to virtually unlimited power boating, despite staff dissent that the recreational activity would be extremely harmful to nesting waterfowl. *See* George Cameron Coggins, "Devolution" in *Federal and Land Law: Abdication by Any Other Name*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 211, 215 (1996). In effect, the FWS had abdicated its responsibility to the purpose of the refuge to benefit local political and popular interests. *See id.*

96. *See* BEAN & ROWLAND, *supra* note 14, at 293. The one exception, *Coupland v. Morton*, No. 75-1390, 5 ELR 20507 (4th Cir. 1975), also provides an example of how local interests have prevailed over FWS decision-making. However, in contrast to the agency's role in the *Ruby Lake* cases, the FWS tried but failed to prevent local interests from prevailing. The case involved landowners who challenged a FWS decision to severely restrict motorized traffic from traversing the beach of the Back Bay NWR in southeastern Virginia. Local residents and vacationers used the beach as a "sand highway" for residents and vacationers accessing property located adjacent to the refuge. *See id.*; *see also* Comment, *The*

followed the *Ruby Lake* example by requiring the FWS to make a compatibility determination before permitting a secondary use, but they have generally deferred to a FWS decision without extensive analysis.⁹⁷ This leaves the *Ruby Lake* decisions as the only two decisions which held that the Secretary violated either the Refuge Administration Act or the Refuge Recreation Act by finding a secondary use compatible with the purpose of a wildlife refuge.⁹⁸

Back Bay Wildlife Refuge "Sand Freeway" Case: A Legal Victory in Danger of Political Emasculation, 5 *Envtl. L. Rep.* (Envtl. L. Inst.) 10148 (1975) [hereinafter *Back Bay Comment*]. The court held that the FWS restriction was justified, concluding "that the continued and rapidly escalating use of the Refuge beach as a traffic corridor for land developers and land owners . . . is inimical to the use of the property as a wildlife refuge and is a depredation of the purpose of the property as a wildlife refuge." *Coupland*, 5 *ELR* at 20506. Similar to the *Ruby Lake* cases, local residents took a keen interest in the outcome of *Coupland*. Less than a month after the decision, nearly 1,000 landowners, beach-buggy enthusiasts, and sympathizers gathered at the refuge for a mile-long protest march down the beach, catching the attention of a local Congressman who proposed legislation which would allow access. *See id.* In 1980, Congress passed a law permitting certain full-time residents of the area south of the refuge to commute across it daily. *See Act of July 25, 1980, Pub. L. No. 96-315, § 3, 94 Stat. 957 (1980)*. Commentators posit that a general reluctance on the part of the FWS to restrict uses on wildlife refuges may stem from its experience with local constituents in this case. *See, e.g., BEAN & ROWLAND, supra note 14, at 294 & n.69.*

97. *See, e.g., Animal Lovers Volunteer Ass'n v. Cheney*, 795 F. Supp. 994 (C.D. Cal. 1992), in which plaintiffs alleged the incompatibility with refuge purposes of oil and gas production, and a red fox control program on Seal Beach NWR in southern California implemented for protection of the endangered California least tern and the light-footed clapper rail. The court dismissed the case with prejudice. *See id.* at 1000. Based on review of an EIS prepared by the FWS, the court concluded that contaminant surveys demonstrated that oil drilling did not harm wildlife on the refuge, and that the FWS considered all the evidence in determining that the red foxes were playing a substantial role in inhibiting recovery of the two endangered bird species. *See id.* at 999.

98. *See BEAN & ROWLAND, supra note 14, at 293.* Especially in recent years, the Department of the Interior has quickly settled compatibility lawsuits out of a fear of allowing precedent setting examples. *See Wilderness Soc'y v. Babbitt*, 5 F.3d 383 (9th Cir. 1993); *see also Nat'l Audubon Soc'y v. Babbitt*, Civil No. C92-1641 (W.D. Wa. 1993) (both cases discussed *infra* Part II.C).

On two occasions in the mid-1980's and early 1990's, the Humane Society of the United States attempted to end hunting on wildlife refuges, but courts dismissed both claims.⁹⁹ For example, in *Humane Society v. Lujan*,¹⁰⁰ the District Court of the District of Columbia dismissed a claim that the FWS violated either the Refuge Administration Act or the Refuge Recreation Act by allowing a deer hunting program on Mason Neck NWR.¹⁰¹ The court held that by taking precautions to protect against harm to bald eagles, harm to the public, and by closely monitoring the deer populations, the FWS "took account of the relevant factors," fulfilling its duties under both acts.¹⁰² To date, not a single case challenging wildlife refuges has succeeded.¹⁰³ Few cases on any other uses exist, and the courts had little impact on NWRS management until the mid-1990's, when the National Audubon Society sued the Department of the Interior for a

99. See *Humane Soc'y of the U.S. v. Lujan*, 768 F. Supp. 360 (D.D.C. 1991); *Humane Soc'y of the U.S. v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988).

100. *Humane Soc'y of the U.S. v. Lujan*, 768 F. Supp. 360 (D.D.C. 1991).

101. See *id.*

102. See *id.* at 364. The events following the case show why the most emotional controversy surrounding public uses of the wildlife refuges concerns hunting and trapping. See Fink, *supra* note 8, at 68. It also provides some insight into why the 1997 Amendments create a special designation for hunting, along with other "wildlife dependent public uses," as a "priority public use." 16 U.S.C. §§ 668dd(a)(4)(H)-(K), 668ee(2) (1994 & Supp. III 1997) discussed *infra* Part IV.B. In response to the court's decision, opponents of hunting on the refuge successfully lobbied for a rider in the FY 1993 Interior and Related Agencies Appropriations Bill that would prohibit hunting on the refuge. H.R. 5503, 102d Cong., § 309 (2d Sess. 1992). The effort was defeated when the Congressional Sportsmen's Caucus lobbied successfully for an amendment to the bill that would eliminate the provision. 138 CONG. REC. H6433 (daily ed. July 22, 1992). In *Humane Soc'y of the U.S. v. Lujan*, the FWS defended the hunt as a necessary management action to control the deer population on the refuge, arguing that "the desire of some local sportsmen for the opportunity to hunt Mason Neck [was] merely a felicitous by-product." *Lujan*, 768 F. Supp. at 364. That the Congressional Sportsmen's Caucus would go to such ends to defend this by-product, indicates a heightened sensitivity to the elimination of hunting on wildlife refuges. It is yet another example of how small localized interests have influenced the direction of the NWRS. See discussion *infra* Parts IV.C. & V.

103. See BEAN & ROWLAND, *supra* note 14, at 297.

system-wide injunction against the permitting of incompatible uses on several wildlife refuges.¹⁰⁴

3. The Fish and Wildlife Service Defines "Compatible Use"

Prior to the 1997 Amendments to the Refuge Administration Act, the FWS provided the only administrative definition of "compatible use" in a refuge manual designed to assist managers in making consistent decisions.¹⁰⁵ The manual stated that a manager may declare a use compatible with the purposes of a refuge only if he determines that it "does not materially interfere with or detract from the purpose(s) for which the refuge was established."¹⁰⁶ Because the compatibility section of the manual had no statutory foundation,¹⁰⁷ it failed to curtail widespread approval of harmful uses.¹⁰⁸ The absence of a clear definition for a "material interference" left a land manager open to influence from self-interested local and national actors seeking approval for their preferred uses of NWRS lands.

C. Lack of Public Recognition and Insufficient Funding

Although federal appropriators provided substantial increases to the FWS in recent fiscal years, leading to the 100th Anniversary of the NWRS in 2003,¹⁰⁹ the National Wildlife Refuge System has a long history of inadequate funding and manpower.¹¹⁰ The

104. See *Nat'l Audubon Soc'y v. Babbitt*, No. C92-1641 (W.D. Wash. filed Oct. 22, 1992); see also discussion *infra* Part IV.B.

105. See U.S. Fish and Wildlife Service, Refuge Manual 5 RM 20.1 (1986) (internal document), reprinted in *1989 Management Review Hearings*, *supra* note 16, at 403.

106. *Id.*

107. See S. REP. NO. 103-324, at 6 (1994).

108. See *id.*

109. See *Hearing on H.R. 442 National Wildlife Refuge System Centennial Act*, 106th Cong. (2000) (statement of Daniel P. Beard, Ph.D., Senior Vice President, National Audubon Society). This results in an average annual increase over the last three years of approximately \$30 million per year. Despite the increases, the operations and maintenance backlog continues to grow, reaching approximately \$2 billion in FY 2000.

110. See Fink, *supra* note 8, at 43. Congress has poorly funded the NWRS compared to other federally managed lands. In 1995, NWRS funding per acre of land managed was \$1.80. In the same year, the Bureau of Land Management received \$2.54 per acre managed, the USFS received

underfunding is largely a consequence of the obscure mission of the NWRS.¹¹¹ In addition, the FWS, as the managing agency of the NWRS, has failed throughout most of its history to communicate its needs to the public or to build a constituency for the NWRS.¹¹² Consequently, the Refuge System has suffered from low public recognition and the lack of a strong constituency that would act as an advocate for the NWRS as it competes with other federal programs for funding.¹¹³

\$6.83 per acre managed, and the NPS received \$13.23 per acre managed. See H.R. REP. NO. 105-329, at 4 (1997).

111. See discussion *infra* Parts II.A-B.

112. See Fink, *supra* note 8, at 44. However, in 1995, a coalition of interest groups called the Cooperative Alliance for Refuge Enhancement ("CARE") developed out of a unified belief that the maintenance and management of habitat provided by national wildlife refuges and their surroundings are essential to fish and wildlife populations. Although the groups that comprise CARE frequently differed on the form of the 1997 Amendments, and later in the implementation of the amendments, they have bonded in a common interest to help provide much needed financial resources to the NWRS. Telephone Interview with Jim Waltman, Director, Refuges and Wildlife, The Wilderness Society (Feb. 23, 2000) [hereinafter Waltman Interview]. See also *Oversight Hearing Before the Subcomm. on Fisheries, Wildlife and Oceans of the Comm. on Res. on Maintenance Backlog at National Wildlife Refuges (Part II)*, 104th Cong. (1996) (statement of Dr. Rollin D. Sparrowe, President, Wildlife Management Institute). The following organizations which comprise CARE represent over 13 million constituents: American Fisheries Society, American Sportfishing Association, Congressional Sportsmen's Foundation, Defenders of Wildlife, Ducks Unlimited, International Association of Fish and Wildlife Agencies, Izaak Walton League of America, National Audubon Society, National Wildlife Federation, National Wildlife Refuge Association, Safari Club International, The Wilderness Society, the Wildlife Society, Trout Unlimited, Wildlife Legislative Fund of America and Wildlife Management Institute. See *id.* The Director of the FWS has credited CARE with playing a central role in advancing bipartisan Congressional support for substantial recent funding increases, including a \$42 million increase, the largest in NWRS history, in 1998. See *Hearing on H.R. 4442 National Wildlife Refuge System Centennial Act*, 106th Cong. (2000) (statement of Jamie Rappaport Clark, Director, U.S. Fish and Wildlife Service) (reporting that despite these increases, it is a widely held belief that the NWRS requires further significant increases to be fully operational in its 200th Anniversary year of 2003).

113. See Fink, *supra* note 8, at 43.

The 93 million acre NWRS is the only federal land management agency treated as one of seventeen programs, within the FWS, within the Department of the Interior. All other federal land management systems, including the NPS, the BLM, and the USFS, have directors who report directly to members of the President's cabinet. Consequently, directors of other land management agencies have few programs to focus on. The Director of the FWS however, must allocate a request for limited funds among many different functions, including enforcement of the Endangered Species Act and other wildlife laws, such as import and export of certain species under CITES; the operation of fish hatcheries; conservation of migratory birds under international treaties; and two complex grants to state programs.¹¹⁴

Over time, the consequences to the NWRS of weak public recognition, low funding, an obscure mission, and placement within the FWS among sixteen other wildlife-related functions have included: (1) weak or sporadic public support for refuges, less public use of refuge lands for compatible wildlife-dependent recreational and educational activities, and less public participation in the planning and decision making processes that guide management of wildlife refuges; (2) inadequate funding for managers to address invasive species issues, inadequate water quality and quantity on refuges, and a \$526 million system-wide maintenance backlog; (3) a corps of leadership with limited background in land management which is forced to spread its attention across many competing responsibilities; and (4) a reduced focus on land management functions, especially when compared with the other federal land management agencies.¹¹⁵

II. THE LEGISLATIVE COMPROMISE

A. The GAO Compatibility Report & The 1989 Hearings

In the late 1980's, a decline of migratory bird populations caused enough alarm among members of Congress to prompt a request to the General Accounting Office for a study of wildlife management

114. NAT'L AUDUBON SOC'Y, *AMERICA'S HIDDEN LANDS: A PROPOSAL TO DISCOVER OUR NATIONAL WILDLIFE REFUGE SYSTEM* (1999) [hereinafter *AMERICA'S HIDDEN LANDS*].

115. *See id.*

practices affecting the Fish and Wildlife Service's ability to reverse the decline with refuge lands.¹¹⁶ The GAO report based on this study, entitled *National Wildlife Refuges: Continuing Problems with Incompatible Uses Call for Bold Action* ("GAO Compatibility Report"), documented a litany of harmful secondary uses of wildlife refuges, including mining, off-road vehicular use, air boat use, water-skiing, rights-of-way for power lines and vehicular access, military air and ground exercises, trapping, logging, beekeeping, and hunting dog field trials.¹¹⁷ The report had relevance beyond the published findings because the GAO based its results on responses to a questionnaire sent to wildlife refuge managers.¹¹⁸ With a greater than ninety percent response rate, the professionals who managed the

116. See GAO COMPATIBILITY REPORT, *supra* note 85, at 2. The report resulted from a joint request by the Honorable Mike Synar, Chairman, Subcommittee on Environment, Energy and Natural Resources, Committee on Government Operations, and the Honorable Gerry E. Studds, Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment, Committee on Merchant Marine and Fisheries. See *id.* at 1.

117. See *id.* at 17. The report had unique consequences because it prompted interest from Congress and litigation from conservation groups which led to the 1997 Amendments, see *infra* Parts III.B-F., but it was not the only report which recognized the need for changes in the management of the NWRs. As early as 1968, a panel of wildlife scientists assembled by then-Secretary of the Interior Stuart Udall, reported that "patterns of public use must be rigorously controlled to protect the primary purpose of refuges, to emphasize natural values, and to minimize inappropriate activities." LEOPOLD REPORT, *supra* note 18, at 33. Similar calls for action were made in 1978 and in 1982. See, e.g., GAO COMPATIBILITY REPORT, *supra* note 85, at 12 (citing U.S. DEP'T OF THE INTERIOR, NATIONAL WILDLIFE REFUGE STUDY TASK FORCE (1978) (stating that "secondary uses should not be detrimental to the existence of the wildlife for which the refuges were established."); U.S. FISH AND WILDLIFE SERV., FIELD STATION THREATS AND CONFLICTS (1982); U.S. DEP'T OF THE INTERIOR, FISH AND WILDLIFE SERVICE RESOURCE PROBLEMS (1982) (finding that waterfowl were considered threatened by secondary use problems on 85% of the refuges, wetlands were affected on 79%, and endangered species were affected on 41%). The Fish and Wildlife Service took no action on these reports beyond informing managers of the results. See GAO COMPATIBILITY REPORT, *supra* note 85, at 12-13.

118. See GAO COMPATIBILITY REPORT, *supra* note 85, at 3.

daily operations of wildlife refuges criticized the magnitude of harmful secondary uses allowed by their own agency.¹¹⁹

In 1989, wildlife refuge managers reported that ninety percent of the refuges had at least one secondary use, seventy percent of the refuges had at least seven different secondary uses, and more than thirty percent of the refuges had fourteen different uses.¹²⁰ Based on these responses, the GAO concluded that managing the demand for secondary uses diverted refuge managers' attention and scarce resources away from wildlife management.¹²¹ The report also concluded that the uses harmed wildlife.¹²² Despite a clear mandate in the Refuge Administration Act and the Refuge Recreation Act that the FWS only allows secondary activities compatible with the purposes of a refuge,¹²³ and confirmation of this standard in the FWS Refuge Manual,¹²⁴ managers reported that at least one harmful secondary activity occurred on nearly 60% of the wildlife refuges.¹²⁵ Many refuges had more than one harmful use and twelve refuges had more than ten harmful uses.¹²⁶

On September 12, 1989, the day the GAO published its report, the two House of Representatives committees with responsibility for wildlife refuges, held a joint hearing on management of the NWRs.¹²⁷ In his opening remarks, Congressman Gerry E. Studds, then Chairman of the House Subcommittee on Fisheries and Wildlife Conservation and the Environment, accused the FWS of abusing the public trust by managing habitat to protect wildlife resources, "while at the same time polluting their water, destroying their habitat and

119. *Id.* at 3 (attributing the harmful uses to two primary factors). First, the FWS allowed uses that refuge managers believed harmful to satisfy local public and economic interests that sought them. Second, refuge managers felt that they were powerless to prohibit harmful uses because of limitations on FWS jurisdiction over refuge lands, including ownership of subsurface mineral rights, shared jurisdiction over navigable waterways within refuge boundaries, and the lack of control over military access. *See id.*

120. *See id.* at 3.

121. *See id.*

122. *See id.* at 4.

123. *See infra* Part II.B.1.

124. *See infra* Part II.B.3.

125. *See* GAO COMPATIBILITY REPORT, *supra* note 85, at 4.

126. *See id.* at 19.

127. *See generally* 1989 Management Review Hearings, *supra* note 16.

harassing their young."¹²⁸ This criticism set the tone for a tense hearing in which several members of Congress made strong calls for legislative or administrative action.¹²⁹

In response to congressional concerns, the FWS created a task group comprised of representatives from each of the seven regions to identify incompatible uses on refuge lands and to prepare recommendations for strengthening management of the NWRS.¹³⁰ In 1990, the task group reported that harmful secondary uses occurred on sixteen percent of refuge lands.¹³¹ The Refuge Administration Act did not preclude the Service from eliminating these uses,¹³² indeed it seemed to demand action.¹³³ However, the FWS chose to maintain the status quo until forces from outside the agency provoked change.¹³⁴ Legislation started to become a possibility in 1991, when Florida Senator Bob Graham introduced a bill establishing policies for the administration and management of the NWRS.¹³⁵ However, a lawsuit based on the results of the GAO Compatibility Report and the 1990 FWS Task Force report aroused interest among critical constituents of the NWRS and provided the real motivating force for congressional action.

128. *Id.* at 2 (opening statement of Congressman Gerry E. Studds).

129. *See generally* 1989 Management Review Hearings, *supra* note 16.

130. *See* COMPATIBILITY TASK GROUP, U.S. FISH AND WILDLIFE SERV., SECONDARY USES OCCURRING ON NATIONAL WILDLIFE REFUGES 9 (1990) [hereinafter COMPATIBILITY TASK GROUP REPORT]. The Director of the FWS asked the task group to: "(1) identify field stations that have use concerns; (2) identify those uses that are incompatible or harmful; and (3) prepare recommendations for resolving incompatible and/or harmful uses." *Id.* at 17.

131. *See id.* at 25.

132. *See, e.g.*, FULFILLING THE TERMS, *supra* note 70, at 6. *See also infra* Part III.B.

133. *See* Plaintiff's Complaint for Declaratory Judgment and Injunctive Relief, at 8-9, Nat'l Audubon Soc'y v. Babbitt, No. C92-1641 10 (W.D. Wash. filed Oct. 22, 1992) [hereinafter Plaintiff's Complaint]; *see also* Defenders of Wildlife v. Andrus, 455 F. Supp. 446, (D.D.C. 1978), discussed *infra* Part II.B.2.

134. Waltman Interview, *supra* note 112.

135. *See* The National Wildlife Refuge System Management and Policy Act of 1991, S. 1862, 101st Cong. (1st Sess. 1991).

B. Audubon v. Babbitt: "Ruby Lake" Grows Up

In the 1992 lawsuit, *Nat'l Audubon Soc'y v. Babbitt*,¹³⁶ environmental groups alleged that the Department of the Interior violated the National Wildlife Refuge System Administration Act ("NWRSA"),¹³⁷ the Refuge Recreation Act ("RRA"),¹³⁸ and the National Environmental Policy Act ("NEPA")¹³⁹ by allowing secondary uses which interfered with the conservation purposes of individual refuges, and which injured fish and wildlife populations on refuge lands.¹⁴⁰ The complaint included ten counts, each alleging a violation on a specific wildlife refuge.¹⁴¹ Examples of secondary uses that were alleged to result in violation of the Refuge Recreation Act and the NWRSA included: (1) military air training exercises at altitudes as low as fifty feet despite no determination of compatibility with the purposes of Cabeza Prieta NWR as a refuge for protection of habitat for bighorn sheep, the endangered Sonoran pronghorn antelope, and the endangered Sanborn's bat;¹⁴² (2) grazing on 68% of Camas NWR, in Southeastern Idaho, despite known adverse impacts on wildlife and waterfowl habitat;¹⁴³ and (3) motorized boating and other activities which disturbed, harassed and injured endangered West Indian manatees on Crystal River NWR, in western Florida.¹⁴⁴

At the time plaintiffs brought *Audubon v. Babbitt*, only the *Ruby Lake* decisions had held that the Secretary violated compatibility provisions of the RRA and NWRSA.¹⁴⁵ However, *Audubon v. Babbitt* shared a critical characteristic with the *Ruby Lake* cases that

136. *Nat'l Audubon Soc'y v. Babbitt*, No. C92-1641 (W.D. Wash. 1992). Litigants settled a companion case to enjoin the Navy from using the Copalis National Wildlife Refuge off the coast of Washington for aerial target practice when the Navy voluntarily stopped the practice and Secretary of the Interior Babbitt rescinded the Navy's permission to use the refuge for this purpose. See *Defenders of Wildlife v. Lujan*, Civil No. C92-1643 (W.D. Wash. filed Apr. 11, 1994).

137. 16 U.S.C. § 668dd-ee (1994) (amended 1997).

138. 16 U.S.C. § 460k-k-4 (1994).

139. 42 U.S.C. §§ 4321-4361 (1994).

140. Plaintiff's Complaint, *supra* note 133, at 8-9.

141. *See id.*

142. *See id.* at 11.

143. *See id.* at 14.

144. *See id.* at 16.

145. *See infra* Part II.B.2.

was absent from prior unsuccessful lawsuits. Since the plaintiffs relied on the 1989 GAO survey of managers,¹⁴⁶ the subsequent FWS task force report,¹⁴⁷ and individual reports of refuge managers,¹⁴⁸ the National Audubon Society was using information produced by the FWS to allege violations of acts governing the NWRs.¹⁴⁹ This time, however, the allegations were on a grand scale. They applied to a wide variety of activities on many different wildlife refuges that had the potential to force widespread changes in management practices system-wide.

In October 1993, the FWS settled with the *Audubon v. Babbitt* plaintiffs.¹⁵⁰ Pursuant to the settlement, the agency agreed to review and terminate each harmful secondary use referred to in the 1990 Task Group report that it had the authority to regulate and control, unless it could provide a written determination that such use was compatible with the primary purposes of the refuge on which it

146. Plaintiff's Complaint, *supra* note 133, at 8-9.

147. *See id.* at 9-11.

148. *See, e.g., id.* at 17 (describing the situation at Crystal River NWR).

On April 11, 1990, the Refuge Manager of Crystal River National Wildlife Refuge Public found that . . . recreational use[s] [including motorized and non-motorized boating, photography and underwater photography, scindiving, camping and swimming are] incompatible with the purposes of the refuge. The Refuge Manager's determination . . . was based on his conclusion that such recreational uses were "causing endangered West Indian manatees to alter their normal feeding, resting and breeding behavioral characteristics" . . . and that the manatees' survival is endangered thereby.

Id. The complaint asserted that despite the manager's clear statement that "[t]he only way to ensure compatibility [of waterbased recreation uses] is to annually close the refuge to waterborne activities between October 1 and March 31," the FWS had failed to implement a seasonal closure. *Id.*

149. *Compare* *Defenders of Wildlife v. Andrus*, 11 ERC 2098 (D.D.C. 1978), *and* *Defenders of Wildlife v. Andrus*, 455 F. Supp. 446, 448 (D.D.C. 1978), *with* *Animal Lovers Ass'n v. Cheney*, 795 F. Supp. 994 (C.D. Cal, 1992), *and* *Humane Soc'y of the U.S. v. Lujan*, 768 F. Supp. 360 (D.D.C. 1991).

150. *See* Final Settlement Agreement, *Nat'l Audubon Soc'y v. Babbitt*, No. C92-1641 (W.D. Wash. filed Oct. 22, 1992).

occurred.¹⁵¹ The FWS fulfilled these and many other settlement terms in 1994, providing a report that discussed the elimination of dozens of secondary activities, and assessing the compatibility of hundreds more.¹⁵² The report documented that the FWS had either modified or eliminated an overwhelming number of existing uses of refuge lands, in order to make them generally compatible with refuge purposes,¹⁵³ but this did not halt the growing pressure for new legislation that had swelled as a result of *Audubon v. Babbitt*.

*C. Young v. Babbitt: Attempts at Legislation and the Final
Compromise*

In 1991, Florida Senator Bob Graham, captivated by the history of Pelican Island¹⁵⁴ and troubled by reports of incompatible public uses on wildlife refuges, proposed amendments to the NWRSA which established three purposes for the NWRS,¹⁵⁵ and included provisions for a compatibility process,¹⁵⁶ refuge planning,¹⁵⁷ and affirmative duties for the Secretary of the Interior.¹⁵⁸ The bill provided a framework for the 1997 Amendments, but it initially lacked support from the FWS and from hunting and fishing constituents.¹⁵⁹ Over the next two years, conservation groups, including the Audubon Society, the Wilderness Society, and Defenders of Wildlife negotiated with the FWS, the Wildlife Management Institute, and the International Association of Fish and Wildlife Agencies ("IAFWA") to produce a stronger bill. In 1993, Senator Graham proposed Senate Bill 823,¹⁶⁰ a second attempt at legislation, only this time the bill was backed by broad support from NWRS constituents and the Clinton

151. *See id.* at 10.

152. *See generally* FULFILLING THE TERMS, *supra* note 70.

153. *See id.*

154. *See supra* note 4.

155. *See* S. 1862, 102d Cong. § 4(2)(A)-(C)(1991).

156. *See id.* § 5.

157. *See id.* § 6.

158. *See id.* § 4.

159. Jim Waltman, Director Refuges and Wildlife, the Wilderness Society, Address at the National Wildlife Refuge Managers' Conference, Keystone Colorado (Oct. 21, 1998) (transcript on file with author) [hereinafter Waltman Address].

160. *See* S. 823, 103d Cong. (1st Sess. 1993).

Administration.¹⁶¹ Although Senator Graham's bill failed to pass in the 103d Congress, its broad support offered promise for the 104th Congress.¹⁶² The bill's strength lay in its inclusion of key components of the 1991 amendments: a mission statement, a compatibility determination process and planning provisions. The bill however, left out one important provision. Senator Graham had neglected to provide for hunting and fishing.¹⁶³

161. *See id.* Prior to the hearings considering S. 823, no one knew for sure whether the Clinton Administration would support the bill. Although the Chief for the Division of Refuges within the FWS worked with conservation groups in crafting and proposing amendments as early as 1989, and was actually among the first advocates for a new bill, it took five years before the Department of the Interior and the FWS agreed to support new legislation. Waltman Interview, *supra* note 112. At the hearings, Don Barry, then Counselor to the Assistant Secretary for Fish, Wildlife and Parks, Department of the Interior, spoke on behalf of Secretary of the Interior Bruce Babbitt in support of S. 823. *See S. 823, National Wildlife Refuge System Management and Policy Act: Hearing Before the Subcomm. on Clean Water, Fisheries, and Wildlife of the Comm. on Environment and Public Works*, 103d Cong. 3 (1993) (statement of Don Barry, Counselor to the Assistant Sec'y for Fish, Wildlife and Parks, Dep't of the Interior) [hereinafter *Hearings on S. 823*]. This development shocked most of the individuals in attendance, and convinced some organizations to dramatically alter their testimonies. Waltman Interview, *supra* note 112. *Compare Hearings on S. 823*, at 24-25 (statement of Max Peterson, Executive Vice President, International Association of Fish and Wildlife Agencies) (reporting the Association's "significant agreement with a lot of the statements Don Barry made" and pledging support for further negotiations on S. 823), *with id.* at 71 (written testimony of the International Association of Fish and Wildlife Agencies) (stating that the "[a]ssociation believes that new legislation is not needed for the National Wildlife Refuge System").

162. *See* Waltman Address, *supra* note 159.

163. *See* S. 823, 103d Cong., 1st Sess. (1993). Senator Graham's bill included as a "purpose of numerous units within the refuge system . . . to provide opportunities, as appropriate, for fish- and wildlife-dependent recreation and environmental education, if . . . compatible with the purposes of the particular refuge . . . and consistent with sound scientific principles of fish and wildlife management." *Id.* § 4(C). But the bill did not define "wildlife-dependent recreation" to include hunting or fishing, and it excluded the term "wildlife dependent recreation" from the purposes of the System. In his opening statement for hearings on S. 823, Senator Graham stated his position:

Traditional recreation currently allowed on many Refuges, including hunting, is not to be banned. I hunt and I firmly

As a result of the 1994 elections, the Republican Party assumed control of the House of Representatives, and Congressman Don Young from Alaska took the chair of the House Resources Committee, the oversight committee for the Fish and Wildlife Service. Concerned that the *Audubon v. Babbitt* settlement would combine with other events to undermine hunting on wildlife refuges, William Horn, acting on behalf of the Wildlife Legislative Fund of America ("WLFA") and Paul Lenzini, counsel to the IAFWA, convinced Congressman Young and Bill Brewster, the Democratic co-chair of the House Sportsman's Caucus, to introduce a new bill which better protected the sportsmen's interests.¹⁶⁴ The result, H.R. 511, was supported by most of the sporting community.¹⁶⁵

H.R. 511 elevated the traditionally secondary recreational uses of hunting, fishing, wildlife observation and education to "purposes" of the NWRS, placing them in parity with conservation of wildlife on all wildlife refuges.¹⁶⁶ Because the Clinton Administration interpreted the bill to create a right for recreational users to sue each other over the proper use of a refuge, then Secretary of the Interior

believe hunting should be allowed on our Refuges whenever, by objective, scientifically sound data, there [sic] is to show where, when, and how hunting can take place without becoming incompatible with the purposes of the individual Refuge My intent is to achieve a balance between traditional recreational activities and the primary purposes of the preservation of wildlife.

Hearings on S. 823, supra note 161 (statement of Senator Bob Graham). Although supportive of refuge hunting, Senator Graham's statement lacked the protections that specific statutory provisions would provide.

164. Telephone interview with William P. Horn, Director of National & International Affairs, Wildlife Legislative Fund of America (February 23, 2001) [hereinafter Horn Interview]. The sporting community was concerned that the Audubon settlement would have wide ramifications for wildlife refuge management without input from the refuge system's large sporting constituency. In addition, many felt that the Graham Bill raised the bar to permitting all uses without any differentiation among them. They read the language to mean that a duck hunt would have priority equal to oil and gas drilling on a refuge. The combination of the Young chairmanship and the growth of the sportsman's caucus resulting from the Republican Revolution provided an opportunity for concerned sportsmen to propose their own bill. *Id.*

165. *Id.*

166. H.R. 511, 104th Cong. (1996).

Bruce Babbitt threatened a veto on behalf of the President.¹⁶⁷ The House of Representatives responded by passing the bill with a 150-vote margin.¹⁶⁸

Motivated by the failed enactment of S. 823 and fear that H.R. 511 could pass despite the veto threat, the FWS, led then by Director Mollie Beattie, responded with an intense lobbying effort in opposition to Senate passage of H.R. 511.¹⁶⁹ Director Beattie also worked with Don Barry, then Chief Counsel to the FWS, Rob Shallenberger, then Chief of the Division of Refuges, and members of the NWRS staff to develop Executive Order 12,996 entitled "Management and General Public Use of the National Wildlife Refuge System."¹⁷⁰

The lobbying effort in the Senate succeeded, and Executive Order 12,996, signed by President Clinton on March 25, 1996,¹⁷¹ provided the foundation for the 1997 Amendments.¹⁷² Most importantly, it

167. *Hearings on H.R. 511, supra* note 1, at 95 (statement of Secretary of the Interior Bruce Babbitt).

168. *See* 142 CONG. REC. H3775 (1996).

169. Telephone Interview with Dan Ashe, Assistant Director, Refuges and Wildlife, U.S. Fish and Wildlife Service (Mar. 9, 2000) [hereinafter Ashe Interview]. Prior to his current position, Mr. Ashe was the Assistant Director, External Affairs, and the chief negotiator representing the position of the Fish and Wildlife Service in drafting the 1997 Amendments. His prior experience with the potential amendments to the Refuge System Administration Act extends as early as 1989 when he was staff director for the House Committee on Merchant Marine and Fisheries. Mr. Ashe, the son of a wildlife refuge manager, was raised on several wildlife refuges.

170. Exec. Order No. 12,996, *reprinted in* 16 U.S.C.A. § 668dd (West 1985 & Supp. 2000).

171. *Id.*

172. Shallenberger Interview, *supra* note 74. The Executive Order provided the foundation for the 1997 Amendments to the NWRSA, and included some previously unconsidered provisions. For example, Congressman Saxton objected to the FWS's elimination of preexisting recreational uses on lands added to Forsythe refuge. The Department of the Interior responded to the Congressman's criticism by including in the Executive Order a limitation of compatibility determinations to consideration of preexisting public uses. Thus, the FWS was not forced to allow special privileges enjoyed by private individuals prior to acquisition. For example, the new compatibility determination process would not force the FWS to allow public hunting on a newly acquired parcel because two individuals had previously hunted the land with permission of the prior owner. *Id.* This method of avoiding arbitrary

established a policy of wildlife conservation as the singular purpose of the NWRs, and it made "wildlife-dependent public uses" of hunting, fishing, wildlife observation and photography, and education and interpretation "priority general public uses"¹⁷³ which should "receive enhanced attention in planning and management within the Refuge System."¹⁷⁴ Final legislation adopted these and other provisions of the executive order.¹⁷⁵

To ensure that interests concerned with new legislation understood each other's positions, Secretary Babbitt initiated weekly negotiations involving sportsmen's associations, environmental groups, Congressional staff members and agency officials.¹⁷⁶ After these sessions, Congressman Young revised H.R. 511 and introduced H.R. 1420 in the second session of the 103d Congress. The bill passed Congress and was signed into law by President Clinton on October 9, 1997 as the National Wildlife Refuge System Improvement Act of 1997.¹⁷⁷

III. THE NWRsIA: MAKING THE BUNCH A SYSTEM

Congress placed a mission statement at the core of the 1997 Amendments, that defines the NWRs as "a national network of

elimination of preexisting uses on lands added to the NWRs, without sacrificing the ability to eliminate uses incompatible with the mission of the NWRs or the purpose of the individual refuge, was eventually included in the 1997 Amendments.

173. Exec. Order No. 12,996, *supra* note 170, § 3(a).

174. *Id.* § 3(c).

175. See National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (1997) (codified as amended in scattered sections of 16 U.S.C. § 668dd-ee (1994 & Supp. III 1997)).

176. See *id.*; Shallenberger Interview, *supra* note 74, (explaining that the Secretary of the Interior was not involved with development of Executive Order 12,996, but he was required to approve of the proposed order before it could be sent to the Office of Management and Budget for approval from all Cabinet members). This process resulted in some changes to the original FWS proposal. Most importantly, the Department of Defense refused to approve the executive order absent a provision exempting pre-existing military agreements from the compatibility process. See *id.* The provision was included in the executive order. See Exec. Order No. 12,996, *supra* note 170, § 2(f). It was also eventually in the 1997 Amendments. See 16 U.S.C. § 668dd(d)(4)(A) (1994 & Supp. III 1997).

177. See Statement on Signing the National Wildlife Refuge System Improvement Act of 1997, 2 PUB. PAPERS 1332 (Oct. 9, 1997).

lands and waters for the conservation, management, [for the] 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.”¹⁷⁸ In administering the NWRS, the 1997 Amendments require the Secretary to “ensure that the mission of the System . . . and the purposes of each refuge are carried out.”¹⁷⁹ Congress intended the mission statement to guide overall management and to supplement the purposes of individual refuges,¹⁸⁰ responding to decades of calls for organic legislation to provide a unifying purpose for all refuges in the system.¹⁸¹

178. 16 U.S.C. § 668dd(a)(2) (1994 & Supp. IV 1998).

179. *Id.* § 668dd(a)(4)(D).

180. See H.R. REP. NO. 105-106, at 8 (1997), *reprinted in* 1997 U.S.C.C.A.N.

181. See *id.* (pointing out that in explaining the longstanding need for a mission statement, the House Resources Committee repeated a sentiment expressed in 1968 by the National Wildlife Refuge System Advisory Board on Wildlife Management appointed by Secretary of the Interior, Stewart L. Udall, that “[w]hat is still lacking is a clear statement of policy or philosophy as to what the National Wildlife Refuge System should be and what are the logical tenets of its future development.” (quoting LEOPOLD REPORT, *supra* note 18, at 3)). The same commission also provided evidence of why final agreement on the mission took so long.

Nearly everyone has a slightly different view of what the refuge system is, or should be. Most duck hunters view the refuges as an essential cog in perpetuation of their sport. Some see the associated public shooting grounds as the actual site of their sport. A few resent the concentration of birds in the refuges and propose general hunting to drive the birds out. Bird watchers and protectionists look upon the refuges as places to enjoy the spectacle of masses of water birds, without disturbance by hunters or by private landowners; they resent any hunting at all. State fish and game departments are pleased to have the federal budget support wildlife areas in their states but want maximum public hunting and fishing on those areas. The General Accounting Office in Washington seems to view the refuges as units of a duck factory that should produce a fixed quota of ducks per acre or of bird days per duck stamp dollar. The Bureau of Outdoor Recreation sees the refuge system as 29 million acres of public playgrounds. All of these views are valid, to a point. Yet the National

The mission statement included in the 1997 Amendments confirmed that the "conservation needs of wildlife are paramount" on all refuges.¹⁸² This gave legal meaning to the faith Secretary Babbitt spoke of in the passage which introduces this Article, and an unequivocal directive to managers and users of the NWRS that the needs of wildlife come first. The belief that "there ought to be special places set aside exclusively for the conservation of this nation's fish and wildlife"¹⁸³ has not always prevailed on wildlife refuges.¹⁸⁴ "Wild creatures large and small"¹⁸⁵ remain threatened by "the relentless force of the bulldozer, chain saw and plow."¹⁸⁶ This will continue unless the law includes provisions to ensure that the mission is carried out. Consequently, Congress included in the 1997 Amendments provisions designed to: (1) provide a formal process for reviewing the compatibility of secondary refuge activities;¹⁸⁷ (2) require that all national wildlife refuges are governed by a comprehensive conservation plan developed with ample opportunity for public involvement;¹⁸⁸ and (3) place affirmative stewardship

Wildlife Refuge System cannot be all things to all people . . .

LEOPOLD REPORT, *supra* note 18, at 3-4.

182. See Statement by President William J. Clinton Upon Signing H.R. 1420, 33 WEEKLY COMP. PRES. DOC. 1535 (Oct. 13, 1997).

183. *Hearings on H.R. 511*, *supra* note 1, at 95 (statement of Bruce Babbitt, Sec'y of the Interior).

184. See *infra* Part III.A-B.

185. *Hearings on H.R. 511*, *supra* note 1, at 95 (statement of Bruce Babbitt, Secretary of the Interior).

186. *Id.*

187. See 16 U.S.C. § 668dd(d)(3)(A)-(B) (1994 & Supp. III 1997).

188. See *id.* § 668dd(e); see also report language accompanying the 1997 Amendments, in which the House Resource Committee states that the principal focus of the National Wildlife Refuge System Improvement Act is to:

establish clearly the conservation mission of the System, provide clear Congressional guidance to the Secretary for management of the System, provide a mechanism for unit specific refuge planning, and give refuge managers clear direction and procedures for making determinations regarding wildlife conservation and public uses of the System and individual refuges.

obligations upon the Secretary of the Interior to protect and provide for the NWRS.¹⁸⁹

In the 1997 Amendments, Congress also declared that “wildlife dependent recreational uses,” including fishing, hunting, wildlife observation and photography, and environmental education and interpretation, are “priority general public uses of the system which shall receive priority consideration in refuge planning and management.”¹⁹⁰ The 1997 Amendments further provided that when the Secretary of the Interior “determines that a proposed wildlife-dependent recreational use is a compatible use within a refuge, that activity should be facilitated subject to such restrictions or regulations as may be necessary, reasonable and appropriate.”¹⁹¹ Although Congressman Young’s version of the National Wildlife Refuge System Improvement Act never made it past the U.S. Senate, his desire to ensure a place for hunting and other wildlife-dependent recreational uses survived the legislative process intact.¹⁹²

H.R. REP. NO. 105-106, at 3 (1997), *reprinted in* 1997 U.S.C.C.A.N. 1798-5, 1798-7.

189. *See* 16 U.S.C. § 668dd(a)(4) (1994 & Supp. III 1997).

190. 16 U.S.C. § 668dd(a)(3)(C) (1994 & Supp. III 1997).

191. *Id.* § 668dd(a)(3)(D). As stated by Secretary Babbitt during the negotiations which led to passage of the 1997 Amendments, and repeated by the House Committee on Resources, “[t]he law will be whispering in the manager’s ear that she or he should look for ways to permit the use if the compatibility requirement can be met.” H.R. Rep. No. 105-106, at 9 (1997), *reprinted in* 1997 U.S.C.C.A.N. 1798-5, 1798-13.

192. The 1997 Amendments added wildlife photography and environmental interpretation to the definition of “wildlife dependent recreational use” included in H.R. 511. *Compare* H.R. 511, 104th Cong. § 4 (1996) (including among the purposes of the NWRS a provision of opportunities for compatible uses of refuges consisting of fish and wildlife-dependent recreation, including fishing and hunting, wildlife observation and environmental education), *with* 16 U.S.C. § 668ee(2) (1994 & Supp. III 1997) (defining “wildlife-dependent recreational use” as a “use of a refuge involving hunting, fishing, wildlife observation and photography, or environmental education and interpretation.”). Rob Shallenberger argued for the addition of wildlife photography because it contributed to the education objective, principally through the distribution and publication of photographs, videos and other forms of media. The FWS was also working with the North American Nature Photography Association to develop a memorandum of understanding to achieve common objectives. *See* Memorandum from Rob Shallenberger, to the author (Aug. 17, 2000) (on file with author).

Combined with the mission statement and individual purposes of wildlife refuges, the provisions pertaining to wildlife-dependent recreational uses effectively create a hierarchy of uses that must be considered in refuge management decisions.¹⁹³ The NWRS mission of conservation of fish, wildlife, plants and their habitats is at the top of this hierarchy.¹⁹⁴ All human uses must be compatible with this mission,¹⁹⁵ but to the extent such uses are allowed, wildlife-dependent recreation takes precedent over all others.¹⁹⁶ The 1997 Amendments disallowed other uses such as rights-of-ways, grazing, recreational trapping, boating, oil drilling, camping and off-road vehicle use, not only when incompatible with the NWRS mission, but also when they would interfere with the wildlife-dependent recreational uses.¹⁹⁷ The Act does not declare these uses incompatible by definition, but it does accord priority to specified activities dependent upon the presence of wildlife.¹⁹⁸

This next section examines the provisions of the 1997 Amendments that resulted from the compromise between Secretary Babbitt's vision for the NWRS, and Congressman Young's vision. It discusses the significant elements of the compatibility and planning provisions, the reasons for their inclusion in the 1997 Amendments,

193. See 16 U.S.C. § 668dd(a)(3)(C) (1994 & Supp. III 1997); see also Proposed Compatibility Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 64 Fed. Reg. 49,067, 49,072 (Sept. 9, 1999) [hereinafter Proposed Compatibility Policy]; for final policy see Final Compatibility Regulations Pursuant to the National Wildlife Refuge System Act of 1997, 65 Fed. Reg. 62,458 (Oct. 18, 2000) (to be codified at 50 C.F.R. pts. 25, 26, 29) [hereinafter Final Compatibility Regulations]; 1 COGGINS & GLICKSMAN, *supra* note 18, § 14A.03[1].

194. See 16 U.S.C. § 668dd(a)(2) (1994 & Supp. III 1997).

195. See *id.* § 668dd(a)(3).

196. See *id.* § 668dd(a)(3)(C).

197. 1 COGGINS & GLICKSMAN, *supra* note 18, § 14A.03[1].

198. *Regarding S. 1059, National Wildlife Refuge System Improvement Act: Hearings Before the Senate Env't and Public Works Comm.*, 105th Cong. 95 (1997) [hereinafter *Hearings on S. 1059*] (statement of Bruce Babbitt, Sec'y of the Interior). The 1997 Amendments do not prioritize among the six wildlife-dependent recreational uses, but the proposed FWS compatibility policy directs a refuge manager faced with a conflict between or among priority uses to "evaluate, among other things, which use most directly supports long-term attainment of refuge purposes and the Refuge System mission." Proposed Compatibility Policy, *supra* note 193, at 49,072.

and some possible ramifications of these provisions. Part IV uses public choice theory to explain the inclusion in the 1997 Amendments of hunting and fishing as "priority general uses of the system which shall receive priority consideration in refuge planning and management."¹⁹⁹

199. 16 U.S.C. § 668dd(a)(3)(C) (1994 & Supp. III 1997). The compatibility and planning provisions, the mission statement, and the establishment of priority public uses on wildlife refuges included in the 1997 Amendments address two of the three major characteristics of the NWRS identified in this Article as creating a need for new legislation: (1) the lack of a clear mission for the refuge system, and (2) the failure of legislators and administrators to develop a reliable system of determining compatible uses on wildlife refuges. The third characteristic identified in this Article, inadequate funding and low public recognition, is not addressed by the NWRSA directly. Although the author believes that a more inclusive compatible use determination process, clearer mandates for the Secretary of the Interior, and a distinct mission for the NWRS will lead to greater public participation and awareness of the refuge system. *See* discussion Parts IV, V & VI. The degree to which this occurs depends greatly upon the commitment and resources the FWS puts behind implementation of the 1997 Amendments. Ultimately, the result will be a byproduct of legislation intended to improve the management of the refuge system as a system of lands dedicated to a singular mission focused on the health of fish and wildlife. Since enactment of the 1997 Amendments, Congress has made two significantly smaller steps towards increasing awareness of the NWRS. The National Wildlife Refuge System Volunteer and Community Partnership Enhancement Act of 1998 amended the Fish and Wildlife Act of 1956 to promote volunteer programs and community partnerships for the benefit of national wildlife refuges. *See* Pub. L. 105-242, 112 Stat. 1574 (1998). In June 2000, Congressman Young introduced H.R. 4442, an act to establish a commission to promote awareness of the National Wildlife Refuge System among the American public as the System celebrates its centennial anniversary in 2003. No additional funds are authorized under H.R. 4442, but the Volunteer and Community Partnership Enhancement Act authorizes, and Congress has appropriated, \$1,000,000 annually to carry out the purposes of this Act. *See* Pub. L. 106-291, 114 Stat. 922 (2000); THE U.S. DEP'T OF THE INTERIOR, BUDGET JUSTIFICATIONS AND ANNUAL PERFORMANCE PLAN FOR FISCAL YEAR 2001: U.S. FISH AND WILDLIFE SERVICE. In addition, the Act may provide greater opportunities for private contributions to wildlife refuge needs because it includes provisions that liberalize the conditions under which the Secretary of the Interior may enter into cooperative agreements with private and state organizations. *See* 106

H.R. 4442 § 3(f). In his 1994 seminal article on the National Wildlife Refuge System, Richard Fink asserts that for the NWRS to achieve its full potential it must attain greater stature within the FWS. Fink maintains that “[i]nstead of being a vehicle for accomplishing other FWS programs, the refuges must be afforded an identifiable status under the line direction of a person whose sole responsibility is the refuge system and is ranked at or higher than the level of Assistant Director.” Fink, *supra* note 8, at 108. However, Fink rejects a longstanding National Audubon Society proposal that Congress establish a new Wildlife Refuge Service, organizationally equivalent to the National Park Service:

The proposal offered here rejects [a proposed Wildlife Refuge Service] because of the considerable disruption it would cause for the FWS and because of the availability of needed technical and scientific expertise within the FWS. Additionally, . . . [i]n the author’s view, very significant reform of the NWRS statutory framework is needed at the earliest date, and proposing the creation of a new agency is likely to substantially delay legislative action in the current budget-cutting climate [because it would increase political opposition from the FWS and others].

Id. at 108 n.789. The FWS recently elevated the position of Chief of Refuges, responsible for refuge system management and land acquisition, to a rank equal to that of an Assistant Director. *See generally* AMERICA’S HIDDEN LANDS, *supra* note 114. The change may have come as a result of increased pressure from the National Audubon Society to create a “National Wildlife Refuge Service” with the same status as the Wildlife Refuge Service described by Richard Fink. *Id.* This author agrees with Mr. Fink’s point that the creation of a new National Wildlife Refuge Service would disrupt the FWS. Such disruption is inevitable because the NWRS currently constitutes over half of the operating budget of the FWS. However, Fink’s key point (that a new statutory framework is necessary at the earliest date) became moot with the passage of the 1997 Amendments. In contrast, the National Audubon Society argues that a new National Wildlife Refuge Service will help the NWRS by aligning it with other major federal land systems, and by eliminating the barrier created by placing the NWRS under the auspices of an organization with myriad other responsibilities. *Id.* at 5. Witnesses invited to hearings on H.R. 4442 were asked to comment on the possible creation of a National Wildlife Refuge Service, and virtually all witnesses opposed it. *See generally* *Hearing on H.R. 4442 National Wildlife Refuge System Centennial Act*, 106th Cong. (2000). However, the Audubon Society has persisted in its efforts. The organization maintains that: (1) the NWRS is fundamentally similar to other federal land management agencies, yet dissimilar to programs within the FWS; (2) the organizational structure of the FWS places the NWRS at

A. Defining "Compatible Use"

The 1997 Amendments draw from the refuge manual to define compatible use as "a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge."²⁰⁰ Recognizing past failures of the Secretary to consistently and rigorously determine the compatibility of secondary uses with refuge purposes,²⁰¹ Congress required the Secretary to promulgate final regulations that establish a process for determining whether a use of a refuge is a compatible use by October 9, 1999.²⁰² At a minimum, the regulations require: (1) the designation of a responsible official for compatibility determinations;²⁰³ (2) "a description of the timeframe, location, manner and purpose of each use;"²⁰⁴ (3) that the responsible official identify the effects of a use

a level of importance equal to functions funded at a considerably lower level; and (3) a new National Wildlife Refuge Service could provide a higher profile for the Refuge System, lead to more focused leadership and result in greater public awareness. *See id.* (statement of Daniel P. Beard, Senior Vice President for Public Policy, The Nat'l Audubon Soc'y). As the history of the development of the NWRSA reveals, early opposition from the FWS to "radical" proposals from the National Audubon Society is common. The FWS tendency to ignore early reports calling for new legislation for the NWRSA, and ultimately its failure to respond to the 1989 GAO Compatibility Report which led to the *Audubon v. Babbitt* lawsuit, has forced interest groups to take the lead in forcing change within the NWRSA. It is the author's opinion that the Audubon proposal for a new National Wildlife Refuge Service should make it clear to the FWS that successful implementation of the NWRSA, and a heightened focus on the NWRSA in upper management, is necessary if the agency expects to keep the NWRSA under its auspices.

200. 16 U.S.C. § 668ee(1) (1994 & Supp. III 1997).

201. *See* H.R. REP. NO. 105-106, at 11 (1997), *reprinted in* 1997 U.S.C.C.A.N. 1798-5, 1798-15; *see also supra* Part II.A.

202. *See* 16 U.S.C. § 668dd(d)(3)(B) (1994 & Supp. III 1997). The FWS published proposed compatibility regulations on September 9, 1999 and the final regulations were published on October 18, 2000. *See Proposed Compatibility Policy & Final Compatibility Regulations, supra* note 193.

203. *See* 16 U.S.C. § 668dd(d)(3)(B)(i) (1994 & Supp. III 1997); *see also Proposed Compatibility Policy & Final Compatibility Regulations, supra* note 193.

204. 16 U.S.C. § 668dd(d)(3)(B)(ii) (1994 & Supp. III 1997).

on refuge resources and the purposes of each refuge;²⁰⁵ (4) a written compatibility determination;²⁰⁶ (5) expedited consideration of nondetrimental uses;²⁰⁷ (6) “the elimination or modification of any use as expeditiously as practicable after a determination is made that the use is not a compatible use;”²⁰⁸ (7) re-evaluation of all uses at least every ten years;²⁰⁹ (8) re-evaluation of wildlife-dependent uses when conditions or information change, but no later than fifteen years;²¹⁰ and (9) opportunities for public comment.²¹¹

Because terms included in the definition of compatible use such as “sound professional judgment,” “will not materially interfere with or detract from,” and “use of a refuge” remain open to interpretation, refuge managers continue to have considerable latitude in determining compatible uses under the 1997 Amendments.²¹² This Part discusses the possible administrative and judicial interpretation of these terms in light of their significant impact on implementation of the 1997 Amendments. In addition, this Part briefly discusses exemptions from the compatibility determination process of over flights²¹³ as well as, exemptions for the activities of federal agencies with primary jurisdiction on a refuge.²¹⁴

1. Sound Professional Judgment

During negotiations over the 1997 Amendments conservation groups expressed concern that reliance on the “sound professional judgment” of a refuge manager regarding compatibility determinations would confer so much discretion that a court could hold a compatibility determination unreviewable under the

205. *Id.* § 668dd(d)(3)(B)(iii).

206. *Id.* § 668dd(d)(3)(B)(iv). Because the FWS has a history of not writing down compatibility determinations, this requirement is an important one. *See* GAO COMPATIBILITY REPORT, *supra* note 85, at 13 (noting that, in many situations, the FWS did not require documentation for the justification for a use, and that refuge managers were authorized to negotiate with proponents of secondary uses and resolve conflicts).

207. *See* 16 U.S.C. § 668dd(d)(3)(B)(v) (1994 & Supp. III 1997).

208. *Id.* § 668dd(d)(3)(B)(vi).

209. *See id.* § 668dd(d)(3)(B)(vii).

210. *See id.* § 668dd(d)(3)(B)(viii).

211. *Id.* § 668dd(d)(3)(B)(ix).

212. 1 COGGINS & GLICKSMAN, *supra* note 18, § 14A.03[1].

213. *See* 16 U.S.C. § 668dd(d)(4)(A) (1994 & Supp. III 1997).

214. *See id.* § 668dd(d)(4)(B).

Administrative Procedure Act²¹⁵ (APA) as agency action “committed to agency discretion by law.”²¹⁶ Because a court could read the term as providing no meaningful standard against which to judge an abuse of discretion, the amendments might be interpreted as eliminating opportunities for judicial review.²¹⁷ Congress may have precluded this result by defining the term “sound professional judgment” to mean “a finding, determination or decision that is consistent with principles of sound fish and wildlife management and administration, available science and resources, and adherence to the requirements of this act and other applicable laws.”²¹⁸ This definition contains terms that are themselves unclear, leaving open the possibility that Congress effectively overruled the *Ruby Lake* holding, which placed judicially enforceable limits on the Secretary’s discretion to permit recreational uses on refuges,²¹⁹ and leaving the FWS free to act as it chooses.²²⁰

Although precluding judicial review does not require an express statement from Congress that an action is committed to agency discretion,²²¹ only a showing of “clear and convincing evidence” that Congress intended to preclude review will suffice.²²² A court may look to legislative history to determine whether Congress expressed a purpose to commit an action to agency discretion.²²³ In report language attached to the 1997 Amendments, Congress recognized the conservation groups’ concern and expressed its intent not to

215. 5 U.S.C. § 701(a)(2) (1994).

216. See *Hearings on H.R. 511*, *supra* note 1 (statement of James R. Waltman, Director, Refuges and Wildlife Program, The Wilderness Society).

217. See *Heckler v. Chaney*, 470 U.S. 821 (1985) (holding that the APA’s exception for matters committed to agency discretion by law precludes judicial review even if Congress has not affirmatively precluded review, if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s abuse of discretion).

218. 16 U.S.C. § 668ee(3) (1994 & Supp. III 1997).

219. *Id.*

220. See, e.g., 1 COGGINS & GLICKSMAN, *supra* note 18, § 14A.03[1].

221. See *Gregory Elec. Co. v. U.S. Dep’t of Labor*, 268 F. Supp. 987, 991 (1967).

222. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967).

223. See *id.* at 142.

preclude judicial review of compatibility determinations.²²⁴ Congress also included requirements for the FWS to seek public comment in the planning and compatibility procedures,²²⁵ attempting to open the process instead of reducing avenues of review.²²⁶ Because Congress placed no explicit bar on judicial review, and because the 1997 Amendments tend to give more opportunity for review than under the unamended Refuge Administration Act, a court is unlikely to hold that compatibility determinations are committed to agency discretion by law.

Although the 1997 Amendments do not preclude judicial review of compatibility determinations, the terms describing sound professional judgment do reflect the success of the FWS in achieving a high level of deference to the professional judgment of refuge managers.²²⁷ For example, because the 1997 Amendments only

224. H.R. REP. NO. 105-106, at 7 (1997), *reprinted in* 1997 U.S.C.C.A.N. 1798-5, 1798-11:

The Committee is aware of concerns that the definition of sound professional judgment confers such a level of discretion that compatibility determinations might be held to be unreviewable as an agency action "committed to agency discretion by law" within the meaning of the Administrative Procedure Act [citation omitted]. Section 6 of H.R. 1420 provides detailed standards and procedures to be followed in making compatibility determinations, and, thus, while discretion resides in refuge officials, there is clearly law to apply so as to permit judicial review if other conditions of reviewability under the APA are met.

Id.

225. See discussion *infra* Parts IV.A., IV.A.3; see also 16 U.S.C. § 668dd(d)(3)(B)(vii)-(ix), (e)(1)(A)(ii)-(iii), (e)(4) (1994 & Supp. III 1997).

226. See, e.g., *Abbott Labs.*, 387 U.S. at 140 (holding that Congress had not committed decisions under the Food, Drug and Cosmetics Act to Department of Agriculture discretion because of a lack of evidence that members of Congress meant to preclude traditional avenues of relief).

227. Dan Ashe Interview, *supra* note 169. The FWS negotiated the amendments with a focus on ensuring that managers retained the flexibility to manage the land according to their discretion. The agency argued that because the manager is the one closest to the resource, and the closest to the community most affected by compatibility determinations, the law should provide substantial flexibility for him to act according to his judgment. The FWS did not argue for preclusion from judicial review; it

require use of “available science and resources” for making a compatibility determination,²²⁸ a refuge manager has no obligation to generate data.²²⁹ A manager *is* required, however, to rely on any relevant science provided to him or her.²³⁰ Thus, the burden to generate information is placed on the person arguing for, or against the use, and not on the agency.²³¹

maintained that a manager must remain accountable for his decision-making, but the FWS did fight for provisions that would provide maximum flexibility. *Id.*

228. 16 U.S.C. § 668ee(3) (1994 & Supp. III 1997).

229. See H.R. REP. NO. 105-106, at 12 (1997), reprinted in 1997 U.S.C.C.A.N. 1798-5, 1798-11. The compatibility regulations that the FWS proposed further restricted the “available science” standard by requiring a manager to base analysis on information “readily available to the manager, including field experience and familiarity with refuge resources.” Proposed Compatibility Policy, *supra* note 193, at 49,072. During negotiations over the 1997 Amendments, the FWS and conservation groups strongly disagreed over the use of the term “available science” versus the standard of “best available science” which is part of the Endangered Species Act. Ashe Interview, *supra* note 169. Environmental groups pushed for the term because they believed it requires the agency to seek and rely on the best information available at the time, including information not readily available to the manager. Waltman Interview, *supra* note 112. They argued that this standard was needed because a land manager’s tendency to believe she knows the land better than anyone else often leads to a refusal to acknowledge outside science. *Id.* The FWS asserted that the 1997 Amendments established a compatibility process replete with opportunities for public comment, providing outside entities with a means to provide a manager with the best available science. Ashe Interview, *supra* note 169. The additional requirement in the 1997 Amendments that the FWS revisit a compatibility determination when significant new information comes available, or conditions change significantly, provides further assurance that new information can change a compatibility determination. See 16 U.S.C. § 668dd(d)(3)(B) (1994).

230. See 16 U.S.C. § 668dd(d)(3)(B) (1994 & Supp. III 1997).

231. The proposed policy clarified the burden on the individual proposing a use by stating that “if available information to the Refuge Manager is insufficient to document that a proposed use is compatible, then the Refuge Manager would be unable to make an affirmative finding of compatibility and we must not authorize or permit the use.” Proposed Compatibility Policy, *supra* note 193, at 49,072.

2. Materially Interfere with or Detract from the Fulfillment of the Mission of the System or the Purposes of the Refuge

Similar to the term “sound professional judgment,” the amendments leave open to interpretation the term “materially interfere with or detract from the fulfillment of the Refuge System mission or the purpose of the refuge.” In the proposed compatibility regulations, the FWS placed the burden of proof squarely on the proponent of a use to show that the cumulative effects will not materially detract from the purpose of the refuge or the mission of the System.²³² The proposed regulations also required a refuge manager to consider indirect impacts of a use “when conducted in conjunction with other existing or planned uses of the refuge, and uses of adjacent lands or waters that may exacerbate the effects of a refuge use.”²³³ By defining indirect effect in this manner, the FWS proposed regulations provide a manager with justification for disallowing a use because it detracts from the ability of a refuge to play an important role in the health of the larger ecosystem of which it is a part.

232. *See id.* The regulation language provided:

[w]hen completing compatibility determinations, Refuge Managers use sound professional judgment to determine if a use will materially interfere with or detract from the fulfillment of the Refuge System Mission or the major purpose(s) of the refuge. Compatibility, therefore, is a threshold issue, and the proponent(s) of any use or combination of uses must demonstrate to the satisfaction of the Refuge Manager that the proposed use(s) pass this threshold test. *The burden of proof is on the proponent to show that they pass; not on the Refuge Manager to show that they surpass.* Some uses, like a proposed construction project on or across a refuge that affects the flow of water through a refuge, may exceed the threshold immediately, while other uses, such as boat fishing on a small lake with a colonial bird rookery may be of little concern with growing numbers of boats

Id. (emphasis added).

233. *Id.*

3. Exemptions

The 1997 Amendments authorized the FWS to enter agreements that exempt from the compatibility standard activities “authorized, funded or conducted” by federal agencies other than the FWS if the agency has primary jurisdiction of a refuge or a portion of a refuge.²³⁴ The provision was designed to apply to several “overlay refuges” where another agency holds fee, but over which the FWS has secondary jurisdiction to manage the lands as a wildlife refuge.²³⁵ Because the lands affected by the provision comprise approximately 1.4 million acres, virtually all located in the lower forty-eight United States,²³⁶ the exemption effectively exempts the FWS, or any agency holding primary jurisdiction, from public review of compatibility determinations on over one-sixteenth of refuge lands outside Alaska. In addition, the provision often applies to lands set aside by another agency to mitigate damage caused by other projects.²³⁷ Thus creating a situation whereby an agency is told to mitigate, but left with significant control of lands.²³⁸

In addition to the provision exempting overlay refuges, the 1997 Amendments exempted overflights from compatibility review, including any review from the FWS.²³⁹ This provision resulted from a response to the first count of *Audubon v. Babbitt*, which alleged

234. 16 U.S.C. § 668dd(d)(4)(B) (1994 & Supp. III 1997).

235. Ashe Interview, *supra* note 169. It is important to note that extending the compatibility process to over flights would have expanded FWS authority substantially. Because the FWS does not have authority of airspace above refuges, compatibility determinations have never applied. Instead, the FWS works with the FWS and military base commanders to minimize impacts. In some cases, authority to regulate under the Endangered Species Act may apply. *Id.*

236. *See* 1999 FWS LANDS REPORT, *supra* note 6, at 6-7. The FWS has secondary jurisdiction on approximately 63,000 acres of the approximately 77,000,000 acres of wildlife refuges in Alaska. The remaining 1,400,000 acres are included in the 16,000,000 acres located in the lower 48 states and the territories. *See id.*

237. *See* 1999 FWS LANDS REPORT, *supra* note 6, at 6-7. The FWS has secondary jurisdiction on approximately 63,000 acres of the approximately 77,000,000 acres of wildlife refuges in Alaska. The remaining 1,400,000 acres are included in the 16,000,000 acres located in the lower 48 states and the territories. *See id.*

238. *See id.*

239. *See* 16 U.S.C. § 668dd(d)(4)(A) (1994 & Supp. III 1997).

that the Secretary of the Interior violated the Refuge Administration Act by allowing the Air Force to engage in military overflights as low as fifty feet above the surface of Cabeza Prieta NWR, in Arizona.²⁴⁰ When the Secretary entered into settlement negotiations, Senator John McCain of Arizona threatened to withhold Mollie Beattie's approval as Director of the FWS unless the settlement secured the right of the Air Force to continue with the overflights at Cabeza Prieta.²⁴¹ The final *Audubon v. Babbitt* settlement complied with the Senator's request.²⁴² In addition, in order to secure the status of military overflights on wildlife refuges, President Clinton's 1996 Executive Order directed the Secretary of the Interior to "continue . . . permitted uses of units of the Refuge System by other Federal agencies, including those necessary to facilitate military preparedness"²⁴³ Although virtually all negotiators of the 1997 Amendments agreed on the incompatibility of overflights with the mission of the system, and with most refuge purposes, they also agreed that these two events strongly indicated that amendments could not pass Congress without a provision exempting overflights from the compatibility review process.²⁴⁴

B. Comprehensive Conservation Planning Provisions

Prior to passage of the 1997 Amendments, some viewed the FWS as a "statutory stepchild" because the Refuge System Administration

240. See Plaintiff's Complaint for Declaratory Judgment and Injunctive Relief, at 11, *Nat'l Audubon Soc'y v. Babbitt*, No. C92-1641 (W.D. Wash. filed Oct. 22, 1992).

241. Waltman Interview, *supra* note 112.

242. See Final Settlement Agreement, at 3-4, *Nat'l Audubon Soc'y v. Babbitt*, No. C92-1641 (W.D. Wash. filed Oct. 22, 1992) (requiring the FWS to determine its authority to regulate or control military activities within or affecting the Cabeza Prieta NWR and to take such action within that authority as [the FWS] determines is appropriate and necessary to protect wildlife). Although the Department of the Interior concluded that it possessed no authority to regulate military activities in the airspace, the agency did enter into an agreement with the Department of Defense to restrict flights to no lower than 1,500 feet above the refuge, "except within mutually approved low-level corridors." FULFILLING THE TERMS, *supra* note 70, at 1-2 & Attachment 1.

243. Exec. Order No. 12,996, *supra* note 170.

244. Ashe Interview, *supra* note 169.

Act lacked explicit planning authority,²⁴⁵ while all other Federal land management agencies' organic acts included planning provisions.²⁴⁶ Consequently, wildlife refuge planning in the FWS was a creature of administrative initiative, characterized by decentralized and inconsistent planning efforts.²⁴⁷ Planning provisions in the 1997 Amendments superseded the FWS's ad hoc approach to refuge planning by requiring the FWS to manage every refuge or related complex of refuges consistent with a "comprehensive conservation plan,"²⁴⁸ intended to implement the system's mission.²⁴⁹

In the 1997 Amendments, Congress did not tell the FWS to follow a specific form in completing plans, but it did require that each plan describe six specific characteristics of each planning unit.²⁵⁰ The

245. 1 COGGINS & GLICKSMAN, *supra* note 18, § 10F.03[2][a]; *see also* BEAN & ROWLAND, *supra* note 14, at 283-99.

246. *See, e.g.*, National Parks and Recreation Act of 1978, 16 U.S.C. § 1a-1-1a-8 (1994) (establishing general management plans for the National Park System, conducted primarily at two levels: one level for deciding priorities for additions to the park system, the other for developing management plans for units within the system); Federal Land Planning and Management Act of 1976, § 202, 43 U.S.C. § 1712 (1994) (establishing planning requirements for lands managed by the Bureau of Land Management); *see generally* 1 COGGINS & GLICKSMAN, *supra* note 18, § 10F; George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. COLO. L. REV. 307 (1990). ANILCA requires the FWS to achieve several broad purposes for Alaska wildlife refuges in part through formal planning, but these provisions do not apply to refuges in the lower 48 states. *See* ANILCA, *supra* note 36.

247. *See* Verburb & Coon, *Planning in the U.S. Fish and Wildlife Service*, 24 Trends No. 2, at 20, 24 (1987).

248. 16 U.S.C. § 668dd(e)(1) (1994 & Supp. III 1997).

249. *See* 1 COGGINS & GLICKSMAN, *supra* note 18, § 10F.03[3][c][i].

250. *See* 16 U.S.C. § 668dd(e)(2) (1994 & Supp. III 1997) (providing that

the Secretary, acting through the Director, shall identify and describe . . . (A) the purposes of each refuge comprising the planning unit; (B) the distribution, migration patterns, and abundance of fish, wildlife, and plant populations and related habitats within the planning unit; (C) the archaeological and cultural values of the planning unit; (D) such areas within the planning unit that are suitable for use as administrative sites or visitor facilities; (E) significant problems that may adversely affect the populations and habitats of fish, wildlife,

1997 Amendments kept in effect any plans in existence prior to passage of the Act, until the FWS promulgates a new plan. If the preexisting plan is consistent with the 1997 Amendments, it may continue to govern management decisions on a refuge for the statutorily required fifteen years.²⁵¹

Because conservationist groups sought to use the planning process to ensure an opportunity for public involvement in refuge management, negotiators placed a high priority on the inclusion of planning requirements in the 1997 Amendments from the beginning of the negotiations.²⁵² This interest shaped the planning procedures contained in the 1997 Amendments.²⁵³ Since the FWS was required to provide for "active public involvement"²⁵⁴ and make plans available for public comment,²⁵⁵ among other requirements,²⁵⁶ the conservation groups gained a valuable means to provide input on refuge management decisions. The planning provisions also provide the NWRS with an important opportunity to use the planning process to build public support for its conservationist mission.

and plants within the planning unit and the actions necessary to correct or mitigate such problems; and (F) opportunities for compatible wildlife-dependent recreational uses.

Id. § 668dd(e)(2)(A)-(F) (1994 & Supp. III 1997)).

251. *See id.* § 668dd(e)(1)(C).

252. Shallenberger Interview, *supra* note 74. Existing laws allowed the FWS to develop refuge plans, and the agency had engaged in the practice sporadically prior to enactment of the 1997 Amendments. *See* H.R. REP. NO. 105-106, *supra* note 5, at 14. However, conservation groups expressed concern in negotiations that without clear statutory guidelines, too much control would be left in the refuge manager's hands, and the FWS could change plans at a particular refuge every time a manager of a refuge changed. Shallenberger Interview, *supra* note 74.

253. *Id.*

254. 16 U.S.C. § 668dd(e)(4)(A) (1994 & Supp. III 1997).

255. *See id.* § 668dd(e)(4)(B).

256. The 1997 Amendments also require the FWS to complete plans for all System units by 2012; *see id.* § 668dd(e)(1)(B) (revise each plan at least every 15 years); *see id.* § 668dd(e)(1)(A)(iv) (consult with all adjoining landowners); *see id.* § 668dd(e)(3)(A) (coordinate the planning process with state conservation plans); *see id.* § 668dd(e)(3)(B) (publish public comments with the final plan); *see id.* § 668dd(e)(4)(A).

C. Responsibilities of the Secretary

In addition to compatibility and planning requirements, the 1997 Amendments impose fourteen explicit duties on the Secretary of the Interior.²⁵⁷ These duties generally address five areas: (1) four duties require that the NWRS make opportunities for wildlife-dependent recreational uses available;²⁵⁸ (2) four duties clarify the Secretary's duty to the mission of the NWRS;²⁵⁹ (3) three duties pertain to coordination with other federal agencies, including the military, the states, and landowners adjacent to wildlife refuges;²⁶⁰ (4) two duties require the Secretary of the Interior to ensure that refuges receive adequate water for the fulfillment of refuge purposes;²⁶¹ and (5) a final duty requires the Secretary to "monitor the status and trends of fish, wildlife and plants in each refuge."²⁶² This section addresses two important requirements: the duty to acquire water rights necessary for refuge purposes, and the affirmative duty to ensure that the mission of the system is carried out.

1. "Acquiring" Water Rights

Maintaining an adequate supply of high quality water is critical to the fish and wildlife habitat objectives on most wildlife refuges in the system, especially on wildlife refuges in the arid west.²⁶³ Drought and competition with agricultural, industrial, and urban users jeopardize the health of many important refuges, such as the Klamath NWR located in northern California and southern Oregon, the Malheur NWR in southeastern Oregon, the numerous refuges of

257. *See id.* § 668dd(a)(4).

258. *See id.* § 668dd(a)(4)(H)-(K).

259. *See id.* § 668dd(a)(4)(A)-(D).

260. *See id.* § 668dd(a)(4)(E), (L), (M).

261. *See id.* § 668dd(a)(4)(F)-(G).

262. *Id.* § 668dd(a)(4)(N).

263. *See* U.S. Fish and Wildlife Service, Water Rights Issues, at <http://refuges.fws.gov/NWRSFiles/OtherIssues/WaterRights.html> (last visited Apr. 5, 2001). Though essential to the protection of refuges from water diversion, the FWS has not sufficiently documented water use and identification of existing water rights. Of 224 western refuges, only fifty-seven have quantified water rights, while only sixty western refuges have fully documented their water needs. Ninety-one refuges may have reserved rights, but only eleven of the refuges have quantified those rights.

California's central valley, and the Stillwater NWR in Nevada.²⁶⁴ The assertion of water rights for wildlife refuges creates greater potential for conflict than on other federal public lands because unlike many national forests and parks, refuges are located at low elevations, downstream from diversions.²⁶⁵ The location of wildlife refuges in low-lying areas also exacerbates water quality problems because runoff from upstream farms and ranches often contain chemicals that cause extensive harm to waterfowl and other species.²⁶⁶

Since Congress has enacted a limited waiver of sovereign immunity by the United States in water rights litigation, the Department of the Interior often must claim water rights for wildlife refuges in state court.²⁶⁷ Virtually all western states base water rights

264. *See id.*

265. *See* 4 ROBERT E. BECK ET AL., *WATERS AND WATER RIGHTS*, § 37.03(a)(3) (1991 ed.).

266. *See, e.g.*, CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 9-16 (1992) (describing the effect on Stillwater NWR of the Newlands Project, a federally funded program created in 1902 to provide water to agriculture in the arid regions of southwestern Nevada). The Project, encompassing approximately 350,000 acres near Fallon, Nevada, created the Derby Dam, which diverted enough water from the source of the Pyramid Lake, then the second largest natural lake in the western United States, to reduce the lake by 25%, from 221 square miles to 167 square miles. Diversions, first used for agriculture, ended up as wastewater in Stillwater NWR. *Id.* Wilkinson describes the result as a "death trap" for wildlife, and quotes the following description provided by Tom Harris of the Sacramento Bee, who visited the refuge in 1987:

A yard-wide band of death rings the massive, shallow and shrinking lake they call the Carson Sink, overwhelming evidence that the ecological system here is in complete collapse Dead fish by the uncountable millions are washing up along the gooey shoreline, bobbing across the surface or decaying on the bottom, where bloating gases soon will pop great fetid masses more of them to the surface.

Id. (quoting from Tom Harris, *Scientists Try to Find Out What is Wiping Out Life at Carson Sink*, *FRESNO BEE*, Feb. 15, 1987, at A1).

267. 43 U.S.C. § 666(a) (1994). The "McCarran Amendment" states:

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to use the water of a river system or other source, or (2) for the

on the prior appropriation doctrine, which awards water rights to the first person to put the water to a beneficial use.²⁶⁸ In *Arizona v. California*, the Supreme Court held that Congress may reserve a water right for federal lands from state allocation systems as of the date of withdrawal for express or implied purposes.²⁶⁹ In the same case, the court reserved water rights to the Havasu Lake National Wildlife Refuge.²⁷⁰ The Department of the Interior relies on this authority to claim reserved rights on wildlife refuges for “consumptive and non-consumptive water uses necessary for the conservation of migratory birds and other wildlife.”²⁷¹

Congress left little doubt that the 1997 Amendments do not create a reserved water right in the United States “for any purpose,”²⁷² but the 1997 Amendments also included two provisions obligating the Secretary to take actions that address the urgent water needs of the

administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

Id. The Supreme Court has held that the “or otherwise” language in the Amendment means that federal reserved water rights are subject to adjudication in state courts. *See United States v. Dist. Court In and For Eagle County*, 401 U.S. 520, 524-25 (1971). Courts have generally held that the McCarran Amendment only applies to comprehensive proceedings in which the state joins all potential water rights claimants in a watershed, and not to actions filed against the United States by individual water users. *See, e.g., Dugan v. Rank*, 372 U.S. 609, 618 (1963).

268. *See, e.g., Irwin v. Phillips*, 5 Cal. 140 (1855).

269. *See Arizona v. California*, 373 U.S. 546 (1963), *decree entered*, 376 U.S. 340, 346 (1964).

270. *See Arizona v. California*, 373 U.S. at 601. The Ninth Circuit subsequently ruled that the Kenai National Moose Range possessed reserved water. *See United States v. Alaska*, 423 F.2d 764, 767 (9th Cir. 1970).

271. 86 Interior Decisions 553, 604-07 (1979). Examples provided in the decision include watering needs, habitat protection, fire protection, and soil and erosion control, but recreational uses have no reserved rights because they are secondary purposes. *See id.*

272. 16 U.S.C. § 668dd(n)(1)(A) (1994 & Supp. III 1997) (providing that “[nothing in the 1997 Amendments] shall (A) create a reserved water right, express or implied, in the United States for any purpose.”). Even if Congress allowed creation of a water right, it would have little value to the FWS because most competing rights predate 1997.

NWRS. First, Congress clearly instructed the Secretary to “assist in the maintenance of adequate water quantity and quality to fulfill the mission of the System and the purposes of each refuge.”²⁷³ Second, Congress instructed the Secretary to “*acquire*, under State law, water rights that are needed for refuge purposes.”²⁷⁴ In a water rights adjudication, a state court might easily read the latter provision to mean that the Secretary must “acquire” any needed water rights for a wildlife refuge, thus construing the NWRSA to renounce existing reserved rights.

Several characteristics of the 1997 Amendments indicate that Congress did not intend to renounce reserved water rights. First, House Committee language indicated that Congress included the water rights provisions as a new duty for the Secretary to protect and acquire water rights for wildlife refuges.²⁷⁵ The Committee further stated that the provision “does not expand or diminish existing authority with respect to water or water rights.”²⁷⁶ In addition, two

273. 16 U.S.C. § 668dd(a)(4)(F) (1994 & Supp. III 1997).

274. *Id.* § 668dd(a)(4)(G) (emphasis added).

275. See H.R. REP. NO. 105-106, at 10 (1997), *reprinted in* 1997 U.S.C.C.A.N. 1798-5, 1798-14. Here, Congress addresses the affirmative duty of the Secretary to acquire, under state law, water rights needed for refuge purposes as follows:

[Section (4)(a)(4)(F) of the amended NWRSA] directs the Secretary to assist in the maintenance of adequate quantities and quality of water to fulfill the mission of the System and the needs of each refuge. In doing so, the provision imposes a new, more specific, obligation to the Secretary. It does not, however, expand or diminish existing authority with respect to water or water rights. Therefore, in meeting the obligation imposed by new paragraph (4)(F), the Secretary must rely on existing authority, such as the authority to: acquire water rights with appropriated funds, improve the operations of Federal agencies with respect to the identification and protection of relevant water rights; purchase water; and participate in State water rights adjudications to perfect and defend relevant water rights.

Id.

276. H.R. REP. NO. 105-106, *id.* at 10. Interviews with negotiators by the author support this interpretation. The FWS recognized the importance of refuge water rights, and negotiated for a result as favorable to the preservation and future acquisition of these rights as possible. However, western members of Congress were supportive of their

provisions in the savings clauses of the 1997 Amendments counsel against court interpretation of the NWRSIA to defeat reserved water rights: Congress stated that “[n]othing in this Act shall . . . (B) affect any water right in existence on [October 9, 1997]; or (C) affect any Federal or State law in existence on [October 9, 1997] regarding water quality or water quantity.”²⁷⁷ If read in their entirety, the 1997 Amendments maintain the status quo regarding water rights. The Supreme Court established this status quo by interpreting wildlife refuges to have reserved rights in *Arizona v. California*.²⁷⁸ Although not free from doubt, reserved rights on wildlife refuges should remain intact after the 1997 Amendments because Congress expressed no indication in the text of the 1997 Amendments or in the legislative history that it intended to reverse these results.

2. An Affirmative Duty to Ensure that the Mission of the System is Carried Out

The 1997 Amendments imposed on the Secretary of the Interior the duty to “ensure that the mission of the System . . . and the purposes of each refuge are carried out.”²⁷⁹ When a conflict arises between the mission of the NWRS and a purpose of a refuge, the 1997 Amendments require the Secretary to resolve it “in a manner that first protects the purposes of the refuge, and, to the extent practicable, that also achieves the mission of the System.”²⁸⁰ Because the mission statement effectively creates a purpose which applies to all refuges, it helps a refuge manager make an informed compatibility decision in two ways: (1) it provides a purpose in cases

ranching and farming constituents’ interest in protecting their own water rights, and the FWS could only maintain the status quo. Ashe Interview, *supra* note 169. The Act can help in water rights adjudications by providing the FWS with more flexibility to determine uses. *Id.* For example, at Klamath NWR, where an adjudication is ongoing, the Service declared some leaseland grazing programs incompatible with the purposes of the refuge, allowing the agency to redirect water away from the farmers and toward wildlife needs. *Id.*

277. Pub. L. No. 105-57, 111 Stat. 1252, 1259 (1997).

278. See *Arizona v. California*, 373 U.S. 546, 601 (1963), *decree entered*, 376 U.S. 340, 346 (1964) (awarding reserved water rights to the Havasu Lake and Imperial National Wildlife Refuges); *United States v. Alaska*, 423 F.2d 764, 766-67 (9th Cir. 1970).

279. Pub. L. No. 105-57, 111 Stat. 1252, 1255 (1997).

280. See 16 U.S.C. § 668dd(a)(4)(D) (1994 & Supp. III 1997).

when an establishing act or executive order of a particular refuge is unclear; and (2) it provides a refuge manager with a tool to deny a permit for a secondary use that is compatible with the purposes of a refuge, but not compatible with the more general conservation mission of the NWRS.

Although incompatible with the mission of the NWRS, conditions at Deer Flat NWR, located in southwest Idaho and eastern Oregon, provide an example of how the FWS can eliminate a use compatible with the purpose of a refuge. Motorized boating, similar to that which occurred on Ruby Lake NWR, takes place regularly on the 8,000 acre Lake Lowell within Deer Flat NWR.²⁸¹ Both refuges were established to provide habitat for migratory birds.²⁸² However, because Deer Flat NWR is not a nesting ground for migratory birds, but instead serves primarily as a wintering ground, and because Lake Lowell is a deepwater lake in contrast to the shallow lake conditions at Ruby Lake NWR,²⁸³ the argument used in the *Ruby Lake* cases to

281. A three-person FWS staff manages the 11,381-acre Deer Flat National Wildlife Refuge as a breeding and resting area for migratory birds and other wildlife. See U.S. FISH AND WILDLIFE SERVICE, DEER FLAT NATIONAL WILDLIFE REFUGE HOME PAGE, at <http://www.r1.fws.gov/deer/Public.htm> (last visited Apr. 5, 2001). Assisted in management by state personnel, the refuge allows motor and sail powered water craft on the Lake Lowell sector of the refuge from April 15th through September 30th, at a level of usage which dwarfs that at Ruby Lake NWR in the 1970s. *Id.* Although the FWS has no official numbers, the refuge manager estimates that approximately 140,000 - 150,000 individuals visit the refuge for boating purposes annually. Telephone Interview with Elaine Johnson, Refuge Manager, Deer Flat National Wildlife Refuge Complex (June 15, 2000) [hereinafter Johnson Interview]; cf. *infra* note 96 (citing *Defenders of Wildlife v. Andrus*, 455 F. Supp. 446 (D.D.C. 1978)), for the fact that public use on the refuge exceeded 50,000 individuals annually, including 30,000 boaters.

282. Compare Exec. Order No. 7655 (July 12, 1937) (establishing Deer Flat NWR "as a refuge and breeding grounds for migratory birds and other wildlife"), with Exec. Order No. 7923 (July 2, 1938) (establishing Ruby Lake NWR "as a refuge and breeding ground for migratory birds and other wildlife").

283. Telephone Interview with Kevin Ryan, Refuge Manager at Deer Flat NWR, from December 1989 to November 1998. Boaters on the shallow Ruby Lake could not help but venture into vegetative areas which provided habitat for nesting birds, but, with the exception of personal watercraft, boaters on the larger and deeper Lake Lowell generally stay in areas with no vegetation, where there is less potential for harm. *Id.*

eliminate boating due to its incompatibility with waterfowl nesting conditions is not applicable to Deer Flat NWR.²⁸⁴

If, under the unamended NWRSA, the FWS had desired to eliminate motorized boating on Deer Flat NWR, the agency would probably have failed because it could not have shown the incompatibility of boating with the purpose of the refuge as habitat for migratory birds.²⁸⁵ However, as a result of the 1997 Amendments, the FWS may eliminate boating on Deer Flat NWR because it is incompatible with the *mission* of the NWRSA. Because the agency could base its decision on the incompatibility of the cumulative effects of boating on the general wildlife values of Deer Flat NWR, and not just on boating's effect on migratory waterfowl, a decision to eliminate boating under the amended NWRSA is more likely to withstand judicial scrutiny.²⁸⁶

IV. THE NWRSA, PUBLIC CHOICE AND PUBLIC USE

[A]s we reach out to new partners and invite them under our conservation tent, we must not forget our longtime friends. The hunting and angling communities have been supporting our mission since before [the FWS] was even established. Yet, as America's landscape becomes more urbanized, young people are growing up disconnected from the farm and the field. We need to find ways to get the younger generations in touch with wildlife, and one of the best ways to do that is to preserve the future of our nation's hunting and fishing traditions.²⁸⁷

284. *Id.* On several occasions the FWS has observed western grebes nesting on the lake, but the nests are generally located far enough into the native grasses to dampen the effect of boat wakes similar to those known to damage the nests at Ruby Lake NWR.

285. *Id.*

286. Johnson Interview, *supra* note 281. The ability to withstand public scrutiny is a different matter. The prospect of telling local users that they could no longer jet-ski or water-ski on the refuge prompted the current refuge manager to remark that she had warned her friends to "start laying [their] bets now as to how soon they're going to run me out of town." *Id.*

287. *The Fish & Wildlife Service and the New Millennium: Memorandum from Jamie Rappaport Clark, Director, U.S. Fish and Wildlife Service, to the Employees of the Fish and Wildlife Service, FISH &*

By establishing in the 1997 Amendments a policy whereby "compatible wildlife-dependent recreation is a legitimate and appropriate general public use of the [NWRs],"²⁸⁸ Congress ended the long debate surrounding the presence of hunting and fishing on wildlife refuges.²⁸⁹ The FWS still has authority to disallow both uses when it determines that either one is incompatible with the mission of the NWRs or the purpose of a refuge,²⁹⁰ but by including hunting and fishing among the wildlife-dependent recreational uses,²⁹¹ Congress required the FWS to give these uses priority consideration.²⁹² Thus, through passage of the NWRsIA, the sporting community solidified a comfortable and long-standing status quo, which allowed for extensive practice of hunting and fishing on refuge lands across the United States. In its final section, this Article uses the legal theory of "public choice" to explain how these groups rose from a status of relative disinterest in amending the NWRsAA to become a critical party to passage of the 1997 Amendments,²⁹³ placing their interests at the core of the final legislation.

A. Public Choice Theory Explained

Public choice theory is the economic study of decision-making applied to processes that take place outside of the free market.²⁹⁴

WILDLIFE NEWS (U.S. Fish and Wildlife Serv., Wash., D.C.), Jan.-Feb., 2000, at 32 [hereinafter *New Millennium Memo*].

288. 16 U.S.C. § 668dd(a)(3)(B), 668ee(2) (1994 & Supp. III 1997).

289. See *New Millennium Memo*, *supra* note 287, at 32.

290. See 16 U.S.C. § 668dd(d)(3)(A)(i) (1994 & Supp. III 1997).

291. *Id.* § 668ee(2).

292. See *id.* § 668dd(a)(3)(C).

293. Although President Clinton's 1993 support of Senator Graham's proposed amendments to the NWRsAA dramatically improved the chances for new legislation, *see supra* note 162, it was not enough to ensure passage of the bill. Ultimately, it was the commitment of the sport fishing and hunting groups to a piece of legislation, which would provide some protection for their interests that led to congressional support of the proposed 1997 Amendments. Shallenberger Interview, *supra* note 74. Overwhelming support for H.R. 511 in the House of Representatives supports this position. See *supra* note 168.

294. See Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 415 (1994).

Since 1986, when James Buchanan was awarded the Nobel prize in economics for his work in the field, theorists have increasingly used public choice to describe the legislative process.²⁹⁵ By intertwining the disciplines of political science and economics, public choice theory rejects the notion that a legislature or an administrative body acts out of the public interest, and recognizes instead that small, well-organized special interest groups exert a disproportionate influence on policymaking.²⁹⁶ Public choice also contradicts the position that the clash between opposing interest groups (for example, between conservation groups and consumptive users of public lands) results in an accurate reflection of the interests of the public at large.²⁹⁷ Consequently, broadly diffused national interests suffer at the hands of interest groups more willing and able to pay for political influence.²⁹⁸

295. See DANIEL A. FARBER & PHILLIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 1 (1991).

296. See Blumm, *supra* note 294, at 416. Blumm warns, though, that:

[A] couple of disclaimers should be added here. First, public choice theory is a positivist theory; it is merely descriptive, without normative aspirations. It should not be assumed that public choice theorists advocate that public policy reflect only the self-interest of policy makers. Rather, the assumption that politicians are self interested allows public choice theorists to understand and describe reality more accurately. Second, even the most rigorous public choice analyses do not claim that the concept of self-interest can explain all political decisionmaking. Unselfish ideological or other individual beliefs about the public interest do play an important and vital role in the formation of public policy. Thus, neither ideology nor self interest should be considered an exclusive causal agent in the political arena.

Id. at 416-17. Although the author uses public choice theory to describe the need for the 1997 Amendments, and in many cases the behavior of negotiators involved with the drafting of final legislation, the common commitment to the NWRS as a system dedicated to the national interest in the preservation of wildlife was also a driving force in the final realization of the 1997 Amendments, and one that ultimately prevailed in many provisions of the final legislation. See *supra* Part III.C.

297. See Blumm, *supra* note 294, at 422.

298. See *id.*

Public choice theory holds particular relevance in the case of public lands management, where the interests of disorganized, distant public owners are regularly overshadowed by the opposing interests of locally concentrated commodity and recreational interests.²⁹⁹ For example, an application of public choice theory to “multiple use management”³⁰⁰ of Bureau of Land Management (“BLM”) and U.S. Forest Service (“USFS”) lands described the influence exerted by stockmen’s associations and timber mills to convince land managers to allow overgrazing on public rangelands, and below cost timber sales in the national forests.³⁰¹ “Multiple use”

299. *See id.* at 407-08; *see also supra* Parts II.B.2 & III.

300. Blumm, *supra* note 294, at 407. Multiple use promises a wide variety of renewable land uses and emphasizes administrative flexibility and long term productivity:

“Multiple use” means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

16 U.S.C. § 531(a) (1994). *See also* 43 U.S.C. § 1702(c) (1994) (providing a similar definition in the Federal Land Policy and Management Act, listing both renewable and nonrenewable resources, and promising to meet both the present and future needs of the American people without “permanent” impairment of the productivity of the land and the quality of the environment). In contrast, commentators describe the NWRS as a dominant use land management system, focused solely on preservation of the wildlife resource, but tempered by an allowance for “compatible public uses.” 1 COGGINS & GLICKSMAN, *supra* note 18, § 14A.01. *See supra* Part III.B.1.

301. *See* Blumm, *supra* note 294, at 407 (citing DENZEL FERGUSON & NANCY FERGUSON, *SACRED COWS AT THE PUBLIC TROUGH* (1983)); Richard H. Braun, *Emerging Limits on Federal Land Management Discretion: Livestock, Riparian Ecosystems, and Clean Water Law*, 17 ENVTL. L. 43 (1986); U.S. GEN. ACCT. OFF., *NATURAL*

allows for production of resources through careful land use planning and decision-making delegated to the local manager, but its foundation in the “standardless delegation of authority to managers of public lands and waters” has exposed the BLM and USFS to local commodity interests.³⁰²

Stockmen’s associations and timber mills focus little attention on the NWRS because timber sales and grazing occur infrequently on wildlife refuges,³⁰³ but, as shown in earlier sections of this paper, a

RESOURCES MANAGEMENT ISSUES, Transition Series, GAO/OCG-93-17TR (Dec. 1992), at 20 (stating that in 1990, the federal government lost \$35.6 million on below-cost timber sales); Michael F. Kline, *The National Chainsaw Massacre: Below Cost Timber Sales in the National Forests*, 13 B.C. ENVTL. AFF. L. REV. 553 (1986). See generally CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER AND THE FUTURE OF THE WEST*, at 75-174, 219-92 (1992) (comparing the effects of commodity-based interest group pressure on national forests, rangelands and dam operations).

302. Blumm, *supra* note 294, at 407.

303. See U.S. FISH AND WILDLIFE SERV., *America’s National Wildlife Refuges: Where Wildlife Comes Naturally, Grazing and Haying* (explaining that the FWS allows grazing of 258,166 animal use months on 1,416,005 acres, with more than 60% of this use occurring on 893,332 acres at Charles M. Russell National Wildlife Refuge in eastern Montana), at <http://refuges.fws.gov/NWRSFiles/HabitatMgmt/GrazingAndHaying.html> (last visited Apr. 5, 2001). Most grazing on refuges is allowed by refuge permit, or because existing grazing rights were retained when a refuge was acquired. See *id.* See also U.S. FISH AND WILDLIFE SERVICE, *America’s National Wildlife Refuges: Where Wildlife Comes Naturally, Forest Management* (stating that forest lands account for approximately 18% of the 93.6 million acres in the Refuge System, and the FWS estimates that between 12,000 and 18,000 acres are subject to timber harvest annually), at <http://refuges.fws.gov/NWRSFiles/HabitatMgmt/Forestlands.html> (last visited Apr. 5, 2001). Neither tree harvesting nor grazing is extensive on wildlife refuges, but both uses have caused harm. See, e.g., GAO COMPATIBILITY REPORT, *supra* note 85, at 25 (reporting grazing cited by refuge managers as harmful on fifty-five refuges and logging cited by refuge managers as harmful on thirteen refuges). For more than sixty years, cattle grazed Sheldon NWR in Northwestern Nevada. Overgrazing devastated native grasses and eroded creek banks. As a consequence of stream siltation caused by the erosion, the chub, a rare desert fish, was listed as threatened under the Endangered Species Act. Other species, including songbirds and sage grouse, also suffered. Even the refuge manager lamented in 1991 that the refuge was “being run like a cattle ranch.” B. Meier, *Refuges Feel Strain and Wildlife and Commerce Collide*,

history of NWRS expansion with virtually no system-wide purpose³⁰⁴ and a tradition of scattered and unclear administering and establishing acts³⁰⁵ has often resulted in “standardless” decision making similar to that resulting from the “multiple use” mandate on Forest Service and BLM lands. Thus, the FWS allowed boaters on Ruby Lake NWR and recreationists on Crystal River NWR despite overwhelming evidence that their respective uses significantly harmed wildlife on the refuges. The allowance of deer hunting on a small refuge in Virginia, or a few commuters’ desire to use a refuge beach as their driveway, caused alarm among members of the Congressional Sportsmen’s Caucus and resulted in debate among members of the United States Congress. Twenty percent of the managers of the NWRS stated only a decade ago that they allowed uses they knew to be harmful to wildlife only to satisfy local and economic interests.³⁰⁶ The 1997 Amendments help to solve these problems by strongly disfavoring most public uses, providing the FWS with strong statutory support for denying access to refuges for uses not among the priority public uses.³⁰⁷ Hunting and fishing on wildlife refuges did not suffer the same fate because the sporting community had the political will and strength to establish a firm position for their sports as statutorily established appropriate uses of the NWRS.

B. “Wildlife-dependent Public Use” and the Hunter’s Victory

Considering the history of the NWRS, the elevation of hunting and fishing to “priority public uses” should not come as a surprise.

N.Y. TIMES, Dec. 1, 1991, at A38. In 1991, the Wilderness Society sued to eliminate the grazing program at Sheldon NWR. Motivated by concerns that litigation would result in system-wide ban on grazing, the FWS agreed to a settlement which phased out grazing on the refuge. *See Wilderness Soc’y v. Babbitt*, 5 F.3d 383, 386-88 (9th Cir. 1993) (awarding plaintiffs attorney fees because the lawsuit was a material factor in the FWS decision to eliminate grazing on the refuge).

304. *See supra* Part II.A.

305. *See supra* Part II.B.

306. *See supra* notes 91-103, 130-147 and accompanying text.

307. Ashe Interview, *supra* note 169 (stating that “if it’s not a priority public use, there’s not much use for it”). Ashe commented that by enabling the FWS to reject a use based on its incompatibility with a priority public use, the 1997 Amendments virtually doom non-wildlife-dependent uses on wildlife refuges. *Id.*

Public choice theory suggests that the influence of special interest groups will be strongest under three conditions, all met by sportsmen's groups in the mid-1990's when the 1997 Amendments took form: (1) when the group opposes changes to the status quo; (2) when the group's goals are narrow and have low political visibility; and (3) when the group has the ability to enlist support from an alternative friendly forum, in this case from powerful members of Congress and from the FWS.³⁰⁸ This Article has alluded to all three of these conditions in earlier sections, and it concludes with a brief reference to each of them as explanation for the rise of hunting and fishing to permanent status on wildlife refuges across the nation.

The allowance of hunting is firmly established as the status quo. Sportsmen's groups, historically supported by the FWS,³⁰⁹ have traditionally formed the NWRS's core constituency.³¹⁰ These interests are well entrenched in the history and the future of the NWRS.³¹¹ Although the FWS has often maintained that hunting does not cause harm to wildlife on refuges,³¹² and the agency often uses hunting as a viable management tool to protect wildlife,³¹³ it has allowed the practice under conspicuous circumstances. For example, the FWS suffered from criticism for the continued allowance of

308. See Blumm, *supra* note 294, at 420-21.

309. See 1 COGGINS & GLICKSMAN, *supra* note 18, § 18:03[4][a].

310. See RICHARD J. TOBIN, THE EXPENDABLE FUTURE: U.S. POLITICS AND THE PROTECTION OF BIOLOGICAL DIVERSITY 52 (1990).

311. See 1 COGGINS AND GLICKSMAN, *supra* note 18, § 14A.03[1] (noting the inclusion of hunting as a priority public use in the NWRSIA).

312. Most recently, the FWS reviewed hunting programs at over 220 refuges in response to the *Audubon v. Babbitt* settlement. See *supra* Part III.B. In no case did the agency find that hunting and fishing were incompatible, but modifications to two hunt programs were necessary to assure compatibility. See H.R. REP. NO. 105-106, at 4 (1997), *reprinted in* 1997 U.S.C.C.A.N. 1798-5, 1798-8 (agreeing with these findings and further finding that the review demonstrated that "traditional wildlife dependent recreation has been generally compatible and has a legitimate and valuable place on System lands.").

313. See 1 COGGINS & GLICKSMAN, *supra* note 18, § 18.03[4][a] (noting that the FWS has consistently "acted on its belief that hunting is a valuable management tool"); 50 C.F.R. §§ 31.2, 31.14 (1999) (authorizing FWS control of surplus wildlife populations through public hunting, fishing and trapping).

migratory bird hunting in the late 1980's despite evidence that many waterfowl populations were at a historic low.³¹⁴

Support for hunting in the FWS has deep roots. Theodore Roosevelt was not a preservationist in the mold of a John Muir or an Aldo Leopold. Instead, he was a conservationist of his time who believed in the conservation of natural resources more for human use than for the sake of protecting wilderness.³¹⁵ His many trips to the western United States in his formative years drove home the importance of preserving habitat to ensure the continued existence of game for future hunters to kill.³¹⁶ Roosevelt was not the only hero of the NWRS who valued hunting. Ding Darling, the political cartoonist who developed the "blue goose,"³¹⁷ was an activist and a

314. See, e.g., *1989 Management Review Hearings*, *supra* note 16, at 212 (statement of Dave Olsen, then Assistant Director for Refuges and Wildlife).

[CONGRESSMAN] SYNAR: Does it make sense to keep some refuges open to waterfowl hunting at a time when the populations of some species are at a historic low?

Mr. OLSEN: [W]e develop framework regulations for this country . . . based on total waterfowl populations for the Nation . . . the number of waterfowl harvested on refuges is I wouldn't say insignificant, but probably 1 percent of the total harvest that we have in this Nation.

Mr. SYNAR: You will agree that the waterfowl situation is at a historic low, is it not?

Mr. OLSEN: That's correct.

Mr. SYNAR: Would it not make sense for the refuges to be closed?

Mr. OLSEN: I don't think generically to just close all refuges for waterfowl hunting would be appropriate.

Mr. SYNAR: It is within your power to do that, is it not?

Mr. OLSEN: Not my power.

Mr. SYNAR: The Fish and Wildlife Service.

Mr. OLSEN: It is.

Id.

315. See BRANDS, *supra* note 3, at 622.

316. See *id.* at 621.

317. National Wildlife Refuge System Design Symbol, 64 Fed. Reg. 33,904. The "blue goose," can be seen on every boundary sign in the System. As result of a new Fish and Wildlife Service policy reinstating the blue goose as the official symbol of the NWRS, the blue goose will soon also have a place on every entry sign in the System.

waterfowl hunter who pushed for passage of the Migratory Bird Hunting Stamp.³¹⁸ He later became Director of the Bureau of Biological Survey, predecessor to the FWS.³¹⁹ J. Clark Salyer III, another hunter and considered the father of the NWRS, helped to add approximately 23 million acres to the system as chief of the Division of Wildlife Refuges from 1934-1961.³²⁰ Today, hunting takes place on over half of the wildlife refuges in the NWRS,³²¹ and all court challenges to the activity have failed.³²² It was clear before the 1997 Amendments that hunting held a firm position in the NWRS and, in the 1997 Amendments, Congress seems to have left little question that this will continue.

The sportsmen's groups also meet the second two conditions that led to their strong influence on the 1997 Amendments. The sportsmen's goal of elevating hunting and fishing to purposes of the refuge system was never met, but Congress did carve out a special niche in the 1997 Amendments, which clearly protects their interests. Finally, with the ascension of the Republican Party and the support of Congressman Don Young, the sportsmen were able to enlist the necessary congressional support to gain a powerful position in negotiations pertaining to the 1997 Amendments.³²³

The influence of the founders of the refuge system on the character of the NWRS, and continued involvement from sportsmen's groups throughout the 20th Century, set a foundation for the sporting community of the late 1990's to have a profound influence on the 1997 Amendments. The events of the mid-1990's that resulted in H.R. 511 showed how sportsmen can flex their muscles when necessary. Secretary Babbitt's strong veto threat of

318. See discussion *supra* Part II.A.2.

319. See REED & DRABBLE, *supra* note 2, at 9 (noting that the declining populations of ducks and geese resulting from the dustbowl conditions of the great depression raised a great clamor among hunters and biologists). Darling was joined by Aldo Leopold, one of the greatest conservation writers of the 20th Century, on a commission established by Franklin Roosevelt to study the problem and to report on methods to restore waterfowl. *Id.*

320. See Greenwalt, *supra* note 2, at 401.

321. See U.S. Fish and Wildlife Serv., *National Wildlife Refuge System Searchable Databases: Search for Recreational Opportunities*, at <http://refuges.fws.gov/Tango3/queryfiles/profile-rec.taf?function=form> (last visited Apr. 5, 2001).

322. See *supra* notes 100-103.

323. See *supra* Part III.C.

H.R. 511 avoided the daunting prospect of a proliferation of lawsuits pitting user against user, and it eventually assured the preeminence of wildlife protection on refuges across the country; however, the 1997 Amendments did not preclude future conflict between environmentalists and sportsmen. Instead, because Congress remained silent on the balancing required when one priority, public use, conflicts with another, it left it to the managers of the NWRS to deal with these conflicts as they arise. Consequently, the FWS will continue to balance hunters' interests against the interests of environmentalists.

CONCLUSION

In 1961, speaking at the inauguration ceremony of the President who would later sign the Refuge Recreation Act of 1962, an aged poet stood in front of millions of Americans and struggled to read lines of a poem he had completed the night before. The glare of the sunlight upon the paper inhibited his sight, causing the poet to cast away the new poem in favor of one he declaimed by heart.³²⁴ His words told us something about Americans and the land we inhabit that is worth remembering. On that cold January inauguration day, Robert Frost had the following to say about Americans and our relationship to the land:

324. JAY PARINI, *ROBERT FROST: A LIFE* 414 (1999).

One hour into the ceremony just ahead of Kennedy's swearing in Frost was called forward. He ambled slowly to the podium, then fumbled for a while with his manuscript; at last, haltingly, he began to read his "Dedication." But the light struck the page in such a way that he could not see, and he said, 'I'm having trouble with this.' The new vice president tried to help by shielding the page with his top hat, but Frost brushed him aside with a joke. He then delighted the audience by launching into "The Gift Outright," which he declaimed by heart. He ended magnificently The crowd began to cheer, drowning out a gaffe: Frost thanked the president-elect, Mr. John Finley." . . . But the mistake passed unnoticed and Frost was easily forgiven by those who heard it. He was now the embodiment of American poetry: an icon caught in the act of being an icon

Id. at 414-15.

Something we were withholding made us weak Until we found that it was ourselves We were withholding from our land of living, And forthwith found salvation in surrender. Such as we were we gave ourselves outright (The deed of gift was many deeds of war) To the land vaguely realizing westward, But still unstoried, artless, unenhanced, Such as she was, such as she would become.³²⁵

Fortuitously, the “deed of gift” to our nation’s wildlife requires no deed of war, but it does require a level of sacrifice that has increased since Robert Frost died two years after he spoke at John F. Kennedy’s inauguration. The Pacific Ocean long ago ended this nation’s vague realization westward, and Americans are noticing that our “enhancements” have resulted in much harm to the wildlife of our “land of living.” Thus, giving ourselves over to that land requires a different kind of surrender than before: America’s inhabitants must now learn to protect and to preserve our lands if we also want to enjoy them.

The history of the NWRS tells us that a choice to ignore the vast system of lands this nation has set aside for wildlife is a choice to let others decide how those lands are treated. Without active participation in the management of refuge lands, the future will tell the same story. Elaine Johnson’s comments about the tenuous nature of her status as manager of Deer Flat NWR³²⁶ serve as a reminder that local pressures do not disappear merely because Congress wishes them away with statutory provisions. However, the 1997 Amendments offered a way to reconcile those interests with national interests by creating standards and by creating a process that requires the managers of the System to abide by those standards. The success of the law depends on this nation’s ability to engage in an important dialogue between a national public which believes that, “in a country as bountiful and as diverse as ours, there ought to be special places that are set aside exclusively for the conservation of this nation’s fish and wildlife,”³²⁷ and those who often believe the same, but who live, work and play beside and in those places. We owe it to ourselves and we owe it to “our land of living” to engage fully in this dialogue.

325. ROBERT FROST, THE GIFT OUTRIGHT (1961), in ROBERT FROST, COME IN & OTHER POEMS 185 (Louis Untermeyer ed., 1967).

326. See *supra* note 286.

327. *Hearings on H.R. 511*, *supra* note 1.

