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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WILDERNESS WATCH; ARIZONA WILDERNESS COALITION; THE SIERRA CLUB; WESTERN WATERSHEDS PROJECT and THE GRAND CANYON WILDLANDS COUNCIL, Plaintiffs, v. U.S. FISH AND WILDLIFE SERVICE, et al, Defendants.	CIV-07-1185-PHX-MHM **Plaintiffs' Motion for Summary Judgment and Accompanying Memorandum of Points and Authorities** **Oral Argument Requested**

In accordance with Rule 56 of the Federal Rules of Civil Procedure and based upon the Separate Statement of Facts filed herewith and the attached Memorandum of Points and Authorities, Wilderness Watch respectfully moves this Court for summary judgment to prevent the U.S. Fish and Wildlife Service from constructing, operating, and maintaining man-made water impoundments in order to increase certain wildlife populations inside a federally designated Wilderness area.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

The question presented by this lawsuit is whether the U.S. Fish and Wildlife Service may construct, maintain, and operate permanent water impoundments inside a federally designated wilderness area, when the Wilderness Act, which is the statute that governs the

management of the area, explicitly prohibits the use of motorized vehicles, temporary roads, and permanent structures in wilderness, and when recent Ninth Circuit caselaw also interprets the Wilderness Act as prohibiting such actions. A second question is whether the U.S. Fish and Wildlife Service may authorize the construction and operation of these water impoundments without offering notice and comment opportunities to opponents of the plan and without undertaking an environmental review of the action in an environmental assessment or environmental impact statement, even though the Service's regulations require this review whenever a proposed action has "the potential" to violate a federal law such as the Wilderness Act, or when an action may have adverse effects on wilderness.

A. Wilderness and the Wilderness Act

The Wilderness Act states:

> "In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. . . .
>
> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. [Wilderness is] an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions."

16 U.S.C. § 1131 (a), (c).

This case is about what kinds of land development activities—road building, concrete pouring, earth moving and so forth—are permitted to occur in "Wilderness" areas, which are uniquely regulated public lands that have been congressionally declared to be off-limits to almost all forms of development and motorized use. These remote and scenic public lands, designated and managed under the 1964 Wilderness Act, make up a small but

important component of our country's public landscape.[1] Wilderness lands are designated by Acts of Congress, and are carved out of existing national forests, national parks, public rangelands, and, as in this case, national wildlife refuges.

Here, the narrow issue is whether permanent water impoundments constructed of concrete, plastic, and steel can be built and used in the Kofa Wilderness near Yuma, Arizona. These water impoundments are designed to artificially create year-round water where it would not otherwise exist and, as a result, alter the natural conditions of the wilderness in order to inflate populations of deer and bighorn sheep, which are popular game animals. SoF par. 12, 21; Yaqui and McPherson Categorical Exclusion and Minimum Requirements Analysis, AR 138, 154. The principle at issue here is whether permanent construction by heavy equipment of structures designed to modify the natural condition and natural ecology of the land is lawful or appropriate on America's most restricted, natural landscapes.

When congress grants "Wilderness" status to a particular landscape it confers America's most restrictive public land zoning designation on the wilderness land—a designation that statutorily prohibits most intervention or "land management" from even occurring. 16 U.S.C. 1133(c) (forbidding commercial enterprise, permanent or temporary roads, mechanical transport, and permanent structures in wilderness). Unlike national parks or national forests, wilderness lands are managed not to "protect" some particular aspect of nature, but rather to let nature ebb and flow in its primeval fashion: management of these lands is done not to enhance a given feature of the natural world or to protect, in a paternalistic fashion, one component of the natural world, but rather to protect the whole raging panoply of nature's ecological processes as they live, thrive, die, and evolve. To this end, active management of wilderness lands is reduced to a minimum. Commercial uses of wilderness are prohibited, roads (even temporary ones) and permanent structures are prohibited, and motorized transport, even by boat, is prohibited. *Id.* No logging, no vacation

[1] Excluding Alaska, there are about 400 million acres of public lands in America, and about 46 million of those are designated wilderness. George Coggins, Charles Wilkinson, and John Leshy, *Federal Public Land and Resources Law*, pp. 10 and 1129 (5th Ed. 2002).

homes, no boat docks, no gift shops, no snowmobiles, and no jeeps: wilderness lands are set aside for primitive recreation that is done on foot or not at all. Wilderness is a place where nature reigns on nature's terms, where the land is to remain forever unmodified and in its "natural condition." 16 U.S.C. §1131 (a).

The statute that invented this unusual, "hands-off" Wilderness designation defines wilderness to be "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." 16 U.S.C. §1131(c). Wilderness, the statute tells us, is to be managed to retain its "primeval character," and whatever human activities may take place in wilderness, they must be accomplished "without permanent improvements." *Id.* The statute declares that the point of wilderness is to assure that humans do not "modify" all formerly wild areas; these wilderness areas are therefore to be retained in their "natural condition." *Id.* at (a).

Accordingly, lands under this extremely restrictive management regime can be walked upon, but bicycles are forbidden. *Id.* at (c) (forbidding "mechanical transport"). Commercial activity is forbidden. *Id.* Hunters can visit these lands, but they must carry out what they kill on their backs: they may not use wheeled carts or all-terrain vehicles to drag their animal carcasses out of the wilderness. And as described below, roads, reconstruction of hiking shelters, motorized transport on pre-existing roads, repair of man-made water impoundments to protect fishing opportunities, even harvest of fish eggs beneath the surface of the water have all been forbidden in wilderness by federal courts.

Like no other land designation, wilderness is a place where people can go to encounter the "primeval character" of nature in its rawest form, where animals are left to their own primeval ways, and where nature is left to its own primeval ebb and flow, entirely free from the developments and improvements that can be found in less restrictively regulated landscapes like national parks and national forests, where leaving the land in its "natural condition" is not the paramount concern.

This case is about whether the natural condition of a remote Arizona desert Wilderness may be modified by the construction and use of permanent, man-made water impoundments

and pumping fixtures designed to artificially increase the natural availability of water and inflate the populations of certain big-game animals. (Hunting mule deer or bighorn sheep when they drink from man-made water holes is legal in Arizona, and is a popular means of shooting animals that otherwise would be difficult and time-consuming to stalk and kill. *See* Exhibit 1, Arizona hunting guidelines.)

B. The Kofa Wilderness

The Kofa Wilderness is approximately 500,000 acres in size and encompasses very arid, hot, mountainous, and rugged terrain just north of Yuma. SoF par. 1, AR 143. It was established by the 1990 Arizona Desert Wilderness Act and is managed pursuant to that Act and the 1964 Wilderness Act. 101 Pub. L. 628 (November 28, 1990); 16 U.S.C. 1331. The Kofa Wilderness was formed from lands in the Kofa Wildlife Refuge, and is managed today by the U.S. Fish and Wildlife Service, which has management responsibilities for National Wildlife Refuges and Wildernesses that were formed from them. 16 U.S.C. §1131(b).

Desert bighorn sheep have occupied this landscape since, in Tohono O'odham terms, "time immemorial." Desert bighorn are shy animals that evade predators chiefly by living in areas their predators cannot go or long survive: rocky cliff faces in places with little water and searing heat. *See* Investigative Report, at AR 395 (describing natural history of desert bighorn sheep.); SoF par. 5. Desert bighorn can go long periods—no one knows how long—without water, and have been found occupying areas that have no surface water whatsoever.[2] They have been observed knocking the tops off of cactus and eating the pulp for its moisture in areas where there is no surface water available, and they have persisted in desert environments were surface water availability is at best precarious. *Id.* Their populations have historically been fairly robust in the Kofa area, and one reason the Kofa Game Preserve was established, in 1939, was to preserve habitat for this magnificent, mysterious, and reclusive animal. SoF par.3; Minimum Tool Analysis, AR 155.

[2] *See* Charles Sheldon, "An Expedition to the Sierra del Rosario: Sonora, 1916" *reprinted in* Gary Nabhan, *Counting Sheep: 20 Ways of Seeing Desert Bighorn,* University of Arizona Press, 1993. The Sierra del Rosario is the most arid mountain range in North America, isolated and surrounded by a belt of sand dunes. The range has no permanent water, but has historically been occupied by desert bighorns. The article is attached as Exhibit 1.

Along with desert bighorn sheep, mule deer also live in Kofa, and are popular and abundant prey for hunters. SoF par. 2. 10; AR 138. And, recently, mountain lions have been moving into the Kofa Wilderness and preying on both mule deer and bighorn sheep, to the alarm of game managers and hunters alike. SoF par. 7; Joint News Release, AR 117, 119. Some have speculated that the abundance of man-made waters in Kofa now permit mountain lions to survive in the area, which otherwise would be too arid for them to endure.[3]

C. The challenged action

The challenged action is the decision by the Fish and Wildlife Service to construct, operate, and maintain two large water impoundments that are designed to provide year-round water in areas where no water is currently found. SoF par.12; Yaqui and McPherson Redevelopment Project Categorical Exclusion, AR 155. The Service's plan is to modify the natural condition of the area to artificially inflate the numbers of big game animals through the construction and use of large, permanent water impoundments. *Id.* Wilderness Watch seeks injunctive and declaratory relief for violations of the Wilderness Act's prohibition against permanent structures and modification of the Wilderness's natural condition, and the National Environmental Policy Act's requirement that controversial actions like this one be undertaken with appropriate public notice and comment and environmental review. Relief is available by removing the structures or, at a minimum, rendering them inoperable and by ensuring that future construction of this type is done in a lawful manner with appropriate public review.

II. Summary of Facts

The Kofa Wilderness was established by the Arizona Desert Wilderness Act of 1990. 101 Pub. L. 628 (November 28, 1990). Section 301 of that Act states that the Kofa Wilderness "shall be administered by the Secretary of the Interior in accordance with the

[3] Harley Shaw, *Only Prey*," reprinted in Nabhan, supra. Shaw states that "A more readily available water supply could make desert bighorn range more acceptable to lions." The excerpted article is attached as Exhibit 2.

provisions of the Wilderness Act." *Id.* at Sec. 301 (b). The Kofa Wilderness is administered by the U.S. Fish and Wildlife Service, an agency in the Department of Interior.

On June 14, 2007, Wilderness Watch was told by one of its members that two permanent, man-made water impoundments were to be constructed in the Kofa Wilderness near Yuma, Arizona. SoF par. 24; Declaration of Tina Marie Ekker, par. 2. Believing such water impoundments to be inappropriate inside designated wilderness and contrary to the Wilderness Act's prohibitions against the construction of "permanent improvements" or "structures or installations" inside any wilderness, the plaintiffs attempted to contact the U.S. Fish and Wildlife Service and persuade them to halt this construction. SoF par. 25; *Id.*at par. 6. During telephone conversations with Service staff, Wilderness Watch learned that the Service had signed a Decision Notice authorizing the "Yaqui and McPherson Tanks Redevelopment Projects" some two weeks previous, on May 30, 2007. *Id.* The Yaqui tanks are partly in the Kofa Wilderness and the McPherson tanks are entirely within the Kofa Wilderness. SoF par. 13; AR 139, 143-4. Though styled as "redevelopment" of old tanks, the new McPherson tanks are nearly a mile from the original McPherson tanks that they are said to be replacing, and the new Yaqui tanks are also on an entirely different "footprint" from the old Yaqui tanks. SoF par. 14; AR 122. Moreover, both of the old tanks will be left operating in their current conditions. SoF par. 15; AR 136, 137.

During their June 15, 2007 telephone conference, Wilderness Watch learned that members of the Yuma Rod and Gun Club and other members of the public would be assisting with the construction of the tanks. SoF par. 11; Declaration of Tina Marie Ekker par. 7. The following week Wilderness Watch filed suit and moved for a temporary restraining order, but the projects had been completed.

No public mailings were sent to the plaintiffs regarding this project and no notice of the action appeared on any website or other location until after the decision was made and the construction had begun. SoF par. 27. Only members of the hunting community had notice of the action in time to provide public comment. SoF par. 11; AR 159.

The water impoundments were constructed in the first weeks of June, using earth-moving equipment, backhoes, trucks, and cement mixers. SoF par. 17AR 27, 30-90. The impoundments contain large underground water tanks that distribute rainwater to above-ground "feeder" tanks; when water is not available it is to be delivered there by way of firehoses and water trucks. SoF par.17, 18; AR 136. The scope and method of this construction is perhaps best comprehended by observing the color photographs contained in the record at pp. 30-50. Those photos depict earth-moving equipment, deep trench excavation, and cement mixing inside the Wilderness at the McPherson Tank site.

III. Standard of Review

Whether or not a violation of the National Environmental Policy Act or the Wilderness Act has occurred is generally governed by the judicial review section of the Administrative Procedures Act, 5 U.S.C. §701-706. The Administrative Procedures Act provides, in pertinent part, that a reviewing court shall "set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. at 706.

Levels of deference due to federal agencies when they make decisions implementing the Wilderness Act have been addressed by an *en banc* panel of the Ninth Circuit in *Wilderness Society v. U.S. Fish and Wildlife Service,* 353 F.3d 1051, 1059-60 (9th. Cir. 2003)(en banc). Under the framework the court articulated, where the Wilderness statute is clear and unambiguous, no deference is required and the plain meaning of Congress is to be enforced. *Id.* If on the other hand the statute is ambiguous, the agency's decision is entitled to *Chevron* deference if the decision has the force of law, but is to be given "respect" if it is merely "granting permits [or] not acting in a way that would have precedential value for subsequent parties." *See High Sierra Hikers Assoc. v. Blackwell*, 390 F.3d 630, 647-8 (9th. Cir. 2004).

With respect to the National Environmental Policy Act claims, agency action is to be set aside if it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

IV. Argument

A. Because the Wilderness Act explicitly prohibits the construction of permanent structures and the use of motorized, heavy equipment inside wilderness, the decision to construct and operate large, permanent water impoundments and to modify the natural conditions of the Kofa Wilderness—and the use of backhoes, cement mixers, and other motorized vehicles to do so—is unlawful.

The construction, operation, and maintenance by the defendants of large, permanent water impoundments inside the Kofa Wilderness, using temporary roads and heavy equipment like backhoes, trucks, and cement mixers, is unlawful because the Wilderness Act explicitly prohibits such activity. Moreover, wilderness areas are to be managed to retain their "natural conditions" in an unmodified state, and the proposed action will modify the ecology of the area as well as its physical characteristics by the installment of these water impoundments. Finally, the exceptions to the Act are read narrowly, and do not apply to the Service's decision to install these permanent structures for the purpose of modifying the natural conditions of the Kofa Wilderness. The impoundments should be removed or, at the least, rendered inoperable and their maintenance enjoined.

1. Permanent Structures and Motorized Use are Not Permitted in Wilderness.

Permanent structures that modify the natural conditions of the landscape in wilderness areas are prohibited. 16 U.S.C. §§1131(a), 1133(c). The Wilderness Act speaks very clearly to permanent structures in Wilderness: "An area of wilderness is . . . defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements." 16 U.S.C. §1131(a). The Act further declares that, except where necessary for the administration of the wilderness, "there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any [wilderness]." 16 U.S.C. §1133(c).

Simply put, courts in the Ninth Circuit have read such language to mean what exactly what it seems to mean: permanent structures, like those at issue here, modify the natural

conditions of the landscape and are prohibited in wilderness. For example, in a case that resembles this one in many ways, the National Park Service sought to rebuild historic trail shelters that pre-dated the establishment of the Olympic Wilderness Area, and which had fallen into disrepair. *Olympic Park Associates v. Mainella*, 2005 U.S. Dist. LEXIS 44230 (W.D. Wash. July 29, 2005). The Park Service planned to rebuild the historic structures in its maintenance yard and airlift them into the wilderness, installing them in the same location the original structures were placed. *Id.* at 5. The Park Service stated that the shelters were needed to improve recreational opportunities in the area and to focus environmental impacts on specific locales. *Id.* Moreover, the Service argued, the shelters were historic, and protected by law under the National Historic Preservation Act. *Id.* at 4, 5. The court reviewed the Wilderness statute, its prohibition against permanent structures, and its overriding mandate to preserve an area's "primitive character and influence." *Id.* at 18. The court stated that once wilderness is designated, "a different perspective on the land is required" that focuses on the primitive character and the preservation of the land's natural conditions. *Id.* The court concluded that with wilderness designation comes "a new value . . . on the land" for its primitive character and lack of permanent improvements, and thus found the reconstruction of the historic shelters to be "in direct contradiction of the mandate to preserve the wilderness character of the Olympic Wilderness." *Id.* at 24.

Similarly, a federal court in California enjoined repair of historic stone and mortar water impoundments in the Emigrant Wilderness, again pursuant to the "prohibitions" section of the Wilderness Act at 16 U.S.C. §1133(c). *High Sierra Hikers Ass'n v. U.S. Forest Service*, 436 F.Supp. 2d 1117 (E. D. Cal. 2006). These water impoundments raised natural lake levels three to four feet from their original depth, and permitted the addition of fish to natural ponds and lakes that otherwise could not support fish. *Id.* at 1123-1124. The Forest Service wanted to preserve and maintain the dams to enable fishing and use of the historic structures, and for protection of sensitive species. *Id*. at 1124-5. The court found that "the text of the Wilderness Act provides no indication that Congress intended to exempt existing dams in wilderness areas from the general prohibition against 'structures' or

'installations.'" *Id.* at 1131. The court went on to state that "the plain and unambiguous text of the Wilderness Act speaks directly to the activity at issue in this case—repairing, maintaining and operating dam 'structures'—and prohibits that activity." *Id*. Again, the plain reading of the Wilderness Act prevailed.

In this case, the Fish and Wildlife Service has used motorized earth-moving equipment to construct large water impoundments out of plastic, steel, and concrete. SoF. Par. 17; AR 127. The impoundments will be maintained and filled, when necessary, with a water truck and fire hose. SoF. Par. 20; AR 136. The impoundments are made of giant plastic pipes, twenty-four inches in diameter and twenty feet long, buried side-by side in deep trenches that were dug by backhoes and other earth-moving equipment, driven onto the site by means of a temporary road through a desert wash. SoF par. 17, 19; AR 126, 30-50. "Feeder" lines that are six inches in diameter and up to one hundred and fifty feet in length extend from the pipes to natural drainages, where weirs made of concrete building blocks and mortar divert the natural flow into the buried pipes. SoF par. 17; AR 126. These pipes in turn direct water to a concrete water trough, by means of a mechanical float and check-valve. *Id.* The trough is dug into the ground and provides water year-round for bighorn sheep and other animals, which would likely include mountain lions and mule deer. SoF par. 16, 21;AR 136, 157. In this way, the area's natural conditions are modified so that water is provided year-round where it otherwise would be scarce, intermittent, or not exist at all. As a consequence, animals that otherwise would not inhabit the area because of the scarcity of water in the area's natural conditions, can now do so.

The plain language of the Wilderness Act does not permit this activity: the use of motorized equipment and the creation of permanent structures are explicitly prohibited by the Act. 16 U.S.C. §1133(c). The language of the Act that prohibits structures, installations, temporary roads, and motorized equipment—all of which has been violated by the Service in this project—has been addressed in the Ninth Circuit and has been found to mean precisely what it appears to mean. Like the re-built hiking shelters to facilitate recreation, and the repair and maintenance of stone and mortar water impoundments to permit fish

populations and rare species to exist where they otherwise would not, the construction, maintenance, and operation of permanent water impoundments that alter the ecology and natural condition of the Kofa Wilderness with concrete and steel water diversion structures is an impermissible action under the Wilderness Act, and should be enjoined.

2. The paramount concern in wilderness is the preservation of the natural condition of the wilderness landscape.

The Wilderness Act was enacted "to assure that an increasing population . . . does not occupy and modify all areas of the United States . . . leaving no lands designated for preservation and protection in their natural condition." 16 U.S.C. §1131(a). The paramount concern with wilderness is the protection of "wilderness character," which is precisely this mandate to preserve wilderness land in its natural condition. In fact, the Wilderness Act twice instructs federal agencies that the preservation of the land's "natural condition" is the purpose of wilderness, first in the above quoted passage and again in §1131(c), where Wilderness is defined to be "an area of undeveloped Federal land retaining its primeval character . . . without permanent improvements . . .which is protected and managed to as to preserve its natural conditions." 16 U.S.C. §1131(c).

The preservation of wilderness character has proven to be of overriding importance in determining whether a given act inside wilderness is permissible. For example, in the case involving the reconstruction of historic hiking shelters, the court stated that once the wilderness was established, "a different perspective on the land" was required, one that focused on managing the land for its "primitive character and influence, without permanent improvements . . . protected and managed so as to preserve its natural conditions." *Olympic Park Associates v. Mainella*, 2005 U.S. Dist. LEXIS 44230 at 18. The court highlighted language in the Act that states that wilderness may be managed for purposes such as recreation, but "only insofar as also to preserve its wilderness character." *Id.* at 23.

The Ninth Circuit Court of Appeals, asked to determine whether it was permissible to commercially harvest fish eggs from under water, completely out of the view of wilderness

visitors, also fastened upon the "natural condition" language. *Wilderness Soc'y v. U.S. Forest Service,* 353 F.3d 1051 (2003)(en banc)(amended at 360 F.3d 1374). The court reviewed the language of the Act and declared that because the Wilderness Act "states as a goal the 'preservation and protection' of wilderness lands 'in their natural condition," the fish-egg project could not be seen to advance those goals, and enjoined the action. *Id.* at 1061.

Finally, in a case involving a Forest Service decision to permit tourists to access a historic buildings inside wilderness in motorized vehicles, the Eleventh Circuit Court of Appeals noted that just because the use, in that case, was environmentally benign did not mean it was permissible. *Wilderness Watch v. Mainella,* 375 F.3d 1085 (11th Cir. 2004). "The prohibition on motor vehicle use . . . stems from more than just its potential for physical impact on the environment," the court wrote. "The Act seeks to preserve wilderness areas 'in their natural condition.'" *Id.* at 1093. Again, the court enjoined the use.

In the Kofa Wilderness, the express purpose of the action is to modify the natural conditions of the landscape, to artificially provide year-round water where it would not otherwise exist, and to artificially inflate the populations of some animals—possibly at the expense of others. The Kofa actions cannot in any way be said to be preserving the "primeval character" or the "natural conditions" of this extremely arid, forbidding landscape, because the actions are expressly designed to overcome those natural conditions in order to make the area more amenable to certain desired species. Like the plan to harvest fish eggs, to take tourists to a historic property, and to reconstruct historic shelters, this plan is inspired by a human impulse to improve upon nature or modify and use nature in an apparently benign way, but those impulses do not override the Wilderness Act's overarching mandate to preserve wilderness in its primeval state, unmodified, and in its natural condition.

3. No Exceptions Permit the Service's Action

Agencies that have desired to install permanent structures, use motorized equipment, or authorize commercial use in wilderness have uniformly done so under what they have

perceived to be an exception to the Act's strict prohibitions against these activities. The Act states, for example, that agencies may "administer [wilderness] for such other purposes for which it may have been established," so long as they preserve wilderness character in doing so. 16 U.S.C. §1133(b). The Act also states that the prohibited acts are prohibited "except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act." *Id.* at (c). But these "exceptions" have not often availed the federal agencies, because courts have read the language narrowly, and read it to require a high standard of protection for wilderness character. Thus, agencies have the power to administer wilderness for other purposes, but those purposes must preserve wilderness character, and preserving wilderness character means leaving the land in its natural condition. *See Olympic Park Associates v. Mainella* at 23 ("This rule allows the NPS to administer the [wilderness] for other purposes only insofar as to also preserve its wilderness character.")

Further, if an agency wishes to conduct a prohibited activity, it must show that the activity is "necessary to meet minimum requirements for the administration of the area" *as wilderness*—which is to say, in its unmodified, primeval, natural condition. Few activities are required for such administration, and few permitted.

Here, the administration of the Kofa Wilderness as wilderness requires only that it be left alone, unmodified and in its natural condition.

B. Because the decision to construct the Wilderness water impoundments was done without public review or an opportunity for public comment, the decision was unlawful, and violated the National Environmental Policy Act.

The National Environmental Policy Act requires the federal government to take a "hard look" at the environmental consequences of its actions. *Neighbors of Cuddy Mtn. v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002). It sets forth specific procedures that must be followed to ensure that federal actions are done in a manner that takes into consideration their impacts on the environment. *See e.g.* 40 C.F.R. §§1500.2, 1502.1. A central component of the Act is its requirement that federal actions undergo public review in a notice and comment process. 40 C.F.R. §1500.2(d), §1506.6. Moreover, the U.S. Fish and

Wildlife Service regulations declare that it is Department policy "to the fullest practicable extent, to encourage public involvement in the development of Departmental plans and programs . . . and to provide timely information to the public to better assist in understanding such plans and programs affecting environmental quality in accordance with CEQ Regulations." 69 Fed. Reg. 10866, 10873 (March 8, 2004).

In this case, hunting groups that favor more artificial water impoundments and the concomitant artificial inflation of certain game animal populations were apprised of this action well before it was finalized, and their input was, presumably, considered. SoF par. 11;AR 24, 159. But organizations that support maintaining wilderness in its natural, unmodified condition were not made aware of the project, and received no notice of the action. SoF par 27; Declaration of Tina Marie Ekker.

The Service was well aware of the controversy surrounding these water developments and even addressed that controversy in their Investigative Report prepared for the project, acknowledging that the construction would be opposed by some organizations and "may meet with public disapproval." SoF par. 28; AR 411. The Report also stated that "clashing social values" surrounding the construction "must be addressed." SoF par. 28; AR 412. Nonetheless, the Service did not notify wilderness advocates or other members of the public of the project, preferring to conduct this wilderness action in secret, notifying only hunting groups of their actions. Sof par 27, 11; AR 24, 159, Declaration of Tina Marie Ekker.

Because the Service knew of the controversy and yet prepared the project it (with respect to the plaintiffs) in secret, the project was authorized unlawfully. Federal projects must undergo a public comment process that is fair to all; they may not be conducted with notice to favored parties but in secrecy with respect to those who may oppose the project.

C. Because the decision is controversial and likely to violate the Wilderness Act, an environmental assessment or environmental impact statement was required.

The National Environmental Policy Act requires the federal government to prepare an environmental assessment or an environmental impact statement for all federal actions that

"may" have a significant effect on the environment. 42 U.S.C. §4332(2)(C); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001). Certain projects, however, are deemed so minor or routine that no analysis of this type is called for. Such projects can be conducted under what is called a "categorical exclusion," and for these projects, no environmental assessment or environmental impact statement is required. 40 C.F.R. §1508.4.

In order to qualify for a categorical exclusion, a project must fall under a category of actions that the agency has found to have no significant cumulative or individual effects on the environment, and the project must not implicate any "extraordinary circumstances." *Id.* Extraordinary circumstances have been identified by the Service and are listed in the Service's Department Manual. 516 DM 2, App. 2, at AR 249. If the proposed project properly falls under a category outlined in the agency regulations but nevertheless implicates an extraordinary circumstance, the categorical exclusion cannot be used and an environmental assessment must be prepared. 516 DM 8.5 at AR 257; 40 C.F.R. §1508.4. According to the Manual,

> Extraordinary circumstances exist for individual actions within CXs which may: (2.2) Have adverse effects on such natural resources and unique geographic characteristics as . . . wilderness areas, (2.3) Have highly uncertain and potentially significant environmental effects or represent a decision in principle about future actions with potentially significant effects . . . (2.9) Have the potential to violate a Federal law.
>
> Department Manual Appendix 2, Chapter 2, at AR 249.

In this case, each of the above listed extraordinary circumstances are implicated. First, the action is taking place inside a wilderness area and is designed for the express purpose of disturbing the natural water regime and disrupting and modifying the ecology of the wilderness to favor some animals and components of the wilderness over others. Second, the decision to maintain these water impoundments comes with a decision to maintain them, probably for decades, with water trucks, hoses, and earth-moving equipment inside a

wilderness. Third, and probably most striking, this action has an undeniable "potential" to violate the Wilderness Act because it entails heavy machinery, permanent structures, motorized equipment, and temporary roads in direct contradiction to express language in the Wilderness Act that forbids these things. *See Wilderness Watch v. Mainella*, 375 F.3d at 1095, 1096 (categorical exclusion improper for van trips across wilderness, which clearly threatens to violate federal law, and agency "at a minimum," should have recognized the potential and analyzed the trips in an environmental assessment).

There is little doubt that this action, at the very least, has "the potential" to violate the Wilderness Act because of its use of earth-moving equipment to construct and maintain permanent structures inside a Wilderness via a temporary road, all for the express purpose of modifying the natural conditions of the land.

Because the decision to construct these water impoundments implicates so many of the Wilderness Acts statutory prohibitions, the action has the potential to violate the federal Wilderness Act, and an environmental assessment was required to be prepared for this project, with an appropriate notice and comment period to all interested members of the public.

Conclusion

Wilderness is not the place to modify the natural habitat conditions of the land by constructing and operating permanent structures with earth-moving equipment; and such activities, if contemplated, must be opened for public comment and an appropriate environmental review must be conducted. For the foregoing reasons, plaintiffs respectfully request that the Court grant their motion and enter judgment in their favor.

Respectfully Submitted this _____Day of December, 2007

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CERTIFICATION

I hereby certify that on December 14, 2007, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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