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6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF ARIZONA

8 Wilderness Watch, Inc., et al,

9 Plaintiffs,

10 v.

11 U.S. Fish and Wildlife Service, H. Dale  
12 Hall, et al,

13 Defendants.

CIV-07-1185 PHX-MHM

**FEDERAL DEFENDANTS'  
RESPONSE TO PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT AND CROSS-MOTION  
FOR SUMMARY JUDGMENT**

14  
15 Defendants, U.S. Fish and Wildlife Service, et al (federal defendants), submit this brief in  
16 response to Plaintiffs' Motion for Summary Judgment and their own Cross-Motion for Summary  
17 Judgment in support of the position that the federal defendants complied with the provisions of  
18 the National Environmental Policy Act (NEPA), 42 U.S. C. § 4332, *et seq.*, the Wilderness Act,  
19 16 U.S.C. § 1131, *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq.*,  
20 when implementing the actions to redevelop the Yaqui and McPherson tanks in the Kofa  
21 National Wildlife Refuge (Kofa). This Response and Cross-Motion for Summary Judgment are  
22 supported by the attached Memorandum of Points and Authorities.

23 Respectfully submitted this 1st day of February, 2008.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. Introduction

3 Plaintiffs allege that the federal defendants violated the Wilderness Act by using mechanized  
4 or motorized vehicles in the redevelopment of the Yaqui and McPherson water tanks located  
5 within the Kofa (Count 3 of Plaintiffs' First Amended Complaint); violated NEPA by  
6 implementing the redevelopment projects using a categorical exclusion (CE) and not presenting  
7 the projects for public review (Counts 1 and 2 of Plaintiffs' First Amended Complaint); and  
8 violated the APA in that these decisions were arbitrary, capricious, an abuse of discretion or not  
9 otherwise in accordance with the law.

10 The Kofa contains approximately 665,400 acres of which 510,000 are designated  
11 wilderness. Federal Defendants' Response to Plaintiffs' Statement of Fact No. 1. The Kofa  
12 Game Range was designated in 1939. Federal Defendants' Statement of Fact No. 1. The Kofa  
13 Wilderness Area was designated in 1990. Federal Defendants' Statement of Fact No. 1. The  
14 Kofa contains a major portion of the largest contiguous habitat for desert bighorn sheep. Federal  
15 Defendants' Statement of Fact No. 6. Recent surveys indicate a significant decline in the  
16 bighorn sheep population, from approximately 813 bighorn sheep in October of 2000 to  
17 approximately 390 bighorn sheep in October of 2006. Federal Defendants' Statement of Fact  
18 No. 1. In order to investigate and identify factors which may contribute to the bighorn sheep  
19 population decline, the federal defendants, in conjunction with Arizona Game and Fish  
20 Department (AZGFD), prepared an Investigative Report and Recommendation for the Kofa  
21 Bighorn Sheep Herd. Federal Defendants' Statement of Fact No. 5. The report prepared in  
22 April of 2007 discusses the significance of the bighorn sheep, possible mortality factors and  
23 management strategies and implementation, including consideration of available water sources,  
24 effects of hunting and impact on wilderness. Federal Defendants' Statement of Fact Nos. 5, 6,  
25 7, 8, 9. One factor contributing to the population decline was drought. Strategies for supplying  
26 year round water availability were discussed in the report, including redeveloping water sources.  
27 Federal Defendants' Statement of Fact Nos. 7, 11. As part of the process of implementing the  
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1 recommendations in the report, federal defendants prepared an Environmental Action Statement,  
2 including categorical exclusion documentation, and Minimum Requirements Analysis for both  
3 the “Yaqui and McPherson Tank Redevelopment Projects” and for the “Capturing and  
4 Monitoring Wildlife and Transporting Water and Equipment and Installation of Evaporative  
5 Covers and Measuring Devices on Water Sources in Wilderness.” Federal Defendants’  
6 Statement of Fact No. 12. The document describes the project purpose as one “to redesign new  
7 water sources that capture and store rainwater more efficiently, greatly reducing the need to haul  
8 supplemental water.” Federal Defendants’ Statement of Fact No.12. The use of a CE for small  
9 water control structures is permitted by FWS policy. Federal Defendants’ Statement of Fact  
10 No. 13. The FWS also considered the use of mechanized or motorized vehicles in the  
11 redevelopment projects in wilderness areas as outlined in FWS policy. Federal Defendants’  
12 Statement of Fact No. 14. In connection with that analysis, the federal defendants prepared  
13 Minimum Requirements Analysis documents, including a description of the project, project  
14 materials and project plans. Federal Defendants’ Statement of Fact No. 12. A previously  
15 prepared report, “The Kofa National Wildlife Refuge and Wilderness and New Water Mountains  
16 Wilderness Interagency Management Agreement and Environmental Assessment,” adopted by  
17 issuance of a Finding of No Significant Impact (FONSI) in 1997 recognized the need to continue  
18 efforts to repopulate the desert bighorn sheep. Federal Defendants’ Statement of Fact Nos. 18,  
19 19. After this significant investigation and evaluation, the Yaqui and McPherson tanks were  
20 redeveloped in June of 2007 in conformance with the methods outlined in the plans and the  
21 projects were completed. Federal Defendants’ Statement of Fact No. 22. The Yaqui Tank  
22 redevelopment is primarily outside the designated wilderness. The McPherson Tank  
23 redevelopment is within the wilderness. Federal Defendants’ Response to Plaintiffs’ Statement  
24 of Fact No. 13. The federal defendants complied with both the requirements of the Wilderness  
25 Act and NEPA in implementing these redevelopments. The decision to redevelop these tanks  
26 is not arbitrary or capricious, but rather a well-reasoned and considered action by the

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1 professionals within the FWS, and should be upheld. Further, as the projects are complete,  
2 plaintiffs' requests for relief are moot.

## 3 II. Plaintiffs' Case is Moot

4 Under Article II of the Constitution, federal court may decide only an actual "case or  
5 controversy," and a case must be dismissed - at any stage in the litigation - if it appears to be  
6 moot. *See, e.g., Defunis v. Odegaard*, 416 U.S. 312, 319 (1974); *Environmental Protection*  
7 *Information Center, Inc. v. Pacific Lumber Co.* 257 F.3d 1071, 1076 (9<sup>th</sup> Cir. 201). Federal  
8 courts have "no authority 'to give opinions upon moot questions or abstract propositions, or to  
9 declare principles or rules of law which cannot affect the matter in issue in the case before  
10 [them].'" *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*,  
11 159 U.S. 651, 653 (1895)).

12 A claim is moot if it has lost its character as a present, live controversy. *American Tunaboat*  
13 *Assn. v. Brown*, 67 F.3d 1404, 1407 (9<sup>th</sup> Cir. 1995). A claim is rendered moot if intervening  
14 events prevent the court from granting effective relief. *See e.g., Murphy v. Hunt*, 455 U.S. 478,  
15 481-82 (1982); *United States v. Arce-Jasso*, 389 F.3d 124, 131 (5<sup>th</sup> Cir. 2004); *see also, Davis*  
16 *v. Page*, 714 F.2d 512, 519 (5<sup>th</sup> Cir. 1983). If a case is moot, it must be dismissed because  
17 "Article III of the Constitution prohibits federal courts from taking further action on the merits  
18 in moot cases." *Environmental Protection Information Center, Inc. v. Pacific Lumber Co.*, 257  
19 F.3d 1071, 1076 (9<sup>th</sup> Cir. 2001) (citation omitted).

20 Plaintiffs repeatedly state that the "principal at issue" or "challenged action" is whether  
21 "water impoundments" may be or can be constructed in the Kofa Wilderness. *See* Plaintiffs'  
22 Motion for Summary Judgment at pp. 3, 4, 6. First, there is no dispute that the Yaqui Tank  
23 redevelopment is largely outside wilderness area. The McPherson Tank redevelopment is within  
24 wilderness. Federal Defendants' Statement of Fact No. 13. There is no dispute that the projects  
25 are completed. Federal Defendants' Statement of Fact No. 23. There is no dispute that the  
26 federal defendants prepared at least five environmental documents to investigate, evaluate and  
27 proceed with the redevelopment project, including the Investigative Report and  
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1 Recommendation for Kofa Bighorn Sheet Herd; AR at pp. 392-430, the EAS and CE for both  
2 the Yaqui And McPherson Tanks Redevelopment Projects, and the Capturing and Monitoring  
3 Wildlife and Transporting Water. AR at pp. 134-148 and 162-168, and the Minimum  
4 Requirements Analysis for both of the above projects. AR at pp. 149-161 and 169-179. Not  
5 only can the projects be built, but they have been built and the area restored to its pre-project  
6 condition. Plaintiffs appear to request the Court to remand the action to the agency for  
7 preparation of an environmental assessment. The projects having been completed, the requested  
8 relief will not provide any effective relief as there is no action remaining to review.

9 Courts have consistently found that where the challenged action has been completed, as it  
10 has here, no effective relief can be granted and the case is moot. *Bayou Liberty Ass'n, Inc. v.*  
11 *U.S. Army Corps of Engineers*, 217 F.3d 393 (5<sup>th</sup> Cir. 2000), citing *Florida Wildlife Federation*  
12 *v. Goldschmidt*, 611 F.2d 547 (5<sup>th</sup> Cir. 1980). In *Bayou Liberty Association, Inc.*, the Corps  
13 issued a § 404 CWA permit to build a retail complex near a bayou in Louisiana. 217 F.3d at  
14 395. A homeowners association filed suit, alleging that the Corps failed to consider sufficiently  
15 the impact of the development on flooding in the area surrounding the bayou. The plaintiffs  
16 requested declaratory and injunctive relief which sought to suspend the permit issued by the  
17 Corps. *Id.* The district court denied plaintiffs' motions for a temporary restraining order and  
18 for a preliminary injunction. By the time the case was considered by the Court of Appeals,  
19 construction of the retail projects was already substantially complete. The Fifth Circuit held that  
20 plaintiffs' claims were moot:

21 [Plaintiffs] . . . requested injunctive relief staying or suspending the permit and  
22 requiring the Corps to consider the direct indirect and cumulative impacts.  
23 [Plaintiffs] also sought declaratory relief stating that the Corps was required  
24 to consider those impacts before granting the permit. However, even if this  
court were to find in [Plaintiffs'] favor and suspend or stay the permit, this  
action would not have any effect because the construction authorized by the  
permit has been substantially completed.

25 *Bayou Liberty Association, Inc.*, 217 F.3d at 396 (emphasis added).

26 The District of Arizona has addressed the issue in the context of the Endangered Species  
27 Act. *Defenders of Wildlife v. Flowers*, (CIV-2195-TUC-CKJ) 2003 WL 22143263 (D. Ariz.).

1 *Defenders of Wildlife v. Flowers* involved the authorization of 0.07 acres of fill for a road  
2 crossing under a national permit. *Id.* at \*1. The plaintiffs filed suit alleging that the Corps  
3 authorization violated the ESA and APA. *Id.* at \*2. The court found the fill activity was  
4 complete, and, thus, that the Corps lacked any jurisdiction over the project. *Id.* Accordingly,  
5 the court dismissed the case because it could not issue any effective relief. *Id.* The court  
6 specifically rejected the plaintiffs' argument that some relief could be granted because the Corps  
7 could require steps to be taken to mitigate the impacts of the action since the Corps no longer  
8 had jurisdiction over the project. *Id.* at \*3.

9 As demonstrated above, all activities necessary to redevelop the water tanks are complete.  
10 No federal action remains for FWS to review, analyze or correct.

### 11 III Standard of Review and Applicable Statutes

12 If the Court determines it may review plaintiffs' claims, the claims fail as the decision of the  
13 federal defendants this was not arbitrary, capricious or an abuse of discretion.

#### 14 A. Administrative Procedure Act

15 The APA prescribes the standard of review for challenges to an agency action under statutes  
16 like NEPA and the Wilderness Act that otherwise provide no private right of action. *Marsh v.*  
17 *Oregon Natural Resources Council*, 490 U.S. 360, 377 n.23 (1989); *Clouser v. Espy*, 42 F.3d  
18 1522, 1528 n.5 (9<sup>th</sup> Cir. 1994) (Wilderness Act reviewed under APA); *Bicycle Trails Council*  
19 *of Marin v. Babbitt*, 82 F.3d 1445 n.5 (9<sup>th</sup> Cir. 1996) (NEPA reviewed under APA). Under the  
20 APA, an agency action shall withstand judicial review unless it is arbitrary, capricious, an  
21 abuse of discretion or not otherwise in accordance with the law. "The scope of review under the  
22 arbitrary and capricious standard is narrow and the court is not to substitute its view for that of  
23 the agency." *Hopi Tribe v. Navajo Tribe v. United States*, 46 F.3d 908, 914 (9<sup>th</sup> Cir. 1995). An  
24 agency's decision may only be called arbitrary and capricious if the agency has relied on factors  
25 which Congress has not intended it to consider, entirely failed to consider an important aspect  
26 of the problem, offered an explanation for its decision that runs counter to the evidence before  
27 the agency, or is so implausible that it could not be ascribed to a difference in view or the

1 product of agency expertise. *Southwest Center for Biological Diversity v. U.S. Forest Service*,  
2 100 F.3d 1443, 1448 (9<sup>th</sup> Cir. 1996).

3 The agency action at issue is provided a presumption of administrative regularity. *Citizens*  
4 *to Protect Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). In deciding an APA case, a court  
5 is to “review the whole record or those parts of it cited by a party.” 5 U.S.C. § 706. Thus, the  
6 scope of review is necessarily limited to the Administrative Record before the agency decision-  
7 maker. *Florida Power & Light v. Lorion*, 470 U.S. 729, 743 (1985); *Camp v Pitts*, 411 U.S. 138,  
8 143 (1973). An agency’s interpretation of the meaning of its regulations should be given  
9 controlling weight unless plainly erroneous or inconsistent with its terms. *Alaska Center for the*  
10 *Environment v. U.S. Forest Service*, 189 F.3d 851, 857 (9<sup>th</sup> Cir. 1999). The reviewing court  
11 defers to the agency so long as the agency decision is based on a permissible construction of the  
12 statute or regulations it is entrusted to administer. *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S.  
13 837, 843 (1984); *see U.S. v. McKittrick*, 142 F.3d 1170, 1173 (9<sup>th</sup> Cir. 1998) (Fish and Wildlife  
14 Service’s interpretation of its own regulations entitled to deference).

15 Rule 56 of the Federal Rules of Civil Procedure sets forth the standard for granting summary  
16 judgment. Summary judgment is appropriate where there are no genuine issues of material fact  
17 and the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477  
18 U.S. 242 (1986). The distinction between considering a summary judgment motion in an  
19 ordinary civil case and an APA record review case is that, where a court reviews a decision of  
20 an administrative agency, summary judgment is an appropriate mechanism for deciding the legal  
21 question of whether the agency could reasonably have found the facts as it did. *See Occidental*  
22 *Engineering Co. v. Immigration and Naturalization Service*, 753 F.2d 766, 770 (9<sup>th</sup> Cir. 1985).

### 23 B. Wilderness Act

24 The Wilderness Act was enacted in 1964 “to secure for the American people of present and  
25 future generations the benefits of an enduring resource of wilderness.” 16 U.S.C. § 1131(a).  
26 The Wilderness Act, 16 U.S.C. § 1131, *et seq.*, defines wilderness as “a wilderness, in contrast  
27 to those areas where man and his own works dominate the landscape, is hereby recognized as  
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1 an area where the earth and its community of life are unchallenged by man, or where man  
2 himself is a visitor who does not remain.” As a general rule, wilderness areas exclude man-made  
3 intrusions and modifications of the land. However, the Wilderness Act directs that, “except as  
4 necessary to meet minimum requirements for the administration of the area for the purpose of  
5 [the Act] . . . there shall be . . . no structure or installation.” 16 U.S.C. § 1133. The statute does  
6 not expressly prohibit permanent structures. Congress could have imposed such a prohibition,  
7 but did not. Congress did recognize that some structures, including permanent ones, may be  
8 “necessary to meet minimum requirements for the administration of the area.” *See* 16 U.S.C.  
9 § 1133. The Wilderness Act requires administering agencies to “administer such area for such  
10 other purposes for which it may have been established and also to preserve its wilderness  
11 character. Except as otherwise provided in this chapter, a wilderness area shall be devoted to  
12 the public purposes of recreational, scenic, scientific, educational, conservation and historic  
13 use.” *See* 16 U.S.C. § 1133(c). The FWS Refuge Manual addresses wilderness area  
14 management. In the context of motorized equipment, the manual states as follows:

15 8.8 Administrative guidelines.

16 A. Use of motorized equipment. Motorized equipment may be used in special  
17 circumstances if it is the minimum tool necessary to accomplish a task  
18 safely and without long term impairment of the area’s wilderness character.  
19 However, except where Congress specifically authorizes such uses in the  
20 establishing of laws or in other acts modifying the Wilderness Act such as  
21 ANILCA, the use of motor vehicles, motorized equipment, mechanical  
22 transportation, and the landing of aircraft would not be used in the routine  
23 administration of wilderness. The determination of when motorized  
24 equipment constitutes the minimum tool will be left to the refuge manager.  
25 Some examples of special situations are given below.

26 (2) Activities essential to accomplishing refuge objectives. For  
27 example, if bighorn sheep tanks dry up and the only means of  
28 supplying water is by trucking it into the tanks or, where grazing  
is permitted, bringing a veterinarian in by truck to treat seriously  
ill cattle.

AR at pp. 329-330. Congress, therefore, gave agencies the ability to maintain structures when  
necessary to meet the minimum requirements for the administration of efforts to conserve  
wildlife resources of the lands. Congress also understood that wilderness areas would not



1 always be absolutely pristine. See 16 U.S.C. 1131(C)(1) (defining wilderness area that  
2 “generally appears go have been primarily affected by the forces of nature, with the imprint of  
3 mans’ work substantially unnoticeable.” (emphasis added). Congress further decided that a  
4 number of uses would be compatible with wilderness designation, including hunting, fishing and  
5 some temporary roads and motorized equipment even though those uses are not without impacts.  
6 See 16 U.S.C. § 1331(d). The projects at issue in this case meet the Minimum Requirements  
7 Analysis of the Wilderness Act.

### 8 C. National Environmental Policy Act

9 Congress enacted the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*,  
10 to establish a consistent process through which federal agencies must consider the consequences  
11 of their actions on the environment. NEPA requires analysis and public disclosure of significant  
12 environmental effects to ensure informed decision making, but does not require the agencies to  
13 select any particular decision. *Robertson v. Methow Valley Citizen’s Council*, 490 U.S. 332, 350  
14 (1989) (“if the adverse environmental effects of the proposed action are adequately identified  
15 and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh  
16 the environmental costs.”); See also, *City of Carmel by the Sea v. U.S. Department of*  
17 *Transportation*, 123 F.3d 1142, 1150 (9th Cir. 1997) (NEPA does not guarantee substantive  
18 results, but only sets forth procedural mechanisms to ensure proper consideration of  
19 environmental concerns).

20 NEPA also established the Council on Environmental Quality (CEQ), 42 U.S.C. § 4342.  
21 In 1978, the CEQ adopted regulations governing federal agency compliance with NEPA.  
22 40 C.F.R. §§ 1500-1517. The CEQ’s regulations provide for two methods of determining  
23 whether a proposed major federal action requires preparation of an Environmental Impact  
24 Statement (EIS). First, the agency may conduct a preliminary examination called an  
25 Environmental Assessment (EA), of the proposed action. *Id* at §§ 1501.4, 1508.9. The EA  
26 “serves to . . . briefly provide sufficient evidence and analysis to determine whether the action  
27 will have a ‘significant’ effect on the environment, the threshold for preparation of an EIS. *Id*  
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1 at 1508.9. Second, the CEQ's regulations direct agencies to identify classes of actions, referred  
2 to as categorical exclusions (CE's), that normally, "do not individually or cumulatively have a  
3 significant effect on the human environment" and are, therefore, excluded from the requirement  
4 of preparing an EA or an EIS. *Id.* at §§ 1507.3(d)(2), 1508.4; *see also, Alaska Center for the*  
5 *Environment v. U.S. Forest Service*, 189 F.3d 851, 857 (9<sup>th</sup> Cir. 1999). Categorical exclusions  
6 are, thus, an integral part of the NEPA scheme and in no way evade compliance with NEPA. In  
7 1983, the CEQ explained that the use of CE's avoided unnecessary documentation of minor  
8 environmental effects. An EA allows agencies to focus their environmental review efforts on  
9 the major actions that will have a significant effect on the environment and which are the  
10 primary focus of NEPA. *See* 48 Fed. Reg. 34,265-266 (July 28, 1983); *see also, 40 C.F.R.*  
11 *§ 1500.4(p)* (noting that the establishment and use of CE's can reduce excessive paperwork by  
12 eliminating unnecessary preparation of EA's). Categorical exclusions are, therefore, an integral  
13 part of the NEPA process and in no way evade compliance with NEPA. The CEQ regulations  
14 do not require that an agency provide for the a public comment when it approves a project under  
15 a categorical exclusion. *See* 40 C.F.R. § 1503.

16 Pursuant to the CEQ regulations, the Department of the Interior promulgated categorical  
17 exclusions which were set forth in the Department Manual, pt. 516, ch. 2, apps. 1 & 2, and ch. 8.  
18 A.R.245 - 249 and 255 - 261. Categorical exclusions specific to the Fish and Wildlife Service  
19 are found in Chapter 8 of the Department Manual and were initially promulgated at 62 Fed. Reg.  
20 2375-2382 (January 16, 1997). The categorical exclusions presented in the Federal Register and  
21 incorporated into the Department Manual, were subject to public comment. The public  
22 comments were addressed in the Federal Register publication including the public comments  
23 concerning the suggested categorical exclusions. The Department Manual excludes the following  
24 from documentation in an Environmental Assessment or an Environmental Impact Statement:

25 "B. Resource Management

- 26 (1) research, inventory, and information collection activities directly related to the  
27 conservation of Fish and Wildlife resources which involve negligible animal  
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1 mortality or habitat destruction, no interaction of contaminants, or no introduction  
2 of organisms not indigenous to the affected ecosystem;

3 (2) the operation, maintenance and management of existing facilities in routine  
4 reoccurring management activities and improvements, including renovations and  
5 replacements which result in no or only minor changes in use, and have no or  
6 negligible environmental effects on site or in the vicinity of the site;

7 (3) the construction of new, or the addition of, small structures or improvements,  
8 including structures and improvements for the restoration of wetland, riparian, in-  
9 stream or native habitats, which result in no or only minor changes in the use of the  
10 affected local area. The following are examples of activities that may be included  
11 . . .

12 (b) the construction of small water control structures; . . .

13 (6) the reintroduction or supplementation (i.e., stocking) of native, formerly native, or  
14 established species into suitable habitat within their historic or established range,  
15 where no or negligible environmental disturbances are anticipated.”

16 516, Department Manual, ch. 8, sec. 8.5., A.R. 257 - 261

17 Additionally, the FWS manual contains provisions for preparation of an Environmental  
18 Action Statement (EAS), although not specifically provided for by NEPA or the CEQ  
19 regulations, utilization of EAS allows for NEPA related decisions. EAS documents are not  
20 normally subject to public comment. *See* AR at pp. 252-254.

21 Redevelopment of the Yaqui and McPherson Tanks and the monitoring of the bighorn  
22 sheep, including the transporting of water and equipment and installing evaporative covers on  
23 water sources, fall within the categorical exclusions enumerated as B(3)(b) and (6). The Fish  
24 and Wildlife Service was not arbitrary and capricious in the use and application of these  
25 categorical exclusions in this case.

#### 26 IV. The FWS Complied With the Provisions of the Wilderness Act and NEPA

27 In compliance with NEPA and the Wilderness Act the federal defendants prepared EAS and  
28 categorical exclusion documents and Minimum Requirements Analyses with NEPA worksheets  
for these redevelopment projects in accordance with department and service policies.

The EAS and categorical exclusion document for the Yaqui and McPherson Tank projects  
describe the projects purpose as one “to redesign new water sources that capture and store  
rainwater more efficiently, greatly reducing the need to haul supplemental water . . . [the desired  
goal of the project is to ensure an adequate and well-distributed water supply for desert bighorn

1 sheep] . . . the redevelopments would increase the efficiency of both capture and storage of run-  
2 off and reducing the need to haul water . . . the redevelopment of the Yaqui and McPherson  
3 Tanks would assist the service and Arizona Game and Fish Department in their efforts to reverse  
4 the population decline of the desert bighorn sheep . . .” AR at pp.134, 136. The EAS and  
5 categorical exclusion document for the monitoring of wildlife and transporting of water  
6 discusses the necessity to maintain water for wildlife and the need to use minimum methods to  
7 achieve those goals. AR at pp.162, 165. In addition, the service prepared minimum  
8 requirements analyses for both the Yaqui and McPherson Tanks redevelopment projects and the  
9 monitoring of wildlife and transporting water sources in the wilderness. These minimum  
10 requirement analyses discuss he needs and the methods that will be utilized in achieving the  
11 objective of providing water to wildlife. AR at pp. 149-161 and 169-179. These minimum  
12 requirement analyses indicate that the management actions within the Kofa Management Plan  
13 and Environmental Assessment include maintaining water for wildlife in the wilderness. AR at  
14 pp. 154 - 155

15 The Fish and Wildlife Service has adopted regulations that recognize the minimum  
16 requirements exception to the Wilderness Act. The regulations state as follows:

17 Except as specifically provided and subject to existing private rights, there  
18 shall be no commercial enterprise and no permanent road within a  
19 wilderness unit, and except as necessary to meet minimum requirements for  
20 the administration of the area (including measures required in emergencies  
21 involving the health and safety of persons within the area), there shall be  
22 no temporary road, no use of motor vehicles, motorized equipment or  
23 motorboats, no landing of aircraft, no other form of mechanized transport,  
24 and no structural or installation within any such area.

25 The director may authorize occupancy and use of a National Wildlife  
26 Refuge by officers, employees, agencies and agents of federal, state and  
27 county governments to carry out the purposes of the Wilderness Act and  
28 the Act establishing the wilderness and will prescribe conditions under  
which motorized equipment, mechanical transport, aircraft, motor boats,  
installations, or structures may be used to meet the minimum requirements  
for authorized activities to protect and administer the wilderness. The  
director may also prescribe the conditions under which such equipment,  
transport, aircraft, installations, or structures may be used in emergencies  
involving the health and safety of persons, damage to property, violations  
of civil and criminal law or other purposes.

1 50 C.F.R. § 35.5.

2 Many wilderness areas are also part of a National Wildlife Refuge System and as such are  
3 administered by the Fish and Wildlife Service. The Fish and Wildlife Service has recognized  
4 the potential conflict between administration of wilderness areas and refuge land. The National  
5 Wildlife System Act states that the mission of the National Wildlife Refuge System is to  
6 “administer a national network of lands and waters for conservation, management, and where  
7 appropriate, restoration of fish, wildlife and plant resources and their habitats within the United  
8 States for the benefit of present and future generations of Americans.” 16 U.S.C. § 668dd(a)(2).  
9 The Act further provides “compatible wildlife dependent recreational uses are the priority  
10 general public uses of the system shall receive priority consideration in refuge planning and  
11 management.” 16 U.S.C. § 688dd(a)(3)(c).

12 Additionally, the Fish and Wildlife Handbook discusses refuge management in connection  
13 with wilderness designation and states that “as written in the Wilderness Act of 1964, the  
14 purposes of the Act are to be ‘within and supplemental’ to the purpose of the refuges within the  
15 designated wilderness. We interpret this to mean the wilderness purposes become additional  
16 purposes of the refuge, yet apply only to those areas of the refuge designated as wilderness.  
17 Wilderness designations provide additional considerations for determining the administrative  
18 and management actions we need to take to achieve a refuge’s purpose on designated wilderness  
19 areas within the refuge system.” 601 FW 1.

20 The policy of the Fish and Wildlife Service further indicates that the overriding goal of the  
21 refuge system is to conserve a diversity of fish, wildlife and plants for their habitats for the  
22 benefit of current and future generations. 601 FW 1, sec. 1.9. The policies indicate that the  
23 priorities for management activities within refuge areas are: 1) conserving fish, wildlife and  
24 plants and their habitats; 2) facilitating compatible wildlife dependent recreational uses; 3)  
25 considering other appropriate and compatible uses. 601 FW 1, sec. 1.10.

26 In keeping with these policies and goals, the Minimum Requirements Analysis for the Yaqui  
27 and McPherson Tanks redevelopment projects considers the affect of the project and whether  
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1 it is consistent with the Wilderness Plan; whether it affects the wilderness character of the area;  
2 and effects on the management of the area. The Minimum Requirements Analysis further  
3 discusses project information on the location, techniques to be employed, and rationale for the  
4 project; alternatives to the water redevelopment projects and the social/recreation/experiential  
5 effects of the projects. AR at pp. 149 - 161. The Minimum Requirements Analysis contains  
6 several precautions which reduce the impacts of the projects on the environment including the  
7 removal of leftover materials, minimal use of vehicles, replanting or transplanting of displaced  
8 plants, and the timing of the project to occur during the summer months when visitation to the  
9 refuge is low. AR at p. 156

10 Finally, the Minimum Requirements Analysis for the Monitoring of Wildlife and  
11 Transporting of Water and Equipment discusses the need to monitor, transport and provide  
12 bighorn sheep with water sources in the wilderness area. The analysis indicates that “there may  
13 be some opposition to this alternative by wilderness advocates who may object to the use of  
14 mechanical devices for any reason, even to maintain wildlife populations that enhance  
15 wilderness characteristics. However, no opposition was raised in 2003 or 2004 when mechanized  
16 means were used to replenish water in natural water sources in wilderness that were about to go  
17 dry or where existing wildlife water captures were developed (such as Charlie Died Tank in  
18 1998 and Scotty Dog Wildlife Water Catchment in 2001).” AR at p. 177

19 The federal defendants thoroughly considered the mission and goals of the refuge,  
20 compliance with the Wilderness Act and compliance with NEPA in developing and executing  
21 the redevelopment projects for the Yaqui and McPherson Tanks in order to monitor, transport  
22 and supply water to the bighorn sheep population. These actions were considered and deliberate  
23 and not done with the intent to exclude potential interested persons. However, the federal  
24 defendants must be allowed to exercise its expertise and discretion in complying with its mission  
25 and goals of refuge management. The decision of the federal defendants was not arbitrary,  
26 capricious or an abuse of discretion.

1 WHEREFORE the federal defendants respectfully request that this Court deny plaintiffs'  
2 Motion for Summary Judgment and grant the federal defendants' Cross-Motion for Summary  
3 Judgment as plaintiffs' claims are moot and the decision of the federal defendants was not  
4 arbitrary, capricious or an abuse of discretion.

5 Respectfully submitted this 1st day of February, 2008.

6 DIANE J. HUMETEWA  
7 United States Attorney  
8 District of Arizona

9 s/Sue A. Klein

10 SUE A. KLEIN  
11 Assistant U.S. Attorney  
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**CERTIFICATION**

I hereby certify that on February 1, 2008, 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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