



United States Department of the Interior  
OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

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M- 37078

Memorandum

To: Secretary

From: Solicitor

Subject: National Wildlife Refuge Land Exchanges

This Opinion addresses the criteria the Fish and Wildlife Service (FWS) should apply in evaluating whether to execute a Refuge land exchange, and whether a compatibility determination is required for an exchange.

## I. Introduction

Under the National Wildlife Refuge System Administration Act (Administration Act),<sup>1</sup> as amended by the 1997 National Wildlife Refuge System Improvement Act (Improvement Act),<sup>2</sup> the U.S. Department of the Interior (Department) has broad authority to use land exchanges to acquire land for the Refuge System. This authority enables the FWS to consolidate FWS-managed lands within existing refuges and to improve habitat protection within the Refuge System.<sup>3</sup> These purposes are consistent with the Refuge System's mission to conserve species and their habitats.<sup>4</sup>

The Administration Act provides general criteria for land exchanges, including that the divested land must be "suitable for disposition" and the value of the land exchanged must be approximately equal.<sup>5</sup> While most refuge land exchanges are relatively routine, some exchanges are more complex and require clearer legal guidance on which processes to apply when considering an exchange. This memorandum clarifies the legal standards applicable to refuge land exchanges undertaken by the Department outside of Alaska.<sup>6</sup>

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<sup>1</sup> Pub. L. No. 89-669, § 4, 80 Stat. 926, 927-29 (1966).

<sup>2</sup> Pub. L. No. 105-57, 111 Stat. 1252 (1997) (codified at 16 U.S.C. §§ 668dd-ee).

<sup>3</sup> The uniform use of "national wildlife refuge" for the various designated refuges, conservation areas, and the like, came into existence pursuant to Proclamation No. 2416, 5 Fed. Reg. 2677 (1940), by President Franklin Delano Roosevelt, which renamed various areas in 39 states and territories.

<sup>4</sup> 16 U.S.C. § 668dd(a)(2).

<sup>5</sup> 16 U.S.C. § 668dd(b)(3).

<sup>6</sup> Because there are unique authorities applicable to land exchanges in Alaska, including section 1302(h) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3192(h), and section 22(f) of the Alaska Native

The statutory text, structure, and legislative history of the Administration and Improvement Acts demonstrate that refuge land exchanges are not new “uses” of refuge system lands that require the FWS to make a compatibility determination under the Improvement Act.<sup>7</sup> This interpretation is consistent with long-standing FWS practice. However, refuge land exchanges must fulfill the conservation mission of the Refuge System and the purposes of the individual refuge. When evaluating a potential exchange, the FWS should consider the exchange as a whole, including known planned uses for the divested land, and determine whether the exchange would likely result in an overall conservation benefit for both the Refuge System and individual refuge. FWS should only proceed with exchanges that would provide a net conservation benefit and further the individual refuge’s purposes. Of course, it follows that if there is a net benefit to the refuge subject to an exchange, the Refuge System as a whole likewise receives a benefit.

## II. Background

### A. The National Wildlife Refuge System Administration Act and Improvement Act

In 1966, Congress passed H.R. 9424 to protect endangered species and consolidate certain land holdings and legal authorities into the National Wildlife Refuge System.<sup>8</sup> Sections 1 through 3 of H.R. 9424 sought to protect endangered species, including through habitat acquisition. Section 4 established the National Wildlife Refuge System “by consolidating the authorities relating to the various categories of areas that are administered by the Secretary of the Interior for the conservation of fish and wildlife.”<sup>9</sup> Sections 1 through 3 together are considered the first federal endangered species legislation and a precursor to the Endangered Species Act of 1973,<sup>10</sup> while section 4 is the Administration Act. The entire bill, however, promoted land acquisition as a

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Claims Settlement Act, 43 U.S.C. § 1621(f), the issue of land exchanges in Alaska is beyond the scope of this Opinion.

<sup>7</sup> 16 U.S.C. § 668dd(d)(3)(A)(iv) (compatibility determination required for new uses).

<sup>8</sup> Pub. L. 89-669, § 4, 80 Stat. 926, 927–29 (1966).

<sup>9</sup> *Id.* Reservation and acquisition of land for the conservation of species and habitat, and creation of refuges in particular, predated the passage of H.R. 9424. *See generally* ROBERT L. FISCHMAN, THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW, App. A (2003) (A Chronology of Refuge System Development). President Theodore Roosevelt established the first refuge through a proclamation in 1903 that reserved Pelican Island for the preservation of native birds. Presidential Order, March 14, 1903 (copy on display at the National Conservation Training Center, Shepardstown, W. Va.); *see also* FISCHMAN at 35. He went on to establish many other bird and game reserves during his time in office. *Id.* That same decade, Congress passed multiple statutes reserving land for species preservation, including the National Bison Range and the National Elk Refuge. *Id.* Subsequent conservation statutes, including the Migratory Bird Conservation Act of 1929 and the Migratory Bird Hunting Stamp Act of 1934 (Duck Stamp Act), authorized and funded the establishment of refuges for migratory bird and waterfowl conservation purposes. *Id.* at 36–37. Additionally, the 1956 Fish and Wildlife Act expressly authorized acquisition of refuge lands. *Id.* at 40. It was not until 1966, however, that Congress consolidated these various wildlife reservations into the National Wildlife Refuge System. For a succinct legal and political history of the refuge system, *see* JOHN D. LESHY, OUR COMMON GROUND, 137–52, 245–52, 382–88, 421–427, 528–39 (2021).

<sup>10</sup> *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174–75 (1978).

primary method for species protection,<sup>11</sup> with section 4 authorizing land exchange as a means to acquire land.<sup>12</sup>

In 1997, Congress substantially amended the Administration Act with the Improvement Act.<sup>13</sup> In the Improvement Act, Congress codified the mission of the Refuge System, infused purpose into the Secretary's overall management of the Refuge System, and established new requirements for refuge-specific planning.<sup>14</sup> The Improvement Act responded to litigation challenging incompatible uses within refuges and multiple reports critiquing refuge management.<sup>15</sup> Accordingly, a primary purpose of the Improvement Act was to curtail incompatible uses, including through the establishment of a unified mission for the Refuge System that would assist managers in making decisions at individual refuges.<sup>16</sup>

The Improvement Act declared the Refuge System's mission to be "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."<sup>17</sup> The Act further specified that "*each refuge shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established.*"<sup>18</sup> Section 668dd(a)(4) directs the Secretary to administer the Refuge System pursuant to 14 specific objectives and conditions that reinforce the conservation, recreation, and other goals of the system.<sup>19</sup> Among these objectives is a charge to the Department to "plan and direct the continued growth of the System in a manner that is best designed to accomplish the mission of the System" and enhance conservation efforts.<sup>20</sup>

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<sup>11</sup> *Miscellaneous Fisheries and Wildlife Legislation – 1965: Hearings before the Subcomm. on Fisheries and Wildlife Conservation of the H. Comm. on Merchant Marine and Fisheries*, 89th Cong. 150-154 (1965) [hereinafter *Hearings of 1965*] (statement by Stewart L. Udall, Secretary of the Interior); see also Robert L. Fischman, *The Significance of National Wildlife Refuges in the Development of U.S. Conservation Policy*, 21 J. LAND USE & ENV'T LAW 1, 12–13 (Fall 2005).

<sup>12</sup> The authority to acquire refuge land by exchange originated in 1935, An Act to amend the Migratory Bird Hunting Stamp Act, § 302, 49 Stat. 382 (1935), *repealed by* Public Law 89-669, 80 Stat. 926 (1966) (Administration Act). In the Administration Act, Congress repealed and replaced this authority, expanding the exchange provision to apply to all refuge areas and authorizing the FWS to receive cash to equalize values. See *Hearings of 1965*, *supra* note 34, at 129; 158 (describing the authority in the 1966 Administration Act as "similar" to the existing authority).

<sup>13</sup> Pub. L. No. 105-57, 111 Stat. 1252 (1997) (codified at 16 U.S.C. § 668dd-ee).

<sup>14</sup> See, e.g., H.R. Rep. No. 105-106, at 3 (1997) [hereinafter House Report] ("The [Improvement Act] amends and builds upon the [Administration Act] in a manner that provides an organic act for the System similar to those which exist for other public lands. Its principal focus 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.").

<sup>15</sup> *Id.* at 3-4. See, e.g., GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-89-196, NATIONAL WILDLIFE REFUGES: CONTINUING PROBLEMS WITH INCOMPATIBLE USES CALL FOR BOLD ACTION (1989).

<sup>16</sup> Cam Tredennick, *The National Wildlife System Improvement Act of 1997: Defining the National Wildlife Refuge System for the Twenty-First Century*, 12 FORDHAM ENV'T LAW J. 41 (Fall 2000); House Report, *supra* note 14, at 3.

<sup>17</sup> 16 U.S.C. § 668dd(a)(2).

<sup>18</sup> 16 U.S.C. § 668dd(a)(3)(A) (emphasis added).

<sup>19</sup> See *Defenders of Wildlife v. Salazar*, 698 F. Supp. 2d 141, 146 (D.D.C. 2010).

<sup>20</sup> 16 U.S.C. § 668dd(a)(4)(C).

The Improvement Act did not alter the land exchange authority in the Administration Act, which was codified in subsection (b), directly following the purpose provisions:

**(b) Administration; Public Accommodations Contracts; Acceptance and Use of Funds; Exchange of Properties; Cash Equalization Payments**

In administering the System, the Secretary is authorized to take the following actions: [...]

(3) Acquire lands or interests therein by exchange (A) for acquired lands or public lands, or for interests in acquired or public lands, under his jurisdiction which he finds to be *suitable for disposition*, or (B) for the right to remove, in accordance with such terms and conditions as he may prescribe, products from the acquired or public lands within the System. The values of the properties so exchanged either shall be approximately equal, or if they are not approximately equal the values shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require.<sup>21</sup>

Section 668dd(b)(3) requires, at a minimum, that the Secretary determine the lands to be divested are “suitable for disposition” and that the exchange is for property of approximately equal value. Located in subsection (b) on administration, the land exchange authority is one of several authorizations that enable growth and management of the system, such as the authorities to enter into contracts and promulgate regulations.<sup>22</sup>

The Improvement Act also required that new uses on refuges be “compatible” with the purpose of each refuge and established standards and procedures for determining compatibility.<sup>23</sup> Before approving any new use on a refuge, the FWS must undertake an extensive process to determine compatibility. A compatible use must not, in the FWS Director’s “sound professional judgment,” “materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.”<sup>24</sup> The Improvement Act defined “sound professional judgment” as “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.”<sup>25</sup> Consistent with this statutory requirement, FWS regulations and policy establish detailed processes for determining and periodically reviewing compatibility.<sup>26</sup> Among other requirements, each compatibility determination must include detailed information about the proposed use, an analysis of the availability of resources for administering and managing the use, and a description of the reasonably anticipated impacts

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<sup>21</sup> 16 U.S.C. § 668dd(b)(3) (emphasis added).

<sup>22</sup> FISCHMAN, *supra* note 9, at 52 (“[T]here are other provisions of the 1966 Refuge Administration Act that explicitly confirm certain management practices generally implicit in proprietary discretion. [...] The Act authorizes the secretary to enter into contracts for the provisions of public accommodations ... and to acquire lands by exchange under certain conditions (§ 4(b)).”).

<sup>23</sup> 16 U.S.C. § 668dd(d)(3)(A)(i). *See* House Report, *supra* note 14, at 9-12; FISCHMAN, *supra* note 9, at 201 (describing passage of the Improvement Act as a response to attention given to incompatible uses in refuges); *see also* Charles G. Curtin, *The Evolution of the U.S. National Wildlife Refuge System and the Doctrine of Compatibility*, 7 CONSERVATION BIOLOGY 29 (1997).

<sup>24</sup> 16 U.S.C. § 668ee(1).

<sup>25</sup> 16 U.S.C. § 668ee(3).

<sup>26</sup> 50 C.F.R. § 26.41; 603 FW 2.

of the use.<sup>27</sup> Proposed compatibility determinations must be published for public review and comment prior to finalization.<sup>28</sup>

The statutory language provides examples of uses that may be carried out in refuges if deemed compatible, including hunting, fishing, and recreation,<sup>29</sup> and easements for powerlines, telephone lines, and roads.<sup>30</sup> The Improvement Act also expressly exempts some activities from compatibility requirements. Subsection (d)(4) exempts overflights above a refuge and certain “activities authorized, funded, or conducted by a Federal agency (other than the [FWS]) which has primary jurisdiction over a refuge or a portion of a refuge.”<sup>31</sup> There is no statutory reference to any interplay between compatibility determinations and land exchanges.

## **B. FWS Land Exchange Policies**

The FWS uses refuge land exchanges to acquire inholdings within a refuge’s boundary, and to otherwise expand a refuge. Many exchanges are relatively routine and non-controversial transactions that consolidate refuge landholdings to serve the overall conservation purposes of the Refuge System and the affected refuge.

FWS does not undertake compatibility determinations for land exchanges but generally requires demonstration that the exchange will benefit the refuge. The FWS Manual chapter on land-acquisition planning states that “[lands] under Service or other Federal agency control can be exchanged for land having greater potential for achieving habitat protection objectives.”<sup>32</sup> Additional procedural requirements for non-purchase acquisitions, including land exchanges, are found at 342 FW 5. These policies establish procedures for implementing an exchange, including setting threshold values that determine who must approve the exchange and whether Congress must be made aware.<sup>33</sup>

Land exchanges must also comply with the National Environmental Policy Act (NEPA). For most exchanges, FWS uses a categorical exclusion.<sup>34</sup> For larger land exchanges, FWS typically completes an environmental assessment (EA) to evaluate the environmental consequences of an exchange and determine if further NEPA compliance is required. This includes consideration of the resource values of the tracts to be exchanged and how the acquisition will further the purposes of the refuge. While the anticipated use of the divested land is not analyzed directly, FWS may consider it in general terms, especially as part of the indirect and cumulative impacts analysis.

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<sup>27</sup> 603 FW 2.12.

<sup>28</sup> 603 FW 2.12(A)(9).

<sup>29</sup> 16 U.S.C. § 668dd(d)(1)(A). These uses, assuming they are wildlife-dependent, are the “priority general public uses” of the Refuge System. 16 U.S.C. § 668dd(a)(3)(C).

<sup>30</sup> 16 U.S.C. § 668dd(d)(1)(B).

<sup>31</sup> 16 U.S.C. § 668dd(d)(4).

<sup>32</sup> 341 FW 2.2(D).

<sup>33</sup> 342 FW 5.7.

<sup>34</sup> 516 DM 8.5.A(4). The categorical exclusion is for “[t]he acquisition of real property obtained either through discretionary acts or when acquired by law, whether by way of condemnation, donation, escheat, right-of-entry, escrow, exchange, lapses, purchase, or transfer, that will be under the jurisdiction or control of the United States.” *Id.*

### III. Law Governing Land Exchanges

Few courts have interpreted the Department's refuge land exchange authority, and the decisions provide limited guidance. In *Sierra Club v. Hickel*, which predates the Improvement Act, the Sixth Circuit found that the land exchange authority is committed to the Secretary's discretion and unreviewable by the court.<sup>35</sup> In *Town of Superior v. United States Fish and Wildlife Service*, a federal district court held that a compatibility determination was not required for a land exchange, and the Tenth Circuit affirmed the decision on separate grounds.<sup>36</sup> More recently, in *National Wildlife Refuge Association v. Rural Utilities Service*, a federal district court in Wisconsin noted that a land exchange "would very likely have to meet the same compatibility requirements" as a right-of-way approval, and held that the proposed land exchange was an attempt to evade the compatibility requirements.<sup>37</sup> The FWS's appeal of this decision is before the Seventh Circuit.<sup>38</sup> The few judicial decisions to date leave room for agency expertise and discretion to articulate standards to protect the Refuge System.

I conclude that a refuge land exchange must provide a conservation benefit to the refuge, and further the individual refuge's purposes. Congress established in the Improvement Act a clear conservation mission for the Refuge System.<sup>39</sup> Read in context, the land exchange authority is a means to implement the broader statutory scheme to protect habitat and species and expand the System.<sup>40</sup> A land exchange is not a "use," as contemplated by the Improvement Act, however, and the Administration and Improvement Acts do not require FWS to conduct a compatibility determination for any land exchange.

#### A. Compatibility Determinations Are Not Required

The text and structure of the Act lead to the conclusion that a land exchange does not require a compatibility determination. As the court in *Town of Superior* held, a land exchange is not a "use" as contemplated by the Act.<sup>41</sup> Examples of uses in the Act, including hunting, fishing, and electric utility rights-of-way, fall within a colloquial definition of the word "use."<sup>42</sup> That is, they are activities performed by third parties or the public on refuge land.<sup>43</sup> A land exchange does not fit this definition. For one, it is not an action by a third party. More importantly, a land exchange is not a use of refuge land and does not authorize a new use on refuge land. It is a process for disposing of existing refuge land and acquiring new refuge land.

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<sup>35</sup> *Sierra Club v. Hickel*, 467 F.2d 1048, 1051 (6th Cir. 1972).

<sup>36</sup> *Town of Superior v. United States Fish & Wildlife Serv.*, 913 F. Supp. 2d 1087, 1111–12 (D. Colo. 2012), *aff'd on other grounds*, *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677 (10th Cir. 2015).

<sup>37</sup> *National Wildlife Refuge Association*, 580 F. Supp. 3d 588, 599, 608–610 (W.D. Wis.).

<sup>38</sup> *Appeal docketed*, No. 22-1737 (7th Cir. April 29, 2022).

<sup>39</sup> See 16 U.S.C. § 668dd(a)(2); House Report, *supra* note 14, at 3 (noting that the Improvement Act provides an organic act for the Refuge System and establishes a "conservation mission").

<sup>40</sup> See 16 U.S.C. § 668dd(a)(4)(C).

<sup>41</sup> 913 F. Supp. 2d at 1111.

<sup>42</sup> See *id.*; *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 11 (D.D.C. 1998).

<sup>43</sup> *Fund for Animals*, 27 F. Supp. 2d at 11.

This distinction is made clearer in considering the steps FWS takes to complete a compatibility determination. Many compatibility determination requirements would be nonsensical or need significant alteration if applied to the most common land exchanges. For example, where inholdings are acquired in exchange for peripheral refuge lands, FWS would no longer have a general regulatory interest in new uses on the exchanged lands.<sup>44</sup> Thus, there would be no basis for a compatibility determination on non-refuge lands. Similarly, there would be no purpose in FWS periodically reevaluating the compatibility of a land exchange, because the decision is permanent once completed. Many of the questions FWS must answer in making a compatibility determination, such as duration and how the use will be conducted, would not make sense in the context of a land exchange.<sup>45</sup> Rather, as is already FWS policy, only subsequent proposed uses on the acquired land require compatibility determinations.<sup>46</sup>

The structure and legislative history of the Act also support the conclusion that a land exchange is not subject to a compatibility determination. The land exchange provision precedes the section on compatibility determinations, which then makes no reference to the land exchange provision. As the court in *Town of Superior* held, “Congress is presumed to know how to condition an agency’s exercise of authority on the completion of an analysis and did not do so in this instance.”<sup>47</sup> In the Improvement Act, Congress could have stated its intent to require compatibility determinations for land exchanges. Instead, the land exchange provision’s language has remained nearly identical since the 1966 passage of the Administration Act.<sup>48</sup> In fact, the statutory authority for FWS to acquire refuge lands through exchanges predates and exists outside of the Administration Act.<sup>49</sup>

The absence of land exchanges from the statute’s express exemptions from compatibility determinations does not change this conclusion. The Improvement Act was passed after multiple studies identified incompatible uses across the Refuge System and FWS settled a lawsuit by agreeing to end incompatible uses.<sup>50</sup> The identified incompatible uses track with the colloquial definition of an action by a third party or the public on a refuge.<sup>51</sup> Congress had these examples in mind when drafting the Improvement Act, and likely did not consider land exchanges to be “uses” otherwise subject to and needing exemption from compatibility requirements.<sup>52</sup> According to the House Report on the Improvement Act, one of the two express exemptions

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<sup>44</sup> The FWS does possess some regulatory power over non-refuge land to prevent impairment to the refuge. *See Camfield v. United States*, 167 U.S. 518, 525–26 (1897) (Property Clause includes power to regulate private land to protect federal property); *United States v. Alford*, 274 U.S. 264 (1927) (upholding federal statute that prohibited abandonment of unextinguished fires in or near any national forest). *Cf. State of Minn. v. Block*, 660 F.2d 1240, 1251 (8th Cir. 1981) (holding that Congress could legislate restrictions on private lands within the boundaries of a wilderness area if the restrictions are necessary to protect the wilderness).

<sup>45</sup> *See* 603 FW 2.12.

<sup>46</sup> *See* 50 C.F.R. § 25.21(d).

<sup>47</sup> *See Town of Superior*, 913 F. Supp. 2d at 1111.

<sup>48</sup> Compare 16 U.S.C. § 668dd(b)(3) with Administration Act, Pub. L. No. 89-669, § 4, 80 Stat. 927 (1966).

<sup>49</sup> *See supra* n. 12 (discussing the origins of refuge land exchange authority). *See also* 16 U.S.C. § 742f(a)(4) (general authorization for the Secretary to exchange lands “for the development, advancement, management, conservation, and protection of fish and wildlife resources”).

<sup>50</sup> House Report, *supra* note 14, at 3.

<sup>51</sup> *See, e.g.,* GOV’T ACCOUNTABILITY OFFICE, *supra* note 15, at 20, tbl. 2.3 (listing secondary uses considered harmful, including mining, off-road vehicles, airboats, and military air exercises).

<sup>52</sup> *Id.*

“[recognized] the System includes many ‘overlay’ refuges, over which an agency other than the [FWS] holds primary jurisdiction.”<sup>53</sup> Thus, this exemption was a clarification of how the Act would affect those agencies’ authorities, similar to the other codified exemption for overflights.

While the conclusion that land exchanges do not require compatibility determinations is consistent with *Town of Superior*, it is arguably at odds with *National Wildlife Refuge Association*, a non-precedential district court opinion. In *National Wildlife Refuge Association*, the district court stated that it would “undermine the purposes of the Refuge Act” to allow FWS to approve a proposed land exchange without making a compatibility determination.<sup>54</sup> Although Congress undoubtedly did not intend for the land exchange provision to circumvent the underlying mission of the Refuge System, a thorough review of the law makes plain that compatibility determinations are not required for land exchanges. As explained in the next section, the more persuasive reading of the statute is that Congress intended for the FWS to execute land exchanges in a fashion that would support the Refuge System’s conservation mission by providing a net conservation benefit to and furthering the purposes of the particular refuge.

## **B. Nexus to the Refuge System Mission and Refuge-Specific Purposes**

The text, structure, and legislative history of the statute make clear that Congress intended the mission of the Refuge System, along with the purposes of individual refuge units, to drive administrative decisions, including land exchanges.

The Improvement Act’s conservation focus and implementation directions inform interpretation of the land exchange provision.<sup>55</sup> The Act expressly delineates the Refuge System mission<sup>56</sup> and directs FWS to manage each refuge for its specific purposes.<sup>57</sup> Congress also directed the Secretary “in administering the System” to expand the System in a way that “is best designed to accomplish the mission of the System,” among other conservation-oriented objectives.<sup>58</sup> Congress’s clear mandate to the Department demonstrates that a land exchange, as a means to acquire land for a refuge and expand the Refuge System, must carry out its conservation mission

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<sup>53</sup> House Report, *supra* note 14, at 11.

<sup>54</sup> *National Wildlife Refuge Association*, 580 F. Supp. 3d at 609. The court did not hold that compatibility determinations must apply to all Refuge land exchanges. Rather, the court expressed concern that FWS was skirting compatibility analysis by substituting a land exchange for a proposed modification of a right of way. *See id.* at 609–10. The court did not tackle directly the question of whether the Administration Act and the Improvement Act require compatibility determinations for all land exchanges.

<sup>55</sup> *See, e.g., Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 700 (1995) (upholding the FWS definition of a statutory term in the Endangered Species Act (ESA) in part because of “Congress’ clear expression of the ESA’s broad purpose to protect endangered and threatened wildlife”); *WildEarth Guardians*, 784 F.3d at 685 (identifying “(1) effectuating the intent of Congress; and (2) taking the statutory language in context” as “two of the oldest and most established canons of statutory construction”).

<sup>56</sup> 16 U.S.C. § 668dd(a)(2).

<sup>57</sup> 16 U.S.C. § 668dd(a)(3)(A).

<sup>58</sup> 16 U.S.C. § 668dd(a)(4)(C). *See Fischman, supra* note 11, at 5 (“The refuge system shares with the park system a dominant use policy. The [FWS] manages the refuge system for the purpose of maintaining, enhancing, and restoring nature. Congress calls this preeminent goal ‘conservation.’”) (footnote omitted).



and the refuge's purposes. The land exchange authority is not an isolated provision disconnected from the rest of the statutory scheme.

The statutory context of the land exchange authorization likewise confirms that land exchanges must further the Refuge System mission and refuge-specific purposes.<sup>59</sup> Section (b) lists authorities to administer the Refuge System: the power to enter into contracts, accept donations, undertake land exchanges, enter into cooperative agreements with State agencies, and issue regulations. Just as the Secretary may not enter into contracts, accept donations, enter into cooperative agreements, or promulgate regulations that are antithetical to the Refuge System's mission or a refuge's purposes, the Secretary similarly may not undertake a land exchange that are contrary to these objectives.

Additionally, the legislative history indicates that the land exchange provision is inextricably linked to preservation of habitat and species protection. First, as explained above, the Administration Act was included in the first bill designed to create a comprehensive system for habitat and species protection.<sup>60</sup> Second, the only amendment to the Administration Act's land exchange provision was for the purpose of enhancing habitat protection. In 1976 as part of a larger bill aimed at protecting wetlands, Congress amended the Administration Act's land exchange provision to allow for disposal of partial interests, such as easements.<sup>61</sup> The FWS director testified that the change could "provide greater flexibility to methods of preserving habitat" and included the amendment proposal in a list of options to enhance wetlands acquisition and protection.<sup>62</sup> Third, although the Improvement Act's legislative history does not discuss the land exchange provision, the provision cannot be singled out as unaffected by Congress's renewed commitment to conservation. Congress undoubtedly did not intend the land exchange authority to serve as a workaround to the Improvement Act's unified mission for the Refuge System. Instead, land exchanges must be viewed as a continued method to carry out Congress's conservation objective.<sup>63</sup>

### **C. The FWS Should Consider a Potential Land Exchange as a Whole, Including Planned Uses for the Divested Land**

In exercising land exchange authority, the FWS should weigh the conservation value of the acquired land against the value of the divested land. Any known planned uses for the divested land should also be considered. It is insufficient for FWS to compare only the acreage and

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<sup>59</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting that statutory provisions must be interpreted in context and "with a view to their place in the overall statutory scheme") (citing *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

<sup>60</sup> See *supra* Part I(A)(i).

<sup>61</sup> Pub. L. No. 94-215, § 5, 90 Stat. 190 (1976); H.R. Rep. No. 94-335, at 10 (1975) (citing easements as an example of a partial interest that would be allowed to be exchanged). The FWS also cites this authority for the option to reserve mineral rights when disposing of "acquired lands" (generally, lands acquired from a state or private individual). The FWS manual states that mineral rights are only reserved "when such rights are required to protect the integrity of a particular refuge unit." 342 FW 5.7(J)(2).

<sup>62</sup> *Wildlife Refuges and Organic Act: Hearing before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 94th Cong. 95-96 (1975).

<sup>63</sup> House Report, *supra* note 14, at 9 (underscoring Congressional intent that "wildlife and wildlife conservation must come first" in managing the Refuge System).

economic value of the lands that will be exchanged. FWS should determine that the conservation benefits of any exchange will outweigh identifiable harm and only consummate those exchanges that would further the Refuge System's mission and the individual refuge purposes.<sup>64</sup>

As a first step, the requirement that land be "suitable for disposition" is best read through the lens of the conservation-driven statutory language. Thus, FWS should consider the habitat and broader conservation value of the portion of the refuge to be divested in deciding whether it is suitable.

Second, only by considering both sides of the exchange can FWS determine if the exchange as a whole would advance, rather than circumvent, the Refuge System's conservation mission and individual refuge purposes. Existing policy requires that refuge land only be exchanged for land with "greater potential for achieving habitat protection objectives."<sup>65</sup> In some circumstances, however, a decision limited to considerations of the acquired land's habitat protection value could be insufficient to protect the Refuge System from potential threats based on planned uses for the divested parcel. Therefore, the FWS should prepare a record for each exchange that demonstrates consideration of available information about the planned uses on the divested land and the impacts of those uses on the refuge.

The FWS occasionally faces a situation where a land exchange would further the mission of the Refuge System and the individual refuge's purpose, even though the proposed use on divested land would not otherwise be deemed compatible if the land remained within the refuge. In such a circumstance, the FWS should use its expert judgment to assess the potential harm to the refuge that may occur from the proposed use. To support such an exchange, the FWS should prepare a decision record that clearly demonstrates how the exchange as a whole will further conservation. In other words, the FWS must determine that the potential conservation benefits, viewed in light of the particular refuge's purposes, outweigh the potential harm. If the record does not support such a conclusion, the FWS should determine that the land exchange is inconsistent with the Improvement Act.

It should be noted that while the FWS may consider the intended use for the divested parcel, the new owner is not obligated to pursue that intended use. However, the FWS has other authorities to protect a refuge from potentially harmful uses on divested land should such a situation occur. For example, divested wetlands and lands in floodplains are subject to wetlands and floodplains protection pursuant to Executive Order 11990<sup>66</sup> and Executive Order 11988.<sup>67</sup> The FWS also could place an easement or other deed restriction on the divested property as appropriate. The precise nature of such a restriction should be developed with assistance from my Office.

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<sup>64</sup> Implementing a land exchange is a discretionary action; FWS is not required to undertake any land exchange, even if it will result in conservation benefits for the Refuge System.

<sup>65</sup> 341 FW 2.2(D).

<sup>66</sup> Protection of Wetlands, 42 Fed. Reg. 26,961 (May 24, 1977).

<sup>67</sup> Floodplain Management, 42 Fed. Reg. 26,951 (May 24, 1977).

#### IV. Conclusion

Given the text, structure, and legislative history of the Administration and Improvement Acts, and FWS's longstanding practice, I have concluded that compatibility determinations need not be undertaken for land exchanges. However, the FWS should still apply heightened standards to land exchanges. Congress's dominant focus on conservation, codification of the Refuge System's mission, and direction to manage for refuge-specific purposes demonstrate that FWS must ensure that land exchanges will fulfill the Refuge System's conservation mission and the individual refuge's purposes.



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