

**Of Two Minds: The Policy of Managing the Dual Nature of the National Wildlife
Refuge System**

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“The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.”¹

I) Introduction

The National Wildlife Refuge System (hereafter “NWRS” or “the System”) is staggeringly large, at last count encompassing more than 97 million acres.² It is by far this country’s largest collection of public lands, dwarfing better-known systems such as the National Parks and the National Forests.³ The NWRS is managed by the U.S. Fish and Wildlife Service.⁴ It is the only system of federal lands managed primarily for the benefit and protection of wildlife.⁵ The individual units that comprise the System were created by an array of mechanisms, including executive orders and legislative mandates.⁶ The policies that created and shaped the mission of the NWRS have informed and influenced the United States’ conservation policy as a whole.⁷ This paper will highlight the circumstances that surrounded the creation of the NWRS, as well as its early legislative history. This will be followed by an examination of the 1997 Improvement Act, arguably the NWRS’s first piece of true organic legislation. From there, this paper will examine the management policies and related challenges that have followed in the wake of the Improvement Act. Finally, the complex policy dynamics that have challenged the NWRS will be examined in greater detail, with the Arctic National Wildlife Refuge (ANWR) serving as an example.

II) The Formation and Evolution of the NWRS

¹ National Wildlife System Improvement Act of 1997, Pub. L. No. 105-57, § 5 (a)(4)(D), 111 Stat 1255 (1997).

² National Wildlife Refuge System Home Page, <http://www.fws.gov/refuges> (last visited Mar. 30, 2008).

³ See Robert B. Keiter, *Ecological Concepts, Legal Standards, and Public Law: An Analysis and Assessment*, 44 NAT. RESOURCES J., 943 (2004).

⁴ Kimberly J. Priestley, *The National Wildlife Refuge System: Incompatible Recreational and Economic Uses of Refuge Lands*, 1992 PAC. RIM. L. & POL’Y J. 77, 77 (1992).

⁵ *Id.*

⁶ J. Gregory Mensik & Fred L. Paveglio, *Biological Integrity, Diversity, and Environmental Health Policy and the Attainment of Refuge Purposes*, 44 NAT. RESOURCES J. 1611, 1611 (2004). The System includes 540 refuges, as well as 37 wetlands management districts. U.S. Fish & Wildlife Serv., National Wildlife Refuge Locator, at <http://refuges.fws.gov/refugeLocatorMaps/> (last visited March 24, 2008).

⁷ Robert Fischman, *The Significance of National Wildlife Refuges in the Development of U.S. Conservation Policy*, 21 J. LAND USE & ENVTL. L. 1, 1 (2005).

Although a thorough grasp of history is a necessary precursor to a nuanced understanding of almost any current policy debate, this is particularly true in the context of the NWRS, a system whose history continues to inform and drive its modern policies. The NWRS is noteworthy in that it is the only system of public lands managed for the purpose of protecting wildlife.⁸ Although its exact point of origin is a matter of some debate, scholars tend to see the birth of the NWRS in the 1903 reservation of the Pelican Island Refuge in Florida.⁹ President Theodore Roosevelt announced that Pelican Island was to be set aside as a “preserve and breeding ground for native birds.”¹⁰ The NWRS is inextricably linked to the legacy of President Roosevelt, who set aside fifty-five reserves for birds and wildlife between 1903 and 1909.¹¹

Hunting enthusiasts have always wielded a significant degree of influence in the ongoing debate regarding the proper management and priorities of the NWRS. That reality is directly traceable to the economic history of the NWRS in its nascent stages. In 1929, the Migratory Bird Treaty Act authorized the federal government to purchase lands for the purpose of creating waterfowl refuges. There is immense significance in both the precise wording and the timing of this piece of legislation.¹² With the Great Depression just beginning, the Act authorized the expenditure of funds for the acquisition of land, but actually appropriated no money for that purpose.¹³ If a system of waterfowl and other wildlife refuges was going to flourish, it would have to secure a reliable source of funding, and do so at a time when the U.S. economy was in ruins.

This goal was realized in 1934, when Congress passed the Migratory Bird Hunting Stamp Act.¹⁴ This legislation specified that all waterfowl hunters would be required to purchase a licensing stamp, and further instructed that all proceeds realized from the sale of so-called “Duck Stamps” would be dedicated to the acquisition of waterfowl refuges.¹⁵ As will soon become evident, the fact that hunters provided the funding that was the bedrock of the System has led to an enduring debt of historical gratitude that legislators and managers continue to pay in the modern era. The forthcoming discussion of the 1997 Improvement Act makes it evident that hunters still wield enormous political influence.¹⁶

The next development in the evolution of the NWRS as it exists today happened in 1962, with the passage of the Refuge Recreation Act. Natural resources scholars point

⁸ Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 *ECOLOGY L. Q.* 457, 464 (2002).

⁹ Pelican Island National Wildlife Refuge, <http://www.fws.gov/pelicanisland/history.html> (last visited Mar .23, 20008).

¹⁰ Exec. Order of March 14, 1903.

¹¹ Fischman, *supra* note 8, at 471.

¹² Migratory Bird Treaty Act, 16 U.S.C. §§ 703-11 (2007).

¹³ *Id.*

¹⁴ Duck Stamp Act, 16 U.S.C. §§ 718-718(h)(2007), *cited in* Fischman, *supra* note 8, at 474.

¹⁵ 16 U.S.C. § 715(d). *See also* Fischman, *supra* note 8, at 475 (noting that “the Duck Stamp funding mechanism remains the major source of money for purchasing expansions to the Refuge System.”).

¹⁶ *See infra* Part III.

to this piece of legislation as the beginning of the NWRS's modern era.¹⁷ The Recreation Act contained Congress' first comprehensive vision of the System. It addressed the issue of recreation within the NWRS and mandated that it should be permitted "only to the extent that is practicable and not inconsistent with...the primary objectives for which each particular area is established."¹⁸ This language, significant at the time of its passage, has become increasingly relevant; the friction between unit-level mandates and system-wide objectives was to become an enduring and problematic point of tension. The Recreation Act signaled that the purposes that informed the creation of individual refuges would be of paramount significance, and must be taken into account when any large-scale management scheme is contemplated.

The NWRS formally received its name in 1966, with the passage of the Refuge Administration Act (hereafter RAA).¹⁹ The RAA has been described as the original organic act of the NWRS. Yet, it failed to articulate a single unifying purpose or principle for the NWRS as a whole. And while the RAA contained a number of prohibitions, most notably the prohibition against "taking or possessing and animals or animal parts,"²⁰ such dictates were entirely inapplicable when express provisions of the founding documents of a refuge signaled a contrary intent. Essentially, the RAA created system-wide unity in name only, consolidating "the refuges into a system for comprehensive management only to the extent that establishment documents and amendments, which number over one thousand, allow for common ground."²¹ Within the RAA, the dual forces that were to challenge and shape NWRS policy in the future were already present: the centripetal impulse toward strong centralized organization and comprehensive policy pulling the NWRS one way, and centrifugal forces, in the form of the distinct histories and policies of individual refuges, pulling the NWRS away from a potentially unifying structure.

III) The Promise of the National Wildlife Refuge System Improvement Act of 1997

In the context of public land management, the term "organic legislation" (also commonly referred to as an "organic act") has different layers of meaning. When used in a generic sense, it signifies a document that describes the structure of an institution or an agency.²² But in another sense, organic legislation defines the character and purpose of the public lands systems they manage.²³ We look to organic legislation to do something

¹⁷ Richard J. Fink, *The National Wildlife Refuges: Theory, Practice and Prospect*, 18 HARV. ENVTL. L. REV. 1, 25 (1994). See also George C. Coggins & Michael E. Ward, *The Law of Wildlife Management on the Federal Public Lands*, 60 ORE. L. REV. 59, 99 (1981).

¹⁸ Refuge Recreation Act, Pub. L. No. 87-714, 76 Stat. 653 (1962).

¹⁹ National Wildlife Refuge System Administration Act, Pub. L. No. 89-669 § 1(a), 80 Stat. 926 (1966).

²⁰ *Id.*

²¹ Fischman, *supra* note 8, at 487.

²² Fischman, *supra* note 8, at 503.

²³ See, e.g., ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 103 (2d ed. 1987).

far more than create a management structure or delegate authority to an agency. Organic legislation has the power to create a vision, a “unifying framework” for our public land systems. The legislative history surrounding the 1997 Improvement Act acknowledged that, up to that point, the NWRS had had the benefits of organic legislation only in the generic sense.²⁴

The management scheme created by the RAA, with its strong deference to the founding principles and philosophies of individual refuges, faulted for providing insufficient guidance for the managers of individual refuges, proved to be woefully inadequate. In 1989, the General Accounting Office released a report detailing the alarming levels of incompatible uses that were occurring virtually unchecked on refuges throughout the NWRS.²⁵ The growing awareness of insufficient managerial oversight and the resulting damage to conservation efforts set the stage for a dramatic change for the NWRS; that change came in the form of the 1997 National Wildlife Refuge System Improvement Act. Congress, which had played a fairly passive role in the creation and maintenance of the NWRS up to that point, recognized both the vital importance of true “organic legislation” as well as the price the NWRS had paid up to that point because it lacked guiding principles.²⁶

In order to create legislation that was meaningful to all of the various units that comprise the NWRS, its organic legislation had to speak in relatively general terms. In formulating the Improvement Act, Congress had to confront the tension that has been and continues to be the defining feature of NWRS policy: the difficulty of binding together all the disparate refuge units in a meaningful way while simultaneously recognizing the remarkable diversity of units that comprise the NWRS.

The Improvement Act is anchored by a long-awaited mission statement for the NWRS: “The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.”²⁷

²⁴ “The articulation of a systemic purpose remains the sine qua non of organic legislation. An organic act must generate a purpose to guide land management on an array of individual units in order to create a coordinated system.” Fischman, *supra* note 8, at 510.

²⁵ United States General Accounting Office, National Wildlife Refuges: Continuing Problems with Incompatible Uses Call for Bold Action 13 (1989) (hereafter “1989 GAO Report”). “The GAO Report findings revealed a shocking level of incompatible secondary use through both statistics and qualitative information. The survey found secondary uses occurring on 92% of refuges, and harming conservation goals on 59% of refuges. Fischman, *supra* note 8, at 496.

²⁶ “Unlike the National Parks, National Forests, and [BLM] lands, the [NWRS] remains the only major Federal public lands system without a true ‘organic’ act, a basic statute providing a mission for the System, policy direction, and management standards for all units of the System.” National Wildlife Refuge System Improvement Act of 1997, H.R. Rep. No. 105-06, at 3 (1997).

²⁷ National Wildlife System Improvement Act of 1997, Pub. L. No. 105-57, § 5 (a)(4)(D), 111 Stat 1255 (1997) The Act defines conservation as the effort “to sustain, and, where

The language of the mission statement included in the Improvement Act seems unambiguous, identifying conservation as the central principle that should inform the management of individual refuges within the NWRS.²⁸ This is not particularly divisive or surprising, given that conservation, in some form or another, was more often than not the impetus behind the establishment of individual refuges within the System.²⁹ In its oversight of the NWRS, the Fish and Wildlife Service may not permit uses that are determined to be incompatible with the realization of the NWRS's central mission of conservation.³⁰ Although the idea of compatible uses was hardly new, the Improvement Act provided the Fish and Wildlife Service with a formal mechanism for determining compatibility.³¹

The Improvement Act then creates a "hierarchy of uses," containing four level of prioritization: 1) conservation, 2) wildlife-dependent recreation, 3) other recreational uses, and lastly, 4) economic activity and natural resources use and extraction.³² Although this system of prioritizing uses on refuge land seems straightforward, the Improvement Act also acknowledged the dual-nature of the system it was endeavoring to codify. Conservation clearly sits at the top of the NWRS use hierarchy, but the preexisting mandates of individual refuges can, under some circumstances, supplant conservation at the top of the priority list.³³ The central challenge of implementing the Improvement Act is a familiar one: the challenge of reconciling national systemic mandates with the individual priorities of each refuge unit.

The Improvement Act's hierarchy is a modern piece of organic legislation, but it is highly informed and influenced by the history of the NWRS. Not only does it allow its own mission statement to be supplanted on occasions where the goal of conservation conflicts with the founding principles of individual units, but the second tier of priority is occupied by wild-life dependent recreation.³⁴ Scholars have noted a direct connection between relatively high degree of priority and the historic connection between hunters and the original acquisition of refuge lands.³⁵

Economic uses are placed at the bottom of the Improvement Act's list of priorities. Additionally, economic uses are subjected to yet another requirement; in order to be regarded as compatible within the 1997 framework, an economic use must be shown to actually "contribute to the achievement of a refuge purpose or the System

appropriate, restore and enhance, healthy populations of the fish, wildlife, and plants..."
Id. at § 5(4), 111 Stat. 1252 (1997).

²⁸ See Statement by President William J. Clinton Upon Signing H.R. 1420, 33 Weekly Comp. Pres. Doc 1535 (Oct. 13, 1997).

²⁹ See, e.g., Pelican Island Reservation, Exec. Order No. 1,014 (Jan. 26, 1909), Charles M. Russell National Wildlife Refuge, Exec. Order 7,509, 3 Fed. Reg. 227 (1936).

³⁰ National Wildlife Refuge System Improvement Act of 1997 § 3(a)(1).

³¹ See 16 U.S.C. § 668dd(d)(3)(A)-(B).

³² ROBERT L. FISCHMAN, THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW 93 (2003). See also Fischman, *supra* note 8, at 527.

³³ National Wildlife Refuge System Improvement Act of 1997 § 5(a)(4)(D).

³⁴ *Id.*

³⁵ See *infra* Part IV.B.

mission.”³⁶ Robert Fischman states that “the designated uses in an organic act often are the strongest indicators of the cultural values reflected in the System.”³⁷ By deprioritizing economic uses and making an affirmative contribution a prerequisite to a capability determination, the Improvement Act clearly demonstrated a renewed commitment to manage the NWRS primarily for the benefit of wildlife.

Taken as whole, the provisions of the 1997 Improvement Act mark the emergence of a new understanding of conservation. The definition of conservation provided by the Improvement Act signaled the modern nature of its vision, stating that conservation meant “sustaining or enhancing populations using methods and procedures associated with modern scientific resource programs.”³⁸ The Improvement Act’s mission statement included what has been referred to as the “Ecological Integrity Provision,” which dictates that the Secretary of the Interior should “ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans.”³⁹ These provisions mark a clear move away from the traditional understanding of conservation as “game management,” that looked upon the preservation of wildlife and associated habitat as a means of ensuring continued human recreation. The “new conservation” contemplated in the 1997 Improvement Act recognized the inherent value of preserving wilderness and wildlife for its own sake.⁴⁰

IV) New Era, Familiar Challenges: The Modern Policy of Refuge Management

After a considerable wait, the NWRS received its “modern charter” In 1997.⁴¹ Since that time, two administrations have promulgated policies that flesh out the Improvement Act, transforming the mission statement and hierarchy of uses into working policy initiatives and on-the-ground action within individual refuges.

³⁶ Fischman, *supra* note 8, at 536, *citing* 50 C.F.R. § 29.1 (Oct. 8, 2000).

³⁷ *Id.* at 502.

³⁸ 16 U.S.C. § 668ee (4) (2006).

³⁹ 16 U.S.C. § 668dd (a)(4)(B).

⁴⁰ When it comes to creating unit-level conservation plans, the Improvement Act directs refuge managers to consult a previously completed Fish & Wildlife Service study, entitled “An Ecosystem Approach to Fish and Wildlife Conservation.” This ecosystem planning framework specified the following goals: 1) perpetuation of natural communities of plants and animals, 2) maintenance of naturally-occurring structural and genetic diversity, 3) needs of rare and ecologically important species, 4) minimization of habitat fragmentation, 5) maintenance of uncontaminated land and water, 6) continued role of natural processes (e.g., fires and flooding), and 7) control of undesirable exotic species. *Id.* Yet, even though the Improvement Act is build around modern concepts such as biodiversity, and biological integrity, most wildlife management in the United States still is oriented toward hunting. *See* Jonathon Rosen, *The Ghost Bird*, THE NEW YORKER, May 14, 2001, at 61, 64.

⁴¹ Robert L. Fischman, *From Words to Action: The Impact and Legal Status of the 2006 National Wildlife Refuge System Management Policies*, 26 STAN. ENVTL. L. J. 77, 78 (2007).

The Improvement Act’s mission of “[transforming] collections of resources into organic systems”⁴² was first fleshed out by the Clinton Administration.⁴³ The Clinton-era initiatives took the form of three policies concerning refuge planning, compatibility and an “integrity-diversity-health” initiative.⁴⁴ These policies were issued collectively in the form of a FWS service manual.⁴⁵ The first policy focused on the goal of developing a unique plan for each individual refuge unit. The second policy addressed the need for system-wide compatibility and required the FWS to ensure that, to the greatest extent possible, individual use determinations were not jeopardizing conservation efforts.⁴⁶ Lastly, the integrity-diversity-health policy provided a modern conservation strategy. This policy went into detail about how refuge managers could best confront and reverse alarming ecological trends such as habitat fragmentation and declining animal populations.⁴⁷ Overall, the Clinton policies expressed a preference for systemic unity and a modernized view of conservation and ecological protection.

In 2006, the Bush administration forwarded its own policy approach to the management of the NWRS and the implementation of the Improvement Act.⁴⁸ Two policies in particular signal a departure from the Clinton administration’s vision. In the Goals and Refuge Purposes policy, the Bush administration offered its take on the proper balance between unit level priorities and the system-wide use hierarchy. They made it plain that conflicts between unit-specific goals and system-wide mandates should be reconciled in favor of unit-specific goals. Secondly, the Wildlife Dependant Recreation policy described how the FWS should act affirmatively in order to promote recreational activities, hunting and fishing in particular, on refuge lands.

These competing visions for the future of the NWRS illustrate one of the central challenges to effective refuge management: a lack of continuity over time. Both the Clinton and Bush-era NWRS policies interpreted the Improvement Act’s conservation mandate, but subtle linguistic differences signal stark differences in priorities for and visions of the NWRS’s future.

A) Of “Paramount” Importance: The Balancing of Unit-Level Prioritization and Systemic Management

The 1997 Improvement Act’s conservation mandate appears to be unambiguous; the hierarchy of uses in the Act clearly places conservation ahead of wildlife-dependent recreation and all other uses. But this seemingly simple construction belies the underlying complexity of the Improvement Act’s mandate. The missions of individual refuges are afforded “paramount” status, leaving systemic goals and conservation

⁴² *Id.* at 79.

⁴³ *Id.* See also, U.S. Fish & Wildlife Serv., The Fish and Wildlife Service Manual, available at <http://www.fws.gov/policy/manuals> (last visited Mar. 27, 2008).

⁴⁴ Fischman, *supra* note 40, at 79.

⁴⁵ Fish & Wildlife Serv. Manual, *supra* note 43.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

standards to occupy the periphery “to the extent practicable.”⁴⁹ This language provides the basis for two starkly different policy interpretations that could potentially guide the management of the NWRS; one option is to place significance and emphasis on what binds all refuges together, or alternatively, to risk fragmentation by focusing on the individual attributes and missions of refuges.

The difference in emphasis may seem linguistically minor; both the Clinton and Bush policies clearly acknowledge the Improvement Act language that affords special status to the goals and mandates of individual refuge plans. In spite of this basic agreement about what the Improvement Act requires, the two administrations interpreted the dual-authority nature of the refuge system in starkly different ways.

The common theme running through the Clinton-era policies was an effort to realize the Improvement Act’s vision of an organic system guided by a single mission, or in the words of one scholar, an attempt at “getting individual units to answer large scale ecological challenges.”⁵⁰ The Clinton Refuge Planning Policy urged individual refuge managers to engage in unit-level comprehensive planning, but to do so in such a way that “they are not naturally interfering with or detracting” from the System’s central conservation mission.⁵¹ The focus of the Clinton policies was an attempt to make a connection between the planning and management that was taking place on individual refuges and the NWRS’s central conservation mission.

The Bush-era policies employ a decidedly different approach, focusing their interpretations around strong deference to the “paramount importance” of individual refuge plans.⁵² One critic described the Bush form of deference as relegating systemic goals to the status of “unaffordable luxury,” and as a “centrifugal interpretation of individual purposes which...undermines one of the chief rationales for the 1997 organic legislation.”⁵³ The practice of setting priorities takes on increased significance in a system so consistently lacking adequate funding. Even if direct conflict between individual refuge priorities and the systemic emphasis on conservation are not always present,⁵⁴ the fact that not all priorities will receive funding is a consistent reality.⁵⁵

⁴⁹ National Wildlife System Improvement Act of 1997, Pub. L. No. 105-57, § 5 (a)(4)(D), 111 Stat 1255 (1997).

⁵⁰ Fink, *supra* note 17, at 89.

⁵¹ Fischman, *supra* note 8, at 87.

⁵² *Id.*

⁵³ *Id.* at 80.

⁵⁴ Direct conflict between unit-level goals and systemic conservation are not the norm, but they do happen. For example, a number of refuges were created for the purpose of fulfilling needs for public grazing land. The Fort Peck Game Range is an example of this. *See* Exec. Order No. 7,509 (Dec. 11, 1936).

⁵⁵ “Austere funding is an important limiting factor in the management of the Refuge System...There remains the problem of setting priorities for refuges when the principal goals of an establishment instrument vie with the system mission for resources.” Fischman, *supra* note 31 at 164. *See also* Matthew C. Wald, *Wildlife Refuge System Faces Uneasy Future*, *N.Y. Times*, Jun. 1, 1997, at A9 (noting that the National Park Service spans 83 million acres and had a budget of \$1.3 billion dollars 1997, while the NWRS encompasses more land, but commanded a budget of only \$212 million).

The dichotomy of individual missions and systemic goals elucidated in the 1997 Improvement Act is also a distinction between the traditional and the modern. The founding documents of individual refuges often express preferences for more traditional management goals, usually hunting and fishing. Theodore Roosevelt, the driving force behind the establishment of numerous refuges, is often described as a conservationist. And if the founder of the nation's oldest refuge acted with the goal of conservation in mind, it seems as though individual refuge missions, even those established a century ago, would coexist easily with a modern mission that prioritizes conservation above all else. In order to understand why conflicts between unit level and system-wide goals do happen one must gain an understanding of how the working definition of the word "conservation" has evolved over time. "Roosevelt...was conservationist of his time who believed in the conservation of natural resources more for human use than for the sake of protecting [the character of] wilderness."⁵⁶ Many unit-level mission statements and other founding documents reflect this interpretation of conservation. In contrast, the Improvement Act prioritizes a far more modern interpretation of conservation and stewardship.⁵⁷ Modern systemic planning "revolves around a view of refuges as interconnected ecological networks, and emphasizes preservation."⁵⁸ The Bush administration's preference for individual purpose statements and local priorities over the systemic goal of conservation also signals a preference for more traditional understanding of what conservation means. By arguably granting a higher degree of deference to individual refuge plans than was expressly required by the 1997 Improvement Act, the Bush policies implicitly move away from the focuses on biodiversity and ecological integrity that were the cornerstones of both the Improvement Act itself and the Clinton-era policies interpreting its mandates.

B) A Finger on the Scales: Hunting and Fishing Policy

The fact that refuge lands are open to hunting and fishing is a unique feature of the NWRS's mission.⁵⁹ Prioritized directly behind conservation in the 1997 Improvement Act hierarchy of uses, "wildlife-dependent recreation" is defined as "hunting, fishing, wildlife observation and photography, or environmental education and interpretation."⁶⁰ The Bush-era policies did not explicitly favor or prioritize any of these six activities, but the disproportionate amount of policy consideration offered to hunting and fishing makes the administration's priorities clear.⁶¹ This continued focus on hunting

⁵⁶ H.W. BRANDS, T.R.: THE LAST ROMANTIC 623 (1998). "His many trips to the western United States in his formative years drove home the importance of preserving habitat to ensure the continued existence of game for future hunters to kill. *Id.* at 623-24.

⁵⁷ *See supra* Part III.

⁵⁸ Fischman, *supra* note 40, at 81.

⁵⁹ Robert L. Fischman, *The Significance of National Wildlife Refuges in the Development of U.S. Conservation Policy*, 21 J. LAND USE & ENVTL. L. 1, 6 (2005).

⁶⁰ 16 U.S.C. § 668ee.

⁶¹ Fischman, *supra* note 40, at 79.

and fishing, often at the expense of other forms of wildlife dependent recreation⁶² can be traced back to the long-standing historical debt owed by the NWRS to sportsmen.⁶³

An alarming development buried within the 2006 policies was the removal of all reference to ethics in the discussion surrounding the types of hunting and fishing that the NWRS would seek to promote.⁶⁴ The policies take on a decidedly quantitative tone, explicitly instructing managers that a successful wildlife-dependent recreation policy is one that maximizes hunting and fishing.⁶⁵ This quantitative approach has sparked a backlash, with opponents arguing that the success of hunting and fishing policies require a more nuanced, qualitative measurement of success.⁶⁶

A practical consideration has arguably directed the content of these recent policy statements; the Fish and Wildlife Service can only breathe life into a policy if funding is available to implement the vision. Much of the political support that produces funding for the System is tied to the lobbying efforts and influence of sportsmen's groups. This connection goes a long way toward explaining why the 2006 policies emphasize the importance of maximizing hunting and fishing even in the face of mounting evidence that hunting and fishing is having a markedly negative effect on the environmental health and biodiversity of many refuge units.⁶⁷

In its 1989 report about the epidemic on nonconforming uses occurring on NWRS lands, the General Accounting Office identified what it considered to be the biggest threat to the health and vitality of the NWRS: managers being influenced by external forces to make management decisions based on non-biological factors.⁶⁸ The historically low profile of the NWRS has made adequate funding an ongoing problem.⁶⁹ The Bush-era

⁶² "Hunting and fishing are already widespread and refuge managers typically are familiar with the issues that surround them. The number of refuge managers with educational degrees and experience in the field of sport fish and wildlife management dwarfs the number with similar backgrounds in environmental education or interpretation." *Id.* at 109.

⁶³ *See supra* Part IV.B.

⁶⁴ Final Wildlife-Dependent Recreational Uses Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 71 Fed. Reg. 36418-01 (June 26, 2006).

⁶⁵ *Id.*

⁶⁶ *See* Fischman, *supra* note 40, at 110 (arguing that the Bush polices' method of evaluating success "highlight[s] the short-sightedness of a policy that should articulate an inspiring vision for the transformative character of wildlife-dependent recreation on the very best habitat in the United States.")

⁶⁷ *See* 1989 GAO Report, *supra* note 22.

⁶⁸ "The Fish and Wildlife Service has allowed uses...believed to be harmful to satisfy local public and economic interests that sought them." *Id.* at 4.

⁶⁹ "The refuges are the under-appreciated, quiet, middle child in the family of federal public lands. They receive the fewest visitors and the smallest per acre appropriations." Fischman, *supra* note 55 at 2, citing Cam Tredennick, *The National Wildlife System Act of 1997: Defining the National Wildlife Refuge System for the Twenty-First Century*, 12 FORDHAM ENVTL. L. J. 64, 65 (2000).

recreation policies, and their advocacy for the maximization of hunting and fishing serves as a valuable reminder of the level of influence exerted by sportsmen's groups.⁷⁰

C) Economic Use and Oil Development

The pressure to open refuge lands for recreation, particularly hunting and fishing, is not the only external force influencing the management policies of the NWRS. Even though refuges are abstractly conceived of as "inviolable sanctuaries"⁷¹ for wildlife, refuge lands have long been, and continue to be used for activities that primarily benefit humans, not wildlife. Economic uses occurring on refuge lands can often be traced back to the creation of the individual refuge units.⁷² Economic uses such as grazing and mineral development were frequently permitted in an effort to build public and political consensus around the initial decision to acquire or reserve refuge lands.⁷³

Such concessions have cost refuges dearly. The example of Malheur National Wildlife Refuge in Oregon is instructive.⁷⁴ The Malheur Refuge was preserved for the benefit of waterfowl populations, but in order to create the political momentum necessary to ensure its preservation, cattle grazing has always been allowed on the Malheur Refuge.⁷⁵ The conservation of waterfowl and associated habitat has been significantly compromised by this concession; protected waterfowl populations on Malheur have declined steeply.⁷⁶ And as harmful as grazing can be, oil and gas development is even more detrimental to the realization of conservation goals: "oil and gas operations are the economic uses that most frequently cause adverse impacts on wildlife refuge

⁷⁰ The historical influence of sportsmen's groups can be seen clearly in the disconnect between the high prioritization given to hunting and fishing and the fact that "the vast majority of visits to the refuges are for wildlife observation." Fischman, *supra* note 55, at 6.

See also, Bill Hartwig, Chief, National Wildlife Refuge System, Address at the Conservation in Action Summit (May 25, 2004), *available at* http://fws.gov/refuges/ConservationSummit/Daily/hartwigSpeech_05204.pdf (last visited Mar. 30, 2008).

⁷¹ 16 U.S.C. §§ 715d, 715e (2006).

⁷² Kimberly J. Priestley, *The National Wildlife Refuge System: Incompatible Recreational and Economic Uses of Refuge Lands*, 1992 PAC. RIM. L. & POL'Y J. 77, 84 (1992).

⁷³ *Id.*

⁷⁴ Malheur National Wildlife Refuge Homepage, <http://www.fws.gov/malheur/> (last visited Mar. 24 2008).

⁷⁵ Priestley, *supra* note 67, at 85-86.

⁷⁶ In a twenty-five year period prior to the 1997 passage of the Improvement Act, Malheur has seen a 90% decrease in waterfowl production. Wendy Lee Smith, *The National Wildlife Refuge System*, NAT'L AUDUBON SOC'Y ANNUAL REPORT. 413, 419 (1986).

objectives.”⁷⁷ Both oil and gas development and the removal of mineral resources cause surface disturbances, destruction of habitat, as well as air, water and noise pollution.⁷⁸

In order to grasp the true impact of economic uses on refuge lands, it is important to look past the physical scars caused by activities like drilling, mineral extraction and grazing; it is important also take stock of the monetary resources spent on policing these activities. Time and management resources that could be spent furthering the goal conservation are siphoned away by economic uses.⁷⁹

The placement of economic uses at the bottom of the use hierarchy in the Improvement Act was a direct recognition of the detrimental effects that economic uses have had on the conservation efforts of refuge units prior to 1997.⁸⁰ The seriousness of the threat posed by economic use is underscored by the additional requirement to which such uses are subjected. More than simple compatibility is required; an affirmative contribution to conservation efforts must be established.⁸¹ Given what we know about the fragility of ecosystems and the numbers of endangered species present within the NWRS, it might appear as though the Improvement Act would in effect disallow economic uses on refuge land. Yet, this has not been the case; some economic uses continue based on the argument that they affirmatively benefit wildlife.⁸² In other cases, justification for continued economic activity has been found in the mission statements of individual refuge units, which supercede the mandates of systemic planning.⁸³

As strong as the Improvement Act’s restriction of economic uses appears to be, many legislators advocated for an even more drastic change in 1997. An alternative approach to the problem of economic use was contained in the 1997 House bill, later absorbed by the Senate bill that was to become the Improvement Act.⁸⁴ The House’s plan contemplated a far simpler use hierarchy: conservation would occupy the first tier, wildlife-dependant recreation the second. Apart from those two goals, individual refuge managers would have lacked the authority to authorize any other forms of use.⁸⁵ The rationale behind this idea is traceable to the 1989 GAO report, which concluded that managers were “sometimes willing to accept the adverse effects of some harmful activities as the price of obtaining the goodwill of the public.”⁸⁶ In light of the continued

⁷⁷ See Fink, *supra* note 17, at 65.

⁷⁸ A look at the D’Arbonne National Wildlife Refuge in Louisiana illustrates just how adversely conservation objectives can be affected by oil drilling. Dozens of oil wells have been drilled in D’Arbonne. For each well, at least an acre of vegetation was completely removed. In addition, the drilling has caused a considerable degree of salt-water contamination of both the soil and water. See 1989 GAO Report, *supra* note 22, at 53-56.

⁷⁹ See Lynn A. Greenwalt, *The National Wildlife Refuge System, In WILDLIFE AND AMERICA* 405 (Howard P. Brokaw ed. 1978).

⁸⁰ Fischman, *supra* note 31, at 98.

⁸¹ 50 C.F.R. § 25.12; 50 C.F. R. § 29.1.

⁸² See Greenwalt, *supra* note 79, at 405.

⁸³ Fischman, *supra* note 31, at 98.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ 1989 GAO report, *supra* note 22, at 25-26.

prevalence of economic uses on refuge land, there is a strong argument to be made that the House version of the use hierarchy would have been a more advisable course; perhaps removing economic use decisions from the discretion of unit-level managers would allow them to more easily resist local pressures to open refuges to economic use, too often to the detriment of conservation goals.

V) The Special Case of ANWR: Distressing Signs for the Future and Unity of the NWRS

Ten years have passed since the 1997 Improvement Act provided the NWRS with a long-awaited mission statement and use hierarchy. The very public debate that is currently raging around the Arctic National Wildlife Refuge (ANWR) provides an excellent opportunity to evaluate how much real change the Improvement Act has brought about in the decade since its adoption. An analysis of the two most contentious debates generated by ANWR indicate that while the integration of individual refuge mandates within a coherent systemic management scheme is possible, centripetal forces are threatening to undermine the promise of the Improvement Act.

It is hard to identify a “typical” refuge within the NWRS. The units vary from one another in almost every conceivable way, including origin, size, range of ecosystems, and proximity to development.⁸⁷ Even so, it is easy to see that the Arctic National Wildlife Refuge is in many ways an atypical unit within the NWRS. Its size is staggering; its 19.3 million acres makes it far and away the nations’ largest refuge.⁸⁸ Another atypical attribute of ANWR is the fact that it has routinely occupied space on the front pages of newspapers in recent years; this is highly unusual given the relative obscurity of the Refuge System.⁸⁹

A) A Uniquely Alaskan Concern: Making Space for Subsistence

The subsistence lifestyle is a foreign concept to many in the “lower 48,” but it is a daily reality and frequent conversation topic in Alaskan communities.⁹⁰ Subsistence

⁸⁷ See Advisory Comm. On Wildlife Management, Report on the National Wildlife Refuge System (1968), reprinted in U.S. Fish and Wildlife, Final Environmental Statement Operation of the National Wildlife Refuge System app. W., at W-1 (1979).

⁸⁸ U.S. Fish & Wildlife Service, Annual Report of Lands as of Sept. 30, 2004 at 1 (Apr. 2005).

⁸⁹ See, e.g., Andrew C. Revkin, *Clashing Opinions at Meeting on Alaska Drilling*, N.Y. TIMES, Jan. 10, 2001, at A15; Sam Howe Verhovek, *Refuge Inside Arctic Is Also in the Middle of U.S. Energy Debate*, N.Y. TIMES, Oct. 8, 2000, at A14. For the purposes of full disclosure, ANWR takes on a particularly heightened importance in the eyes of this author; I was raised in Fairbanks, Alaska and have been lucky enough to spend time in ANWR, both in the Brooks’ Range and on the Coastal Plain that is the area usually singled out in proposals for oil exploration and drilling.

⁹⁰ See, e.g., Dermot Cole, *Agency Proposes Keeping Bowhead Whale Hunt At Current Levels*, FAIRBANKS DAILY NEWS-MINER, Feb. 5 2008 at B1; Nick Jans, *Stealth Bills Take*

activities are defined as “the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption of food, shelter, fuel, clothing, tools, or transportation...”⁹¹ The Alaska National Interest Lands Conservation Act (ANILCA), which gave the Arctic National Wildlife Refuge its name and expanded its size to almost twenty million acres⁹² recognized the subsistence lifestyle as a matter of survival for many Native Alaskans, and gave it an appropriately high level of prioritization in the unit-level missions of many Alaskan refuges, including ANWR.⁹³ The subsistence issue provides a clear example of what can happen when the priorities of individual refuge units conflict with, or at least qualify, the hierarchy of uses set out in the 1997 Improvement Act. On Alaskan refuges like ANWR, which are governed by the mandates of ANILCA, subsistence occupies the second priority tier, moving ahead of every purpose except conservation.⁹⁴ The integration of the Alaska-specific provisions of ANILCA with the systemic dictates of the 1997 Improvement Act show that a proper balance between unit-level priorities and the overarching goal of conservation can be struck; subsistence isn’t by definition incompatible with an overarching vision of conservation; indeed, native communities have coordinated admirably with Fish and Wildlife officials in an effort to ensure the dual goals of subsistence living and wildlife preservation.⁹⁵ Subsistence provides an example of how unit-specific goals can be realized without materially harming the NWRS’s mission of conservation.

B) Centrifugal Forces at Work: ANWR as a Harbinger of Systemic Fragmentation

And yet, the unit-level requirements of ANILCA are not always so easily reconciled with the hierarchy of uses set out in the Improvement Act. Section 1002 of ANILCA sowed the first seeds of the drilling debate that has made ANWR a “superstar”

Aim at Your Rights to Vote on Game Issues, ANCHORAGE DAILY NEWS, Mar. 24, 2008 at A18.

⁹¹ 16 U.S.C. § 3113; 50 C.F.R. § 36.2.

⁹² See Sheila Weigert, *Arctic National Wildlife Refuge, In the Debate Over Drilling in the Refuge’s Coastal Plain, The Environment is the Only True Loser*, 8 ENVTL. LAW. 169, 170 (2001).

⁹³ Eric Todderud, *The Alaska Lands Act: A Delicate Balance Between Conservation and Development*, 8 PUB. L. REV. 143, 153 (1987).

⁹⁴ This decision to afford subsistence activities a higher level of priority than recreational hunting and fishing is the subject of vociferous and highly charged debate in Alaskan communities. See, Joris Naiman, *ANILCA Section 810: An Undervalued Protection For Alaskan Villagers’ Subsistence*, 7 FORDHAM ENVTL. L. J. 211 (1996) (describing the often racially charged nature of the subsistence debate).

⁹⁵ See Letter from Sally Gilbert, State of Alaska Fish and Game Coordinator, to Gene Peltola, Refuge Manager, Selawik National Wildlife Refuge (Mar. 13, 2002)(available at www.dnr.state.ak.us/opmp/anilca/word/02_03_13_SELA_newsletter.doc); See also Letter from Tony Knowles, Governor of the State of Alaska, to Jane Bacchieri, Alagnak Wild River Project Coordinator (Jul. 18, 2001) (available at www.dnr.state.ak.us/opmp/anilca/word/scoping_7_01_DGC.doc).

by making provisions for: “an analysis of the impacts of oil and gas exploration, development and production, and...authorize[s] exploratory activity within the coastal plain [of ANWR]...”⁹⁶

The physical remoteness and almost unfathomable size of ANWR leaves it extremely vulnerable to exploitation; the fact that a very small number of Americans will ever have the opportunity to see it for themselves allows people on both sides of the drilling question to offer descriptions of ANWR that support their vision for its future. For example, in a 2002 Fish and Wildlife Service report, ANWR is described as “a complete, pristine and undisturbed ecosystem hosting a rich pageant of wildlife.”⁹⁷ But to former Bush Administration Interior Secretary Gail Norton, it is “a flat white nothingness.”⁹⁸

ANWR, and particularly the coastal plain located therein,⁹⁹ is ground zero for clashing priorities when it comes to management policy because it manages to be two things at once: the location of vast deposits of hydrocarbon, and “the most productive habitat for an impressive assemblage of large mammals and waterfowl.”¹⁰⁰ The most telling thing about the debate surrounding drilling for oil on ANWR’s coastal plain is the conspicuous absence of the Improvement Act in the discussion. Even the most vocal proponents of drilling are not arguing that such a proposal could meet the Improvement Act’s strict requirements for economic uses.¹⁰¹ If an argument has been made that drilling the coastal plain would affirmatively contribute to conservation efforts in ANWR, this author was unable to discover it. The most troubling feature of the drilling debate is that it is occurring entirely outside of the framework of the Improvement Act’s hierarchy. Proponents of drilling frame the debate in terms of “amounts of allowable harm.”¹⁰² The introduction of such language signals an alarming degree of departure from the “conservation above all else” mandate forwarded by the Improvement Act. If the effectiveness or validity of organic legislation is determined by the coherence it is able to bring to a system, the nature of the ANWR drilling debate indicates that the Improvement Act may have fallen well short of its initial promise.

⁹⁶ 16 U.S.C. § 3142 (2006).

⁹⁷ Fischman, *supra* note 31, at 53.

⁹⁸ Testimony of Secretary of the Interior Gale Norton Before the House Committee on Resources On the Arctic Coastal Plain Domestic Energy Security Act of 2003. Mar. 12, 2003, *available at* <http://www.doi.gov/secretary/speeches/030312anwr.htm>. Interior Secretary Norton went on to say: “We call it the Coastal Plain because it is just that—a plain. There are no trees, there are no deepwater lakes. There are no mountains like those in the video.” *Id.*

⁹⁹ See ANWR.org, <http://www.anwr.org/docs/CloseupofareaIII.pdf> (containing a map showing the location of the coastal plain within the Arctic Refuge).

¹⁰⁰ Fischman, *supra* note 31, at 189.

¹⁰¹ See Robert Fischman, *No Refuge is an Island: Arctic Refuge Drilling Debate Misses the Big Picture*, ENVTL. NEWS & COMMENTARY, Apr. 12, 2005.

¹⁰² See Fischman, *Supra* note 104. “Drilling proponents ought to explain how petroleum development advances the conservation mission as a whole- or why the Arctic Refuge does not belong in this vital patchwork of environmental protection.” *Id.*

Another troubling aspect of the rhetoric of those who advocate drilling on ANWR's coastal plain is what *isn't* being discussed: the effect that potential resource development will have on the mission of the NWRS as a whole. One of the problems with ANWR's status as the NWRS's only "superstar refuge"¹⁰³ is that its fame encourages policymakers to view it in isolation from the rest of the System. In so doing, policymakers defy both the spirit and the substance of the 1997 Improvement Act, which emphasized viewing the System as a single network guided by a central philosophy of conservation.¹⁰⁴ The collective failure to adequately consider the impact of decisions affecting ANWR on the NWRS as a whole sets a dangerous precedent, effectively turning the clock back to a time when conservation was viewed as putting aside isolated fragments or showpieces of land.

VI) Conclusion

Former Secretary Norton's characterization of ANWR as "a flat, white nothingness" is concerning in and of itself; but to have such a comment come from the then-Secretary of the Interior signals how truly vulnerable the NWRS is at this stage in its history. The Improvement Act marked a high point in the ongoing struggle to combat the centripetal tendencies that are the historic legacy of the NWRS. Secretary Norton painted a vision of ANWR as an empty place. In reality, ANWR, including its coastal plain, is invaluable habitat for the Porcupine caribou herd, as well as a vast array of migratory birds.¹⁰⁵ By attempting to single out ANWR as an empty, insignificant place unworthy of inclusion in the traditional frameworks that protect the units of the NWRS, Secretary Norton symbolizes the centrifugal forces that still threaten to weaken the cohesive, conservation-driven vision of the NWRS that was the promise of the 1997 Improvement Act.

¹⁰³ Fischman, *supra* note 59, at 6.

¹⁰⁴ See *supra* Part IV.A.

¹⁰⁵ See Douglas S. Sandhaus, *Should Congress Open Up the Alaskan Coastal Plain To Oil Exploration? A Discussion of Options*, 2 U. BALT. J. ENVTL. L. 43 (1992).