U.S. **Department of the Interior**
Office of Inspector General

AUDIT REPORT

MISCELLANEOUS RECEIPTS, U.S. FISH AND WILDLIFE SERVICE

REPORT NO. 00-I-50
NOVEMBER 1999

United States Department of the Interior

OFFICE OF INSPECTOR GENERAL
Washington, D.C. 20240

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Memorandum

To: Assistant Secretary for Fish and Wildlife and Parks

From: Robert J. Williams
for Assistant Inspector General for Audits

Subject: Audit Report on Miscellaneous Receipts, U.S. Fish and Wildlife Service (No. 00-I-50)

This report presents the results of our audit of miscellaneous receipts collected by the U.S. Fish and Wildlife Service. We initiated this audit in response to a June 1997 memorandum from the Service's Acting Director, who requested that we review payments for the mitigation of damages caused by oil and gas exploration activities on Service lands (specifically, refuges in coastal Louisiana) and determine whether the payments were "calculated correctly and commensurate with the damage done." We expanded the objective to determine whether the Service (1) established adequate guidance and controls over the assessment, collection, and use of fees that are charged at national wildlife refuges; (2) applied consistent fees or charges that provide a reasonable return to the Government and that enable the Service to recover related administrative costs; and (3) complied with applicable Government requirements.

At 3 1 refuges contacted and 15 refuges visited, we found that the Service had set fees for the use of refuge resources at amounts that provided a reasonable return to the Government. While more than $32.8 million in fees was assessed by five refuges in Louisiana and Texas during fiscal years 1990 through 1998, we found that only $26 million was deposited into U.S. Treasury accounts, as required by law.

At the five refuges, where mineral rights generally were privately held, the Service charged fees for the mitigation of potential damages from oil and gas exploration activities, even though the Service did not have authority to assess such fees to mineral rights holders. These fees totaled $6.8 million from fiscal years 1990 through 1998 (see Appendix 1). The Service arranged for these fees to be retained for refuge use. That is, the five refuges directed exploration companies to deposit the fees into accounts maintained by a nonprofit organization (the Fish and Wildlife Foundation), to remit the fees to the Service for deposit into the refuges' contributed funds accounts, or to pay the fees to refuge suppliers or grantees.

Had the Service been authorized to assess fees for the mitigation of damages to refuges, the fees should have been deposited into U.S. Treasury accounts, in accordance with the Refuge Revenue Sharing Act and the Miscellaneous Receipts Act. Rather, having arranged for the unauthorized assessment of damage mitigation fees, the Service improperly spent fees of about $2.3 million to augment refuge operations. For example, the Service used receipts of $596,737 to finance grants to universities that conducted research on the refuges, $175,000 to pay the salaries of two refuge employees, and $33,322 to buy a vehicle. In buying these goods and services, the Service did not follow Federal procurement procedures that provide safeguards against improper and wasteful expenditures.

Service officials collected mitigation fees without authorization and retained and used the fees for refuge operations because they considered the assessment of such fees to be a standard industry practice and the receipts to be donations/gifts or the payment of claims. In our opinion, however, the payments were not donations or gifts because they were not conveyed gratuitously without consideration, nor were they payments of claims because the amount of the damages had not been determined.

Finally, we found that the Service made a deduction from the receipts it deposited into the Treasury fund for its costs to administer economic use activities on the refuges. The Refuge Revenue Sharing Act does authorize the Service to pay administrative costs from the receipts, but Service regulations require that the administrative cost deduction be based on the actual or estimated costs of administration. However, the Service had not established policies or procedures for determining its administrative costs. As such, the Service retained receipts of about $21.3 million from fiscal years 1990 through 1998 for undetermined administrative expenses. It may have overrecovered or under-recovered its administrative costs and may not have deposited the appropriate amount into the U.S. Treasury fund.

We made five recommendations to the Service to help ensure that receipts from economic activities on refuges are assessed, collected, and deposited properly, in accordance with applicable Federal laws and Service regulations. We made another recommendation that the Service develop and implement procedures and policies to ensure that cost deductions for administering economic use activities on refuges are based on a supportable and reasonable method of estimating such costs.

In the September 1, 1999, response (Appendix 4) to the draft report from the Acting Director, U.S. Fish and Wildlife Service, the Service concurred with Recommendations A.4, AS, and B. 1. Based on the response, we consider these recommendations resolved but not implemented. Accordingly, the recommendations will be referred to the Assistant Secretary for Policy, Management and Budget for tracking of implementation. The Service did not concur with Recommendations A.l, A.2, and A.3 and included with the response an August 16, 1999, memorandum from the Acting Regional Solicitor, Southeast Region, to the Service's Southeast Regional Director, in which the Solicitor discussed the legal basis for the Service's nonconcurrence with these recommendations. Based on the response, we revised Recommendation A.1 and request that the Service respond to the revised

recommendation. We urge the Service to reconsider its responses to Recommendations A.2 and A.3, which are unresolved (see Appendix 5).

In accordance with the Departmental Manual (360 DM 5.3), we are requesting a written response to this report by January 7, 2000. The response should include the information requested in Appendix 5.

Section 5(a) of the Inspector General Act (Public Law 95-542, as amended) requires the Office of Inspector General to list this report in its semiannual report to the Congress. In addition, the Office of Inspector General provides copies of audit reports to the Congress,

We appreciate the assistance of Service personnel in the conduct of our audit.

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INTRODUCTION

BACKGROUND

The U.S. Fish and Wildlife Service's mission is to conserve, protect, and enhance fish and wildlife and their habitats. To perform this mission, the Service administers the National Wildlife Refuge System, which consists of 516 national wildlife refuges, 38 wetland management districts, and 50 coordination areas, all of which encompass more than 93 million acres of land. The Service conducts a variety of land, fish and wildlife, and public use management activities on these lands. One such land management activity is the economic development of natural resources on refuge lands. Through the issuance of special use permits and other authorizations, the Service provides for the economic use of refuge resources and for the payment of fees or other compensation for resource use.

The Refuge Revenue Sharing Act of 1935 (16 U.S.C. 7 15s) and the Service's Refuge Manual (5 RM 17) provide guidance on the types of special use activities that are authorized on refuges. Specifically, the Refuge Manual (5 RM 17.3) states that "specialized use of a national wildlife refuge may be permitted only when determined to be compatible with the purpose(s) for which the refuge was established" and "consistent with refuge objectives and applicable laws and policies." Also, the Refuge Manual (5 RM 17.11) describes the policies and procedures for administering economic activity on refuges, including permittee selection procedures, fee approval authority, documentation processes, and fee disposition.

Regarding compensation for economic use activities on refuges, the Service's Refuge Manual (5 RM 17.7) requires refuges to establish the rates or fees to be charged for the use of refuge resources. The Refuge Revenue Sharing Act requires the Service to deposit the receipts from the economic use of refuge resources' into a separate U.S. Treasury fund (the National Wildlife Refuge Fund) and allows the Service to deduct from these deposits its cost of administering economic use activities on the refuges. The amounts deposited into the Treasury fund are required to be distributed as revenue-sharing payments to the counties in which the refuges are located. In addition to the Refuge Revenue Sharing Act, the Miscellaneous Receipts Act (3 1 U.S.C. 3302) provides for the deposit of receipts into the General Fund of the Treasury when there is no statutory authority for alternative disposition,

OBJECTIVE AND SCOPE

The objective of the audit was to determine whether the U.S. Fish and Wildlife Service (1) established adequate guidance and controls over the assessment, collection, and use of fees that are charged at the national wildlife refuges; (2) applied consistent fees or charges that provide a reasonable return to the Government and that enable the Service to recover related administrative costs; and (3) complied with applicable Government requirements.

[1] Receipts covered by the Act include revenues from the sale or other disposition of hay, timber, minerals, sand, gravel, and animals and from leases of public accommodations or facilities.

In particular, we reviewed damage mitigation fees paid by companies that conducted oil and gas exploration activities in response to a June 4, 1997, request from the Service's Acting Director, who asked that we determine whether the payments "were calculated correctly and commensurate with damages done." Miscellaneous receipts from economic activities on refuges that were deposited into the U.S. Treasury account and disbursed in accordance with the Refuge Revenue Sharing Act (fiscal years 1990 through 1998) are listed in Appendix 2.

In addition to damage mitigation payments for oil and gas exploration activities, we selected for review, on a judgmental basis, certain categories of miscellaneous receipts (such as grazing, farming, and timber harvesting) at geographically dispersed refuges. In total, we reviewed miscellaneous receipts totaling about $8.7 million received by 29 refuges or refuge complexes during the period of fiscal years 1990 through 1998. Because the Service did not maintain a complete, centralized database on all receipts from economic use activities (such as the number of permits issued) and did not record all receipts from economic activities conducted on refuges (as discussed in Finding A of this report), we could not determine the total number of permits issued or the total amount of the receipts at the 46 refuges or refuge complexes included in our review.

We conducted our audit at the locations listed in Appendix 3. To accomplish our objective, we reviewed laws, regulations, Department of the Interior policies, and Service regulations and accounting records pertaining to economic activities conducted on Service lands. We also interviewed Service personnel at the Service's headquarters, regional, and refuge offices; officials from the Solicitor's office; and representatives of the National Fish and Wildlife Foundation. At our request, our Office of General Counsel reviewed the laws and regulations governing the disposition and use of receipts collected by the Service for mitigation of damages from oil and gas exploration activities and issued a legal opinion on these issues. In addition, we reviewed and analyzed the accounting records of the National Fish and Wildlife Foundation, which administered some of the funds collected from parties engaged in the use of refuge resources.

The audit was made, as applicable, in accordance with the "Government Auditing Standards," issued by the Comptroller General of the United States. Accordingly, we included such tests of records and other auditing procedures that were considered necessary under the circumstances. As part of the audit, we reviewed the Service's internal controls to the extent considered necessary to accomplish our objective. We found weaknesses in the areas of assessing, depositing, and controlling miscellaneous receipts from oil and gas exploration activities and other uses of refuge resources. These weaknesses are discussed in the Findings and Recommendations section of this report. If implemented, our recommendations should improve the internal controls in these areas. We also reviewed the Departmental Report on Accountability for fiscal year 1998, which included information required by the Federal Managers' Financial Integrity Act, and the Service's annual assurance statement on management controls for fiscal year 1998. Based on these reviews, we determined that none of the reported weaknesses were directly related to the objective and scope of this audit.

PRIOR AUDIT COVERAGE

During the past 5 years, the General Accounting Office has not issued any reports on the Service's miscellaneous receipts. However, the Office of Inspector General issued the survey report "Farming Operations on National Wildlife Refuges, Region 1, U.S. Fish and Wildlife Service" (No. 94-I-408) in March 1994. The report stated that the Sacramento River National Wildlife Refuge in California was authorizing a farmer, through a cooperative agreement, to harvest and sell crops and to use the proceeds to restore Refuge lands to riparian habitat' but that this action was not in conformance with Service policies and the requirements of the Refuge Revenue Sharing Act. The report further stated that Refuge management established a cooperative farming program with a nonprofit conservation organization to use proceeds from the sale of excess crops to finance habitat restoration, which was estimated to *cost $10,000* per acre. The report contained four recommendations, of which three recommendations were considered resolved and implemented and one recommendation was considered resolved but not implemented.

*According to the report, riparian habitats are woodland regions adjacent to streams, sloughs, rivers, or lakes where animals live and plants grow.

FINDINGS AND RECOMMENDATIONS

A. MISCELLANEOUS RECEIPTS

The U.S. Fish and Wildlife Service established fees for the use of refuge resources at amounts that provided a reasonable return to the Government. During the survey phase of our audit, we reviewed the methods used by the Service to set fees for the use of refuge resources and found that, in general, at the 3 1 refuges contacted and 15 refuges visited, the Service conducted surveys to determine local comparable rates for resource use and established fees and charges based on the surveys. However, the Service did not implement adequate controls to ensure that officials at five refuges[3] in Louisiana and Texas assessed, collected, and used miscellaneous receipts from certain economic activities on the refuges in accordance with Federal laws and in compliance with Service regulations. Specifically, at the five refuges, the Service (1) assessed mineral rights holders fees for potential damages to the refuges, even though Federal laws and Service regulations did not authorize such assessments; (2) did not deposit all receipts from economic activities into U.S. Treasury funds, as required by law and the Service's Refuge Manual; and (3) did not spend the receipts in compliance with procurement regulations. Also, refuges in two regions did not fully comply with Service guidance on issuing economic use permits. Service officials at the five refuges said that they did not comply with applicable laws and regulations because they considered the assessments of fees to mineral rights holders to be "standard industry practices" and that they did not deposit the receipts into Treasury funds because they considered the receipts to be donations which could be retained for refuge use. Also, refuge officials said that the receipts were needed to compensate the refuges for the adverse effects of oil and gas exploration activities. As a result, receipts of $6.8 million were not deposited into U.S. Treasury accounts or made available to make payments to counties, as required by the Refuge Revenue Sharing Act, of which a portion of these receipts were unauthorized assessments to mineral rights holders who conducted oil and gas exploration activities on the refuges. In addition, the Service spent receipts of about $2.3 million to augment refuge operations, buying goods and services without following Federal procurement procedures that provide safeguards against improper and wasteful expenditures.

Assessing Fees to Mineral Rights Owners

We found that officials at the five refuges without authorization assessed fees to entities that held the subsurface rights to minerals on the refuges. These rights are referred to as reserved or excepted mineral rights.[4] To protect refuges from damage caused by oil and gas

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[3]The five refuges are the Sabine National Wildlife Refuge in Hackberry, Louisiana; the Southeast Louisiana Refuge Complex in Slidell, Louisiana; the Cameron Prairie National Wildlife Refuge in Bell City, Louisiana; the Lacassine National Wildlife Refuge in Lake Arthur, Louisiana; and the Santa Ana National Wildlife Refuge in Alamo, Texas.

[4]According to the Service Manual (612 FW 2.6), reserved rights are rights under which the owner of oil and gas rights, when selling the land to the United States, reserves in the deed of conveyance the right to sell, lease, explore for, and remove minerals on that land. Excepted rights are oil and gas rights that were outstanding to third parties when the United States acquired title to the lands.

exploration activities, the U.S. Fish and Wildlife Service Manual (612 FW 2.9C) requires operators to obtain a performance bond or certificate of insurance for exploration, development, and production activities associated with Federally owned mineral rights. Further, the Manual (612 FW 2.9B) and the Code of Federal Regulations (50 CFR 29) state that mineral rights owners are responsible for restoring the area in which they operate "as nearly as possible to its condition prior to commencement of operations" (50 CFR 29.32), and the Manual (612 FW 2.9D) provides for the Service to "take legal action for damages, secure an injunction, and where appropriate, seek criminal penalties" if the mineral rights holder "exceeds the boundaries of what is reasonably necessary" to recover minerals and does not restore the area. However, the Manual and the Code do not authorize the Service to assess fees for potential damages to refuges from oil and gas exploration activities, particularly if the exploration is conducted by or on behalf of mineral rights holders. Specifically, the Manual (6 12 FW 2.9D) states that while the Service is authorized to assess fees for the privilege of conducting explorations for Federally owned minerals, "the Service has no legal authority to charge an owner for the right to develop outstanding or reserved oil and gas rights." (Emphasis added.) Also, the Service's Southeast Regional Solicitor, in a February 16, 1982, memorandum to the Southeast Regional Director, stated that "there does not appear to be any legal basis for charging a fee to mineral owners, their lessees, and assigns for the use of refuge lands in their exercise and enjoyment of the mineral rights which were reserved or excepted from the title acquired by the government to the lands so long as the surface use is reasonably necessary to the enjoyment of their rights." Our General Counsel, in an August 1998 legal opinion, supported the Regional Solicitor's position, stating, "The FWS [Fish and Wildlife Service] does not have the general authority to impose charges for potential damages to the surface caused by exploration activities where private entities own the oil and gas rights in the underlying lands." Our General Counsel further stated:

> While the regulation also states that "[p]ersons conducting mineral operations on refuge areas must comply with all applicable Federal and State laws and regulations for the protection of wildlife and the administration of the area," the regulation does not establish a permitting process or fee structure for exploration activities conducted by mineral rights owners. In contrast, ... F WS [Fish and Wildlife Service] regulations do establish fees and charges for the grant of privileges on wildlife refuge areas and require that any economic use of natural resources of any wildlife refuge area must be authorized by appropriate permit. These regulations do not apply to privately held mineral interests since owners who exploit their mineral interests are exercising their rights. not privileges. [Emphasis added.]

We also found that the refuges did not maintain documentation to show mineral ownership when they recorded mitigation payments. Thus, although officials at the five refuges said that refuge minerals generally were privately held, we could not determine what portion of the receipts for the mitigation of potential damages ($6.8 million was paid from fiscal years 1990 through 1998) were attributable to payments made by or on behalf of companies that held mineral rights. For example, in December 1996, the Southeast Louisiana Refuge Complex issued a permit to a company that was authorized to conduct exploration activities

by an oil company which held subsurface rights to minerals on a portion of the Complex. Under the terms of the permit, the exploration company paid the Complex $739,200 and received authorization to explore mineral deposits on the entire Delta National Wildlife Refuge, of which about 90 percent (according to Southeast Regional officials) of the Refuge consisted of acquired lands where the subsurface mineral rights were privately held.

According to Service officials, mineral rights holders were charged fees for potential damages caused by their exploration activities because the Service was authorized to do so under a Louisiana law. However, our General Counsel found that the law, Landowner Mitigation Rights (Louisiana Revised Statute 49:214:41.E), does not authorize such assessments. Rather, the law states that surface owners may require compensatory mitigation. Also, our General Counsel said that Louisiana and other state laws provide that mineral rights owners must exercise their rights with reasonable regard for the rights of surface owners (Louisiana Revised Statute 3 1.11) and that they will be liable for damages only if they breach this duty. Service officials also said that they assessed fees for the mitigation of potential damages to the refuges because the assessments were a standard industry practice that was not prohibited by law.

Depositing Receipts

In addition to having no authorization to assess mineral rights holders fees for the mitigation of potential damages to refuges from oil and gas exploration activities, the Service also improperly retained the fees. According to our General Counsel, had the fees been authorized, the payments should have been deposited into U.S. Treasury funds, either the General Fund of the Treasury, under the Miscellaneous Receipts Act, or into the National Wildlife Refuge Fund, under the Refuge Revenue Sharing Act. At the five refuges, however, the Service retained the receipts for refuge use rather than depositing the fees into Treasury accounts. During fiscal years 1990 through 1998, Service officials at the five refuges collected receipts for economic activities on refuges totaling over $32.8 million. Of this amount, refuge officials improperly deposited receipts of $1.5 million into National Fish and Wildlife Foundation accounts, deposited receipts of $5.1 million into contributed funds accounts, and used receipts of $.2 miliion to pay vendors for goods and/or services for the refuges. The remaining receipts, totaling $26 million, were properly deposited into a Treasury account, as required by law.

National Fish and Wildlife Foundation Accounts. From July 1990 through September 1998, the Southeast Louisiana Refuge Complex[6] and the Cameron Prairie and Lacassine National Wildlife Refuges in Louisiana and the Santa Ana National Wildlife Refuge in Texas improperly arranged for the National Fish and Wildlife Foundation to establish accounts for the deposit and use of receipts collected for oil and gas exploration and other activities. As

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[5]The National Fish and Wildlife Foundation is a charitable and nonprofit corporation and is not an agency or establishment of the United States.

[6]The Southeast Louisiana Refuge Complex consists of the Atchafalaya, Big Branch Marsh, Shell Keys, Bogue Chitto, Bayou Sauvage, Breton, and Delta National Wildlife Refuges.

of September 1998, deposits to these accounts totaled $1,923,463 (see Table 1), of which $1,5 10,972 was collected for the use of refuge resources (the remaining amount, $4 12,491, was attributable to Service receipts from sources other than economic use activities).

Table 1. Revenues Deposited Into U.S. Fish and Wildlife Foundation Accounts

Refuge	Deposits*	Less Other Revenues* *	Refuge Resource Deposits
Cameron Prairie	$81,800	$60,000	$21,800
Lacassine	70,625	0	70,625
Santa Ana	114,942	0	114,942
Southeast Louisiana	1,656,096	352,491	1,306,605
Total	$1,923,463	$412,491	$1,510,972

*Deposits were made between January 1990 and September 1998.

**Other revenues (that is, revenues from sources other than economic use activities) include amounts that were deposited into U.S. Fish and Wildlife Foundation accounts which benefited the refuges. These amounts include court-ordered payments to refuges from private parties ($60,000), matching funds and interest accrued on Foundation accounts ($57,927), revenue that could not be verified as being paid for economic uses ($127,293), payments from private landowners for damages to private wetlands under an arrangement with the U.S. Army Corps of Engineers ($164,271), and payments received from a permit issued by the Corps of Engineers ($3,000).

The Project Leader at the Southeast Louisiana Refuge Complex stated that the deposit of receipts into Foundation accounts was justified because the receipts were donations or gifts and, as such, were not subject to the Act's requirement that the funds should be deposited into the Treasury fund. However, an August 1998 legal opinion from our Office of General Counsel concluded that the receipts did not meet the legal definition of donations or gifts. Specifically, the legal opinion found that the receipts, whether collected for exploration of Federally owned mineral rights or pursuant to permitting arrangements or contracts with mineral rights owners, could not be considered donations because they were not gratuitous conveyances made without consideration. Our General Counsel further stated that even if the receipts could be considered donations, the arrangement with the Foundation would violate the Department of the Interior's Donation Activity Guidelines, which forbid agencies or employees from accepting or soliciting donations from prohibited sources under a cooperative foundation program.

The Laccassine Refuge Manager stated that the Refuge did not deposit these receipts into the Treasury fund because the companies paying the fees said that the receipts should be used to pay for Refuge improvements. Refuge officials also said that expenditures made from Foundation accounts were not subject to Federal procurement regulations and that the funds in Foundation accounts were used to supplement refuge operating budgets. Service headquarters officials said that the refuges needed to retain the receipts to pay the cost of

damages caused by oil and gas exploration activities, which they described as extensive. However, the officials provided no documentation to show the amount of such damages or the cost of restoration. The officials also said that reimbursements for damages through other means was undesirable because it would entail high costs for personnel and potential litigation.

Contributed Funds Accounts. During fiscal years 1990 through 1998, the four-refuges in Louisiana improperly deposited receipts of $5,146,496 for the mitigation of potential damages caused by oil and gas exploration and other activities into contributed funds accounts reserved for refuge use, as shown in Table 2.

Table 2. Revenues Deposited Into Contributed Funds Accounts

Refuge	Deposits	Less Other Revenues*	Total Deposit
Cameron Prairie	$730,980	0	$730,980
Lacassine	883,560	0	883,560
Sabine	3,397,465	0	3,397,465
Southeast Louisiana	134.491	$21.546	112.945
Total	$5,146,496	$21,546	$5,124,950

*"Other Revenues" includes amounts that were not generated from the issuance of economic use permits. We could not determine whether deposits of $2 1,546 were paid for the economic use of refuge resources.

According to the Fish and Wildlife Service Manual (260 FW 4, "Contributed Funds"), contributed funds received "from outside sources are gratuitous conveyances or transfers of money or ownership in property (real or personal) to the Service without consideration." Because the receipts deposited into the contributed funds accounts were not "gratuitous conveyances" but rather compensation for potential damages to refuge lands, we believe that the refuges should have deposited these receipts into the Treasury funds pursuant to the provisions of the Refuge Revenue Sharing Act and/or the Miscellaneous Receipts Act. During our audit, we asked Service headquarters officials to provide information demonstrating that the Service was authorized to retain the receipts in refuge-specific accounts. However, the Service did not provide any documentation to support the authorization.

Fees Paid to Refuge Vendors and Grantees. From August 1990 to September 1997, officials at the Sabine, Cameron Prairie, and Lacassine National Wildlife Refuges improperly directed that companies pay fees of $200,038 for the mitigation of damages from oil and gas exploration activities directly to Service vendors and grantees.

Using Receipts

At the five refuges, Service officials spent receipts of $2.1 million, which had been deposited into Foundation and contributed funds accounts, to purchase a variety of goods and services for refuge operations. From Foundation accounts, for example, the Service directed that payments of $1.1 million be used for the following purposes: $75,580 for equipment purchases and repairs, $10,279 for supplies, $184,882 for a research grant, $186,950 for marine-related purchases for a Government-confiscated boat, $47,328 for aerial monitoring, $17,30 1 for computer equipment, $33,322 for a sport utility vehicle, $47,294 for Foundation administrative expenses, and $493,503 for other expenses.[7] From funds deposited into the refuges' contributed funds accounts, the Service spent funds of more than $1 million as follows: $411,855 on research grants, of which $343,765 was paid for research on alligator nesting habits; $293,230 for equipment and equipment repairs; $10,990 for construction and lumber; $40,300 for supplies; $3,439 for fuel; $2,088 for utilities; $1 1,237 for bankcard charges; $37,545 for payroll; $1,565 for travel; and $232,558[8] for other expenses. In addition, the receipts of $200,038, which were directly paid to vendors and grantees, were used for the following purposes: $113,23 8 for a research grant to a university to evaluate the impact on vegetation of a seismic project, $82,000 to a university for an animal migration study, and $4,800 for water control structures.

By using receipts in Foundation and contributed funds accounts to buy goods and services, the Service was able to make purchases without following Federal procurement procedures that require supervisory reviews and approvals of purchases, limit the amount of purchases that can be authorized by contracting offkials, and promote competitive procurement practices. Moreover, in purchasing items with the receipts, two of the refuges did not comply with procurement regulations contained in the Fish and Wildlife Service Manual (302 FW 1.9A) that limited a refuge's procurement authority to amounts of $5,000 or less. For example, offkials at the Southeast Louisiana Refuge Complex made 26 individual purchases between November 1991 and June 1998 that exceeded the Refuge's $5,000 procurement limitation. Specifically, by spending funds that should have been deposited into Treasury accounts, four refuges augmented their operating budgets without the benefit of Congressional and Service management oversight.

A Region 4 District Manager attributed the refuges' retention and use of miscellaneous receipts to their need for additional funding and insufficient Regional oversight. This official stated that refuges in the Lower Mississippi were "very underfunded" and that he believed the refuges retained and used the receipts to finance needed refuge improvements. This official also stated that refuge managers made decisions on the use of fees "without policy direction from the regional or headquarters offices." Another Regional official stated that regions differed in their interpretation of the proper disposition of fees for the use of refuge resources. However, a February 6, 1984, memorandum from the Service's Acting

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[7] Consists of 203 disbursements, the nature of which could not be identified from disbursement records.

[8] Consists of 57 disbursements, the nature of which could not be identified from disbursement records.

Associate Director to the Regional Director, referring to a Solicitor's opinion that had been issued in January 1984, stated that receipts from oil and gas exploration activities "should be deposited in accordance with the Revenue Sharing Act."

Controls Over Permit Issuance

We found that officials at the five refuges had not fully implemented Refuge Manual (5 RM 17) procedures for issuing economic use permits. Specifically, the Manual requires that (1) fee schedules be established for economic use activities; (2) fees exceeding the refuge manager's warrant authority[9] (as established by the regional office) be approved by the regional office; (3) economic use permits include the limitations and conditions under which the permit is granted, the exact fees charged, and the manner in which the fees should be paid; (4) prenumbered permits be used; and (5) the receipt and/or disposition of funds be recorded in logs.

We reviewed 123 permits and 25 other transactions issued by the five refuges between October 1989 and September 1998 and found that none of the permits were processed fully in accordance with these requirements. Although the refuges generally established fees in compliance with the Refuge Manual requirements, maintained logbooks to record the funds received or ledgers to record expenditures, and included the limitations and conditions under which the permits were granted, Service officials in Regions 2 and 4 had not established a warrant authority level for refuges in Louisiana and Texas, as required by the Manual, and neither region had issued prenumbered economic use permits to these refuges.

Recommendations

We recommend that the Director, U.S. Fish and Wildlife Service:

1. Discontinue the practice of charging fees for the mitigation of potential damages to national wildlife refuges from oil and gas exploration activities associated with privately held subsurface mineral rights.

2. Discontinue the practice of establishing accounts with the National Fish and Wildlife Foundation and of depositing into the accounts funds received for economic use activities, including fees for the mitigation of damages, on national wildlife refuges. In addition, any funds remaining in Foundation accounts should be deposited into the U.S. Treasury funds, as required by law.

3. Discontinue the practice of establishing contributed funds accounts with proceeds received for the economic use of national wildlife refuge resources, including fees for the mitigation of potential damages to refuges. In addition, any funds remaining in contributed funds accounts should be deposited into the U.S. Treasury funds, as required by law.

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[9] According to the Refuge Manual (5 RM 17.11 (B)), a warrant authority is a set amount of revenue a refuge manager is authorized to collect through the issuance of an economic use permit.

4. Establish and implement controls to ensure that miscellaneous receipts from economic activities on national wildlife refuges (including fees for the mitigation ofpotential damages to refuges) are assessed, collected, and deposited in accordance with applicable laws and Service regulations.

5. Establish procedures and processes to ensure that the regions and refuges comply with the requirements of the Refuge Manual (5 RM 17) regarding economic activities conducted on refuge lands, including the establishment of warrant authorities for permits issued by refuges, the use of prenumbered permits, and the proper disposition of refuge receipts.

U.S. Fish and Wildlife Service Response and Office of Inspector General Reply

In the September 1, 1999, response (Appendix 4) to the draft report from the Acting Director, U.S. Fish and Wildlife Service, the Service concurred with Recommendations 4 and 5 and did not concur with Recommendations 1, 2, and 3. The Service also included an August 16, 1999, memorandum from the Acting Regional Solicitor, Southeast Region, to the Service's Southeast Regional Director, in which the Solicitor discussed the legal basis for the Service's nonconcurrence with Recommendations 1, 2, and 3. Based on the response, we revised Recommendation 1 and request that the Service provide a response to the revised recommendation and that it reconsider its responses to Recommendations 2 and 3, which are unresolved (see Appendix 5).

Recommendation 1. Nonconcurrence.

U.S. Fish and Wildlife Service Response. The Service stated that it differed with our legal interpretations "regarding authorities to collect and use fees associated with oil and gas seismic activities on the refuges." The Service also said that "under State law," it had the right to restore the surface or to require operators to pay for surface damages to the refuges and that "clarification of legal authorities related to collection and use of receipts from environmental damages caused predominantly by oil and gas seismic activities on refuges is crucial to [the Service's] ability to respond to the concerns raised in the audit." The Service also said, "Since we have a difference of opinion over legal authorities, we recommend that this question be remanded to the Solicitor's Office ... for clarification."

The Service's Acting Regional Solicitor agreed that the Service "has no authority to grant a seismic permit with respect to privately owned minerals" but said that the Service has "consistently asserted" that its collections do not "constitute authorization to conduct seismic operations." The Acting Regional Solicitor said that the legal opinion provided by our General Counsel (a finding that the collections were unauthorized) was "not based upon any recitation of law or precedent" and that "there are sound legal reasons for disputing [the Office of Inspector General's] conclusion that the Service lacks authority to collect for

surface damages in the form of shot hole fees."[10] The Acting Regional Solicitor cited the United States Code (31 U.S.C. 3711 (a)), which provides for the collection and/or compromise of claims by Federal agencies, as support for its statement. The Acting Regional Solicitor noted that the Service reserves the right to "assert additional claims over and above the shot hole fees, if such fees do not cover all of the damages." The Acting Regional Solicitor also stated that the Service's fees were "nothing more than a standardized means of calculating the amount of the surface owner's claim arising from damages caused by the seismic operation."

The Acting Regional Solicitor said that if the Service were to seek correction of damages by the operator and, failing that, institute litigation for monetary damages, "an intolerable burden" would be placed on Service personnel, the Office of the Solicitor, and the Department of Justice "to try cases that could more easily be resolved administratively."

Office of Inspector General Reply. We revised the recommendation, deleting reference to the need for the identification of mineral rights ownership in permit issuance because this matter is not essential to the underlying issue of whether the Service is authorized to assess fees to holders of mineral rights. Regarding the Service's comments on its "right under State law" to seek restoration or payment for surface damages to refuges, our recommendation did not address the Service's efforts to seek restoration or its collection of payments for the actual costs of damages. Rather, the recommendation pertained to the practice of seeking payment for the "potential" cost of mitigating damages when they may not have occurred and/or when the actual cost of the damages had not been determined. Even if the Service is authorized to assess "upfront" fees, we believe that the fees are Federal receipts that should be deposited into U.S. Treasury accounts.

Regarding the Acting Regional Solicitor's comment that we did not cite "law or precedent" in finding that the Service was not authorized to assess fees, we provided the Service with a memorandum from our General Counsel which contained numerous references to Federal laws, regulations, case authority, and prior Solicitors' opinions that stated that the Service could not assess fees to mineral rights holders under a permitting process. Because the Service obtained the receipts by issuing special use permits that referred to the operators as permittees, we consider the fees to be payments made under a permitting process. Also, we cited the Fish and Wildlife Service Manual (612 FW 2.9), which provides for the issuance of a permit for mineral exploration only when the deed to the property recognizes the right to require a permit. With respect to fees for exploration, the Manual (6 12 FW 2.9D) states that the Service "has no'legal authority to charge an owner for the right to develop outstanding or reserved oil and gas rights. However, charges can be assessed if other than reasonable surface damage occurs." (Emphasis added.)

We disagree with the Acting Regional Solicitor's statement that the Service is authorized to collect fees for the mitigation of potential damages because the damages "fall within the

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[10] ""Shot hole fees" are defmed by the Acting Regional Solicitor as the exploration fees charged by the Service to seismic operators for conducting oil and gas exploration activities on Service lands.

definition of a 'claim,"' which the Service has the right to collect. According to the Code of Federal Regulations (4 CFR 101.2), to qualify as a claim, "an appropriate agency official" 'must determine the amount of funds or property that is "owed to the United States from any person, organization, or entity." We found that the fees cannot be considered as payments of claims because the Service has not determined the extent and cost of damages caused by the oil and gas exploration activities. Furthermore, Title 3 1, Section 37 11, of the United States Code, cited by the Regional Solicitor, establishes general procedures for agencies to follow in collecting claims but does not authorize the Service to receive or to collect payments for the mitigation of potential damages to the refuges.

We also disagree that the collection of fees for potential damages to refuges is a standard industry practice, as illustrated by IP Timberlands Operating Co., Ltd. v. Denmiss Corp., 657 So.2d 282 (La. Ct. App. 1995), which was cited by the Acting Regional Solicitor in the response. The Acting Regional Solicitor stated that in this case, the Court acknowledged that the collection of shot hole fees for surface damages was a "common practice." However, our General Counsel reviewed the case and found that the Court had ruled that the payment of a "shot hole fee" as compensation for damages caused by mineral rights holders under a permitting arrangement was not authorized. Although the Court recognized that the assessment of upfront shot hole fees was a method of payment used to compensate mineral lessees or mineral rights holders for the right to explore their minerals, the Court made no determination that this was an appropriate method of compensating surface owners for surface damage.

We consider seeking restoration or monetary compensation for the actual cost of damages to be the Service's only currently authorized options for remediating damages to refuges caused by mineral rights holders. Also, existing laws and regulations only authorize the Service to exercise these options when mineral rights holders conduct exploration activities in a negligent manner. If the Service finds that its current authorization does not adequately protect the Government's interests, it should seek legislative authorization to charge mineral rights holders fees for the mitigation of potential damages to the refuges.

Recommendation 2. Nonconcurrence.

U.S. Fish and Wildlife Service Response. The Service said that there is "no basis for considering this practice [the establishment of accounts with the National Fish and Wildlife Foundation] as beyond our legal authority." The Service further stated that the matter should be referred to the Office of the Solicitor.

The Acting Regional Solicitor said that although "monetary fees received directly by the Service must be deposited in the miscellaneous receipts of the Treasury," fees for the mitigation of potential damages were not revenues from the sale of minerals "or other privileges" and thus were not subject to the requirement that they should be deposited into a U.S. Treasury account. The Acting Regional Solicitor referred to shot hole fees as "a surrogate for the seismic operator's obligation to correct the damages done to refuge resources" and said that the operator could "discharge this obligation by actually correcting the damages or contracting with a third person to perform the corrective action." The Acting

Regional Solicitor said that an investigation should be undertaken "to ascertain whether the Foundation possesses the legal authority to serve as the seismic operator's agent for the correction of surface damages on the refuge." The Acting Regional Solicitor further said that the Service did not "believe that the monies collected for surface damages have to be actually spent correcting the damages done."

Office of Inspector General Reply. Under the basic principles of appropriations law, all monies received for the Government from any source must be deposited into U.S. Treasury accounts unless there is specific statutory authority for alternative disposition. Because the collections were related to oil and gas exploration activities on Federal land, we consider the fees to be Federal receipts. Since we did not locate nor did the Service provide us with any statutory authority for alternative disposition of these receipts, the monies must be deposited into Treasury accounts, as required by Federal law.

We also disagree with the Acting Regional Solicitor's statement that the Foundation acted as the "agent" for the oil and gas exploration companies. The operators did not enter into agreements with the Foundation to perform refuge restoration work on their behalf. Rather, the Foundation, under an agreement with the Service, served as the Service's agent, accepting receipts from oil and gas exploration companies and financing the refuges' operations. We also consider the deposit of Federal receipts into a non-Governmental account to be inconsistent with Federal appropriations law.

Recommendation 3. Nonconcurrence.

U.S. Fish and Wildlife Response. The Service requested that the issue of whether contributed funds accounts should be discontinued and the account funds deposited into Treasury funds be "remanded to the Office of the Solicitor for resolution." The Service also said that it was authorized to accept gifts and other contributions under the Fish and Wildlife Act (16 U.S.C. 742f(b)(1)). The Service further stated, "Unless we are advised otherwise by the Solicitor's office, we believe this provision to be adequate legal authority for acceptance of conditional contributions such as those that have been accepted for oil and gas seismic activities."

Office of Inspector General Reply. We do not consider the receipts to be donations or contributions that can be deposited into contributed funds accounts because the fees were paid by companies that conducted mineral exploration activities on the refuges and the payments were made under agreements related to these activities. According to our General Counsel, to be considered contributions, the receipts would have to represent gifts, donations, or bequests that were conveyed gratuitously without consideration (that is, without providing for the donor's economic interests). Also, Volume 2, Chapter 6, of "Principles of Federal Appropriations Law," issued by the General Accounting Office in 1992, states that the "statutory authority to accept gifts does not include fees and assessments exacted involuntarily." We found that the fees generally were associated with the issuance of special use permits, which established the terms and conditions for the conduct of oil and gas exploration activities on the refuges, and we found no indication that the payments were made voluntarily and apart from the exploration activities conducted by mineral rights

holders. Further, the payors were "prohibited sources" because their activities were monitored by the Service; thus, the Service was not allowed to solicit or accept the payments as contributions.

B. COST DEDUCTIONS

The U.S. Fish and Wildlife Service retained a portion of its miscellaneous receipts to pay administrative costs without determining or estimating the costs of processing permits and administering special use activities on refuges. The Refuge Revenue Sharing Act states that expenses incurred in connection with the administration of revenue-producing and revenue-sharing activities may be deducted from payments made to the U.S. Treasury fund. However, the Service did not collect and analyze data to determine its administrative costs and had not established policies and procedures for administrative fee determinations. As a result, the Service, which retained receipts totaling about $2 1.3 million from fiscal years 1990 through 1998 for administrative expenses, did not know whether it had over-recovered or underrecovered its costs of administering economic use activities on refuges or deposited the appropriate amount into the Treasury fund.

Administering Economic Uses

Refuge officials perform several administrative functions related to the oversight of economic use activities on the refuges. Guidance on these administrative functions is contained in the Refuge Manual (5 RM 17 and 20), which requires regional directors to provide oversight of economic use activities on the refuges to ensure that the activities are conducted in compliance with Service regulations. Specifically, the Refuge Manual requires refuge managers to develop and maintain lists of parties interested in using refuge resources, perform compatibility determinations, award permits for specialized uses, perform fee determinations, monitor specialized uses to ensure compliance with permit provisions, and nominate refuge collection officers who are responsible for controlling and managing receipts. The Refuge Manual (5 RM 17.9B) also provides guidance on the refuge manager's determination of the cost of administering specialized uses as follows:

> Costs will be determined or estimated from the best available records (additional cost accounting systems should not be developed solely for this purpose). The cost computation shall cover the proportionate share of direct and indirect costs to the refuge carrying out the activity, including but not limited to:
>
> (1) Salaries, employee leave, travel expense, rent, cost of fee collection, postage, maintenance, operation and depreciation of buildings and equipment;
> (2) A proportionate share of the refuge's overhead costs; and
> (3) The costs of law enforcement, research, establishing standards, and regulation, to the extent they are determined to be properly chargeable to the activity.

We found that the Service had no procedures or processes for estimating the cost of administering economic use activities on refuges. According to a Service headquarters official, the Service's Division of Realty directed the Service's finance center to deduct from the miscellaneous receipts deposited into the Treasury fund "about $2.4 million" per year

as compensation for the Service's cost to administer economic use activities on the refuges. The official also said that because the Service had "no formula" or "clear cut way" of determining the cost of administering refuge economic use activities, it had not imposed a requirement that the refuges should compute or estimate such costs. Also, the official said that "the amount of recovered costs had been artificially capped" to minimize the amount deducted from receipts that were deposited into the Treasury fund. Based on Service records, we determined that deductions of $2 1.3 million were made during fiscal years 1990 through 1998 from receipts subject to deposit into the Treasury fund. Because the amount of these deductions was not based on estimated or actual administrative costs, the Service may have under-recovered or overrecovered its administrative costs or not remitted the appropriate amount to the United States Treasury.

Recommendation

We recommend that the Director, U.S. Fish and Wildlife Service, develop and implement procedures and policies to ensure that cost deductions made from Refuge Revenue Sharing Act receipts are based either on the *Service's* actual cost of administering economic use activities on national wildlife refuges or on a supportable and reasonable method of estimating such costs.

U.S. Fish and Wildlife Service Response and Office of Inspector General Reply

In the September 1, 1999, response (Appendix 4) to the draft report from the Acting Director, U.S. Fish and Wildlife Service, the Service concurred with the recommendation. Based on the response, we consider the recommendation resolved but not implemented (see Appendix 5).

CLASSIFICATION OF MONETARY AMOUNTS

Finding: Area	Funds To Be Put To Better Use
Oil and gas exploration and other fees	$6.8 million

REFUGE REVENUE SHARING ACT RECEIPTS AND PAYMENTS RELATED TO ECONOMIC ACTIVITIES ON NATIONAL WILDLIFE REFUGES, FISCAL YEARS 1990 THROUGH 1998

FY	Gross Receipts	Cost Deductions	Net Receipts	Amount of Payment From Appropriation	Total Payment to Local Government*	Total Payment Due Local Government	Percent Paid
90	$5,935,083	$2,209,121	$3,725,962	$8,904,000	$12,629,962	$16,221,621	77.9
91	7,090,000	2,245,489	4,844,511	10,942,800	15,787,311	16,875,311	93.6
92	6,746,380	2,446,545	4,299,835	11,848,800	16,148,635	18,030,646	89.6
93	6,452,514	2,434,412	4,018,102	11,748,283	15,766,385	19,309,148	81.7
94	5,920,317	2,183,707	3,736,610	12,000,000	15,736,610	20,208,042	77.9
95	7,062,504	2,391,764	4,670,740	11,977,000	16,647,740	21,588,652	77.1
96	6,681,411	2,446,769	4,234,642	10,779,000	15,013,642	22,846,549	65.7
97	8,995,000	2,347,699	6,647,301	10,779,000	17,426,301	24,048,949	72.5
98	9,559,000	2.624.000	6.935.000	10.779.000	16.604.174	26,674,150	62.0
	$64.442.209	$21,329,506	$43.112.703	$99,757,883	$141,760,760	$185.803.068	76.3

*Actual payments are made after the close of the fiscal year using carryover net receipts and appropriated funds (if necessary) to compensate for any shortfall in payments to counties, as discussed in the "Background" section of this report.

SITES VISITED OR CONTACTED

Site	Location
Southeast Region	**Atlanta, Georgia**
Southeast Louisiana Refuges Complex	Slidell, Louisiana
Sabine NWR	Hackberry, Louisiana
Cameron Prairie NWR	Bell City, Louisiana
Lacassine NWR	Lake Arthur, Louisiana
Piedmont NWR	Round Oak, Georgia
Bayou Cocodrie NWR*	Ferriday, Louisiana
Catahoula NWR*	Rhinehart, Louisiana
Lake Ophelia NWR*	Marksville, Louisiana
North Louisiana NWR Complex*	Farmerville, Louisiana
Tensas River NWR*	Tallulah, Louisiana
Noxubee NWR*	Brooksville, Mississippi
Bon Secour NWR*	Gulf Shores, Alabama
Okefenokee NWR*	Folkston, Georgia
Southwest Region*	**Albuquerque, New** Mexico
Lower Rio Grande /Santa Ana NWR Complex	Alamo, Texas
Attwater Prairie Chicken NWR*	Eagle Lake, Texas
Anahuac NWR*	Anahuac, Texas
Hagerman NWR*	Sherman, Texas
Bosque del Apache NWR*	Socorro, New Mexico
Wichita Mountains NWR*	Indiahoma, Oklahoma
Salt Plains NWR*	Jet, Oklahoma
Pacific Region	**Portland, Oregon**
Malheur NWR	Princeton, Oregon
Modoc NWR	Alturas, California
Klamath Basin NWR Complex	Tulelake, California
Ridgefield NWR Complex*	Ridgefield, Washington
Sacramento NWR Complex*	Willows, California
Stillwater NWR*	Fallon, Nevada
San Francisco Bay NWR Complex*	Newark, California
Nisqually NWR Complex*	Olympia, Washington
Southeast Idaho NWR Complex*	Pocatello, Idaho
Turnbull NWR*	Cheney, Washington
Deer Flat NWR*	Nampa, Idaho
Sheldon/Hart Mountain NWR Complex*	Lakeview, Oregon

*Contacted only.

Site	Location
Rocky Mountain Region*	Denver, **Colorado**
Fort Niobrara-Valentine NWR Complex	Valentine, Nebraska
J. Clark Salyer NWR Complex	Upham, North Dakota
Charles M. Russell NWR	Lewistown, Montana
Audubon NWR	Coleharbor, North Dakota
Devils Lake WMD	Devils Lake, North Dakota
Arrowwood NWR	Pingree, North Dakota
Medicine Lake NWR Complex*	Medicine Lake. Montana
Midwest Region	Fort **Snelling, Minnesota**
Tamarac NWR*	Rochert, Minnesota
Ottawa NWR*	Oak Harbor, Ohio
Morris Wetland Management District*	Morris, Minnesota
Mingo NWR*	Puxico, Missouri
DeSoto NWR*	Missouri Valley, Iowa
Crab Orchard, NWR*	Marion, Illinois
Northeast Region*	**Hadley, Massachusetts**
Chincoteague NWR*	Chincoteague, Virginia

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

SEP - 1 1999

In Reply Refer To:
FWS/RF99-00 199

Memorandum

To: Assistant Inspector General for Audits

From: Acting Director

Subject: Draft Audit Report on Miscellaneous Receipts, U. S. Fish and Wildlife Service (E-IN-FWS-005-98-R)

We have reviewed the draft audit report and concur in the need to improve administrative processes relating to administration of miscellaneous receipts. However, we continue to differ with legal interpretations expressed in the draft report regarding authorities to collect and use fees associated with oil and gas seismic activities on refuges. The exercise of surface and subsurface rights is a correlative responsibility; that is, both owners have equal responsibility of exercising due caution with regard to the other owner's rights. Therefore, the seismic operator, if it possesses authority from the mineral owner, may use the surface in a reasonable manner to explore for minerals. At the same time, we have the right under State law to require a seismic operator to restore the surface to its original condition or to pay for damages to the surface.

Mitigation of environmental damages caused by seismic exploration on refuge lands has been administered by our field managers while acting in good faith to best carry out the mission of preserving natural resources in a complex and difficult legal and administrative arena. We expressed disagreement with several legal interpretations in a preliminary draft report both at the July 1, 1999, exit conference and in our July 9, 1999, follow-up comments. Page 18 of the IG legal opinion, which under-pins the audit report and recommendations, acknowledges that there is no clear statutory authority authorizing collection of fees nor how they are to be deposited. The Office of the Solicitor from our Southeast Region in Atlanta reviewed the draft audit report and prepared an August 16, 1999, memorandum expressing disagreement with a number of the legal conclusions in the draft report, A copy is attached for your information and use.

Clarification of legal authorities related to collection and use of receipts from environmental damages caused predominantly by oil and gas seismic activities on refuges is crucial to our ability to productively respond to the concerns raised in the audit Since the Office of the Solicitor is the official legal advisor to Interior agencies, we urge that recommendations in the final report be amended to remand all legal opinions to the Office of the Solicitor.

Our responses to the specific recommendations from the draft audit report follow:

RECOMMENDATION A.1 : Require refuge managers to determine whether refuge resource users have mineral rights before issuing permits and discontinue the practice of charging use fees or fees for the mitigation of potential damage from oil and gas exploration activities to those owners who hold mineral rights on refuge properties.

Response: We do not concur. Refuge managers are already taking into account ownership of mineral rights as permits are issued. Very few federally owned mineral rights are involved. In those cases where federally owned mineral rights are involved, mitigation payments are collected with the knowledge and concurrence of the Bureau of Land Management who acts as the agent of the government in the assessment and collection of all royalties, fees, and payments associated with federally held mineral rights.

Discontinuing collection of fees for oil and gas exploration activities would be in direct contradiction to our interpretation of legal authorities available to us to protect the resources of the National Wildlife Refuge System. Since we have a difference of opinion over legal authorities, we recommend this question be remanded to the Solicitor's Office, the official legal advisor for the Department, for clarification.

Implementing Action: The Director will request the Office of the Solicitor issue an opinion on the Service's authority to assess fees for restoration and mitigation of surface damage arising from oil and gas exploration activities.

Responsible Official: Chief, Division of Refuges

Target Date: 60 days after issuance of the final audit report.

RECOMMENDATION A. 2: Discontinue the practice of establishing accounts with the National Fish and Wildlife Foundation and of depositing into the accounts funds received for economic use activities on national wildlife refuges. In addition, any funds remaining in Foundation accounts should be deposited in the U.S. Treasury funds, as required by law.

Response: We do not concur. As was discussed at the exit conference, we believe that there is *no* basis for considering this practice as beyond our legal authority and that the National Fish and Wildlife Foundation or another third party could act in the capacity of insuring that adequate restoration of damages occurs. The August 16 comments from our Southeast Region Solicitor's Office also cover this topic and conclude that this is a viable alternative so long as there is no legal bar to the Fish and Wildlife Foundation acting in this capacity. Until we are advised otherwise, we assume that the National Fish and Wildlife Foundation is not legally precluded from carrying out this type of function as a service to protecting wildlife resources on refuges but a definitive answer is needed. As with recommendation 1, the question of the legal authorities needs to be posed to the Office of the Solicitor. We recommend that funds continue to be retained in the account until the Solicitor's legal opinion is issued.

Implementing Action: The Director will request the Office of the Solicitor issue an opinion on whether the National Fish and Wildlife Foundation or other third party entity can serve as an agent to satisfy the seismic operator's obligation to restore and mitigate damages to the surface.

Responsible Official: Chief, Division of Refuges

Target Date: 60 days after issuance of the final audit report

RECOMMENDATION A.3: Discontinue the practice of establishing contributed funds accounts with proceeds received for the economic use of national wildlife refuges resources, In addition., any funds remaining in contributed funds accounts should be deposited into the US, Treasury funds, as required by law.

Response: We do not concur. As with recommendations 1 and 2, our interpretation of legal authorities differs from the OIG and we request that the question be remanded to the Office of the Solicitor for resolution. Our authority to accept contributions is found in the Fish and Wildlife Act, 16 USC 742f(b)(1) which states: "In furtherance of the purposes of this Act, the Secretary of the Interior is authorized to accept any gifts, devises, or bequests of real and personal property, or proceeds therefrom, or interests therein for the benefit of the United States Fish and Wildlife Service, in performing its activities and services. Such acceptances may be subject to the terms of any restrictive or affirmative covenant, or condition of servitude, if such terms are deemed by the Secretary to be in accordance with law and compatible with the purpose for which acceptance is sought." It is clear from the discussions at the exit conference that there is not a common understanding of type of authorities this provides. **Unless we are** advised otherwise by the Solicitor's office, we believe this provision to be adequate legal authority for acceptance of conditional contributions such as those that have been accepted for oil and gas seismic activities.

Implementing Action: The Director will request the Office of the Solicitor issue an opinion on whether receipts from activities such as oil and gas seismic activities can be treated as conditional contributions.

Responsible Official: Chief, Division of Refuges

Target Date: 60 days after issuance of the final audit report.

RECOMMENDATION A.4: Establish and implement controls to ensure that miscellaneous receipts from economic activities on national wildlife refuges are assessed, collected, and deposited in accordance with the law and Service regulations.

Response: We agree that improved administrative processes clarifying how various receipts are to be administered would be helpful.

Implementing Action: Policy guidance will be incorporated in the effort under recommendation **A.5.**

Responsible Offkial: Chief, Division of Refuges

Target Date: Draft policy guidance will be completed 90 days after issuance of the Solicitor's opinion on recommendations 1 through 3, above. Final policy will be issued 9 months following completion of the draft.

RECOMMENDATION **A.5:** Establish procedures and processes to ensure that the regions and refuges comply with the requirements of the Refuge Manual (5 RM 17) regarding economic activities conducted on refuge lands, including the establishment of warrant authorities for permits issued by refuges, the use of prenumbered permits, and the proper disposition of refuge receipts.

Response: We concur with this recommendation.

Implementing Action: The 5RM17 manual chapter will be reviewed and updated to provide improved administrative guidance. Since major questions remain related to legal authorities, this effort cannot be effective until the issuance of legal opinions by the Solicitor on items A. 1 to A.3, above.

Responsible Official: Chief, Division of Refuges

Target Date: An updated draft manual chapter will be completed within 90 days of completion of the Solicitor's opinion and a final chapter will be issued 9 months following completion of the draft.

RECOMMENDATION **B.l:** We recommend that the Director, U.S. Fish and Wildlife Service, develop and implement procedures and policies to ensure that cost deductions made from Refuge Revenue Sharing Act receipts are based either on the Service's **actual** cost of administering economic use activities on national wildlife refuges or on a supportable and reasonable method of estimating such costs.

Response: We concur with this recommendation.

Implementing Action: Develop and implement policy guidance for Service manual.

Responsible Official: Chief, Division of Refuges

Target Date: Interim guidance will be issued within 90 days following issuance of the final audit report, and final guidance will be incorporated in the updated manual chapter to be completed under recommendation A.5.

Attachment

United States Department of the Interior

OFFICE OF THE SOLICITOR
Southeast Regional Office
Richard B. Russell Federal Building
75 Spring Street, S.W.
Atlanta, Georgia 30303

IN REPLY REFER TO:

JHH
FWS.SE.1320
G-512
MI-3

August 16, 1999

MEMORANDUM

TO: Sam D. Hamilton, Regional Director, FWS, Atlanta, GA

FROM: Kahlman R. Fallon, Acting Regional Solicitor Southeast Region

SUBJECT: Office of Inspector General Audit of Disposition of Fees Derived from Seismic Operations

On July 26 the Office of Inspector General (OIG) conducted an exit interview with the Service on the above-referenced subject. John H. Harrington of this office attended the session and provided assistance. Following that meeting, OIG prepared a Draft Audit Report, dated July 28, 1999. which has been provided to us for our review and comments.

The draft report correctly states that the Service has no authority to grant a seismic permit with respect to privately owned minerals. Under the law of Louisiana, geophysical information regarding a mineral deposit belongs to the mineral owner. The mineral owner alone may authorize the conduct of seismic exploration. If the Service were to authorize seismic exploration on minerals not belonging to the United States, a trespass upon the rights of the mineral owner would result. Layne Louisiana Co. v. Superior Oil Co., 209 La. 1014, 26 So.2d 20, 22 (1946). The Service has consistently asserted during the audit that its collect on of shot hole fees does not constitute authorization to conduct seismic operations. Indeed, tie Service insists that a seismic exploration company seeking entry upon a refuge produce documentation proving that a right to conduct the activity has been received from the mineral owner. Otherwise the seismic operator is not allowed to proceed.

For at least the past fifteen years, the Service has collected from the operator a payment for surface damages caused by the seismic activity. The payment has been reduced to a specific amount for each shot hole. A permit is issued to the operator, which sets forth stipulations for

the protection of refuge resources. The stipulations also reserve to the Service the light to recover an additional payment if the shot hole fee is inadequate to cover all of the a amages to the refuge. The Service's authority to collect shot hole fees from a seismic operator and the disposition of such receipts constitute the major focus of the OIG draft report. Those are the issues that we shall address.

The OIG Office of General Counsel (OIG/OGC) reached a conclusion in its legal opinion[1], which the draft report adopted without discussion, that:

> [t]he FWS [Fish and Wildlife Service] does not have general authority to impose charges for potential damages to the surface caused by exploration activities where private entities own the oil and gas rights in the underlying lands,

Significantly, this conclusion, which drives the entire draft report, is not based upon any recitation of law or precedent. Rather, the OIG/OGC believes that if the seismic operation results in damages to the surface, the Service first must seek correction of the damages by the seismic operator, and, failing that, institute an action for money damages in Federal District Court. This is an unrealistic demand that would place an intolerable burden on the personnel resources of the refuge to prepare litigation reports, on the Office of the Solicitor to review and forward litigation requests, and on the Department of Justice to try cases that could more easily be resolved administratively. Moreover, there are sound legal reasons for disputing the OIG/OGC conclusion that the Service lacks authority to collect for surface damages in the form of shot hole fees.

The Service has asserted that the shot hole fee is an "up front" standardized payment for damage to property owned by the United States. The Service has an obligation to:

> try to collect a claim of the United States Government for money or property arising out of the activities of. . . the agency.

31 U.S.C. 371 l(a).

Damages to refuge lands caused by seismic exploration fall within the definition of a "claim". 4 CFR 101.2 ("claim" refers to, "an amount of money ... which has been determined by an appropriate agency official to be owed to the United States from any person, organization, or

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[1] The legal opinion of the OIG/OGC on the authority of the Set-vice to assess shot hole fees for damages to refuge resources is not binding upon the Service. During the exit interview, it was requested that this issue be remanded to the Service so that an authoritative opinion from the Office of the Solicitor could be obtained. The draft report does not mention this request. We recommend that the Service's comments to the draft report include a renewal of the request to remand to the Service the legal issue of its authority.

entity, except another Federal agency."). The Service protects the interests of the United States in its permits by reserving the right to assert additional damage claims over and above the shot hole fees, if such fees do not cover all of the damages. This additional claims provision, we believe, means that the shot hole fee is a best estimate of damages-not a compromise of a claim. Consequently, the requirements of 31 U.S.C. $3711, pertaining to the compromise of claims of the United States, are not applicable in the shot hole fee'context.

The OIG draft report balked at the Service's use of the shot hole fee as a measure of "potential" damages, that have not been reduced to a sum certain. We do not view this as an impediment to the collection of such fees. It must be noted, and the draft report correctly points out, that a mineral owner in Louisiana has the right to use so much of the surface as is necessary to explore for and extract the minerals. At the conclusion of operations, the mineral owner must return the surface as near as is practicable to its original condition. If the mineral owner uses an unreasonable amount of the surface or fails to restore the surface, an action for money damages would lie against him. See, e.g., Broussard v. Waterbury, 346 So.2d 1342 (La. App 1977); East v. Pan American Petroleum Corp., 168 So.2d 426 (La. App. 1964). An "up front" shot hole fee is nothing more than a standardized means of calculating the amount of the surface owner's claim arising from damages caused by the seismic operation. The common usage of the shot hole fee in the State of Louisiana is illustrated in the case of IP Timberlands Operating Co., Ltd. v. Denmiss Corp., 657 So.2d 282 (La. App. 1995) (hereafter referred to as Denmiss).

In Denmiss the owner of 95,000 acres of timberlands entered into a lease with International Paper (IP) for the purpose of growing forest products. Denkrnann, the lessor, reserved the right to grant mineral leases, provided that the value of forest products destroyed or damaged by such mineral operations would be paid to the lessee. In the early stages of the lease, "when geophysical exploration work was completed, IP would send a forester to assess the damages to its holdings, and Denkmann would compensate IP according to the losses it had sustained." 657 So.2d at 296. This ***modus operandi*** did not last long:

> Eventually, it was agreed between Denkmann and IP that IP would seek its damages directly from the geophysical exploration companies that were performing the work, instead of from Denkmann. At this point, IP decided that the expense involved in sending foresters to assess damages was too burdensome; thereafter, it chose to be compensated for damages to its timber holdings by the shot hole method, receiving anywhere from $50.00 to $150.00 per shot hole. This decision prompted IP's practice of requiring seismic companies to appiy for a "petit" in order to conduct their seismic work.

657 So.2d at 296-97.

IP, however, overstepped its legal rights. It began to issue geophysical exploration permits as if it possessed authority to grant such rights in the minerals. Denkrnann sued for violation of his rights as the mineral owner. IP defended, asserting that the permits were no more than "damage

releases." The Court ruled in favor of Denkmann and upheld a verdict in his favor in excess of $2 million. It found significance in IP's use of a permit which required the payment of shot hole fees, "a method of payment normally used to compensate mineral lessees or mineral owners for the right to explore their minerals." 657 So.2d at 298. The Court stated in a footnote:

> Although we acknowledge the existence of testimony that shot hole fees were often used as a quick measure for surface damages, this fact does not change our opinion as to the implications of this type of payment when it is encompassed in a permit for seismic operation.

657 So.2d at 298 fn. 26 (emphasis added).

This footnote makes it exceedingly clear that IP's difficulties arose, not from the collection of shot hole fees for surface damages which the *Court* acknowledged were common practice, but from the collection of fees for the purpose of permitting seismic exploration of the minerals that did not belong to it.

The Service is extremely careful, as noted above, not to fail into the trap in which IP found itself. The permits issued by the Service are not the authorizing type of permits granted by IP. The Service's permits are concerned with protection of refuge resources-not with the granting of exploration rights. Hence, the Denmiss case is a very clear indicator that the Service's practice of requiring shot hole fees only for surface damages is consistent with local industry practices. If the Service must look to state laws for the measure of its rights as a surface owner, see Caire v. Fulton, Civ. No. 84-3184 (W.D. La. 1986), then it ought to be able to look to state law, as interpreted by the oil and gas community and the Courts of the State, in seeking its remedy against seismic exploration companies.

The next issue that the draft report takes up is the disposition of funds received in the past in the form of shot hole fees. We agree with the conclusion that the monetary fees received directly by; the Service must be deposited in the miscellaneous receipts of the Treasury. This is required by 31 U.S.C. § 3302(b). *We* disagree with the draft report's suggestion that the shot hole fees may be deposited in the refuge revenue sharing account. These fees do not constitute revenues from the "sale" of minerals or other privileges. 16 U.S.C. § 715s. As discussed above, the Service does not possess, and has not asserted, the authority to grant rights with respect to privately owned minerals.

One method of disposition of funds that we believe should be given further consideration, but which the draft report summarily dismissed, is the payment of shot hole fees by the seismic operator to the Fish and Wildlife Foundation, instead of directly to the Service. If shot *hole* fees are a surrogate for the seismic operator's obligation to correct the damages done to refuge resources, it is clear that the operator could discharge this obligation by actually correcting the damages or contracting with a third person to perform the corrective action. An investigation should be undertaken to ascertain whether the Foundation possesses the legal authority to serve

as the seismic operator's *agent* for the correction of surface damages on the refuge, If there is no legal bar to the Foundation acting in this capacity, the seismic operator, the Foundation, and the Service ought to be able to enter into an agreement for the payment and expenditure of shot hole fees to correct surface damages caused by the seismic operation.

As in the analogous case of natural resource damages, 43 CFR Part 11, we do not believe that the monies collected for surface damages have to be actually spent correcting the damages done*. In the case of natural resource damages, the assessment may be expended on a range of alternatives including the "restoration, rehabilitation, replacement, and/or acquisition of the equivalent of the injured natural resources and the services they provide." 43 CFR 11.82(a). While these natural resource damage regulations are not applicable to seismic exploration, the remedial concepts employed in those regulations could be adapted to the case of damage caused by seismic exploration. Imposition of appropriate administrative controls on this process should relieve any fear that use of the Foundation would result in fiscal abuses.

In conclusion, while the draft report had many important recommendations to make regarding the Service's handling of shot hole fees, it is our opinion that it proceeded from an incorrect basis that the Service does not possess authority to collect such fees. We believe that assessment of shot hole fees is clearly within the authority of the Service to protect Federally owned lands and collect for the damage to such lands. Moreover, the method utilized by the Service to collect for surface damages is one that is entrenched in the culture of the Louisiana oil and gas industry. Shot hole fees are well received by the industry, acknowledged by State courts, convenient to assess, and protective of the United States interests.

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[2] A three party agreement among the seismic operator, Foundation, and the Service for the purpose of correcting damages suffered by the refuge would not be constrained by the limitations, for example, set forth in Section 305 of the Federal Land Policy and Management Act, 43 U.S.C. § 1735. That provision authorizes the Bureau of Land Management to assess monetary damages for injuries to the public lands, but it must expend such funds only for the particular rehabilitation work necessitated by the action which led *to the* receipt of the funds. Excess monies must be refunded to the party from whom they were collected or deposited in the miscellaneous receipts of the Treasury. Opinion of the Comptroller General, B-204874 (July 28, 1982). The limitations contained in that provision are not applicable to the Service or the Foundation. Therefore, if shot hole fees may be directed to the Foundation, the parties to any agreement for the expenditure of such fees are free, within the bounds of reason, to define the types of creative remedial action that will be funded.

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Further inquiries regarding this matter may be directed to John H. Harrington at (414) 331-6342.

Kahlman R. Fallon

Kahlman R. Fallon
Acting Regional Solicitor

STATUS OF AUDIT REPORT RECOMMENDATIONS

Finding/Recommendation Reference	Status	Actions Required
A.1	Unresolved.	Provide a response to the revised recommendation. If concurrence is indicated, provide an action plan that includes a target date and the title of the official responsible for implementation. If nonconcurrence is indicated, provide reasons for the nonconcurrence.
A. 2 and A.3	Unresolved.	Reconsider the recommendations, and provide action plans that include target dates and titles of the officials responsible for implementation.
A.4, AS, and B.l	Resolved; not implemented.	No further response to the Office of Inspector General is required. The recommendations will be referred to the Assistant Secretary for Policy, Management and Budget for tracking of implementation.

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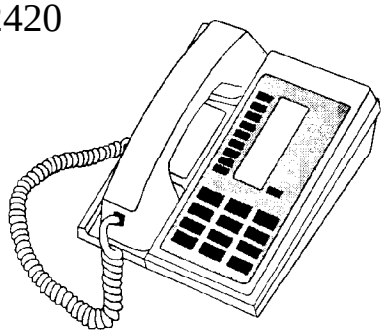
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