ALAN WILSON
ATTORNEY GENERAL

April 27, 2015

Mayor Rutledge B. Leland, III
Town of McClellanville
405 Pinckney Street
McClellanville, SC 29458

Dear Mayor Leland:

This Office received your request for an opinion regarding public access to the navigable waters which flow through Cape Romain National Wildlife Refuge. You explain that on February 21, 1991, the State of South Carolina, through the Budget and Control Board, executed a ninety-nine year lease in favor of the United States Fish and Wildlife Service. The lease granted all of the State's interest "in all marsh lands, sand banks, shores, edges, lands uncovered by water at low tide, and all waterbottoms and waters which are included in the boundaries of the Cape Romain National Wildlife Refuge, or which are contiguous and adjacent to the easterly boundary and fronting on the Atlantic Ocean to mean low tide. . ." Notwithstanding that language, the lease further provides that the lease is "[s]ubject to existing easements for. . .public highways and roads. . .And also subject to the following: [t]he right of the State of South Carolina to authorize the taking of shellfish, finfish, and other salt water species within the refuge boundary. . . ."

You state that within the last year a new Refuge Manager has begun asserting authority under the lease to prohibit kayak tour guides from conducting tours through the refuge even though the kayaks remain on public waters only and do not exit onto refuge property and although recreational boaters and commercial fishermen are allowed unfettered access. You tell our Office that this is of serious concern to the Town of McClellanville because the town has been deliberately moving to grow eco-tourism in the area. When a kayak service brings clients to McClellanville in order to paddle through Cape Romain, the tour patrons often eat in the town's restaurants, rent its houses, and buy gifts in its shops.

You are asking if the Cape Romain National Wildlife Refuge may legally bar access by the public to the navigable waters which flow through the refuge boundaries under the terms of the lease consistently with the Constitution and laws of South Carolina.

You need to be aware that this Office can not investigate or make factual determinations. See Op. S.C. Att'y Gen., 2013 WL 3479877 (June 26, 2013) ("[T]his Office does not have the authority of a court or other fact-finding body, and therefore, it is unable to adjudicate or investigate factual questions"); see also Op. S.C. Att'y Gen., 2013 WL 3479876 (June 26, 2013) (explaining this Office does not investigate facts, but instead only issues legal opinions). See Op. S.C. Att'y Gen., 2015 WL1593296 (March 26, 2015). We can provide you with the law, however.

LAW/ANALYSIS:

The State Legislature has passed a law granting Cape Romain to the United States and giving the United States jurisdiction over it subject to certain restrictions. The law provides:

> Subject to the rights of the South Carolina Department of Natural Resources or its successors to lease and subject to the rights of the people of the State to gather oysters and other shellfish on any of the lands hereinafter described, there has been granted to the United States all of the marshlands, sand banks, shores, edges and lands uncovered by water at low tide which are included within the outside boundaries of the premises hereinafter described or which are contiguous and adjacent to such boundaries, to wit. . .
>
> > (4) All that tract of land known as Cape Romain and Bird Bank containing nine hundred and seventy (970) acres, situated in Charleston County, being the premises granted to John Lee, William Lee and Charles E. Lee, by grant recorded in grant book O No. 6, page 486, in the office of the Secretary of State aforesaid and subsequently conveyed to H. P. Jackson by deed recorded in book Y-20, page 215, in the R.M.C. office aforesaid, a plat of which is recorded in plat book B, page 131, in the R.M.C. office aforesaid. . .
>
> *Jurisdiction; migratory bird refuge.*- Subject to the rights of the South Carolina Department of Natural Resources as provided above the United States shall have exclusive jurisdiction on the lands so granted for the purpose of carrying out the provisions of the act of Congress approved February 18, 1929, known as the "Migratory Bird Conservation Act" and all acts hereafter amendatory thereof, and for the purpose of the preservation and conservation of all migratory birds which are or hereafter may be under the jurisdiction of the United States. . .
>
> *Reverter when no longer used for game refuge.*- The lands so granted shall revert to the State in the event the United States shall cease to use said lands for the purpose of a migratory bird refuge. . . .

S.C. Code Ann. § 3-3-210 (1976 Code, as amended).

The Legislature has conveyed jurisdiction over the lands of the refuge to the United States and the lease grants the State's interest in "all waterbottoms and waters which are included in the boundaries of the Cape Romain National Wildlife Refuge" to the United States. We accordingly believe that federal law is applicable to your question regarding access to Cape Romain.

In Fund for Animals v. Hall, 777 F.Supp.2d 92 (D.D.C. 2011), the court provides an excellent overview of national wildlife refuges:

> The National Wildlife Refuge System consists of over 540 wildlife refuges spanning more than 95 million acres, with locations in all fifty states. [Doc. 111 at 4.] The Refuge System is home to more than 700 species of birds and 220 species of mammals, and provides habitat for more than 250 threatened and endangered species. Individual refuges vary greatly in size. The Yukon Delta National Wildlife Refuge in southwest Alaska, for example, encompasses more than 19 million acres; the Cedar Point National Wildlife Refuge along Lake Erie in Ohio consists of 2500 acres.

The court in United States v. Rinaudo, 684 F.Supp.2d 675 (E.D.N.C. 2010) explains the purpose of wildlife refuges and their recreational use as follows:

> Congress established the National Wildlife Refuge System to "administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." 16 U.S.C. § 668dd(a)(2). Congress has determined that recreation is an appropriate use of the System and has thus directed that compatible recreational activities "should be facilitated, subject to such restrictions or regulations as may be necessary, reasonable, and appropriate." 16 U.S.C. § 668dd(a)(3)(d).

Although recreation is an important use of a wildlife refuge, it is not the primary focus. In Fund for Animals v. Hall, supra, the court stated:

> Since the Refuge System's inception, Congress has gradually increased recreational activities in the refuges, including sport hunting. In 1997, for example, Congress identified six "wildlife-dependent recreational activities" that are "priority general public use[s]." 16 U.S.C. § 668dd(a)(3)(C). These priority uses are hunting, fishing, wildlife observation, wildlife photography, environmental education, and environmental interpretation. 16 U.S.C. § 668dd(a)(3)(A). At the same time, however, Congress has attempted to mitigate the effects of increased recreational use of the refuges. Thus, the Fish and Wildlife Service[1] must still "provid[e] for the conservation of fish, wildlife, plants, and their habitats," "monitor[ ] the status and trends of fish, wildlife, and plants in each refuge," and "ensure[ ] the biological

[1] National wildlife refuges must be administered by the Secretary of the Interior through the United States Fish and Wildlife Service. See 16 U.S.C.A. § 668dd(a)(1).

> integrity, diversity, and environmental health of the system." 16 U.S.C. § 668dd(a)(3)-(4).

This is more fully explained by 16 U.S.C.A. § 460k, which authorizes the Secretary of the Interior within the National Wildlife Refuge System to "administer such areas or parts thereof for public recreation when in his judgment public recreation can be an appropriate incidental or secondary use" and authorizes him "to curtail public recreation use generally or certain types of public recreation use within individual areas or in portions thereof whenever he considers such action to be necessary...."

A treatise shows the relationship between preservation of wildlife and recreation in a wildlife refuge:

> [p]reservation of wildlife is only one aspect of resource preservation in the national park system, but it is the raison d'etre of the national wildlife refuge system. Congress in 1966 directed the Fish and Wildlife Service to subordinate all human uses of the refuges to the welfare of resident and migratory wildlife populations.[2] In the 1997 National Wildlife Refuge System Improvement Act (NWRSIA), Congress reinforced that priority by making wildlife conservation the "mission" of the entire System.[3]

3 Pub. Nat. Resources L. § 24:1 (2nd ed.) Another treatise explains:

> In administering a refuge within the National Wildlife Refuge System, the Fish and Wildlife Service is required to control and direct the refuge by regulating human access in order to conserve the entire spectrum of wildlife found within the refuge.

38 C.J.S. Game § 39.

National wildlife refuges are closed to public use until the Fish and Wildlife Service permits use. The National Wildlife Refuge System Improvement Act ("NWRSIA") provides:

> No person shall. . .in any area of the [National Wildlife Refuge] System. . .enter, use, or otherwise occupy any such area for any purpose; unless such activities are performed by persons authorized to manage such area, or unless such activities are permitted either under subsection (d) of this section[4] or by express provision of the law, proclamation, Executive

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[2] Amended by the National Wildlife Refuge System Improvement Act, 16 U.S.C.A. §§ 668dd to 668ee.

[3] See 16 U.S.C.A. §§ 668dd to 668ee.

[4] 16 U.S.C.A. § 668dd(d) states:

> (d) Use of areas; administration of migratory bird sanctuaries as game taking areas; rights of way, easements, and reservations; payment of fair market value
>
> (1) The Secretary is authorized, under such regulations as he may prescribe, to--

> order, or public land order establishing the area, or amendment thereof. . . .

16 U.S.C.A. § 668dd(c).

Section 668dd(c) has been implemented by the Fish and Wildlife Service through regulation (50 C.F.R. §§ 27.11 – 97 (2002)). Pursuant to 50 CFR § 27.97, "... conducting a commercial enterprise on any national wildlife refuge can only be authorized by special permit" and under 50 CFR § 25.41, the refuge manager of a national wildlife refuge issues permits unless the regulations provide otherwise. In McGrail & Rowley v. Babbitt, 986 F. Supp. 1386 (S.D.Fla. 1997), the court determined the following concerning commercial enterprises:

> The regulations do not define "commercial enterprise," but the agency's own interpretation of the term can be found in the FWS [Fish and Wildlife Service] Refuge Manual.[5] The Manual, which is published neither in the Federal Register nor the Code of Federal Regulations, sets forth FWS policy and guidelines for the operation of federal wildlife refuges. The Manual provides that "[i]f a profit is realized" from certain activities, including tours and guide services, then the activities are considered to be commercial.

> (A) permit the use of any area within the System for any purpose, including but not limited to hunting, fishing, public recreation and accommodations, and access whenever he determines that such uses are compatible with the major purposes for which such areas were established. . .
>
> (3)(A)(i) Except as provided in clause (iv), the Secretary shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use and that the use is not inconsistent with public safety. The Secretary may make the determinations referred to in this paragraph for a refuge concurrently with development of a conservation plan under subsection (e) of this section. . .
>
> (iii) Wildlife-dependent recreational uses may be authorized on a refuge when they are compatible and not inconsistent with public safety. Except for consideration of consistency with State laws and regulations as provided for in subsection (m) of this section, no other determinations or findings are required to be made by the refuge official under this Act or the Refuge Recreation Act for wildlife-dependent recreation to occur.
>
> (iv) Compatibility determinations in existence on October 9, 1997, shall remain in effect until and unless modified.

[5] The Court in Babbitt determined that the FWS Refuge Manual was "generally advisory and policy-oriented" and concluded that it provided guidance for refuge managers but was not binding on FWS.

The court in Babbitt determined that the Plaintiff's transporting members of the public to a refuge island by catamaran for a fee fell within the Fish and Wildlife Service's definition of a commercial activity and held that the Fish and Wildlife Service had the authority to require a special use permit for that activity pursuant to 50 C.F.R. § 27.97.

A primary concern of the Fish and Wildlife Service as well as Congress is that all recreational use of a wildlife refuge be "compatible" with the refuge.

> The NWRSIA [National Wildlife Refuge System Improvement Act] authorizes the FWS [Fish and Wildlife Service], "under such regulations as [the Secretary of the Interior] may prescribe, to permit the use of any area within the System for any purpose ... whenever [the Secretary of the Interior] determines that such uses are compatible with the major purposes for which such areas were established." *Id.* § 668dd(d)(1)(A). The Act defines the phrase "compatible use" as "a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director [of the FWS], will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge." *Id.* § 668ee(1).

Wyoming v. United States, 279 F.3d 1214 (10th Cir. 2002). The court in Niobrara River Ranch, L.L.C. v. Huber, 277 F.Supp.2d 1020 (D.Neb. 2003); *aff'd* 373 F.3d 881 (8th Cir. 2004), explains how a compatible use determination is made. It provides:

> The Refuge Act [NWRSIA] describes "compatible use" to include such "wildlife dependent recreational uses" as "will not materially interfere with or detract from the fulfillment of ... the purposes of the refuge." 16 U.S.C. § 668ee(1). This "compatible use" determination must be made by "sound professional judgment," *id.*, and that term is defined, in part, to mean a conclusion "that is consistent with principles of sound fish and wildlife management and administration, [and] available science and resources...." 16 U.S.C. § 668ee(3). The terms "wildlife-dependent recreation" and "wildlife dependent recreational use" are defined to mean a "use of a refuge involving hunting, fishing, wildlife observation and photography, or environmental interpretation." 16 U.S.C. 668ee(2).

In our opinion, the Fish and Wildlife Service has the power to limit the kayak tours in Cape Romain. The kayak tours you describe in your letter are most likely commercial enterprises which require a special permit from the Fish Wildlife Service if they are charging fees for their tours. Since protection and preservation of wildlife is the primary purpose of a national wildlife refuge, the refuge manager has the ability to deny a permit if in his professional judgment, the kayaking tours are not compatible with Cape Romain.

As stated above, our Office can not answer questions of fact. We do not know why the Cape Romain refuge manager is prohibiting the kayak tours. However, similar reasoning to Niobrara River Ranch, L.L.C. v. Huber, supra, may apply. In Huber, the court held that it was entirely reasonable for the Fish

and Wildlife Service to deny a license to a commercial outfitter of kayaks, canoes, and tubes because of rapidly increasing canoe, kayak, and tube usage in a national wildlife refuge and its potential for the devastation of nesting birds. As stated in Op. S.C. Atty. Gen., November 27, 1989, Op. No. 89-137 (1989 WL 406226), though, "the role of this Office is to opine on legal issues rather than to comment on policy matters."

You should know that the refuge manager does not have unlimited discretion when issuing permits. Congress directed the Secretary of the Interior, and thus the Fish and Wildlife Service, to develop a comprehensive conservation plan for each national wildlife refuge[6] and the refuges must be managed "in a manner consistent with the plan." See 16 U.S.C.A. §§ 668dd(e)(1)(A); 668dd(e)(1)(E). The Fish and Wildlife Service is required to identify and describe "opportunities for compatible wildlife-dependent recreational uses." 16 U.S.C. § 668dd(e)(2)(F). The statute also specifies that "compatible wildlife-dependent recreational uses ... shall receive priority consideration in refuge planning and management...." 16 U.S.C. § 668dd(a)(3)(C). See Niobrara River Ranch, L.L.C. v. Huber, supra.

Furthermore, courts have the authority to review decisions of the Fish and Wildlife Service. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C.A. § 702. It is provided by statute that:

> The reviewing court shall. . .
>
> > (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
> >
> > > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> > >
> > > (B) contrary to constitutional right, power, privilege, or immunity;

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[6] The court in Niobrara River Ranch, L.L.C. v. Huber, supra, explained why each national wildlife refuge was required to develop its own conservation plan:

> As the word "comprehensive" suggests, 16 U.S.C. § 668dd(e), requiring the development and implementation of a "comprehensive conservation plan," of necessity also requires the FWS to consider and balance a wide variety of competing interests such as the overall purposes of the refuge, biological and botanical assets, archaeological and cultural values, and compatible wildlife-dependent recreational uses. 16 U.S.C. § 668dd(e)(2)(A)-(F). The statute cannot be read to provide an answer about how these interests must ultimately be harmonized at a given refuge, and, indeed, that is why the FWS was required by Congress to prepare a plan for each refuge to determine how each refuge shall be used.

> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C.A. § 706.

The Court in Huber clarifies:

> The deference owed administrative agencies in cases like this is "substantial." . . .However, "deference" does not mean "rubber stamp." Among other things, even when *Chevron*[7] deference is due, a court should ask whether the agency: (1) has relied on factors which Congress has not intended it to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation for its decision that runs counter to the evidence before the agency; or (4) has rendered a decision that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Id.* at 894 (citation and quotation omitted).

Niobrara River Ranch, L.L.C. v. Huber, supra.

Court action may be a possibility if the refuge manager does not manage the wildlife refuge in accordance with the comprehensive conservation plan.[8] Although a court owes deference to agency decisions, it will set aside any agency action which it finds to be arbitrary, capricious, or an abuse of discretion.

The lease provides that it is subject to "existing easements for. . .public highways and roads. . . ." You question whether this provision gives the public access to the waters flowing through Cape Romain. Since the statute provides that the jurisdiction of the United States is "[s]ubject to the rights of the South

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[7] *Chevron U.S.A. Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (" 'The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress' " and administrative agencies will thus be afforded wide discretion when filling those gaps).

[8] We do not have a copy of the comprehensive conservation plan.

Carolina Department of Natural Resources or its successors to lease. . . any of the lands hereinafter described," it is a valid question but we can not address this issue.

A "highway" is defined as "broadly, any main route on land, on water, or in the air." Black's Law Dictionary 747 (8th ed. 2004). A "road" is defined as:

> in maritime law, an open passage of the sea that receives its denomination commonly from some part adjacent, which, though it lie out at sea, yet in respect of the situation of the land adjacent, and the depth and wideness of the place, is a safe place for the common riding or anchoring of ships.

Black's Law Dictionary 1328 (6th ed. 1990).

Our Office can not determine if the kayak tours are operating on a road or highway. In Op. S.C. Atty. Gen., October 27, 2014 (2014 WL 5796033) (quoting Op. S.C. Atty. Gen., June 25, 2013 (2013 WL 3362068, 10, n. 5-10), we stated:

> we cannot address questions that involve determinations of fact;. . . ask for an interpretation of provisions of a contract[9] that this Office was not involved in the negotiation thereof; or, that involve contractual disputes, questions of liability under a contract, or other matters which the parties involved should consult with their own attorney or private counsel regarding and, if necessary, should be resolved by a court.

CONCLUSION

In conclusion, it is our opinion that the United States Fish and Wildlife Service has the power to limit public access to the land and water of Cape Romain to protect the wildlife living there. Of course, any such decision would be subject to judicial review.

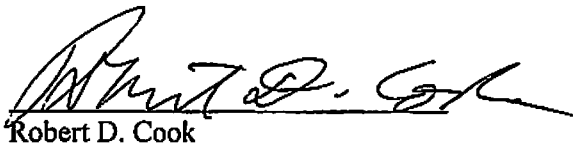
Sincerely,

Elinor V. Lister

Elinor V. Lister
Assistant Attorney General

[9] "In construing leases, South Carolina courts have applied the rules of construction relating to contracts." 14 S.C. Jur. Landlord and Tenant § 10.

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General