ARTICLES

DON'T FENCE ME IN—APPLICATION OF THE UNLAWFUL INCLOSURES OF PUBLIC LANDS ACT TO BENEFIT WILDLIFE

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The Bureau of Land Management and the Forest Service manage millions of acres of public land across the United States. Most of this land serves more than one purpose—grazing, mining, recreation, timber, wildlife—and thus must remain available for these uses. Historically, the Unlawful Inclosures Act (UIA) preserved access for ranchers and homesteaders. More recently, the UIA has also protected access for wildlife whose movements are impeded by fences or other illegal obstructions. This article argues that such protection should be extended to the Sonoran pronghorn antelope in the southwestern United States.

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I. INTRODUCTION

A recent prominent conservation issue in the southwest United States involves the endangered Sonoran pronghorn antelope and the legal and social dispute over the removal and/or modification of barbed wire fences which restrict the range of the pronghorn and hinder their access to food and habitat. These fences are located on public lands which border the Cabeza Prieta National Wildlife Refuge, Organ Pipe Cactus National Monument, and the Tohono O'Odham Nation in the Sonoran Desert of southwest Arizona. This article describes the plight of the Sonoran pronghorn, its heavily impacted habitat, and the efforts of Defenders of Wildlife (Defenders), a national non-profit environmental group, to save this species. The article explains the Federal Unlawful Inclosures Act of 1885 (UIA)[1] and how it was historically applied. Part III of the article considers additional applications of the UIA as a wildlife conservation and recovery strategy. Part IV looks at how Defenders applied the UIA to the case of the Sonoran pronghorn.

Defenders is concerned for the fate of the Sonoran pronghorn antelope (*Antilocapra americana sonoriensis*), the fastest land mammal in the Americas.[2] Although the pronghorn has been listed as an endangered species since March 11, 1967,[3] current population estimates indicate the population in the United States remains as low as one-hundred-thirty animals and shows no signs of stable growth.[4] The prospects are already suspect for long-term survival of a subspecies with so few individual pronghorn. Even more worrisome, the Sonoran pronghorn faces an increased risk of local extirpation because there are only two isolated populations: one small population within the United States and the other in Sonora, Mexico.[5] There are no recent population counts of the Mexican population, but federal wildlife officials estimate the population between two hundred and three hundred pronghorn.[6] Problematically, there is no interchange between the two populations. In the past few years, "Sonoran pronghorn numbers have been greatly reduced in a very short period of time and a combination of factors could act in a way to reduce the numbers further to a point where the subspecies cannot recover."[7] For a large land mammal, low numbers indicate an unsustainably small population

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1 Ch. 149, 23 Stat. 321 (1885) (codified as 43 U.S.C. §§ 1061-1066 (1994)).

2 Ted Williams, *Back From the Brink*, AUDUBON, Nov. 1998, at 76.

3 Native Fish and Wildlife, Endangered Species, 32 Fed. Reg. 4001 (1967).

4 Letter from Sam Spiller, U.S. Fish & Wildlife Service, to Colonel David L. White, United States Air Force 11 (Mar. 27, 1997) [hereinafter FWS Letter Mar. 27, 1997] (citing telephone conversation with John Hervert of the Arizona Game and Fish Department).

5 ARIZONA GAME & FISH DEP'T, CONTRACT NO. F0260483MS143, FINAL REPORT ON SONORAN PRONGHORN STATUS IN ARIZONA 8 (1986) [hereinafter FINAL REPORT ON SONORAN PRONGHORN STATUS IN ARIZONA].

6 Memorandum from Acting Field Supervisor for U.S. Fish & Wildlife Service, Arizona Ecological Services Field Office, to District Manager, U.S. Bureau of Land Management, Phoenix, Arizona District 7 (Dec. 3, 1997) (on file with author).

7 FWS Letter Mar. 27, 1997, *supra* note 4.

with an increased risk of extinction through disease, drought, accident, and local catastrophe.

The range of the endangered Sonoran pronghorn has considerably shrunk due to increased human presence. The pronghorn are known to require large ranges of undisturbed desert habitat, ranging from 40 to 1200 square kilometers per pronghorn.[8] Unfortunately, their current range is limited by fencing and geographic barriers on all sides.[9] An interstate and large highway have combined to effectively block pronghorn access to over half of their former habitat.[10] The current distribution of the subspecies is limited to south of the Gila River, east of the Gila and Tinajas Atlas Mountains, west of Highway 85, and extending into Sonora, Mexico, to about Caborca.[11] The pronghorn is lucky in that all of this area and all of its range is on public lands, and unlike most endangered species today, it does not have the threat of habitat loss from development. However, the pronghorn range has its own limiting factors.

Currently, the pronghorn range is on the Cabeza Prieta National Wildlife Refuge, the Organ Pipe Cactus National Monument, some Bureau of Land Management (BLM) cattle grazing allotments, and the Barry M. Goldwater Range.[12] The many federal agencies that vie to use this space do so at the expense of the pronghorn.[13] Despite thirty years of endangered status, the subspecies is not recovering and may be slipping toward extinction. This is primarily due to an increasingly inhospitable environment and a lack of adequate home range.[14] Military training activities in pronghorn habitat are a significant factor.[15] These activities include air and ground maneuvers, bombing, strafing, artillery fire, and low-level overflights which have adverse effects on pronghorn vitality.[16] In addition, the United States Border Patrol flies extremely low overflights in helicopters and maintains drag roads, harassing the pronghorn.[17]

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8 U.S. FISH & WILDLIFE SERVICE, SONORAN PRONGHORN RECOVERY PLAN 20 (1998).

9 U.S. FISH & WILDLIFE SERVICE, FINAL RECOVERY PLAN FOR THE SONORAN PRONGHORN 6, 14 (1982).

10 FINAL REPORT ON SONORAN PRONGHORN STATUS IN ARIZONA, *supra* note 5, at 10.

11 *Id.*

12 U.S. FISH & WILDLIFE SERVICE, BIOLOGICAL OPINION FOR FIVE GRAZING ALLOTMENTS IN THE VICINITY OF AJO, ARIZONA 5 (1997) [hereinafter FWS BIOLOGICAL OPINION].

13 Joyesha Chesnick, *USAF Seeks Comment on Goldwater Range Lease*, TUCSON CITIZEN, Nov. 11, 1998, at 1C; *Where the Antelope Play, for Now: Wildlife Group, INS at Odds Over Border Patrol Flights*, WASH. POST, Jan. 1, 1999, at A23.

14 Memorandum from Field Supervisor, U.S. Fish & Wildlife Service Ecological Services, to District Manager, U.S. Bureau of Land Management, Phoenix, Arizona District 1-2 (Apr. 25, 1990) (on file with author).

15 Chris Woodley, *The Sonoran Pronghorn: The Air Force's Strongest Adversary*, 6 DICK. J. ENVTL. L. & POL'Y 299, 302-04 (1997).

16 *Id.*

17 *Border Patrol Copters Harm Species, Suit Says*, ARIZ. REPUBLIC, Jan. 3, 1999, at B4. The impact on the survival of the population from military activities and action agencies must be considered in the context of the pronghorns' environment and current status. The Sonoran pronghorn "lives in an extremely harsh desert environment that is subject to extended drought. As a result, the viability of the species is sensitive to environmental and stochastic events." FWS BIOLOGICAL OPINION, *supra* note 12, at 7.

Numerous other factors play a role in the pronghorn's decline. Cattle ranching degrades the natural environment and allows the introduction of non-native vegetation species into pronghorn habitat, further reducing available forage.[18] Impassable roads, highways, and fences prevent the subspecies from seeking more suitable territory.[19] The diversions of the Gila River substantially modified much of the northern habitat so that it is no longer suitable for pronghorn use.[20] The poor design and placement of livestock fences have had severe, adverse affects on the pronghorn. These fences effectively block pronghorn access to forage on BLM lands, as well as access to historic migration routes.[21] The pronghorn need this additional territory for access to water and additional forage in times of drought, which have plagued this area during 1997 and 1998.[22]

Opening the BLM-managed public lands surrounding Ajo, Arizona by removing livestock fences would provide the pronghorn with thousands of additional acres of open space, much of it prime pronghorn habitat. Currently, on these public lands alone, there are approximately forty-two miles of fences enveloping approximately 214,000 acres of habitat.[23]

II. THE UNLAWFUL INCLOSURES ACT AND HISTORICAL APPLICATION

The UIA contains a broad proscription against all enclosures of public lands by any means in order to preserve access to public lands.[24] The UIA, drafted in 1885, was originally entitled "An Act to Prevent the Unlawful Occupancy of the Public Lands."[25]

> *All inclosures of any public lands* in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, . . . had no claim or color of title made or acquired in good faith . . . *are hereby declared to be unlawful*, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited.[26]

> No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States,

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18 ARIZONA GAME & FISH DEPARTMENT, FINAL REPORT ON HOME RANGES, MOVEMENT PATTERNS AND HABITAT SELECTION OF PRONGHORN IN CENTRAL ARIZONA 48-49 (1994) [hereinafter FINAL REPORT ON PRONGHORN RANGES].

19 *Id.* at 46-48.

20 William J. Snape III, *Guest Comment*, ARIZ. DAILY STAR, July 7, 1997, at 15A.

21 FINAL REPORT ON PRONGHORN RANGES, *supra* note 18, at 48.

22 FWS BIOLOGICAL OPINION, *supra* note 12, at 7.

23 U.S. DEP'T OF INTERIOR, BUREAU OF LAND MANAGEMENT, RANGE IMPROVEMENT PERMITS AND COOPERATIVE AGREEMENTS (1963-1973) (granting fencing rights on the Childs, Cameron, Coyote Flat, Why, and Sentinel Range Allotments in Arizona) [hereinafter PERMITS AND AGREEMENTS] (on file with author).

24 Camfield v. United States, 167 U.S. 518, 525 (1897).

25 Ch. 149, 23 Stat. 321 (1885) (codified as 43 U.S.C. §§ 1061-1066 (1994)).

26 43 U.S.C. § 1061 (1994) (emphasis added).

> *or shall prevent or obstruct free passage or transit over or through the public lands*: Provided, this section shall not be held to affect the right or title of persons, who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.[27]

When the Act was created, Congress was attempting to halt the range wars between cattlemen and farmers during the last half of the nineteenth century.[28] Once passed, Congress stated that:

> [t]he necessity of additional legislation to protect the public domain because of illegal fencing is becoming every day more apparent. Without the least authority, and in open and bold defiance of the rights of the Government, large, and oftentimes foreign, corporations deliberately enclose by fences areas of hundreds of thousands of acres, closing the avenues of travel and preventing the occupancy by those seeking homes.[29]

Another cited purpose was to abate the nuisance of enclosed federal lands.[30] In *Stoddard v. United States*,[31] the court invoked the UIA in an early application, stating the Act "was intended to prevent the obstruction of free passage or transit for any or all lawful purposes over public lands."[32] Today, although the range wars and settlement conflicts of the past are mostly gone, the UIA's purpose of insuring free access to public lands can still be useful in implementing the federal mandate to protect wildlife on federal land.

A. Enforcement

The UIA does not provide for a private cause of action. Instead, it provides for federal enforcement with an explicitly defined role for private citizens in the process.

> It shall be the duty of the United States attorney for the proper district, on affidavit filed with him by any citizen of the United States that section 1061 of this title is being violated . . . to institute a civil suit in the proper United States district court, or territorial district court, in the name of the United States.[33]

Thus, the UIA specifically provides for federal enforcement to be brought in the name of the United States.[34]

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[27] 43 U.S.C. § 1063 (1994) (emphasis added).

[28] Leo Sheep Co. v. United States, 440 U.S. 668, 683, 688-89 (1979).

[29] S. REP. No. 48-979, at 1 (1885).

[30] Camfield v. United States, 167 U.S. 518 at 525; *see also* United States v. Brandestein, 32 F. 738 (N.D. Cal. 1887) (stating this chapter is intended to prevent the enclosure and appropriation of tracts of public land by associations of cattle owners, who have surrounded public lands with fences and excluded intended settlers; the application is restricted to cases of wholly unauthorized appropriations and enclosures).

[31] 214 F. 566 (8th Cir. 1914).

[32] *Id.* at 568-69.

[33] 43 U.S.C. § 1062 (1994).

[34] *Camfield*, 167 U.S. at 522. "[I]t is made the duty of the district attorney . . . to institute a civil suit in the name of the United States . . . when complaint is made to him by affidavit by any citizen of the United States." *Id.*

A private party may file an affidavit alerting the United States Attorney for the district of potential violations of the UIA.[35] The affidavit must contain a description of the lands enclosed by the fence and the identity of the person or persons violating the statute.[36] The party alleged to have violated the UIA may be described by name or other information sufficient to identify them.[37] The potential violator may be one who owns, maintains, or built the fence or the owner of the land where the fence is located.[38] At the very least, there must be information sufficient to readily identify the fence's location and the person responsible for it.[39]

Upon receipt of an affidavit, the United States Attorney must institute a civil suit in the proper district in the name of the United States against the parties named or described in the affidavit.[40] All complaints against unlawful enclosures should also be filed with the proper state officials and should contain the same descriptive information as the affidavit.[41] Furthermore, "it is deemed incumbent upon the officers of the Department of the Interior to furnish officers of the Department of Justice with the evidence necessary to a successful prosecution of the law."[42] Once a case is properly commenced by the United States in the courts, an interested party can then pursue permission to intervene in the suit.[43]

B. Defenses to a Violation

Depending on the federal circuit in which the case is brought, the United States may need to show the fence does more than merely enclose public lands. There is a conflict among circuits. The Ninth Circuit has interpreted *Camfield* to require an intent element in a UIA violation.[44] However, the Tenth Circuit has interpreted *Camfield* to hold that intent is

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35 *Id.*

36 43 U.S.C. § 1062 (1994). Section 1062 provides, in pertinent part,

> an affidavit filed with him by any citizen of the United States that section 1061 of this title is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental subdivisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained.

Id.

37 *Id.*

38 *Id.*

39 *Id.*

40 43 U.S.C. § 1062 (1994).

41 Filing of Charges or Complaints, 43 C.F.R. § 9239.2-4 (1998).

42 Responsibility for Execution of the Law, 43 C.F.R. § 9239.2-3 (1998).

43 *See* United States *ex rel.* Bergen v. Lawrence, 848 F.2d 1502, 1504 (10th Cir. 1988). Wyoming and National Wildlife Federation joined as intervenors in this UIA case after filing affidavits.

44 Potts v. United States, 114 F. 52, 54-55 (9th Cir. 1902) (fencing in one's own land and/or fencing land until it joins with another fence is lawful); *see also,* Golconda Cattle Co. v. United States, 214 F. 903, 909 (9th Cir. 1914) (fencing in one's land in order to protect its use and enjoyment is lawful); United States v. Rindge, 208 F. 611, 623 (S.D. Cal. 1913) (holding fences built in good faith and without intent to enclose any public lands are lawful); United States v. Johnston, 172 F. 635, 636 (N.D. Cal. 1908).

unimportant.[45] Only the effect of the fence determines whether the fence is unlawful.[46] If public lands are enclosed, the fence violates the UIA.

Fence gates may constitute a defense to a UIA charge since they may allow access to the land.[47] However, the mere presence of gates does not make a fence lawful.[48] It is not the fence itself, but its effect on access to public lands which constitutes the violation. The courts have found that some fences with gates may be lawful, provided they supply adequate access to public lands.[49] A fence is allowed to remain when its gates allow reasonable access.[50]

III. USE OF THE UIA IN WILDLIFE CONSERVATION AND RECOVERY

Wildlife lawfully enter public lands for both food and habitat. Together, the two cited provisions of the UIA protect wildlife access to public lands.[51] The emphasized clause in section 1063 of the UIA can be interpreted as a prohibition on enclosures protecting access for both humans and animals. It states, "[n]o person . . . by any fencing or inclosing, or any other unlawful means . . . *shall prevent or obstruct free passage or transit over or through the public lands.*"[52] The language in section 1061 is more inclusive, noting that "[a]*ll inclosures of any public lands* . . . made, erected, or constructed by any person . . . to any of which land included within the inclosure the person . . . had no claim or color of title made or acquired in good faith . . . *are hereby declared to be unlawful.*"[53] By its language, the Act applies to "all enclosures."[54] The UIA therefore prohibits inclosures that obstruct access for animals, including the Sonoran pronghorn antelope.

A. Using the UIA for Wildlife Purposes

In 1914, the Eighth Circuit in *Stoddard v. United States*,[55] dealt with the applicability of the UIA to wildlife, specifically range cattle.[56] The

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[45] *See, e.g.*, United States *ex rel.* Bergen v. Lawrence, 620 F. Supp. 1414, 1416 (D. Wyo. 1985), *aff'd*, 848 F.2d 1502 (10th Cir. 1988).

[46] *Id.* "It is only when, under the guise of inclosing his own land, a person builds a fence for the purpose and with the intention of inclosing the public lands of the government, that the fence or inclosure becomes unlawful."

[47] *See Golconda Cattle Co.*, 214 F. at 909.

[48] *Id.*

[49] *Bergen*, 848 F.2d at 1511.

[50] *Golconda Cattle Co.*, 214 F. at 909 (holding a fence is legal when 90 to 3400 foot openings are left in the fence at points frequented by cattle and other animals in their passage to and from grazing lands).

[51] 43 U.S.C. § 1063 (1994).

[52] 43 U.S.C. § 1061 (1994) (emphasis added).

[53] *Id.*

[54] *See Bergen*, 848 F.2d at 1508-09 (discussing passage for pronghorn antelope); *see also* Stoddard v. United States, 214 F. 566, 568-69 (8th Cir. 1914) (finding passage for range cattle).

[55] 214 F. 566 (8th Cir. 1914).

[56] *Id.*

court found that range cattle were entitled to use public lands.[57] The court reasoned the free herding and grazing of public lands are legitimate uses of the public lands, preserved and protected by the UIA.[58] The defendant, Mr. Stoddard, built a barbed wire fence on his privately-owned land, which combined with buttes and gullies (natural barriers), prevented the ranchers in an eastern township from accessing almost all of the fenced township.[59] Stoddard admitted in his testimony he intended for the fence to exclude outside cattle from the whole range, including public lands.[60]

Stoddard argued the prohibition of section 3 of the UIA did not extend to livestock, but only to persons.[61] His position rested on the phrase "*any person* from peaceably entering upon or establishing a settlement,"[62] influencing the last clause to be read "or shall prevent or obstruct free passage or transit of *any person.*"[63] The court disagreed, positing the UIA was "intended to prevent the obstruction of free passage or transit for *any and all lawful purposes* over public lands."[64]

The Eight Circuit affirmed the lower court's grant of injunctive relief requiring the defendant to make specified openings in the fence within a certain amount of time.[65] In a subsequent case, the Eighth Circuit continued to allow livestock passage over federally-owned lands, even when those federal lands are interlocked with private lands in the checkerboard pattern of railroad land grants.[66] Plaintiff Mackay, as a licensee of the government who grazed sheep on public lands to the northwest and south of the parcel in question, was "entitled to a reasonable way of passage over the uninclosed tract of land without being guilty of trespass." [67]

B. Bureau of Land Management and Forest Service Managed Public Lands: The Bergen *and* Crow Tribe *Cases*

In a case highly analogous to the current pronghorn situation, the Tenth Circuit considered whether the UIA preserves access for wildlife so they may migrate onto public lands to forage and for habitat.[68] Years after

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[57] *Id.* at 569.

[58] *Id.*

[59] *Id.* at 567-68. To facilitate the settlement of the West, Congress passed the Union Pacific Act of 1862, ch. 120, 12 Stat. 489 (1862) (codified as 43 U.S.C. § 885 (1994)). The Act gave the railroads loans, an easement, and land in odd-numbered sections. These lands were then sold by the railroad to individuals, giving rise to townships consisting of individuals owning odd-numbered lots while the federal government retained ownership of the even-numbered lots. GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 97-98 (3d ed. 1993).

[60] *Stoddard*, 214 F. at 568.

[61] *Id.*

[62] *Id.* (quoting 43 U.S.C. § 1063 (1994)) (emphasis added).

[63] *Id.* (emphasis added).

[64] *Id.* at 568-69 (emphasis added).

[65] *Stoddard*, 214 F. at 567, 569.

[66] Mackay v. Uinta Development Co., 219 F. 116 (8th Cir. 1914).

[67] *Id.* at 120.

[68] *See* United States *ex rel.* Bergen v. Lawrence, 620 F. Supp. 1414, 1416 (D. Wyo. 1985), *aff'd*, 848 F.2d 1502 (10th Cir. 1988).

Stoddard and *Mackay*, the *Bergen* court dealt with another set of circumstances created from a railroad's checkerboard pattern of land holdings, this time in Wyoming.[69] The case raised issues similar to *Stoddard*; however, since the *Stoddard* decision, the Taylor Grazing Act (TGA) had been passed.[70] *Bergen* read the two statutes together as indicative of congressional intent to protect public access for all lawful purposes.[71]

Pronghorn antelope migrate to an area in Wyoming called the Red Rim.[72] This area is particularly suited for food and shelter during winters because the harsh winds blow snow and expose sagebrush for pronghorn to eat.[73] Defendant Lawrence owned the Daley Ranch, part of the Red Rim checkerboard.[74] He built a barbed and woven wire fence that enclosed both his own and federal lands, the latter of which was specifically disapproved by BLM.[75] The fence was approximately five feet high and "made of woven wire mesh with no gap at the bottom."[76] The fence was twenty-eight miles long.[77]

The fence had twenty-eight gates which could have supplied a defense to the UIA charge, but at least nine of these were locked specifically to exclude antelope.[78] The testimony also showed that open gates made little difference to antelope, who will trail along the fence, missing the openings.[79] The effect and the admitted purpose of the gates were to exclude antelope. Therefore, the court found the fence was unlawful.[80]

Mr. Lawrence, like Mr. Stoddard, contended the UIA did not apply to animals, specifically antelope.[81] The district court simply stated, citing *Stoddard*, it would be hard to understand the UIA's application to cattle but not antelope.[82] On appeal the appellate court agreed and extended the UIA's application to antelope for two reasons. First, the court relied on the UIA's broad language in section 3. Second, the court cited the more em-

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[69] *Id.* at 1415.

[70] Taylor Grazing Act, 48 Stat. 1269, 865 (1934) (codified as 43 U.S.C. §§ 315-316(o) (1994)). The TGA gave authority to the Secretary of the Interior to create grazing districts and to regulate those districts by granting permits to graze on public lands. COGGINS ET AL., *supra* note 59, at 134. The TGA was passed twenty years after *Stoddard* was decided. *Stoddard*, 214 F. at 566.

[71] United States *ex rel.* Bergen v. Lawrence, 848 F.2d 1502, 1510 (10th Cir. 1988).

[72] *Bergen*, 620 F. Supp. at 1415.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 1416, 1418.

[76] *See* Memorandum of Points and Authorities in Support of Plaintiff-Intervenors' Motion for Preliminary Injunction. *Id.* at 1414.

[77] *Bergen*, 620 F. Supp. at 1416.

[78] *Id.* at 1419.

[79] *Id.*

[80] *Id*; *see also* Camfield v. United States, 167 U.S. 518, 518 (finding unlawful a fence with swinging gates at section lines); Stoddard v. United States, 214 F. 566, 568 (8th Cir. 1914) (holding a fence must be removed despite openings).

[81] *Bergen*, 620 F. Supp. at 1416-17.

[82] *Id.* at 1417.

phatic language in section 1 stating "[a]ll inclosures of any public lands . . . are hereby declared to be unlawful."[83]

Both the district and appellate courts took further guidance from the *Stoddard* decision while simultaneously updating the UIA. Access must be afforded for "lawful purposes" of public lands.[84] In determining whether forage (here, specifically regarding antelope) was lawful, the court found that federal land management statutes could instruct the court of Congress's intent for the uses of federal lands.[85] Lawrence's fence obstructed access to BLM land. Therefore, the Federal Land Policy and Management Act (FLPMA) applied.[86] FLPMA's broad goal that "the public lands be managed in a manner . . . that will provide food and habitat for fish and wildlife and domestic animals" encompasses all wildlife.[87]

Another federal statute enacted since the passage of the UIA is the Taylor Grazing Act of 1934 (TGA).[88] The TGA was passed to lend some order to grazing on western lands.[89] It established grazing districts, set up a permitting system, and authorized range improvements (e.g., fences) on public lands.[90] It also furthered the purpose of the UIA noting that "[n]othing contained in this chapter shall restrict the . . . ingress or egress over the public lands . . . for all proper and lawful purposes."[91] Thus, a grazing permittee may build a fence pursuant to the TGA; however, that fence must also comply with the TGA, FLPMA, and UIA.

In *Bergen*, the Tenth Circuit affirmed the district court's order that Lawrence remove the fence. "[W]e agree with the district court that this matter was decided by the Supreme Court in 1897 in *Camfield v. United States*. [Lawrence] cannot maintain a fence which encloses public lands and prevents the lawful purpose of antelope access to their winter feeding range."[92] The court directly addressed the issue and concluded that wildlife is allowed access to forage on public lands.[93]

In another wildlife case regarding the movement of elk, *Crow Tribe of Indians v. Repsis*,[94] the complainants (Crow Tribe) sought the removal of a fence that impeded the passage of elk onto private property.[95] The United States built, and the Wyoming Game & Fish Commission main-

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[83] United States *ex rel.* Bergen v. Lawrence, 848 F.2d 1502, 1508 (10th Cir. 1988). (quoting 43 U.S.C. § 1061 (1994)).

[84] *Id.* at 1509.

[85] *Id.* at 1508.

[86] 43 U.S.C. § 1701(a)(3) (1994). "Public lands not previously designated for any specific use . . . [must] be reviewed in accordance with the provisions of this Act." *Id.*

[87] *Bergen*, 848 F.2d at 1509 (quoting 43 U.S.C. § 1701(a)(8) (1994)).

[88] 43 U.S.C. §§ 315-315r (1994).

[89] *See* Bruce M. Pendery, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management*, 27 ENVTL. L. 513, 519-20 (1997).

[90] 43 U.S.C. §§ 315, 315b, 315c (1994).

[91] 43 U.S.C. § 315e (1994).

[92] *Bergen*, 848 F.2d at 1511-12 (citations omitted).

[93] *Id.* at 1509.

[94] 866 F. Supp. 520 (D. Wyo. 1994), *aff'd*, 73 F.3d 982 (10th Cir. 1995).

[95] *Id.*

tained, a six-mile fence near the Kerns Big Game Winter Range and along the Crow Tribe's southern boundary.[96] Without reaching the merits of the claim, the court cited to the Multiple-Use Sustained Yield Act (MUSYA)[97] in reference to the management of the lands because they were located in the Big Horn National Forest.[98] The National Forest Management Act (NFMA)[99] establishes the valid uses of national forest land.[100] This statute, providing a mandate similar to the "multiple-use" requirement of FLPMA, applied to BLM-managed lands.[101] NFMA requires the U.S. Forest Service to manage federal lands to

> insure consideration of the economic and environmental aspects of various systems of renewable resource management... to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish; provide for diversity of plan and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives.[102]

MUSYA also requires that lands shall be "administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes."[103]

Thus, if anyone encloses or obstructs access to public land, for pronghorn, elk, or any other wildlife, application of the UIA requires a preliminary inquiry into the lawful purposes for the lands.[104] For example, on BLM lands, "multiple use" includes recreation, range, timber, minerals, watershed, wildlife and fish, natural scenic, scientific, and historical values.[105] Generally, public lands are managed under the multiple-use objectives mandated in FLPMA, NFMA, and MUSYA. Wildlife is explicitly included within all three statutes.[106] Accordingly, wildlife needs, including forage and range, are lawful purposes of the public lands. Therefore, access for animals, such as the pronghorn, is protected by the UIA.

C. Other Applications of the UIA

Many situations arise which can invoke the UIA when animals are denied access to public lands. It is important to note the UIA is not limited to endangered species. Each case may be compelling on its own facts,

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96 *Crow Tribe*, 73 F.3d at 993.

97 16 U.S.C. §§ 528-531 (1994)).

98 *Id.* at 982 (finding that the Crow Tribe did not have standing under UIA where members did not bring action in name of United States as provided under UIA; thus, the court did not reach the merits of the case).

99 16 U.S.C. §§ 1600-1614 (1994).

100 16 U.S.C. § 1600(2)-(3) (1994); 16 U.S.C. § 528 (1994).

101 16 U.S.C. § 1604(3)(D) (1994); *see also* 16 U.S.C. § 531(a) (1994); 43 U.S.C. § 1702(c) (1994). FLPMA mandates that the BLM "shall use and observe the principles of multiple-use and sustained yield." 43 U.S.C. § 1702(c)(1) (1994). Multiple-use is defined in part as "a combination of balanced and diverse uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources." 43 U.S.C. § 1712(c) (1994).

102 16 U.S.C. § 1604(g)(3)(A)-(B) (1994).

103 16 U.S.C. § 528 (1994).

104 43 U.S.C. § 1062 (1994).

105 43 U.S.C. § 1702(c) (1994).

106 16 U.S.C. § 1604(3)(D) (1994); 16 U.S.C. § 531(a) (1994); 43 U.S.C. § 1702(c) (1994).

regardless of whether a large number of animals or an endangered species is at risk.[107] The UIA is equally protective of all wildlife.

There are miles of fences and similar impediments on public lands. Therefore, there are likely to be more cases where application of the UIA could be determinative. Other impediments to passage which have not been addressed by the courts, but may fall within the scope of the statute, include highways and paved roads. Many highways and roads effectively block passage because of the associated high mortality rates to animals attempting crossings.[108] Diversions of rivers into large irrigation canals serve to trap animals on one side. Despite these impediments, many solutions exist that would allow passage over or under these barriers.[109] These solutions could contribute to the effectiveness of the UIA by providing land management agencies a means to resolving new and emerging applications of the UIA.

A specific example of an untested application of the UIA is requiring opening or keeping open sealed and abandoned mines for bats. Many traditional tree roosts for bats have been lost to logging, making abandoned mines an important resource for hibernating bats.[110] Often harboring important maternity colonies, abandoned mines can have upwards of 100,000 bats.[111] Primarily for safety reasons, many of these abandoned mines were sealed, sometimes to the detriment of bats.[112] An argument exists that the UIA requires mines to be sealed in a way that will still allow bats ingress and egress. Thus, any obstruction that does not allow this access should be removed or modified. Bolstered by the fact that government agencies recognize it is often necessary to consider bat access to mines, the UIA would be an ideal method for protecting the interests of many bat species.[113]

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107 United States *ex rel.* Bergen v. Lawrence, 620 F. Supp. 1414, 1417 (D. Wyo. 1985) (discussing the possible decimation of the herd); *see also* Rosenthal Aff. at 2; Letter from Roger Schlickeisen, President, Defenders of Wildlife, to Mike Johns, First Assistant United States Attorney (Oct. 16, 1998) [hereinafter Letters and Affidavits Oct.16, 1998].

108 REED F. NOSS & ALLEN Y. COOPERRIDER, DEFENDERS OF WILDLIFE, SAVING NATURE'S LEGACY: PROTECTING AND RESTORING BIODIVERSITY 153 (1994). In California, seven of thirty-five radio-collared cougars were killed by automobiles within the first two years of study. *Id.* The greatest source of mortality for the Florida panther is being struck by automobiles. *Id.*

109 *Id.*

110 MERLIN D. TUTTLE & DANIEL A.R. TAYLOR, BAT CONSERVATION INT'L, INC., BATS AND MINES 5 (1994).

111 *Id.* Of more than six thousand mines surveyed in Arizona, Colorado, and New Mexico, 30 to 70% showed signs of use by bats. *Id.* An average of 10% contained important colonies. *Id.*

112 For example, the Canoe Creek State Park limestone mine in Pennsylvania was sealed, but reopened in time to save the bats. This mine now harbors the largest bat population in the state. *Id.* at 5.

113 For example, BLM installed a "bat-friendly" steel gate at the Old Soak and Betty Lee Cistern Mine, in Arizona. U.S. DEP'T OF THE AIR FORCE, DRAFT LEGISLATIVE ENVIRONMENTAL IMPACT STATEMENT FOR THE BARRY M. GOLDWATER RANGE (BMGR) 3-133 (1998) (discussing the BLM's recreation use and management within the BMGR); *see also* U.S. FISH & WILDLIFE SERVICE, BIOLOGICAL OPINION FOR THE LOWER GILA SOUTH RESOURCE MANAGEMENT PLAN—GOLDWATER AMENDMENT 6 (1990) (making a conservation recommendation, pursuant to 16

Another possible application is use of the UIA to open wildlife corridors. Often one area of public land is not sufficient to support a viable population, especially for species with large area requirements, such as the panther or grizzly bear.[114] Linkages between refuges are key because animals use these corridors when traveling through human dominated landscapes.[115] These corridors can provide seasonal migration routes,[116] daily movement routes of animals, and allow for the long-distance range of species needed to respond to climate change.[117] These movement corridors are often in riparian areas that provide a dependable source of water, abundant insects and plant food, and many tree cavities and substrates for homes for birds and mammals.[118]

IV. DEFENDERS OF WILDLIFE: A CASE STUDY

A. *Defenders of Wildlife's Interest*

Efforts are currently underway to protect the endangered Sonoran pronghorn antelope in the southwestern United States. Among the leaders of this movement is Defenders of Wildlife. Defenders is a national nonprofit, public-interest organization with approximately 290,000 members and supporters, five thousand of whom reside in Arizona.[119] Defenders works to preserve the integrity of natural ecosystems, prevent the decline of native species, and restore threatened habitats and wildlife populations.[120] The Defenders campaign to protect the Sonoran Desert in Arizona, California, New Mexico, and Nevada began approximately seven years ago with the goal of science-based ecosystem management.[121] The endangered Sonoran pronghorn immediately came to the attention of Defenders because it is a highly vulnerable subspecies and has been an institutional priority ever since.

B. *Charge Defined and Proved*

The fences concerning Defenders are built on BLM land near Ajo, Arizona.[122] BLM authorizes year-long and ephemeral grazing on five allot-

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U.S.C. § 1536 (a)(1) (1994), that any gate or sealing technique used to close mines, caves, or similar features should allow for passage of bats).

114 DEFENDERS OF WILDLIFE, FLORIDA PANTHER FACT SHEET (1998); DEFENDERS OF WILDLIFE, GRIZZLY BEAR FACT SHEET (1998).

115 Noss & COOPERRIDER, *supra* note 108, at 153.

116 *Id.* at 153. Ungulates, like elk and mule deer, often use traditional migration routes between summer and winter ranges. *Id.*

117 *Id.* at 152.

118 *Id.*

119 DEFENDERS OF WILDLIFE, ABOUT DEFENDERS OF WILDLIFE FACT SHEET (1997). For more information, see *Defenders of Wildlife* (last modified Apr. 29, 1999) <http://www.defenders.org>.

120 *See generally* DEFENDERS OF WILDLIFE, ANNUAL REPORT (1997)(describing the organization's mission).

121 David E. Brown, *Arizona's Pronghorn Challenge*, DEFENDERS, Mar./Apr. 1992, at 25.

122 *See* Letters and Affidavits Oct. 16, 1998, *supra* note 107.

ments surrounding Ajo.[123] Each of these allotments has had several permittees over the past fifty years, many of whom have built fences on the borders and inside their allotments. These fences may have been built to prevent livestock from straying off the allotment[124] or to keep predators from entering.[125] In either case, they were constructed to be barriers and have become such to the pronghorn.

Even though these fences are old, most built thirty to fifty years ago,[126] they inclose lands that were pronghorn habitat long before cattle were allowed to graze in this area of the desert.[127] They were built before the passage of National Environmental Policy Act (NEPA),[128] Federal Land Planning Management Act (FLPMA),[129] or the Endangered Species Act (ESA),[130] and were put in place with no environmental analysis or wildlife consideration.[131] The style of fence built at that time was barbed wire, as confirmed by fence permits or cooperative agreements that establish these construction specifications.[132] Currently, the allotments contain 4-strand, spaced twelve to sixteen inches apart, barbed-wire fences that are approximately seven to twelve inches off the ground.[133] Barbed wire fences without raised, smooth, bottom strands are the design of most livestock fencing.[134] Pronghorns cannot cross them. Thus, the fences at issue obstruct access because pronghorn cannot crawl under the fence and are not likely to jump over them.[135]

Defenders argued, and the BLM national guidelines confirm, that the type of fencing described above detrimentally affects the pronghorn.[136] The poor design of a livestock fence restricts antelope passage and may reduce pronghorn survival through entanglement.[137] BLM national guidelines for fence construction state that "[a]ntelope normally do not naturally attempt to jump or go through barbed wire fences, but prefer to go

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123 U.S. FISH & WILDLIFE SERVICE, SONORAN PRONGHORN RECOVERY PLAN 20 (1998).

124 Stoddard v. United States, 214 F. 566, 568 (8th Cir. 1914).

125 Zeke Scher, *There's Peace in the Antelope Range War*, DENVER POST—EMPIRE MAGAZINE, June 17, 1979, at 11 (on file with author).

126 Telephone interview with Gene Dahlem, BLM Phoenix Field Office (June 18, 1998).

127 U.S. FISH & WILDLIFE SERVICE, SONORAN PRONGHORN RECOVERY PLAN 4-8, map (1998).

128 42 U.S.C. §§ 4321-4370(d) (1994).

129 43 U.S.C. §§ 1701-1784 (1994).

130 16 U.S.C. §§ 1531-1544 (1994).

131 *See* PERMITS AND AGREEMENTS, *supra* note 23.

132 *Id.* The permit or agreement may specify any type of fence. *Id.*

133 LORI YOUNG, BUREAU OF LAND MANAGEMENT, BIOLOGICAL EVALUATION ON GRAZING ACTIVITIES WITHIN SONORAN PRONGHORN HABITAT 16 (1995) (discussing agency consultation for the Cameron, Childs, Coyote Flat, and Why allotments).

134 BUREAU OF LAND MANAGEMENT, MANUAL HANDBOOK H-1741-1, at IV-3 (Dec. 6, 1989) [hereinafter BLM MANUAL HANDBOOK].

135 Letters and Affidavits Oct. 16, 1998, *supra* note 107, at 7 (declaration of Donald J. Schubert).

136 BLM MANUAL HANDBOOK, *supra* note 134.

137 RICHARD A. OCKENFELS ET AL., ARIZONA GAME & FISH DEP'T, TECHNICAL REPORT No. 13, HOME RANGES: MOVEMENT PATTERNS, AND HABITAT SELECTION OF PRONGHORN IN CENTRAL ARIZONA 48 (1994).

under them."[138] While adults have "inherent physical ability to jump over some fences," they are "unaware" of this and will "jump only when frightened."[139] "Fawns and some adults do not jump even when frightened."[140] The ability to jump is a "learned behavior."[141] Moreover, BLM guidelines note that fence gates are useless because pronghorn will not use them, noting that "[a]ntelope passes have limited effectiveness since antelope moving along a fence line often go by the passes without noticing them."[142] Therefore, if a pronghorn chooses to cross, it must either locate spots where it is safe to cross under (for example, a barbed-free zone of fence over a gully or wash) or learn to jump over it, both of which are highly unlikely.[143] Defenders has argued the fences are antelope-proof and therefore violate the UIA.[144]

Furthermore, the Tohono O'Odham Nation (Tribe) is located to the immediate east of the grazing allotments in question.[145] The Tribe falls within the historic range of the Sonoran pronghorn; however, federal agencies have afforded the Tribe minimal involvement in land management in derogation of their trust obligations.[146] Therefore, it is unknown, but highly possible, that a pronghorn population remains there today. The particular fences on BLM allotments effectively eliminate the possibility of establishing a wildlife corridor between these two habitats. The benefits of which, including a broader range, increased forage opportunities, and increased genetic diversity, are without question.

The UIA establishes a two-prong test which Defenders employed in order to make the allegations of illegal fencing: (1) whether the defendant erected an enclosure which encloses public lands and (2) whether the defendant has a good faith claim or color of title to all of the enclosed land.[147] On BLM-managed land, a third prong applies: whether the enclosure complies with BLM fencing standards.[148] This third prong distin-

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138 BLM MANUAL HANDBOOK, *supra* note 134, at IV-3. Moreover, "[w]oven wire fences . . . restrict both antelope and javelina movements and are extremely hazardous when they prevent antelope migration to winter range or eliminate access to water sources in the summer." *Id.*

139 *Id.* at IV-4.

140 *Id.*

141 *Id.*

142 BLM MANUAL HANDBOOK, *supra* note 134, at IV-4.

143 RICHARD A. OCKENFELS ET AL., ARIZONA GAME AND FISH DEPARTMENT, TECHNICAL REPORT NO. 19, A LANDSCAPE-LEVEL PRONGHORN HABITAT EVALUATION MODEL FOR ARIZONA 41 (1996).

144 *See generally* Letters and Affidavits Oct. 16, 1998, *supra* note 107.

145 *Id.* at 5.

146 *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495-97 (1994). The trust doctrine has been recognized by courts, Congress and the executive branch. It is the "federal government's duty to protect [the separatism of the Native Americans from the majority society] by protecting tribal lands, resources, and the native way of life." *Id.* at 1496. *See also* U.S. DEP'T OF INTERIOR, DEPARTMENTAL MANUAL, DEPARTMENTAL RESPONSIBILITIES FOR INDIAN TRUST RESOURCES 512 DM 2 (1995).

147 43 U.S.C. § 1061 (1994).

148 43 U.S.C. § 1061 (1994); 43 U.S.C. § 1063 (1994).

guishes the Defenders situation from previous cases because the livestock fences are on public land, not private.

Proof exists the public land is enclosed because Defenders personally inspected the fences, reviewed BLM files with descriptions of the fences, and submitted affidavits with these allegations.[149] The affidavits cited the names of the permittees of the allotments and the person who built the fences, as the party for civil prosecution.[150]

Permittees do not have a good faith claim or color of title to all of the enclosed lands.[151] The TGA requires a new permittee on an allotment where the prior permittee built a range improvement (e.g., a fence or a water tank) to reimburse the prior permittee for the reasonable value of the improvement before using it.[152] In other words, when a new rancher takes over another rancher's grazing allotment, the new rancher must pay fair value for all fences on the land. Therefore, the implication is that the permittee is responsible for the fence.[153] FLPMA mandates a similar compensation scheme.[154] The courts have also interpreted the compensation provision to mean that the individual who constructed the improvement should own it.[155] However, the land is public. Although the permittees own and are responsible for the fences, rather than the BLM, courts have held that TGA permits or leases do not grant the permittee any claim or color of title to the lands enclosed.[156] This principle is supported by language in the TGA stating that "[t]he issuance of a [grazing] permit . . . shall not create any right, title, interest, or estate in or to the lands."[157]

Since the fences are on BLM lands, the fences violate the UIA unless they conform with BLM fencing standards promulgated pursuant to the TGA.[158] BLM regulations require that "[r]ange improvements shall be installed, used, maintained, and/or modified on the public lands . . . in a manner consistent with multiple-use management."[159] More specifically, internal BLM standards require "that fences for cattle operations provide a gap of at least sixteen inches at the bottom, with a bottom strand of smooth wire, so that antelope can crawl underneath, and with a top wire only thirty-eight inches high."[160] The fences currently on BLM lands are entirely barbed wire and in excess of three feet tall.[161]

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149 *See generally* Letters and Affidavits Oct. 16, 1998, *supra* note 107.

150 *Id.*

151 *Bergen*, 620 F. Supp. at 1419.

152 43 U.S.C. § 315c (1994).

153 *Id.*

154 43 U.S.C. § 1752(g) (1994).

155 Public Lands Council v. U.S. Dep't of Interior, 929 F. Supp. 1436, 1442-43 (D. Wyo. 1996), *aff'd in part, rev'd in part*, Public Lands Council v. Babbitt, 167 F.3d 1287 (10th Cir. 1999).

156 United States *ex rel.* Bergen v. Lawrence, 848 F.2d 1502, 1510 (10th Cir. 1988).

157 43 U.S.C. § 315b (1994).

158 43 U.S.C. § 315c (1994).

159 Conditions for Range Improvements, 43 C.F.R. § 4120.3-1(a) (1998).

160 United States *ex rel.* Bergen v. Lawrence, 620 F. Supp. 1414, 1416 (D. Wyo. 1985); *see also* BLM MANUAL HANDBOOK, *supra* note 134.

161 *See generally* Letters and Affidavits Oct. 16, 1998, *supra* note 107.

Grazing permittees may build fences on public lands with the authorization of the BLM, pursuant to the TGA.[162] The TGA, in conjunction with the UIA, sets certain standards that these fences must meet, including the assurance of free access to public lands affected by these fences.[163] Public lands must be made available for multiple uses, which includes foraging.[164] Simply because BLM authorized the Ajo range improvements does not make the improvements lawful. They must conform to the UIA, TGA, and other congressional rangeland management guidances. An enclosure will only be lawful, "[w]here a fence is constructed so that it does not obstruct other lawful uses of the federal lands, it is not an unlawful enclosure."[165]

Based on these legal arguments and factual information, Defenders believes it has established a prima facie case of a UIA violation. If the additional element of intent is required by the courts,[166] it may be inferred. BLM and the permittees could have built fences to achieve the purpose of keeping cattle on the allotments, without having the effect of obstructing access to public lands. Surrounding areas such as Organ Pipe Cactus National Monument and Cabeza Prieta National Wildlife Refuge have built pronghorn friendly fences.[167] The design of the fences on the Ajo allotment with barbed wire on the bottom and excessive height, infers the permittees had the intent to keep the antelope off their allotments.

C. Exacerbating Circumstances

Defenders alleges that BLM, the agency responsible for the illegal fences, has repeatedly acknowledged the illegality of the fences, yet fails to take corrective action. The BLM Field Office (Phoenix BLM), BLM National Office, and the Fish and Wildlife Service (FWS) are all very aware of the problems fences pose to pronghorn. In fact, the Phoenix BLM has made numerous written commitments to inspect, maintain, and modify fence lines to minimize or eliminate adverse impacts to pronghorn ante-

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162 43 U.S.C. §§ 315-316(o) (1994).

163 43 U.S.C. § 1063 (1994).

164 43 U.S.C. § 1061 (1994).

165 United States *ex rel.* Bergen v. Lawrence, 848 F.2d 1502, 1510 (10th Cir. 1988).

166 *See infra* Part II.B.

167 Telephone interview with Tim Goodman, BLM (June 15, 1998); Telephone interview with Don Tiller, Refuge Manager, Cabeza Prieta National Wildlife Refuge (June 22, 1998); Telephone interview with Tim Tibbitts, Organ Pipe Cactus National Monument (June 17, 1998) [hereinafter Telephone Interviews].

lope and other wildlife.[168] FWS has directed BLM to do the same.[169] Despite these commitments, the fences remain.

In addition to BLM's own internal directives, FLPMA mandates fence removal. Two of the primary requirements of a land use plan under FLPMA are to "consider present and potential uses of the public lands"[170] and "consider the relative scarcity of the values concerned and the availability of alternative means and sites for realization of those values."[171] BLM took the first step in meeting this requirement by including provisions for fence removal in its Lower Gila South Resource Management Plan.[172] Additionally, the BLM handbook, in existence since 1985, and several other documents in the past decade have affirmed BLM's responsibilities.[173] BLM issues the same commitments and directives yearly in every planning document and environmental analysis.[174] However, Defenders firmly believes it will take legal prodding for BLM to actually act.

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[168] The following is a partial list of BLM commitments to repair or replace livestock fencing.

> Fences with four or more strands of barbed wire have been documented to impede pronghorn movement (Yoakum 1957). Pronghorn prefer to go under the bottom fence strand rather than jump the fence. The current situation on the allotments under consideration is four-strand barbed wire fences. Fence lines are inspected annually and repaired or replaced, as necessary. As fences are reconstructed, the bottom barbed wire strand will be replaced with smooth wire. Wire height will be adjusted to 16" above ground level to meet BLM fencing specifications for wildlife. Replaced barbed wire will be removed from the area and disposed of properly. No surface-disturbing activities will occur from these maintenance activities. As with any fence, the possibility exists that Sonoran pronghorn may become entangled. Overall, this activity is expected to enhance pronghorn movement.

LORI YOUNG, BUREAU OF LAND MANAGEMENT, BIOLOGICAL EVALUATION ON GRAZING ACTIVITIES WITHIN SONORAN PRONGHORN HABITAT 35 (1995); *see also* U.S. DEP'T OF INTERIOR, BUREAU OF LAND MANAGEMENT, LOWER GILA SOUTH RESOURCE MANAGEMENT PLAN 13 (1985) (stating "[f]ences proposed in big game habitat will be designed to reduce adverse impacts to big game movement. Specifications in BLM Manual H-1741-1 (Fencing) and local BLM directives will be used. BLM will consult with the Arizona Game and Fish Department on the design and location of new fences."); U.S. DEP'T OF INTERIOR, BUREAU OF LAND MANAGEMENT, HABITAT MANAGEMENT PLAN 14 (1990) (stating "[w]here existing fences in big game habitat do not meet BLM specifications, they will be modified according to Manual 1737 when they are scheduled for replacement or major maintenance"); U.S. FISH & WILDLIFE SERVICE, SONORAN PRONGHORN RECOVERY PLAN 14-15 (1998) (setting out goals of minimizing human impact and reestablishing historic range, both of which require the modification of fences to fulfill the primary objective of the 1982 Sonoran Pronghorn Recovery Plan).

[169] U.S. FISH & WILDLIFE SERVICE, BIOLOGICAL OPINION OF EFFECTS OF GRAZING ON SONORAN PRONGHORN HABITAT 5 (1997). "All fences being replaced or repaired will be made to be more pronghorn passable by including a smooth bottom strand placed 16" off the ground. Fence lines, pipelines, and above-ground storage tanks will be inspected annually and repaired or replaced as necessary." *Id.*

[170] 43 U.S.C. § 1712(c)(5) (1994).

[171] 43 U.S.C. § 1712(c)(6) (1994).

[172] *See infra* note 169 and accompanying text.

[173] BLM MANUAL HANDBOOK, *supra* note 134, at V-2 (stating when design of the fence is not in accordance with management objectives, the fence must be removed or modified); *see also* PERMITS AND AGREEMENTS, *supra* note 23.

[174] *See infra* note 108 and accompanying text.

Accordingly, on October 16, 1998, Defenders filed two affidavits that cite the violations on the Ajo, Arizona allotments with the United States Attorney General in Phoenix.[175] Following up on the Defenders filing, the Attorney General's office attempted to resolve the issue outside of court. The Attorney General first investigated the issue with the managing agency, BLM, prior to filing a complaint against the allottees. The Solicitor's Office of the United States Department of the Interior acting on behalf of the BLM responded by stating they are trying to modify the fences.[176] In a public workshop on pronghorn recovery, a BLM Phoenix field officer promised the U.S. Attorney that the fences would be modified by the winter of 1999.[177] If the fences are modified by April, Defenders hopes the Attorney General will respond by filing a complaint against the allottees.

V. CONCLUSION

The Sonoran pronghorn antelope requires wide open, sprawling landscapes in order to survive.[178] It relies on its keen eyesight and amazing speed to elude predators; the sparseness of the desert demands acres of land for adequate forage.[179] All of the pronghorn's current habitat is managed by federal agencies, keeping it largely undeveloped.[180] These factors would seem to present ideal conditions for the pronghorn, yet its range continues to shrink due to highways, highway fences, and livestock fences built on these federal lands.[181]

The pronghorn's remaining habitat is on public lands. Congress has repeatedly recognized this simple fact through the initial enactment of UIA,[182] the later passage of the TGA,[183] and more recently with environmental legislation that preserves the multiple uses of the lands.[184] We have the right to camp, hike, hunt, and to recreate in our forests, refuges, and parks. Animals have the right to forage and range through these lands as well. When a private party acts to obstruct human or wildlife access to public lands, the UIA, TGA, and other laws give the public the right to remove that obstruction. The public lands are not meant for the exclusive use of one person.

As the need to preserve land for homesteading became less important in the West (where the majority of public lands are located), other uses

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175 *See generally* Letters and Affidavits Oct.16, 1998, *supra* note 107.

176 Telephone interview with Mike Johns, First Assistant United States Attorney (June 18, 1998).

177 Letter from Gary Bauer, BLM Acting Director, to Field Solicitor, U.S. Dep't of Interior, Phoenix, Arizona (Dec. 18, 1998) (on file with author).

178 DEFENDERS OF WILDLIFE, SONORAN PRONGHORN FACT SHEET (1998).

179 *Id.*

180 U.S. FISH & WILDLIFE SERVICE, SONORAN PRONGHORN RECOVERY PLAN (1982), *supra* note 168.

181 *Id.*

182 43 U.S.C. §§ 1061-1066 (1994).

183 43 U.S.C. §§ 315-315r (1994).

184 43 U.S.C. §§ 1732a-d (1994).

took over and should have been protected by the UIA. Homesteaders invoked the law to free thousands of fenced-in acres for cattle and sheep ranching which the courts supported.[185] These rangelands are now fenced for the benefit of the ranchers and their stock, while simultaneously detrimental to indigenous wildlife. Wildlife, such as the pronghorn antelope, now need the protection of the UIA. *Bergen* affirmed the needs of wildlife for habitat and forage.[186]

In filing its concerns with the United States Attorney General, Defenders believes the UIA is a tool that can aid in the recovery of the Sonoran pronghorn. Fence repair or removal is not an unprecedented action for BLM to take. Earlier in this decade, two other federal agencies, the National Park Service and the Fish and Wildlife Service, removed a fence between the Organ Pipe Cactus National Monument and the Cabeza Prieta National Wildlife Refuge, managed by the respective agencies. Years later, both agencies modified fences on their lands that bordered the BLM grazing allotments to be pronghorn-friendly.[187] Defenders field staff noticed new pronghorn movements but the range is still restricted.[188] BLM has neither removed nor fixed their impassable fences, despite the knowledge that it would benefit the pronghorn. Furthermore, these livestock fences now present the additional danger of boxing pronghorn into grazing allotments from which they cannot find an escape.[189]

The UIA presents an ideal method for prodding the BLM into action by way of Department of Justice involvement in the Ajo, Arizona Sonoran pronghorn situation. If this effort proves successful, the UIA may also provide the direction for restoring access to past pronghorn habitat to the east, north, and south of the highways that are the greatest impediment to pronghorn movement. Consequently, the two populations in the United States and Mexico would no longer be isolated and the survival of this endangered species could be greatly enhanced.

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185 Telephone Interviews, *supra* note 167.

186 United States *ex rel.* Bergen v. Lawrence, 848 F.2d 1502, 1510 (10th Cir. 1988).

187 U.S. FISH & WILDLIFE SERVICE, SONORAN PRONGHORN RECOVERY PLAN (1998), *supra* note 168.

188 *See* Letters and Affidavits Oct. 16, 1998, *supra* note 107.

189 *Id.*