

**PEER Comments on the 2009-2011 Funding Agreement
For the National Bison Range Complex
Between the
U.S. Department of Interior and the Confederated Salish and Kootenai
Tribes
September 17, 2008**

Introduction

On June 19, 2008, representatives of the U.S. Department of Interior (DOI) and its constituent agency, the U.S. Fish & Wildlife Service (FWS), signed a three-year funding agreement for operation and management of the National Bison Range Complex (NBRC), a unit of the National Wildlife Refuge System, containing 38,000 acres encompassing: (1) the National Bison Range, (2) Ninepipe National Wildlife Refuge, (3) Pablo National Wildlife Refuge, and (4) the Lake Wetland Management District.

By its terms, this agreement takes effect “no earlier than 90 days after the Secretary [of Interior] submits this signed AFA [Annual Funding Agreement] to Congress” but the AFA “will be fully effective...by no later than January 1, 2009.”

This new agreement is a successor to a somewhat similar FY 2005 agreement which the FWS summarily cancelled in December 2006 citing a host of performance-related issues on the part of the CSKT, as well as reported mistreatment of FWS employees by the CSKT. The FWS cancellation letter described –

- Wide-ranging performance failures including, but not limited to, unacceptable and unusable biological data collection and reporting, non-compliance with prescribed bison management and husbandry protocols, and negligence with vehicle and equipment maintenance and facilities; and
- The workplace environment at the NBRC as “characterized by harassing, offensive, intimidating and oppressive behavior on the part of employees of CSKT, including obscenity, fighting words, and threats of violence and retaliation directed at employees of the Service.”

On behalf of affected and concerned refuge employees within FWS and retired refuge professionals, Public Employees for Environmental Responsibility (PEER) formally submits these comments on this new three-year agreement:

Overarching Comments

1. No Benefit to Refuge or Wildlife

The purpose of the agreement is not to improve operations of this unit of the National Wildlife Refuge System or to benefit wildlife which relies upon the refuge. Instead, the

purpose behind this agreement is to satisfy an essentially political demand made by the CSKT.

Although the preamble of the agreement alludes generally to “an on-the-ground partnership...to accomplish common goals and objectives to benefit wildlife, habitat and people” (§2A) nowhere in the agreement are these benefits spelled out. By contrast, the agreement appears to contemplate that, at least initially, it will actually result in a diminution in the quantity and quality of services when it states “The Parties understand that the first year of this AFA will be a transition year as new employees learn their jobs...” (§7E1)

Rather than benefit the refuge and its wildlife, this agreement seeks, at best, to minimize the degree of harm that will be done to accomplish its ends of shifting operational control and payrolls from experienced FWS refuge personnel.

2. Public Has No Recourse for Complaints

The NBRC is a federally-funded unit of the National Wildlife Refuge System but nothing in the agreement requires the CSKT to respond to or even record complaints from members of the tax-paying public. Consequently, if a CSKT employee is rude or worse to a refuge visitor there is no clear mechanism for disciplining that employee or preventing a recurrence.

In the event that a complaint from the public may find its way to the FWS Refuge Manager, he or she could take no direct action. Instead, the Refuge Manager would have to trigger cumbersome processes described below that may or may not result in any remedial action.

3. Agreement Boils Down to Outsourcing

The CSKT is currently advertising for a “Tribal Deputy Refuge Manager” and for a “Supervisory Wildlife Biologist” – both positions that are provided for in the APA. The minimum qualifications for these positions indicate that those selected may not be current CSKT employees.

As a result, the net result of this AFA will be to displace federal employees not with tribal members but with contract workers who, in turn, work for a tribal department. Transactionally, this AFA is simply outsourcing federal natural resource jobs to an outside entity.

4. No National Policy Means Ad Hoc Negotiations

The implications and precedential impact of this AFA resound far beyond the National Bison Range. According to DOI official determinations, 57 National Park Service units in 19 states are listed as eligible for similar tribal agreements, including national parks such as Redwood, Glacier, Voyageurs, Olympic and the Cape Cod National Seashore. Similarly, another 18 refuges in 8 states, including all of the Alaska National Wildlife Refuges, are also eligible for similar agreements. These eligible refuges constitute 80% of the land area of the entire National Wildlife Refuge System.

Despite the fact that some 75 national parks and wildlife refuges are eligible for similar tribal transfers, DOI has approached the NBRC negotiations on an *ad hoc* basis, with no overall policy or considered approach. Yet for more than two years, a proposed national policy on tribal AFAs has been pending at DOI without action.

By acting without policy guidance, DOI officials may unwittingly be creating a template for future agreements without any idea of whether this one is a model deserving replication.

5. Public Review and Comment Bypassed

Contrary to what DOI did with its FY 2005 AFA on the NBRC, no draft version of this AFA was placed in the *Federal Register* for public comment. The only outside review provided for in the AFA is that already required by law: a signed copy was sent to the Committee on Indian Affairs of the Senate and to the Subcommittee on Native American Affairs of the Committee on Natural Resources of the House of Representatives.

Even this Congressional scrutiny is after-the-fact, as the agreement is already effective on the dates provided by its terms and requires no further approval. Moreover, it is unclear how these legislative panels could void or stop the AFA even if they were so inclined.

Consequently, DOI chose to act on a matter of major controversy with broad implications for both the entire National Wildlife Refuge System as well as the National Park System without seeking any comment or examination from the public.

Specific Comments

These comments reflect particular provisions of the AFA:

1. Dispute Resolution Process May Paralyze Refuge Management

In the event that there is a disagreement about a refuge management issue, the CSKT may elect to elevate any decision that “is unacceptable to the CSKT” over the head of the Refuge Manager all the way to the Deputy Secretary of Interior by invoking a four-stage process, followed by a further appeal (§19):

First, the CSKT can elevate the matter to the Refuge Supervisor, next to the FWS Regional Director, third to mediation, and fourth, if still not resolved to the satisfaction of the CSKT to a “DOI Senior Management Team” anchored by the Deputy Secretary, the number two official in the cabinet agency. Fifth and finally, if the CSKT is still not happy it can appeal to the Interior Board of Contract Appeals.

In short, this “Dispute Resolution” process is a bureaucratic nightmare designed to daunt even the most adamant Refuge Manager from making any decision or taking any action that may in the slightest way be “unacceptable to the CSKT”.

Thus, while the AFA alludes to the “final authority” and “final responsibility” of the Refuge Manager (§7 A and B), as a practical matter, every action of the Refuge Manager is subject to a numbing gauntlet of appeals that may continue regardless of the merits of the dispute and seem calculated to end only when the CSKT agrees with the outcome.

2. Acceptable Performance Becomes Negotiable

Given the experience with the previous AFA, DOI should have ensured that any future arrangement ensured that the agreed-upon work is done to the satisfaction of the federal agency that is paying for the work. However, this is not the case.

The AFA provides any evaluation be “joint” with the CSKT and does not allow for independent review (§11A). If any “significant perceived performance deficiency” is found by the Refuge Manager, he or she must provide a written justification of what legal authority mandates that the work be done in a specified manner and “why the performance of the CSKT does not meet that requirement” and then provide “the CSKT a reasonable amount of time to remedy the performance or demonstrate to the Refuge Manager that no performance deficiency exists” (§11A3biii).

3. Standards May be Altered without Public Notice

Under the AFA, CSKT can obtain waivers of regulations from the Secretary of Interior (§9B). The only limitation is that the Secretary may not waive any regulation with which by law the CSKT must comply.

4. Public Right-To-Know Suspended

The agreement provides that the Freedom of Information Act “does not apply to records solely maintained by the CSKT” (§ 0D). Moreover, the agreement stipulates that the CSKT will provide financial records of expenditures to the FWS only “to the extent the Service requires them for its budget appropriation or apportionment process” (§10C 1) – phrasing strongly suggesting that the CSKT is under no obligation to open its accounts to any outside review.

Moreover, the only “Activity” record that the CSKT is required to maintain must merely “document the nature of the Activity and when, where, and by whom it was performed” (§10B). Thus, members of the public seeking to determine the basis behind wildlife management decisions may run into a brick wall of fragmentary data and no way to penetrate beyond that wall.

5. Financial Incentive to Cut Corners

Under the agreement, any “funds remaining with the CSKT at the end of a fiscal year may be retained by the CSKT and used on future projects at NBRC” (§10C2). Similarly, the CSKT keeps any interest generated by federal funds (§13F).

Thus, any savings from the operations of this federal facility would not be returned to the taxpayer but would go to the CSKT.

Further, given the limited ability of FWS to examine CSKT expenditures (see Comment 4, above), the agency would not be able to ensure that any savings or interest would be used on NBRC projects. This becomes even more problematic given that all performance measured will be, in essence, open to negotiation (see Comment 2, above).

Thus, the agreement is drafted to give the CSKT a financial incentive to cut corners and reduce expenditures to the potential detriment of refuge purposes.

6. Financial Incentive to Harass or Drive Away Federal Employees

Similarly, the agreement stipulates that the CSKT will be awarded the unused salary and benefits of any FWS employee who quits, transfers or is terminated by the CSKT (§13C). This provision gives the CSKT a financial incentive to drive away federal employees.

As with the previous agreement in which FWS staff alleged deliberate abuse by CSKT employees, creating a financial incentive to remove people from their jobs is a recipe for misunderstanding, mistrust and acrimony.

7. No Specified Remedy for Harassment or Mistreatment of Employees

Despite declaring a “zero tolerance policy” for “discrimination, retaliation and harassment of any type” (§8A), the agreement does not provide any direct remedy or sanction in the event that such abuse occurs.

While federal civil service has well-defined procedures and processes for pursuit of harassment and discrimination claims, it is not clear whether any such avenues exist for CSKT employees or those working under CSKT management.

The agreement does provide for a “joint” investigation and report by CSKT and FWS managers concerning “any allegations” but does not specify what happens if the CSKT and FWS representatives disagree about what occurred or what should be done about it (§8A). In 2006, the CSKT and FWS fundamentally and vociferously disagreed about the merits of FWS staff allegations of harassment and abuse leading to the cancellation of the earlier AFA. If the same events occurred under this new AFA, presumably the dispute would be elevated again to the Secretary of Interior.

8. No Due Process Protection against Banishment for False Allegations

Should an FWS employee wish to remain working at NBRC (as opposed to transfer away, retire or have his or her position eliminated), that civil servant has two choices: 1) go to work for CSKT or remain a federal employee subject to CSKT supervision under an Intergovernmental Personnel Act (IPA) agreement (§12E3).

Should the FWS employee wish to remain on the refuge and retain his or her federal benefits, the IPA is the only option.

Once working under the IPA, the CSKT may terminate the federal employee. If he or she is terminated from an IPA, a federal employee would be thereafter barred from working in any capacity at the NBRC (§12E5ciii).

The agreement specifies that the CSKT may only terminate a federal employee for “cause” but the CSKT determines cause. If FWS disagrees with the CSKT finding of cause, the CSKT must engage in the “dispute resolution process...up through the Regional Director level” (§12E5cii). If, after that elevation, the CSKT still insists upon the termination of the IPA, the agreement provides it would be terminated, forcing the removal of the federal employee from the NBRC.

Thus, the agreement provides that federal civil servant may be removed from a posting over the objection of his or her agency solely at the behest of the CSKT.

Moreover, the removal would act as a banishment of that employee from any future posting on the refuge, thus affecting important property rights of that civil servant. Disturbingly, the agreement allows for this finding of cause without review by an impartial, independent person or body, in violation of the employee’s constitutional procedural due process rights. [See *Mathews v. Eldridge*, 424 U.S. 319, 325, n.4 (1976)]

9. Affected Federal Employees Lose Privacy and Other Rights

For those federal employees working under an IPA, the CSKT would have the right to obtain information from that employee’s personnel file (“any personnel or disciplinary records directly related to the IPA Employee’s performance” §12E5ci). This is information which would otherwise be held confidential under the Privacy Act. Yet, there is no provision for an employee waiver of his or her Privacy Act rights.

Similarly, it appears that the CSKT would obtain and maintain any medical, employment and financial records for that employee generated during the IPA period.

The only safeguard against dissemination of sensitive employee information in the agreement is this sentence:

“CSKT officials agree to keep IPA personnel information confidential and secure” (§12E5ci)

This statement implies that CSKT officials may include a very wide circle of people within the tribal government. Moreover, it is unclear what remedies would be available to a federal employee whose personal information was inappropriately disseminated through oversight by CSKT officials or a decision to violate the provisions of the AFA.

10. Whistleblowers May Be Compromised

While the CSKT would not be subject to the Freedom of Information Act (FOIA), the agreement requires FWS to immediately relay information to it, as specified in the following provision:

“The Service will promptly notify the CSKT Deputy Range Manager in writing of each written comment and documented oral comment received from third parties concerning the CSKT performance of any Activity. The Service will provide that

information to the CSKT on its own initiative, in accordance with the disclosure practices under FOIA and the Privacy Act, without the necessity of a FOIA request from the CSKT. The Service will not take any action regarding the CSKT's performance on the basis of any oral comment that the Service did not document in writing, or any comment the Service did not promptly provide to the CSKT Deputy Manager." (§ 11A 3a)

This extraordinary provision means that every citizen complaint, law enforcement report or whistleblower disclosure should be instantly relayed to the CSKT. Moreover, the Privacy Act or FOIA exemptions may allow the name of the informant to be withheld but the substance and timing of the complaint may enable the CSKT to deduce the source of the information.

This provision could make any person who files a complaint about CSKT performance with the FWS a potential target of retaliation. Such a prospect, if known, would likely deter reports of wrongdoing.

Moreover, relaying information to the CSKT about alleged misconduct may compromise any investigation of that allegation. If defense contractors or other government contractors were accorded a prompt written copy of all reports about their performance, it would be very difficult to investigate contractor fraud or other abuse, because once tipped off the contractor would strive to cover its tracks.

Perhaps most questionable of all is the quasi-immunity conveyed by this provision. It would purport to insulate the CSKT from the consequences of any misconduct, no matter how serious, if the CSKT did not receive a prompt write-up of the initial report which triggered the investigation.

11. Inherently Federal Functions Delegated

Although §7 of the agreement explicitly states that "the Refuge Manager will retain final responsibility and authority for directing and controlling the operation of the NBRC," conditions placed upon that officer's decision-making authorities eliminate essential powers. For example, the following specified Refuge Manager authorities are explicitly made subject to the dispute resolution process in §19.A:

1. Setting work priorities through the NBRC Annual Work Plan;
2. Approval of any uses of the NBRC by third parties, including secondary uses and economic uses;
3. Signature authority for Appropriate Use Determinations and Compatibility Determinations;
4. Signature authority for Special Use Permits;
5. Expenditure of Federal funds allocated to the NBRC, but not transferred to the CSKT under this AFA; [emphasis added]
6. Supervision of Service personnel performing activities retained by the Service; [emphasis added; *note that the CSKT Deputy is not included*]

7. Establishment or modification of regulations for public use that can be accomplished at the field level under 50 CFR Chapter 1, Subchapter C;
8. Final field-level approval of: environmental compliance documents and refuge management plans, including Comprehensive Conservation Plans; step-down management plans; and prescribed fire burn plans;
9. Final field-level approval of: emergency operations documents, including Delegations of Authority; Wildland Fire Situation Analysis; and Wildland Fire Cost Share Agreements; and
10. Final field-level approval of implementation of any actions concerning necessary security issues and concerns.

In addition, by its terms the agreement vests within the CSKT the authority to:

1. Supervise federal employees working under an IPA;
2. Oversee the Biological, Fire and Visitor programs at the NBRC; and
3. Select and supervise refuge volunteers.

The subject AFA was signed pursuant to the Self-Governance Act of 1994 (SGA, codified at 25 USC §§458aa-458hh), which was passed as an amendment to the Indian Self-Determination and Education Assistance Act (ISDEAA, Public Law 93-638, 25 USC §§450-450n). The scope of this law was not intended to supplant any other provisions, restrictions or prohibitions in law. One of those restrictions forbids delegating inherently federal functions.

As Senator John McCain, an active member of the Senate Indian Affairs Committee during passage of the SGA, stated at the debates on enactment of the SGA –

“It is not intended that the Secretary of the Interior’s authority to enter into compacts under Section 403(b)(2) permit the transfer of inherently Federal responsibilities vested by the Congress in the Secretary which are determined by the federal courts not to be delegable under the Constitution.... It is not possible at this time to list all of the elements of Federal programs which may not be subject to self-governance compacts, *but such a list certainly would include discretionary administration of Federal fish and wildlife protection laws...and other discretionary functions vested in Federal officials.*” (Emphasis added) (140 Congr. Rec. S14678, Daily Ed. 10/7/1994)

On May 17, 1996 at the time DOI was beginning implementation of the SGA, DOI Solicitor John Leshy issued a Solicitor’s Opinion on the subject of inherently Federal functions. Two types of limitations were identified: (1) Limitations on the transfer of functions that have been determined by the courts not to be delegable under the Constitution; and (2) Discretionary functions vested in federal officials. In discussing the second limitation, Mr. Leshy drew upon the list in Senator McCain’s floor statement (*supra*) and an OMB Policy Letter (Policy Letter 92-1, Sept. 23, 1992). That policy letter defined an “inherently governmental function” as “a function that is so intimately related to the public interest as to mandate performance by Government employees.” The policy

letter also stated that these functions include those activities that either require the exercise of discretion in applying government authority or the making of value judgments in making decisions for the government.

In general, while the AFA asserts the continued management authority of the FWS that is required by the National Wildlife Refuge System Administration Act, its provisions in fact provide for at the least joint management of the Refuge, and may well in practice amount to a complete transfer of management authority to the CSKT. The AFA is therefore vulnerable to legal challenge.

12. No Administrative Support for Refuge Management

The agreement provides that the only federal employees remaining on the NBRC will be the Refuge Manager and a single FWS Deputy Manager. All other employees would work for or be supervised by the CSKT (§7).

The only provision the agreement makes for administrative or other support is that –

“CSKT will contract for ... [an] Administrative Support Assistant position...As part of the Administrative Support Assistant’s Activities, CSKT shall direct the employee to assist the Refuge Manager and the Service’s Deputy Manager in some of their retained administrative duties.” (§6A1)

Thus, the CSKT will control who, how and to what extent the Refuge Manager and the FWS Deputy receive any administrative support in the array of tasks assigned to them.

13. Flexibility of Refuge System Diminished

The AFA is crafted to lock payment levels, staffing and facilities in place through 2012. It makes no provision for FWS being able to reallocate or prioritize other refuge needs. Nor is there provision for FWS to reallocate funds or personnel due to disease (such as infectious conditions threatening wildlife and/or domestic livestock), drought or other emergency.

Earlier this month, DOI opposed legislation (H.R. 6479) affecting refuge organization in California’s Bay Area on the grounds that locking the organization of a refuge complex into statute would make it less flexible to adapt to changing management priorities. That same argument could be lodged against this agreement submitted by DOI.

14. Start Date and Qualifications Uncertain

The agreement acknowledges that the CSKT will not be ready to assume responsibility for all functions and that implementation “will be phased in” (§24A). Moreover, the qualifications and experience of the CSKT staff is not specified.

Consequently, it is not known when and at what level the CSKT will be able to perform the functions outlined in the agreement.

###