

v.)
)
DIRK KEMPTHORNE,)
in his official capacity as Secretary of the)
Interior)
Department of the Interior)
1849 C Street, N.W.)
Washington D.C. 20240)
)
DALE HALL,)
in his official capacity as Director of the)
U.S. Fish and Wildlife Service)
1849 C Street, N.W.)
Washington, D.C. 20240)
)
Defendants)
_____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs bring this action for declaratory and injunctive relief to require Defendants, the Secretary of the United States Department of Interior (DOI) and the Director of its constituent agency, the United States Fish and Wildlife Service (FWS), to rescind a 2008 Annual Funding Agreement (AFA) with the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (CSKT) for operation and management of the National Bison Range Complex (NBRC), a unit of the National Wildlife Refuge System located in Moiese, Montana; to retrieve any funds already made available to the CSKT under the AFA; to award Plaintiffs reasonable costs and expenses of this litigation, including attorneys’ fees; and for other relief.

2. Plaintiffs include a former Assistant Secretary of Interior for Fish, Wildlife and National Parks; four former Refuge Managers of the NBRC, whose tenures covered all

but three years between 1965 and 2004; a former Chief of the National Wildlife Refuge System; a former regional Refuge Supervisor; a citizen activist on National Wildlife Refuge issues, including the AFA on the NBRC; an NBRC employee who has been forced to transfer away from his position due to the AFA; and a public interest organization whose mission is to advocate for public employees, including those on National Wildlife Refuges.

3. Plaintiffs claim that the AFA violates the National Wildlife Refuge System Administration Act of 1966, as amended, (NWRSA), 16 U.S.C. §§ 668dd-668ee; the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §§ 450-450-n; 458aa-hh, as amended; the Freedom of Information Act, 5 U.S.C. § 552 and the Intergovernmental Personnel Act, 5 U.S.C. §§ 3371-3376.

4. Plaintiffs further claim that Defendants are in violation of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, in failing to prepare an environmental impact statement or other environmental documents required by NEPA before entering into the AFA.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 701-706 (Administrative Procedure Act).

6. This Court has the authority to award costs, expenses and attorneys' fees under 28 U.S.C. § 2412(d) (Equal Access to Justice Act).

7. Venue is properly vested in this court under 28 U.S.C. 1391(e) because the Defendants and one of the Plaintiffs reside in this district.

PARTIES

8. Plaintiff Nathaniel Pryor Reed was nominated to serve as Assistant Secretary of Interior for Fish, Wildlife and National Parks by President Richard Nixon and reappointed by President Gerald Ford. He served in this position from May 1971 until January 1977. His responsibilities included oversight of the activities of the agency that is now titled the United States Fish and Wildlife Service. Among the varied responsibilities of that agency is the management of millions of acres of National Wildlife Refuges such as the National Bison Range. Mr. Reed spent a great deal of time reorganizing the agencies that reported to him, in particular the Refuge System. Following his federal service, Mr. Reed continued his career in conservation and environmental protection, serving seven Florida governors on a wide range of committees and commissions, including service as chairman of the Commission on Florida's Environmental Future.

Mr. Reed is very familiar with the history of the Bison Range and its importance due to its vastness and the population of genetically pure bison, a reminder of what once was the greatest herd of mammals in living history. Based upon his professional experience and familiarity with the relevant legal authorities, Mr. Reed has concluded that management of the NBRC must be the sole responsibility of the United States Fish and Wildlife Service. While the FWS may determine to use the services of the Tribe to work on the range, the responsibility for overall management is the legal duty of the FWS

and its refuge management team. Any other conclusion leads to decisions that could illegally divest the nation of its great refuge system.

9. Plaintiff David S. Wiseman was the Refuge Manager (Project Leader) for the NBRC from 1995 to 2004. In that capacity, he took part in the negotiations for the first (2005) AFA with the CSKT. See ¶¶ 52-56, below. Between 1977 and 1995, he served as Refuge Manager for nine other National Wildlife Refuges and two Wetland Management Districts. After leaving the NRBC, from 2004 to 2007, he was the FWS Region 6 Supervisor for NWRS units located in the states of Colorado, Kansas and Nebraska. Mr. Wiseman has maintained a continuing personal and professional interest in the NBRC. Based upon his professional experience in refuge management, Mr. Wiseman is aware that individuals in the supervisory positions assigned to the CSKT under the 2008 AFA perform “inherently federal functions” which routinely have significant economic, recreational and freedom of movement effects on citizens of the United States. Based upon his professional knowledge and experience, he has concluded that the provisions of the 2008 AFA with the CSKT leave the Refuge Manager with the accountability to manage the refuge but strips his/her authority to direct refuge management.

10. Plaintiff Jon Malcolm was the Refuge Manager (Project Leader) for the NBRC from 1981 until his retirement in 1994. As NBRC Refuge Manager, he spent 13 years building a staff of well-trained, experienced and skilled FWS employees and worked to achieve effective professional management and operation of the Refuge. Since his retirement, he has followed developments at the NBRC, and has been active in matters concerning the NBRC as a private citizen. He organized a petition with 4200

signatures supporting permanent FWS management. He seeks to insure that the goals he pursued in his 13 years as Refuge Manager are furthered rather than undermined. He is aware that during the 2005 AFA with the CSKT, see ¶¶ 52-56, below, the NBRC lost the expertise and abilities of experienced staff members who left due to harassment and job uncertainty. He is concerned that the current AFA will result in damage to the quality and efficiency of management of the Refuge.

11. Plaintiff Marvin R. Kaschke was the Refuge Manager (Project Leader) of the NBRC from 1968 to 1977. From 1977 until 1988 he served at the Sheldon National Wildlife Refuge in Oregon and the Hart Mountain National Antelope Refuge in Nevada. His service prior to 1968 included positions at the Crescent Lake National Wildlife Refuge in Nebraska, the Medicine Lake National Wildlife Refuge in Montana, the Malheur National Wildlife Refuge in Oregon and the Charles M. Russell National Wildlife Refuge in Montana. He retired from a 30 year career in the FWS in 1988.

Mr. Kaschke is concerned that the AFA with the CSKT eliminates public participation in the administration of the Refuge, violates the National Environmental Policy Act and the Refuge planning process, gives funding to an entity (the CSKT) which is not required to meet federal auditing and accounting requirements for those funds, and damages the career opportunities of current FWS personnel at the NBRC.

12. Plaintiff Joseph P. Mazzone was the Refuge Manager of the NBRC from 1965 to 1968. He retired from the FWS after 40 years of service, including positions with responsibilities for National Wildlife Refuge administration in the Regional Offices of Regions 1, 2 and 7. He is currently the Region 8 Representative of the National Wildlife

Refuge Association, a national non-profit organization dedicated to strengthening the ecological integrity of National Wildlife Refuges through advocacy and public education. He maintains a personal and professional interest in the NBRC. Based on his professional experience as Refuge Manager of the NRBC and in other positions in refuge administration, he has concluded that the 2008 AFA abrogates the responsibility and authority of the FWS for essential management functions that must remain under the direct supervision and coordination of the Refuge Manager for effective refuge management. He is concerned that the AFA's dispute resolution process, which gives the Tribe both dispute resolution and appeal rights with regard to any decision of the Refuge Manager, leaves the Refuge Manager with no ultimate authority for refuge management.

13. Plaintiff Marvin L. Plenert was the FWS Assistant Director for the National Wildlife System (Refuge Chief) from 1986 to 1988. He was Deputy Assistant Regional Director of the National Wildlife Refuge System for Region 6, which includes the NBRC, for ten years, from 1977 to 1986. He was also the Regional Director for Region 1 from 1989 to 1994 and the Regional Supervisor for Alaska Refuges from 1973 to 1976. His earlier career positions included responsibility for identifying lands acquired for the Waterfowl Production Areas now part of the NBRC. Mr. Plenert retired in 1994 after 33 years with the FWS.

Based on his professional experience in National Wildlife Refuge management and administration, Mr. Plenert has concluded that the AFA illegally assigns management authority and biological duties to a Deputy Manager and other positions which report to the CSKT. These positions are not required to have the qualifications of FWS employees

in similar positions, potentially resulting in adverse impacts to land and wildlife management.

14. Plaintiff Robert C. Fields retired after 37 years in National Wildlife Refuge management. His last position was as Refuge Supervisor for all California and Nevada Refuges. He was stationed at the NBRC from 1962 to 1963 as a Manager Trainee. From 1965 to 1968 he was Refuge Manager (Project Leader) at Ft. Niobrara National Wildlife Refuge in Valentine, Nebraska. There he was responsible for all aspects of refuge management including the management of a herd of 225-275 bison. He was past President of the Board of Directors of the National Wildlife Refuge Association, and was a Board member for nine years. Based upon his professional experience in refuge management and administration, he has concluded that the current AFA improperly transfers refuge management to the CSKT and will adversely impact resource management.

15. Plaintiff Florence M. La Riviere has been a citizen activist on National Wildlife Refuge issues since 1967, when she began to participate in a citizens' group seeking to ensure the survival of the diminishing wetlands of San Francisco Bay by establishing a National Wildlife Refuge. In 1972, the San Francisco Bay National Wildlife Refuge was established. Today, she is the chair of a group called Citizens Committee to Complete the Refuge (CCCR), which works to acquire all of the remaining wetlands on South San Francisco Bay for placement in the Refuge, now named in honor of Congressman Don Edwards. CCCR is also involved in other issues concerning National Wildlife Refuges, including the AFAs for the NBRC. On behalf of CCCR, Ms.

LaRiviere has submitted multiple requests under the Freedom of Information Act (FOIA) relevant to the AFAs at the NBRC, and has participated in education and advocacy concerning the Bison Range AFAs and the possible precedent they could set for the National Wildlife Refuge System in general.

Based upon her many years of experience as a citizen activist with regard to National Wildlife Refuges, Ms. LaRiviere believes that the FWS provides the NWRS with dedicated, educated professionals who provide quality management of refuges, and that any co-management agreement with an entity outside of the federal government will diminish the quality of refuge management as well as violate the laws governing refuges. She is also concerned that the AFA with the CSKT would severely limit the ability of the public, including herself and her organization, to monitor compliance with refuge laws, regulations and policies by replacing the FWS with a third party, sovereign entity, and by restricting access to information that is now available under FOIA.

16. Plaintiff Delbert Dee “Skip” Palmer has been employed in the maintenance department of the NBRC for 16 years. His duties include grading roads, constructing buildings, and working directly with the bison, including moving them to different areas of the range. He is also sometimes detailed to other refuges around the country to manage prescribed fires and control wildfires. Mr. Palmer lives on a farm eight miles from the NBRC which has been in his family for five generations and which he manages with his son. Therefore, Mr. Palmer never considered transfer to another position which would require him to relocate a viable option under the previous 2005 AFA or the current 2008 AFA. He stayed at the NBRC for the 18 month duration of the 2005 AFA, see ¶ 52

below, and was one of seven employees who filed a grievance against the FWS in 2006 alleging a hostile work environment. See ¶¶ 53-54, below.

Under the current AFA, Mr. Palmer was given a choice of accepting an assignment to the CSKT at the NBRC pursuant to an agreement under the Intergovernmental Personnel Act (IPA), 5 U.S.C. §§ 3371-3376, or accepting a reassignment to another position in the FWS away from the NBRC. Mr. Palmer did not want to leave the NBRC, and as noted above, could not relocate. However, he could not accept the IPA agreement that was offered to him because, contrary to the IPA and its implementing regulations, it ceded his rights as an individual and as a federal employee. The AFA and the IPA agreement allowed the CSKT to have final authority to terminate him, even overriding the decision of the FWS to retain him, and after termination of the IPA he would not have the right to return to his prior federal position or to be offered another position of like pay and grade. *See* 5 C.F.R. 334.107. Instead, if terminated by the CSKT, he would not be allowed to return to the Bison Range in any capacity, the federal position he had occupied would be abolished, and he could be subject to a Reduction in Force (RIF). The AFA and the IPA also removed Palmer's rights under the federal Privacy Act, 5 U.S.C. § 552a.

Because he was given no valid alternative, Mr. Palmer chose the reassignment option, effective January 1, 2009. Mr. Palmer will be stationed at the Lee Metcalfe National Wildlife Refuge, 70 miles from his home, and will be travelling to various other refuges to perform maintenance and fire crew duties.

17. Plaintiff Public Employees for Environmental Responsibility (PEER) is a nonprofit organization headquartered in the District of Columbia. It is a national alliance

of local, state and federal resource professionals. PEER works nation-wide with government scientists, land managers, environmental law enforcement agents, field specialists and other resource professionals committed to responsible management of America's public resources. PEER has a Field Director dedicated to serving employees of the National Wildlife Refuge System and promoting the optimal management and ecological integrity of National Wildlife Refuges. PEER members include employees of the NBRC and other individuals with professional, scientific and recreational interests in the NBRC.

18. Defendant Dirk Kempthorne is the Secretary of the U.S. Department of Interior, and as such, is the official ultimately responsible for the Department's agreement to the AFA and for the Department's compliance with federal law. He is being sued in his official capacity.

19. Defendant Dale Hall is the Director of the U.S. Fish and Wildlife Service, an executive branch department within the Department of Interior which has been designated by law to have management authority over National Wildlife Refuges. He is a signatory to the 2008 AFA. He is being sued in his official capacity.

FACTS

20. On June 19, 2008, representatives of the U.S. Department of Interior (DOI) and its constituent agency, the U.S. Fish and Wildlife Service (FWS), signed a three-year (Fiscal Years 2009-2011) funding agreement with the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (CSKT) for operation and management of the National Bison Range Complex (NBRC), a unit of the National Wildlife Refuge System

(NWRs). The Agreement, although covering three fiscal years, is called an “annual funding agreement” or “AFA” and is attached hereto.

21. The NBRC to which the AFA applies includes: (1) the National Bison Range, (2) the Ninepipe National Wildlife Refuge, (3) the Pablo National Wildlife Refuge and (4) the Northwest Montana Wetland Management District in Lake County. AFA Sec. 4.

22. The National Bison Range (NBR) was established in 1908 and is one of the oldest Wildlife Refuges in the nation. It was the nation’s first wildlife conservation area established at the direction of Congress and acquired completely with funds appropriated by Congress. Using bison purchased and donated to the federal government by the American Bison Society, it has protected and fostered the once nearly extinct American Bison for 100 years. The NBR’s work continues to be vital to the future of the bison as a healthy, genetically pure native species. Its 18,500 acres of native prairie, forests, wetlands and streams also provide habitat for elk, deer, pronghorn antelope, bighorn sheep, black bear, coyote, ground squirrels and other mammals. The Bison Range also supports over 200 species of birds including eagles, hawks, meadowlarks, bluebirds, ducks, and geese. Refuge facilities include a Visitor Center, auto tour roads, walking trails and a picnic area.

23. The Ninepipe National Wildlife Refuge was established in 1921 to function as a refuge and breeding ground for migratory and native birds. (Executive Order 3503, June 25, 1921). It comprises 2,062 acres, consisting of a reservoir that contains about 1,672 acres of water at full pool level, and 390 acres of upland habitat in a narrow band

around the reservoir. At present, the Refuge is managed by the NBRC personnel. It supports abundant migratory waterfowl and other bird species as well as mammals and sport fish.

24. The Pablo National Wildlife Refuge was established in 1921 to function as a refuge and breeding ground for migratory and native birds. (Executive Order 3504, June 25, 1921). It comprises 2,524 acres, consisting of a reservoir that contains about 1,850 acres of water at full pool level and 692 acres of uplands in a narrow band around the reservoir. At present, the Refuge is managed by NBRC personnel. It supports abundant migratory waterfowl and other bird species as well as mammals and sport fish.

25. The Northwest Montana Wetland Management District in Lake County contains nine waterfowl production areas (WPAs) totaling 3,268 acres and a conservation easement of 6,300 acres, all located within 10 miles of the Bison Range. These lands were acquired with proceeds from migratory waterfowl stamps and managed for migratory bird use subject to all provisions of the Migratory Bird Conservation Act (16 U.S.C. 715-715r), except the inviolate sanctuary provisions due to the Migratory Bird Hunting and Conservation Stamp Act (16 U.S.C. 718). These areas support abundant waterfowl, other bird species and small mammals. They are managed by NBRC personnel.

26. By its terms, implementation of the AFA is to be phased in between October 1, 2008 and December 31, 2008, and the AFA is to be fully effective no later than January 1, 2009. AFA Sec. 24 A.

27. The National Wildlife Refuge System Administration Act of 1966, as amended, (NWRSA), 16 U.S.C. §§ 668dd-668ee, provides that the Refuge System "shall be administered by the Secretary [of Interior] through the United States Fish and Wildlife Service." *Id.* § 668dd(a)(1). It authorizes the Secretary to enter into cooperative agreements for the management of programs on a refuge only with State fish and wildlife agencies, and "[s]ubject to standards established by and the overall management oversight of the Director [of FWS]." *Id.* § 668dd(b)(4).

28. The AFA purports to be authorized by Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 458aa-hh, as amended. AFA Sec. 3 A. The ISDEA provides that the Secretary of Interior may enter into annual written funding agreements with Indian tribes "in a manner consistent with the Federal Government's laws," 25 U.S.C. § 458cc(a), which authorize the tribe to "plan, conduct, consolidate and administer programs, services, functions and activities, or portions thereof" administered by DOI's Bureau of Indian Affairs (BIA), *id.* § 458cc(b)(1), and that such agreements may also apply to DOI agencies other than the BIA where the subject programs are "of special geographic, historical, or cultural significance to the participating Indian tribe" *Id.* § 458cc(c). The ISDEAA contains a "Disclaimer" section which prohibits such agreements with respect to "functions that are inherently Federal or where the statute establishing the existing program does not authorize the type of participation sought by the tribe" *Id.* § 458cc(k).

29. The AFA provides funding for the CSKT to perform certain programs, services, functions and activities at the NBRC which are currently being performed by the FWS and its employees.

30. The AFA directs that the CSKT will perform activities at the NBRC in five areas: 1) management, 2) biological program (including habitat management), 3) fire program, 4) maintenance program, and 5) visitor services programs (phased in over two years). AFA Sec. 6 A.

31. The AFA provides that activities not explicitly covered by the AFA are retained by the federal government, but may be included in subsequent AFAs. AFA 6 C. Only the Law Enforcement Program is explicitly assigned to the FWS. AFA Sec. 7 C.3.b.i.

32. The only positions which are designated to be retained by the FWS under the AFA are the Refuge Manager and a Deputy Refuge Manager. The CSKT is to provide a co-equal Deputy Refuge Manager, lead wildlife Biologist, and an Administrative Support Assistant, one of whose functions will be to assist the FWS Refuge Manager and Deputy Manager. AFA Sec. 6 A.1; Sec. 7 C.1. The only program explicitly assigned to be managed by the FWS Deputy Refuge Manager is the law enforcement program. AFA Sec. 7 C.3.b. The CSKT Deputy Refuge Manager is a “senior staff advisor to the Refuge Manager” and is to “provide substantive input to management decision-making at NBRC.” AFA Sec. 7 C. 1. The CSKT Deputy Refuge Manager is to alternate with the FWS Deputy Refuge Manager in serving as Acting Refuge Manager in the absence or unavailability of the Refuge Manager. AFA Sec. 7 C.2. The Acting Refuge Manager is

authorized to exercise all authorities of the Refuge Manager except those specifically reserved to the Refuge Manager in AFA Sec. 7.B (see ¶ 37, below). When the CSKT Deputy Refuge Manager is Acting Refuge Manager, the entire chain of command at the Refuge is comprised of CSKT personnel.

33. The CSKT Deputy Refuge Manager is to direct the day-to-day work of employees and volunteers in the programs which are assigned to the CSKT under the AFA, including federal employees assigned to the CSKT under the Intergovernmental Personnel Act. AFA Sec. 7 C.3.a. See ¶¶ 50-51, below.

34. The CSKT is represented with respect to the AFA by the CSKT Deputy Refuge Manager, and also by the CSKT Natural Resources Department and the Tribal Council. AFA Sec. 7 D.5; 8 A.5; Sec. 11 A.3.b.i –iii; Sec. 19 A.3-4.

35. The CSKT is to “staff and oversee the Activities under this AFA through the professional staff of its Natural Resources Department.” AFA Sec. 12 C. Thus, the CSKT Deputy Refuge Manager and other CSKT employees and volunteers at the NBRC are directed and controlled by the Tribal government.

36. The CSKT is to manage all of the activities assigned to it under the AFA “subject to the final authority of the Refuge Manager.” AFA Sec. 7 A. However, the “final authority of the Refuge Manager” is circumscribed by AFA provisions directing that any decision by the Refuge Manager with which the CSKT Deputy Refuge Manager disagrees, AFA Sec. 7 D.6, or which is “unacceptable to the CSKT,” is subject to

challenge by the CSKT in multi-level dispute resolution procedures and/or in appeals and court actions. AFA Sec. 19 A.2.

37. In fact, all of the functions and authorities which are reserved to the FWS Refuge Manager in the AFA are explicitly made subject to challenge by the CSKT under the dispute resolution and appeal procedures. AFA Sec. 7 B. These are: setting work priorities; approval of uses of the NBRC by third parties; signature authority for Appropriate Use Determinations, Compatibility Determinations, and Special Use Permits; expenditure of federal funds *not* transferred to the CSKT; supervision of FWS personnel performing activities retained by the FWS; establishment and modification of certain regulations for public use; final field level approval of environmental compliance documents and refuge management plans; final field level approval of emergency operations documents, Wildland Fire Situation Analysis and Wildland Fire Cost Share Agreements; and final field-level approval of implementation of any actions concerning security issues. AFA Sec. 7 B.1-10.

38. The AFA describes its arrangement as a “management partnership.” AFA Sec. 7 C.1. The parties (DOI and the CSKT) are directed to “collaborate in the management of the NBRC” through a “Refuge Leadership Team.” AFA Sec. 7 D. That team is to consist of the Refuge Manager, the CSKT Deputy Refuge Manager, the FWS Deputy Refuge Manager and the CSKT Lead Biologist. AFA Sec. 7 D.1. The Refuge Leadership Team is to jointly write the Annual Work Plan for the Refuge, conduct short-term planning and resolve concerns raised by the FWS or the CSKT. AFA Sec. 7 D.2-3.

39. The Annual Work Plan to be “jointly . . . develop[ed]” and “mutually agreed upon” by the FWS and the CSKT for each fiscal year is to include *all* activities on the Refuge, including those to be performed by CSKT and those to be retained by the FWS. AFA Sec. 7 E. It is to be prepared by the Refuge Leadership team, and is to describe the work to be accomplished in the following fiscal year, establish priorities, project completion dates and quality requirements for work, and assign responsibilities for accomplishing work to CSKT and FWS employees. AFA Sec. 7 E 4.b.

40. If the Refuge Leadership Team cannot reach consensus on any matter, the decision of the Refuge Manager will prevail. However, the CSKT Deputy Refuge Manager can invoke the dispute resolution procedures in AFA Sec. 19 “in the event of disagreement with the Refuge Manager’s decision.” AFA Sec. 7 D.6.

41. The dispute resolution process includes four levels of review. First, disputes are to be considered by the Refuge Leadership Team. AFA Sec. 19 A.1 and 2. If the Refuge Leadership Team cannot reach consensus and the decision of the Refuge manager is “unacceptable to the CSKT,” the CSKT Deputy Refuge Manager may elevate the dispute to the second level. At that level, the Refuge Supervisor (who is above the Refuge Manager in the FWS chain of command) and the CSKT Natural Resources Department Head attempt to resolve the dispute. If they are unable to reach consensus, the Refuge Supervisor’s decision will prevail, but the CSKT Natural Resources Department Head may elevate the dispute to the third level. AFA Sec. 19 A.3. At that level, the Tribal Council and the FWS Regional Director attempt to resolve the dispute. Mediation may be invoked by either party. If consensus cannot be reached, the decision

of the FWS Regional Director will prevail, but the Tribal Council may elevate the dispute to the fourth level, which is an appeal to the DOI Senior Management Team, AFA Sec. 19 A.4, consisting of the Deputy Secretary; Associate Deputy Secretary; Assistant Secretary for Fish, Wildlife and Parks; Assistant Secretary for Indian Affairs; Director of the Fish and Wildlife Service, Director of the Bureau of Indian Affairs, and the Associate Solicitor of General Law. AFA Sec. 4. Without going through any of these levels of review, or after they are completed, the CSKT may appeal disputes under the AFA to the Interior Board of Contract appeals and then to court. AFA Sec. 19 B, referencing 25 C.F.R. Part 1000, Subpart R and 25 U.S.C. § 450m-1. See also, 25 U.S.C. § 458cc(h)(1).

42. Any allegations of discrimination or harassment in the workplace are to be resolved by the Refuge Leadership Team. AFA Sec. 8 A.1, 4-5. The AFA does not specify what happens if the FWS and the CSKT disagree about what occurred or what should be done about it.

43. The CSKT may redesign the activities assigned to it and may reallocate funding between activities, with the prior written approval of and subject to any conditions imposed by the Refuge Manager. AFA Sec. 6 B. The decision of the Refuge Manager not to approve a request by the CSKT to redesign activities or reallocate funding with regard to the activities assigned to it would be subject to the dispute resolution and appeal procedures provided in AFA Sec. 19.

44. Compliance with federal environmental laws and requirements is to be jointly shared by the FWS and the CSKT. The Refuge Leadership Team is to identify activities that will require documentation and processes under the National Environmental Policy

Act (NEPA), the National Historic Preservation Act (NHPA), and other cultural resource laws and regulations. The parties are directed to work together to implement the required processes under those authorities. AFA Sec. 9 C.

45. The AFA exempts records of the CSKT related to its activities on the NBRC from the Freedom of Information Act (FOIA), 5 U.S.C. § 552, “except for previously provided copies of Tribal records that the Secretary demonstrates are clearly required to be maintained as part of the record-keeping system of the Department of the Interior” CSKT records are also exempt from the Privacy Act, 5 U.S.C. § 552a. AFA Sec. 10 D.

46. The CSKT’s performance under the AFA is to be jointly evaluated by the CSKT and the FWS. The CSKT has the right to jointly draft and approve its own evaluation. If there are disagreements about the CSKT’s performance, the assessment report is to include the views of both parties. AFA Sec. 11 A.2.

47. The Annual Narrative Report for each fiscal year to be submitted to the FWS Refuge Supervisor is to be prepared by the Refuge Leadership Team. AFA Sec. 11 B. Any other report or evaluation concerning the AFA, as well as periodic status reports to be submitted to FWS’s Regional Office, must also be produced jointly and include both Parties’ positions. AFA Sec. 11 C and D.

48. The AFA provides that any comments about the CSKT’s performance by any third party be promptly provided in writing to the CSKT Deputy Refuge Manager in accordance with disclosure policies under the FOIA and the Privacy Act. The FWS is

prohibited from taking any action regarding the CSKT's performance on the basis of any such comment if it did not comply with this requirement. AFA Sec. 11. A.3.a.

49. The CSKT is permitted to contract out positions to perform the activities assigned to it under the AFA. AFA Sec. 12 A. On information and belief, the CSKT has advertised to fill the CSKT Deputy Refuge Manager, CSKT Lead Biologist and other CSKT positions but has not yet filled those positions.

50. Current FWS employees at the NBRC are given four options under the AFA. These are: 1) Assignment to the CSKT under the Intergovernmental Personnel Act (IPA), 5 U.S.C. §§ 3371-3376; 2) Direct employment by CSKT with CSKT benefits; 3) Direct employment by CSKT with federal benefits; and 4) reassignment by the FWS to another duty station. AFA Sec. 12 E.3. If the federal employee selects direct employment by the CSKT, either with CSKT or with federal benefits, acceptance of that option is at the discretion of the CSKT. AFA Sec. 12 E.6.a. If all of these options are unsuccessful, FWS will conduct a Reduction in Force (RIF). AFA Sec. 12 E.4.

51. For FWS employees who choose the IPA option, the employee, the CSKT and the FWS will jointly develop the employees' performance plans and evaluations. AFA sec. 12 E.5.c. The CSKT may terminate an IPA agreement only "for cause" and after addressing the issue through the first three levels of the dispute resolution process provided in AFA Sec. 19 A. AFA Sec. 12 E.5.c.ii. However, if after engaging in the dispute resolution process, the CSKT disagrees with the FWS's decision, it may terminate the IPA agreement. In that event, the FWS IPA employee may not be reassigned to the NBRC and the balance of the employee's salary and benefits will be

transferred to the CSKT. AFA Sec. 12 E.5.c.iii. Thus, a federal employee of the FWS may be terminated by the CSKT, banished from the NBRC, and have his/her federal position abolished, even if the FWS determines that the employee should be retained. There is no provision assuring that if the IPA agreement is terminated, the federal employee will be assigned to another position at the same pay and grade, or any other position.

52. A previous 2005 AFA with the CSKT covering activities on the NBRC was in place from March 2005 to December 2006.

53. During the 2005 AFA period, on September 19, 2006, seven FWS employees at the NBRC, including Plaintiff Palmer, filed an informal grievance with the FWS Deputy Regional Director, alleging that a hostile work environment had existed at the NBRC since the commencement of the 2005 AFA.

54. The FWS conducted an administrative investigation into the allegations in the informal grievance. In a letter to the FWS Director dated December 6, 2006, the FWS Regional Director, Jerry Mitch King, concluded based on the fact-finding inquiries that “a chronic and pervasive workplace problem of considerable magnitude existed at the NBR,” and that ongoing conditions, including harassment and intimidation of FWS employees, “could not be tolerated.”

55. In his December 6, 2006 letter, as a result of his concerns about the treatment of FWS employees and the visiting public, as well as performance deficiencies on the part of the CSKT, Regional Director King recommended termination of the AFA to the

FWS Director. King also opined that because tribal laws differed from federal laws and regulations, and the CSKT did not operate under the same policies and procedures as the FWS, “it will be almost impossible for management to be in compliance with our legal mandates and directives with respect to the management of the NBR; and even more impossible for the Service to impose Federal policies and procedures on the CSKT.”

56. By letter dated December 11, 2006 from the FWS Regional Director to the CSKT Tribal Chairman, the 2005 AFA was cancelled by the FWS for inadequate performance, including but not limited to failure to comply with FWS bison management standards; failure to meet FWS wildlife monitoring reporting standards and protocols; failure to complete biological study plans and submission of inadequate and unsupported biological reports; failure to timely and properly maintain vehicles, equipment and property; and for creation of a work environment characterized by harassing, offensive, intimidating and oppressive behavior on the part of employees of the CSKT. FWS also found that the CSKT had created unsafe conditions for employees and the public and failed to maintain buildings in compliance with safety and health standards. The termination letter stated that the CSKT’s performance had prevented the FWS from meeting its responsibilities at the NBRC under the National Wildlife Refuge Administration Act and other applicable laws and regulations.

57. Later that month, on December 29, 2006, the Department of Interior announced its intention to enter into a new AFA with the CSKT for the NBRC. Negotiations culminated in the AFA under challenge here.

STATUTORY BACKGROUND

A. National Wildlife Refuge System Administration Act

58. The National Wildlife Refuge System Administration Act of 1966 (NWRSA) formally established the National Wildlife Refuge System. The law consolidated various authorities for managing areas administered by the Secretary of the Interior for the purpose of fish and wildlife conservation. The 1966 law established the standard of "compatibility," requiring that uses of refuge lands must be determined to be compatible with the purposes for which individual refuges were established.

59. In 1976, Congress amended the NWRSA in what became known as the "Game Range Act." The amendments provided generally that areas included in the National Wildlife Refuge System could not be transferred or otherwise disposed of without an Act of Congress, and that all areas within the System were to be administered by the Secretary of Interior through the Fish and Wildlife Service. 16 U.S.C. § 668dd(a). According to the House Report on the bill, the impetus for the legislation was the fact that four game ranges had been jointly administered by the FWS and the Bureau of Land Management (BLM), and the DOI had recently decided that three of the ranges would be transferred to sole administration by the BLM. The purpose of the amendments was to assure that the FWS had responsibility for management of all areas in the refuge system and to preclude dual or joint administration of refuges with any other agency.

60. In 1997, the NWRSA was subject to major amendment in the National Wildlife Refuge System Improvement Act. In that Act, Congress retained the provisions requiring administration of the Refuge System by the DOI through the FWS. The Act

established the conservation of fish, wildlife and plants and their habitats as the mission of the National Wildlife Refuge System, 16 U.S.C. § 668dd(a)(2), provided guidance to the FWS for the management of the System, *id.* § 668dd(a)(4), mandated a long-term comprehensive conservation plan for each refuge, *id.* at § 668dd(e)(1)(A), (B) and (E), and clarified the process for determining the compatibility of refuge uses. *Id.* at § 668dd(d)(3)(B). The legislation also authorized the Secretary, through FWS, to enter into cooperative agreements with State fish and wildlife agencies for the management of programs on a refuge “[s]ubject to standards established by and the overall management oversight of the Director [of FWS].” 16 U.S.C. §668dd(b)(4).

B. Indian Self-Determination and Education Assistance Act

61. The Indian Self-Determination and Education Assistance Act (ISDEAA), as originally enacted in 1975, was intended to assure “maximum Indian participation in the direction of educational as well as other Federal services to Indian communities . . .”, 25 U.S.C. § 450a(a), by permitting an “orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.” 25 U.S. C. § 450a(b). It provided for contracts or cooperative agreements with recognized Indian tribes to perform programs, functions, services or activities which had been administered by the federal government for the benefit of Indians. 25 U.S.C. § 450f(a)(1).

62. In 1994, Congress amended the ISDEAA in what is known as the Tribal Self-Governance Act of 1994 (SGA). Among other things, the amendments permitted the

Secretary of Interior to enter into annual funding agreements (AFAs) for tribal governments to administer programs, functions and activities administered by DOI agencies other than the Bureau of Indian Affairs (BIA) if they are of “special geographic, historical, or cultural significance to the participating Indian tribe” 25 U.S.C. § 458cc(c).

63. The SGA included a “Disclaimer” section, stating:

Nothing in this section is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize the Secretary to enter into any agreement under subsection (b)(2) of this section and section 458ee(c)(1) of this title with respect to functions that are inherently Federal or where the statute establishing the existing program does not authorize the type of participation sought by the tribe: Provided, however an Indian tribe or tribes need not be identified in the authorizing statute in order for a program or element of a program to be included in a compact under subsection (b)(2) of this section.

25 U.S.C. § 458cc(k).

C. National Environmental Policy Act

64. The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, is the “basic national charter for protection of the environment.” 40 C.F.R. 1500.1. Its purposes are to “help public officials make decisions that are based on understanding of environmental consequences, and to take actions that protect, restore, and enhance the environment,” *id.* at § 1500.1(c) and to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” *Id.* at § 1500.1(b).

65. To accomplish these purposes, NEPA provides that a Federal agency must prepare an environmental impact statement (EIS) for “proposals for...major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1502.3. The Council on Environmental Quality regulations list a number of factors that an agency must consider in deciding whether to prepare an EIS. *Id.* § 1508.27. The agency must prepare the EIS or otherwise comply with NEPA *before* going forward with an action.

66. The NEPA process requires the acting agency to first determine whether the action is one that normally requires an EIS. 40 C.F.R. § 1501.4(a)(1). An agency action does not normally require an EIS if it falls within a categorical exclusion. *Id.* § 1501.4(a)(2). “Categorical exclusion” is defined as “a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations.” 40 C.F.R. § 1508.4. If an agency chooses not to prepare an EIS and does not invoke a categorical exclusion, the agency is required to prepare an environmental assessment (EA) to determine whether an EIS is necessary. *Id.* §§ 1501.3, 1501.4(b), 1508.9. If the agency concludes, based on the EA, that an EIS is not required, it must prepare a finding of no significant impact (“FONSI”) which explains the agency’s reasons for its decision. *Id.* §§ 1501.4(e), 1508.13.

D. Administrative Procedure Act

67. The Administrative Procedure Act (APA) makes final agency action subject to judicial review, 5 U.S.C. § 704, and authorizes courts reviewing agency action to hold

unlawful and set aside final agency action, findings and conclusions that are arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

E. Freedom of Information Act

68. The Freedom of Information Act (FOIA) requires that federal agencies make all agency records available to the public, with limited specified exceptions. 5 U.S.C. § 552(a)(3), (b)(1) – (9).

69. As amended on December 31, 2007, FOIA defines agency records to include information which is maintained for an agency by an entity under government contract, for the purposes of records management. 5 U.S.C. § 552(f)(2)(B).

F. Intergovernmental Personnel Act

70. The Intergovernmental Personnel Act (IPA), 5 U.S.C. §§ 3371-3376, provides for, among other things, temporary assignments of federal employees to state or local government, defined to include Indian tribes, for work of mutual concern to both parties. 5 U.S.C. §§ 3372(a); 3371(2)(C). The federal employee so assigned must agree “to serve in the civil service upon the completion of the assignment for a period equal to the length of the assignment.” 5 U.S.C. § 3372(c)(1). The federal employee so assigned “remains an employee of his agency.” 5 U.S.C. 3373(a).

71. In accordance with regulations promulgated pursuant to the IPA,

Federal assignees continue to encumber the positions they occupied prior to assignment, and the position is subject to any personnel actions that might normally occur. At the end of the assignment, the employee must

be allowed to resume the duties of the employee's position or must be reassigned to another position of like pay and grade.

5 C.F.R. § 334.107(b).

CLAIMS FOR RELIEF

COUNT I – Violation of National Wildlife Refuge System Administration Act

72. Plaintiffs reallege and incorporate by reference each and every allegation in the preceding paragraphs.

73. Defendants' final agency action in adopting the annual funding agreement with the CSKT concerning the NBRC is arbitrary and capricious and in violation of the NWRSA, and therefore must be set aside pursuant to the APA, 5 U.S.C. § 706(2)(A).

74. The AFA confers management and administrative authority for the NBRC on the CSKT, in violation of the NWRSA, 16 U.S.C. § 668dd(a)(1), which provides that units of the National Wildlife Refuge System "shall be administered by the Secretary [of Interior] through the United States Fish and Wildlife Service."

75. The AFA confers management and administrative authority for the NBRC on the CSKT by, but not limited to, the following:

A) authorizing the CSKT to manage most of the major NBRC programs;

B) authorizing the CSKT to hire, fire and supervise CSKT employees performing management and other functions on the Refuge, which employees are not subject to federal civil service management controls;

C) authorizing the CSKT to direct and control federal employees and volunteers at the NBRC;

D) authorizing the CSKT to jointly develop federal IPA employees' performance plans and evaluations;

E) authorizing the CSKT to dismiss federal IPA employees and prevent them from serving in any capacity on the NBRC even when the FWS has determined that dismissal is not appropriate;

F) authorizing the CSKT Deputy Refuge Manager to serve as Acting Refuge Manager in the absence or unavailability of the Refuge Manager;

G) providing that any decision of the FWS Refuge Manager is subject to challenge by the CSKT in a multi-level dispute resolution process and appeals -- including decisions involving discretionary governmental determinations as to appropriate uses of the Refuge, environmental compliance, use of federal funds, setting work priorities, supervision of FWS personnel performing activities retained by the FWS, and establishment and modification of certain regulations for public use -- effectively depriving the FWS Refuge Manager of ultimate authority for refuge management;

H) authorizing the CSKT to redesign the activities assigned to it and to reallocate federal funding between activities with approval of the FWS Refuge Manager, but subjecting the Refuge Manager's approval to the multi-tiered dispute resolution process and appeals if the CSKT disagrees, thus effectively conferring upon the CSKT the discretionary authority to allocate funding and determine priorities for the management categories allocated to the CSKT;

I) authorizing the CSKT to prepare jointly with the FWS annual work plans which cover all functions on the NBRC, including discretionary determinations about the allocation of resources and including functions retained by the FWS;

J) precluding independent government review of CSKT's performance by providing that the CSKT's performance under the AFA is to be jointly evaluated by the CSKT and the FWS.

76. The AFA creates a system of dual or joint administration of the NBRC by the FWS and the CSKT, in violation of the NWRSA, 16 U.S.C. § 668dd(a)(1), which provides that units of the National Wildlife Refuge System "shall be administered by the Secretary [of Interior] through the United States Fish and Wildlife Service." The NWRSA does not permit management or joint management of units of the National Wildlife Refuge System by entities other than the FWS.

77. The AFA creates a system of dual or joint administration of the NBRC by creating a "management partnership" through the Refuge Management Team, comprised of two representatives of the FWS and two representatives of the CSKT. The Refuge Management Team manages all functions at the NBRC and makes all decisions, including those reflected in Annual Work Plans and environmental compliance documents, and resolves disputes between the FWS and the CSKT and any allegations of discrimination or harassment in the workplace.

78. The AFA also creates a system of dual or joint management by subjecting all of the decisions reserved to the FWS Refuge Manager to dispute resolution and appeals whenever the CSKT disagrees with any such decision.

79. The AFA dispute resolution process vests ultimate decision-making authority over issues which are disputed between the FWS and the CSKT concerning management

and operation of the NBRC in non-FWS officials of the Department of Interior, in violation of the NWRSA, 16 U.S.C. § 668dd(a)(1), which provides that units of the National Wildlife Refuge System "shall be administered by the Secretary [of Interior] through the United States Fish and Wildlife Service."

COUNT II – Violation of the Indian Self-Determination and Education Assistance Act (ISDEAA)

80. Plaintiffs reallege and incorporate by reference each and every allegation in the preceding paragraphs.

81. Defendants' final agency action in adopting the annual funding agreement with the CSKT concerning the NBRC is arbitrary and capricious and in violation of the ISDEAA, and therefore must be set aside pursuant to the APA, 5 U.S.C. § 706(2)(A).

82. The AFA violates the ISDEAA, 25 U.S.C. § 458cc(k), because it confers upon the CSKT functions that are inherently Federal and because the statute establishing the existing program (the NWRSA) does not authorize the type of participation accorded the CSKT in the AFA.

83. The statute establishing the existing program (the NWRSA) does not authorize the type of participation accorded the CSKT in the AFA because the NWRSA does not permit management or joint management of units of the National Wildlife Refuge System by entities other than the FWS. 16 U.S.C. § 668dd(a)(1).

84. The inherently federal functions conferred upon the CSKT by the AFA include but are not limited to:

- A) management of most of the major NBRC programs;
- B) authority to hire, fire and supervise CSKT employees performing management and other functions on the Refuge, which employees are not subject to federal civil service management controls;
- C) direction and control of federal employees and volunteers at the NBRC;
- D) joint development of federal IPA employees' performance plans and evaluations;
- E) authority to dismiss federal IPA employees and prevent them from serving in any capacity on the NBRC even when the FWS has determined that dismissal is not appropriate;
- F) service by the CSKT Deputy Refuge Manager as Acting Refuge Manager in the absence or unavailability of the Refuge Manager;
- G) authority to dispute and challenge any decision of the FWS Refuge Manager in a multi-level dispute resolution process and appeals -- including decisions involving discretionary governmental determinations as to appropriate uses of the Refuge, environmental compliance, use of federal funds, setting work priorities, supervision of FWS personnel performing activities retained by the FWS, and establishment and modification of certain regulations for public use -- effectively depriving the FWS Refuge Manager of ultimate authority for refuge management;
- H) authority to redesign the refuge activities assigned to the CSKT and to reallocate federal funding between activities with approval of the FWS Refuge Manager, but subjecting the Refuge Manager's approval to the multi-tiered dispute resolution process and appeals if the CSKT disagrees, thus essentially conferring upon the CSKT

the discretionary authority to allocate funding and determine priorities for the management categories allocated to the CSKT;

I) authority to prepare jointly with the FWS annual work plans which cover all functions on the NBRC, including discretionary determinations about the allocation of resources and including functions retained by the FWS;

J) joint evaluation of CSKT's own performance under the AFA.

COUNT III – Violation of the National Environmental Policy Act

85. Plaintiffs reallege and incorporate by reference each and every allegation in the preceding paragraphs.

86. Defendants' final agency action in adopting the AFA with the CSKT concerning the NBRC is in violation of the National Environmental Policy Act (NEPA), and therefore must be set aside pursuant to the APA, 5 U.S.C. § 706(2)(A).

87. Defendants did not prepare an Environmental Impact Statement (EIS), Environmental Assessment (EA) or claim a Categorical Exclusion (CE) for the AFA with the CSKT, in violation of NEPA.

88. Defendants' final agency action in adopting the AFA with the CSKT is a major federal action significantly affecting the quality of the human environment, requiring preparation of an environmental impact statement (EIS). Defendants violated NEPA in failing to prepare an EIS.

89. The AFA recognizes that it is a major federal action which will have a significant effect on the environment in stating that the "AFA represents a significant

change in the operation and maintenance of the NBRC,” and that during the first year, CSKT employees will be “learn[ing] their jobs.” AFA Sec. 7 E.1. The AFA recognizes that at least for the first year of the AFA, only a bare bones program can be provided for the Refuge. The AFA provides that the initial annual work plan under the AFA will be “limited in scope” and “will include only the basic, fundamental Activities necessary to provide for the biological integrity of the NBRC, ensure maintenance of critical infrastructure and equipment and provide basic visitor services,” and that significant on-the-job training and orientation of staff, development of protocols and team-building will be required. AFA Sec. 7 E.4.a. Under the AFA, the NBRC will lose the benefit of the skills and experience of FWS professionals, and be required to expend significant resources training new staff and implementing the new management system under the AFA, resulting in major impacts on the environment of the NBRC.

90. Under the previous AFA with the CSKT, the FWS concluded that the CSKT had failed to comply with FWS bison management standards; failed to meet FWS wildlife monitoring reporting standards and protocols; failed to complete biological study plans; submitted inadequate and unsupported biological reports; failed to timely and properly maintain vehicles, equipment and property; and created a work environment characterized by harassing, offensive, intimidating and oppressive behavior on the part of employees of the CSKT. FWS also found that the CSKT had created unsafe conditions for employees and the public and failed to maintain buildings in compliance with safety and health standards. Thus, FWS is well aware that another AFA with the CSKT is likely to have significant impacts on the environment.

91. In the alternative, Defendants were required to prepare an Environmental Assessment and a Finding of No Significant Impact to justify their decision not to prepare an EIS for the adoption of the AFA, or to claim a Categorical Exclusion from the EIS requirement. Defendants violated NEPA by failing to prepare any of these documents.

COUNT IV – Violation of the Freedom of Information Act

92. Plaintiffs reallege and incorporate by reference each and every allegation in the preceding paragraphs.

93. Defendants’ final agency action in adopting the AFA with the CSKT is in violation of the Freedom of Information Act (FOIA), and therefore must be set aside pursuant to the APA, 5 U.S.C. § 706(2)(A).

94. The AFA exempts records of the CSKT created in connection with its performance of activities under the AFA from FOIA, with the limited exception of “previously provided copies of Tribal records that the Secretary demonstrates are clearly required to be maintained as part of the record keeping system of the Department of Interior.” AFA Sec. 10 D. This provision of the AFA violates 5 U.S.C. § 552(a)(3) and 552(f)(2)(B), requiring that federal agencies make available to the public agency records, including those of contractors which are maintained for the agency.

COUNT V – Violation of the Intergovernmental Personnel Act

95. Plaintiffs reallege and incorporate by reference each and every allegation in the preceding paragraphs.

96. Defendants’ final agency action in adopting the AFA with the CSKT is in violation of the Intergovernmental Personnel Act, (IPA), 5 U.S.C. §§ 3371-3376, and therefore must be set aside pursuant to the APA, 5 U.S.C. § 706(2)(A).

97. The AFA provides that current employees of the NBRC may elect to become tribal employees (at the discretion of the CSKT), to be assigned to the CSKT pursuant to an agreement under the IPA, or to be reassigned to another duty station “where practicable.” AFA Sec. 12 E.3; 12 E. 6. If none of these options can be realized, the FWS is to conduct a reduction in force (“RIF”), eliminating the employee’s position. AFA Sec. 12 E.4.

98. The IPA requires that an employee assigned to a Tribe pursuant to its provisions agrees “to serve in the civil service upon the completion of the assignment for a period equal to the length of the assignment.” 5 U.S.C. § 3372(c)(1). It further provides that the federal employee so assigned “remains an employee of his agency.” 5 U.S.C. 3373(a).

99. The regulations promulgated pursuant to the IPA provide that:

Federal assignees continue to encumber the positions they occupied prior to assignment, and the position is subject to any personnel actions that might normally occur. At the end of the assignment, the employee must be allowed to resume the duties of the employee’s position or must be reassigned to another position of like pay and grade.

5 C.F.R. § 334.107(b).

100. In contravention of these statutory and regulatory provisions, the AFA provides that federal employees assigned to the CSKT pursuant to IPA agreements can be

terminated by the CSKT even if its determination is contrary to the FWS decision on the issue, and that in that event, the employee would not be allowed to resume the duties of his/her position, but in fact will be banned from the NBRC, and the funds for his/her position would be transferred to the CSKT, *i.e.*, his/her federal position would be abolished. AFA Sec. 12 E.5.c.iii.

101. Contrary to the IPA, 5 U.S.C. § 3372(c)(1), the IPA agreements directed by the AFA contain no requirement that the federal employee agree to serve in the civil service at the conclusion of the IPA assignment for a period equal to that of the IPA assignment.

102. In contravention of the regulation at 5 C.F.R. § 334.107(b) which implements the IPA, under the AFA there is no possibility for the employee to resume the duties of his/her prior position at the conclusion of the IPA, and no provision for an alternate assignment to another position at the same pay and grade.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request the court to order the following relief:

A. Declare that Defendants have violated the NWRSA, 16 U.S.C. § 668dd(a)(1), providing that units of the National Wildlife Refuge System "shall be administered by the Secretary [of Interior] through the United States Fish and Wildlife Service," by entering into the AFA with the CSKT which transfers management responsibilities for the NBRC to the CSKT and which removes management authority for the NBRC from the FWS.

B. Declare that Defendants have violated the ISDEAA, 25 U.S.C. § 458cc(k), by entering the AFA with the CSKT which confers upon the CSKT functions that are inherently Federal and which are not authorized by the NWRSA.

C. Declare that Defendants have violated NEPA by failing to prepare an environmental impact statement and by failing to conduct any environmental analysis of the AFA.

D. Declare that Defendants have violated FOIA, 5 U.S.C. § 552, by entering the AFA with the CSKT which purports to exempt records of the CSKT related to the performance of activities under the AFA from disclosure to the public.

E. Declare that Defendants have violated the IPA, 5 U.S.C. §§ 3371-3376, by entering into the AFA with the CSKT which purports to authorize IPA agreements which do not provide for the federal employee to return to his/her previous duties at the conclusion of the IPA or to be reassigned to a position of like pay and grade, and which result in abolition of the employee's federal position if the CSKT decides unilaterally to terminate the IPA.

F. Order Defendants to rescind the AFA with the CSKT.

G. Order that, as a result of the rescission of the AFA, federal employees at the NBRC as of the date the AFA was entered be allowed to return to the positions they held on that date.

H. Order Defendants to retrieve any funds which have been supplied to the CSKT pursuant to the AFA.

I. Enjoin Defendants from entering into any AFA with the CSKT which does not meet the requirements of the NWRSAA, the ISDEAA, NEPA, FOIA and the IPA, as set forth in the Declaratory Judgments above.

J. Award Plaintiffs their reasonable litigation expenses, including attorneys' fees, court costs and other expenses pursuant to the Equal Access to Justice Act, 29 U.S.C. § 2412, *et seq.*

K. Grant such additional relief as the Court deems just and proper.

Dated: December 8, 2008

/s/
Paula Dinerstein
D.C. Bar No. 333971
Senior Counsel
Public Employees for Environmental
Responsibility (PEER)
2000 P St., N.W. Suite 240
Washington, D.C. 20036
Ph: 202-265-7337
Fax: 202-265-3295
pdinerstein@peer.org