

Mr. Jon Jarvis
Director, National Park Service
1849 C Street, N.W.
Washington, D.C. 20240

December 16, 2009

Re: NPS “Benefits-Sharing”

Dear Mr. Director:

On behalf of Public Employees for Environmental Responsibility (PEER), Edmonds Institute, Alliance for Wild Rockies, Wilderness Watch, and the International Center for Technology Assessment, we write to request that you reject the Preferred Alternative for your agency’s Benefits-Sharing Final Environmental Impact Statement (FEIS, October 2009). We believe that careful examination of the financial, legal, practical, and philosophical problems inherent in this plan will lead you to abandon this misguided effort and pursue other readily available alternatives to achieve the valid objectives of this initiative in a manner consistent with the mission of the National Park Service (NPS).

In short, the FEIS lays out a program that will (a) cost NPS more money than it raises; (b) prove utterly impractical to operate; and (c) compromise key resource protection and ethical principles. By contrast, NPS has tools already at its disposal that would better serve the resource and research objectives of NPS.

I. Benefit-Sharing Will Cost NPS More Money than It Raises

While most people would expect that commercial royalty agreements would be a potential major source of revenue for NPS, the FEIS states that the “primary” benefits to NPS from the Preferred Alternative are non-monetary (p.118. Note: all page references are to FEIS.). The FEIS then puts forward the curious notion that the best way to build collegial “research relationships” is through mandatory royalty-sharing.

A. Any Monetary Returns Will Be Consumed by Administrative Costs

The maximum monetary returns forecast for NPS are extremely modest. According to the FEIS, only negligible financial returns would be expected for the first five years. After 20 years, the most optimistic FEIS Benefits-Sharing revenue forecast would be less than \$4 million per year (see “high range...high value” assumption, p. 121).

These figures are gross figures which do not subtract the extensive administrative expenses put forward in the FEIS as “mitigation” for various deleterious effects (p.47). Expenses to NPS would include providing extensive “technical assistance” to the more than 200 individual national park units which host independent research efforts.

Among the required technical assistance, the FEIS states that NPS will need a “strong negotiator” for each CRADA (p. 47). It is unclear whether this refers to a corps of tough negotiators developed from among NPS staff or a group of consultants brought in under contract. If outside negotiators are brought in, it is not stated what such importation would cost or what conflict of interest and insider-dealing protections would be required.

Furthermore, in order to track (CRADA-related) funds, the FEIS states that, however small, “NPS would develop and implement an appropriate accounting procedure to ensure that any monetary benefits resulting from implementing” this policy (p.44). To the unspecified expense of developing that accounting procedure and implementing it, NPS would also have to add the (also unspecified) expense parks would require for “financial support for administration” (p.48) to monitor agreements and verify royalty payments.

Moreover, given that the FEIS stipulates that park research staff would be removed from Benefits-Sharing agreement decisions (p.49), still other staff would be required to monitor private research activities from permitted research in order to spot sources of potential Cooperative Research and Development Agreements (CRADAs). The FEIS notes that there are more than 70,000 research articles published in scientific journals and more than another 100,000 formal and informal scientific reports flowing from NPS research permits.

In a bare nod to what might be considerable expense, the FEIS blandly states that “a portion of monetary benefits could be used to offset administrative costs of benefit sharing agreements” (p.48). Despite the FEIS’S contention that administrative costs will decline with time, as NPS becomes more skilled in benefit sharing negotiation, that contention cannot be given much credence. It is just as likely that over time other parties will become more skilled in benefit sharing negotiations with NPS and, as a result, NPS costs will stay the same or even rise.

In the case of the Diversa CRADA at Yellowstone National Park, for example, consultant and administrative costs were considerable. Records obtained by PEER under the Freedom of Information Act indicate that Yellowstone NP paid consultants \$359,000 over the course of about two years – an amount that exceeds the FEIS “mid-range” estimate for system-wide revenue from all CRADAs in year 5.

In summary, by the FEIS's own admission, it will be a long time, if ever, before the Benefits-Sharing plan produces appreciable monetary resources to support NPS scientific endeavors. The administrative costs from this system are likely to more than consume any revenues produced, to the detriment of NPS science and resource programs

While benefits sharing tasks may provide full employment for the NPS “Benefits-Sharing Team” which has worked on this effort since 2001, nonetheless, it is clear that the preferred Benefits-Sharing plan is likely to cost the NPS far more money than it will produce for at least the next decade, and perhaps much longer.

B. NPS Requires Secret Royalty Agreements to Maximize Revenues

A fundamental assumption made by the FEIS is that secrecy of CRADA royalty agreements will result in financial terms “more favorable to the NPS than those” requiring public disclosure of the terms (p. xx).

The philosophical problems with promoting a policy of secrecy affecting public resources and public agencies are discussed below. It should be noted at the outset, however, that this position is contrary to the principles of openness and transparency in government that President Barack Obama declared as national policy in his January 21, 2009 memo to the Executive Branch.

The FEIS puts forward the premise that the Freedom of Information Act (FOIA) requires NPS to keep agreements shielded from public view as a confidential trade secret if the corporate “partner” so requests it (p.25). This premise is fundamentally flawed. The case law under the trade secrets exemption to FOIA is far more nuanced, conflicting and evolving than represented by the FEIS.

In any event, it is fairly certain that NPS would not be shielded from FOIA requests and/or litigation (which will consume still more NPS resources). In the unlikely event that NPS is ordered to release royalty data, the already modest Benefit-Sharing monetary yield will be reduced even further.

C. NPS Revenues Must Be Shared With Affected Tribes

Under Title II of the Indian Self-Determination Act Amendments of 1994 (Pub. L. 103–413), the Interior Department has determined that 57 National Parks in 19 states, including parks such as Redwood, Glacier, Voyageurs, Olympic and the Cape Cod National Seashore, have “special geographic, historical, or cultural significance” to “Self-Governance” Indian tribes. Many of these parks include those which host scientific research from which potential CRADAs might spring.

The FEIS stipulates that: “In the event that research activities involve the use of traditional knowledge or other valuable proprietary input from a Native American community or other source, it would be the responsibility of the park and the researcher to include such individuals or groups in that benefits-sharing arrangement as appropriate.” (p.42)

This sweeping grant is much broader than that of the Indian Self-Determination Act Amendments. It is not difficult to imagine many situations in which individual Indian or tribal claims might often arise in response to CRADAs. Further, given the vague nature of these entitlements (“as appropriate”), the policy is likely to give rise to disputes and

litigation both of which are likely to consume whatever monetary benefits might have been produced.

D. Congress May Cut Appropriations to Reflect Royalty Revenues

To the extent that NPS were to develop a dependable revenue stream from CRADAs, it is reasonably foreseeable that a Congress seeking to reduce deficits would reduce appropriations to NPS units in reflection of this new royalty revenue. Although the FEIS declares “congressional appropriations” to be beyond the scope of impacts of its analysis of benefits sharing (p28), nonetheless, the development of a continuing revenue stream outside the purview of Congress may very well diminish Congress’s willingness to provide taxpayer funds to the parks.

In summary, the FEIS’s Preferred Alternative projects revenue that is very modest and uncertain, based upon flawed assumptions, and likely to subject NPS to claims and disputes beyond what the FEIS has noted. Where the FEIS does recognize additional costs to NPS from Benefits-Sharing, those costs are certain and large and hold great potential to consume any monetary benefit the agency might have hoped for. Any net fiscal loss produced by the Preferred Alternative would mean drawing financial and staff resources away from the park conservation and scientific resource efforts that the plan purports to benefit.

II. The FEIS Preferred Alternative Is Inappropriate, Cumbersome and Needlessly Constrains NPS Options

The premise of the FEIS is that each national park is a technology laboratory in the meaning of the Federal Technology Transfer Act (FTTA) of 1986. For authority of that proposition, it cites a single district court decision (p.186).

Regardless of the legal merits of that position, if the FTTA governs the national park system, then the NPS will find itself in substantial noncompliance with several provisions of that law. In brief, the FTTA:

- Makes technology transfer a responsibility of all federal laboratory scientists and engineers.
- Mandates that technology transfer responsibility be considered in employee performance evaluations.
- Establishes a principle of royalty sharing for federal inventors (15% minimum) and sets up a reward system for other innovators.
- Creates a charter for Federal Laboratory Consortium for Technology Transfer and provides a funding mechanism for that organization to carry out its work.

These are all features currently absent from NPS policies or programs. In recognition of this absence, the FEIS states that “If the NPS decides to implement benefits-sharing, it

will comply with the requirements of the FTTA to the extent applicable and appropriate to the NPS's specific circumstances and legislative mandates" (p.188).

To the extent that the FTTA conflicts with NPS "legislative mandates", it is questionable that the FTTA is even applicable to NPS. Nonetheless, the FEIS suggests that NPS will have to develop a body of regulations to address FTTA provisions. For example the FTTA:

- Allows current and former federal employees to participate in commercial development of the research fostered by the CRADA, to the extent there is no conflict of interest.

The FEIS points out that regulations would follow "the completion of the EIS" (p. 188). In other words, NPS will have to adopt a formal regulation to accomplish this and other aspects of the FTTA that are presently nonexistent within the National Park Service. Thus, before entering into a single benefits-sharing agreement, including the Diversa-Yellowstone CRADA, the NPS must also adopt standards to implement these parts of the FTTA that guard against conflicts of interest or corruption. The ethics standards must be reviewed by the Department of Justice and be placed before the public.

Similarly, the FTTA mandates royalty sharing for federal inventors (15% minimum) and a reward system for other innovators. The FEIS concedes that "NPS has not set up a mechanism to distribute royalties or other payments received by the NPS" (p. 188).

The FTTA language on CRADAs also requires that "an agency shall make separate determinations of the mission or missions of each of its laboratories" 15 U.S.C. 3710a(e). The NPS has yet to make the required FTTA determinations of the mission or missions of each of its nearly 400 separate "laboratories".

In summary, the NPS Benefits-Sharing Team has selected an inapt, cumbersome and extremely time-consuming process. In other words, the FTTA "shoe" does not fit.

III. The FEIS Preferred Alternative Threatens National Park Values

Once implemented, the FEIS Preferred Alternative may have deleterious effects on the workings of the national park system, protection of its resources, the integrity of its employees and public perceptions of national parks:

A. National Parks Should Not Become Profit Centers

The Preferred Alternative would provide that all benefits from CRADA agreements would go to the individual park from whence came the original resource. This provision is contrary to the tradition and nature of the national park system. The national park system is one system. It is not an amalgam of affiliated operations, each one open for business.

Moreover, if the policy is financially successful, fiscal inequities between and among individual parks will be aggravated, with "haves" (such as Yellowstone) having far more

scientific resources at their disposal on a proportionate basis than parks whose research projects may lack commercial application.

Sending monetary benefits to a central account would make better sense and reinforce the unity and common purpose of the national park system. Once again, it is clear that the FTTA shoe simply does not fit the NPS. Thus we urge the agency - as PEER has already urged in its comments on the DEIS - that all monetary benefits should be directed to a central account in the NPS Headquarters in Washington, D.C. Perhaps that account should be under the management of the Chief Scientist, and/or the NPS Leadership Council. The central account should be devoted solely to the research needs of the national park system. In this way, the Service's most pressing research needs would be supported first.

B. CRADAs May Become a Source of Resource Degradation and Ethical Conflict

Deposit of money from a Benefit-Sharing agreement to the account of the park that generated the agreement creates some ethically questionable situations. Keeping monetary benefits in one park contributes to a "soft" corruption of doing sweetheart agreements because the monetary benefit accrues to "my account".

If the account is not the beneficiary, the manager is likely to be more circumspect ("honest" may be a better word) about whether a given research proposal by a familiar research associate will impair park resources.

The FEIS notes that "national parks have been popular bioprospecting sites for many years" (p.6). One of the methodologies used by bio-prospectors in other contexts involves "*in situ* enrichment selection" – the enrichment of hot springs with any substance, or the alteration of the pH of any body of water for the purpose of finding an organism that thrives and/or out-competes other organisms in the artificially induced state. Such experiments aim to locate organisms or enzymes whose genetic composition makes them best suited for specific industrial applications. Unfortunately, such experiments also engender a fundamental impairment of the body of water. If a decision-making official were to count the monetary benefits that might accrue directly to his/her account, might not his or her judgment be sufficiently affected to allow a small impairment?

Another worrisome example involves recent proposals to research drill inside national park units. In making decisions to grant these research permits, park superintendents should not be tempted by the potential of more funding for his/her own park.

The FEIS repeatedly states that research permit decisions are beyond the scope of its analysis (p. 48), yet it is unrealistic to presume that research decisions will be unaffected by prospects of new revenue to a park. The FEIS itself seems to concede this point when describing its mitigation measures:

“...in the absence of mitigation measures, implementation of Alternative B could result in inappropriate consideration of separate benefits sharing issues at the time NPS research permits are issued” (p. 16).

The principal mitigation offered by the FEIS is to separate the personnel who make research permit decisions from those who negotiate CRADAs. This supposed wall provides no real guarantees of protection because, as the FEIS admits, “park superintendents would be the ultimate decision-makers in both cases” (p.49).

Apart from the direct decisions by park superintendents, decision-making officials would have many tools at their disposal to guide the conduct of their supposedly separate staffs.

We do recognize, as the FEIS states again and again, that decisions about research permits and decision about benefit sharing are intended to be separated. However, if, as the FEIS also emphasizes, benefits sharing can lead to long-term, close, and beholden research relationships, then the hoped-for separation of decision-making may not prove sustainable in fact.

In addition to concern about decision makers, there is concern about those who advise the benefit sharing team. Outside consultants must be strictly without conflicts of interest. The public must be assured that such benefits sharing “advisors” work for organizations that (a) neither receive funds from those who might benefit by the advice they offer the park or (b) engage in advising companies that do product development. Yet, for all its girth, the FEIS does not address this topic.

The enduring concern is that NPS signatories or advisors to royalty-sharing deals related to public goods may trade away the public interest for their own enrichment, either in their current positions, or after retirement, through the revolving door.

C. Secret Royalty Agreements Will Breed Controversy and Distrust of NPS

The afore-mentioned conflicts about resource protection versus royalty revenue will only be aggravated if any part of the deals are kept secret. There must be full public disclosure of the benefits, monetary or non-monetary, exchanged between the parties to a Benefits-Sharing Agreement.

Keeping such information secret will lead to inevitable suspicion of corruption on the part of park employees. The long history and time honored reputation of the NPS must not be subjected to any such suspicion. There is no legitimate justification for keeping secret the benefits, monetary or non-monetary, that are exchanged between the parties to a Benefits-Sharing Agreement.

In this regard, the Preferred Alternative outlines Alternatives B2 and B3 as if they were in fact quite different when in fact, these two are effectively the same. Transparency is not guaranteed in either alternative (see p.45). All that is required to keep the financial nitty-gritty out of the public or Congressional eye would be the stated need on the part of the other party to keep proprietary business information (PBI) secret. Declarations of PBI have proved strong bars to public oversight in other agencies and so, we think, it would be with NPS. Under both alternatives, financial information would be shielded from both taxpayers and the Congress.

By way of mitigation, the FEIS points out that protected CRADA information would only be withheld for 5 years after which it would be released to the public (p.206). However, since the CRADAs are renewable, this five-year zone of secrecy could be extended indefinitely.

As a consequence, secret corporate revenue-sharing deals would become a continuing source of public curiosity and suspicion. The explanation that the FEIS puts forward - in essence, that secrecy enables NPS to cut more lucrative deals - will only worsen the situation.

D. Public Kept Out of the CRADA Process

The FEIS provides that “as suggested by the US Office of Management and Budget (OMB), appropriate organizational procedures would be established to effectively carry out our responsibilities” (p. 145). Nowhere is there any explicit provision for public notice regarding CRADAs. This omission suggests that there is no intention that the public review or comment upon individual CRADAs.

E. Corporate Partnership with Parks Should Be Approached With Greater Caution

One of the hallmarks of the Bush administration was its constant promotion of increasing the corporate role in national parks. This proposal encourages individual parks to become more deeply involved with corporate research operations – in fact that broader relationship is one of the supposed non-monetary benefits of this plan (p.129).

One danger of greater corporate involvement in national parks is that the public will see a diminished need for taxpayer support of parks. Growing corporate entanglement risks erosion of public support for the national parks as the country's common heritage. The parks will be loved and fought for if they understood to be business parks.

F. Benefits-Sharing may Run Afoul of the Wilderness Act

Roughly one-half of the national park system is currently designated as Wilderness, as part of the National Wilderness Preservation System and protected by the Wilderness Act. Another 30 percent of the park system has been recommended or proposed for wilderness designation by the NPS. The Wilderness Act prohibits commercial enterprise in these areas. The commercial nature of the Benefits-Sharing program would likely cause it to run afoul of the Wilderness Act in much of the national park system, yet the Benefits-Sharing FEIS fails to acknowledge or address this concern.

Please Consider Other Alternatives

As we have noted in our comments to the Draft Environmental Impact Statement on Benefits-Sharing, NPS has ample alternatives to what is being put forth as the Preferred Alternative. In addition to the alternatives rejected in the FEIS, the National Parks Omnibus Management Act of 1988 (NPOMA) authorizes the Secretary to “...enter into negotiations with the research community and private industry for equitable, efficient benefits-sharing agreements” resulting from scientific study in the national park system 16 U.S.C. 5395 (112 STAT. 3500).

In 1998 (12 years after the 1986 FTTA), Congress enacted the benefits-sharing language of NPOMA without requiring national parks to become laboratories or to execute CRADAs under FTTA. Proceeding under the NPOMA avoids many of the legal, practical and ethical pitfalls we have outlined. This approach receives no coherent consideration within the FEIS.

Significantly, the FEIS does not analyze other potential benefit sharing mechanisms or compare the relative costs and benefits of all benefit sharing mechanisms (p. 42).

The primary “desired future condition” cited by the FEIS is to “clarify rights and responsibilities regarding research results” (p. 15). Yet, the Preferred Alternative does not confer clarity and chooses a means of implementation which only multiplies the legal questions. We beseech you to engage some INDEPENDENT competent legal advice before taking a further step down the path paved by the NPS Benefits-Sharing Team.

The FEIS stresses that the principal benefits would be non-monetary:

“The most significant non-monetary benefit that can be foreseen for most parks with benefit sharing would be their ability to draw on the scientific expertise of benefit sharing partners.” (p. 129)

However, NPS does not need the costly and cumbersome mechanism outlined in FEIS in order to realize these non-monetary benefits. Research relationships are already being formed in the parks and always have been formed on topics of mutual interest. In addition, the research permit mechanism allows NPS to draw reports from private researchers concerning their results. As the FEIS itself notes, “research experts outside the NPS...regularly assist the NPS with obtaining information essential for effective resource management” (p. 16).

To accomplish the ends sought by the agency, NPS should not seek to shield the public from information or curtail its participation in park decision-making. Instead, NPS should multiply the opportunities for public contact and service by encouraging comment and creating tools such as publically-accessible research databases that make detailed information about park-based resources and research and research results more readily available.

In conclusion, we ask that you take a hard look at the Preferred Alternative put forth in the FEIS, consider all of its consequences and compare the alternatives. Thank you for your consideration of OUR concerns.

Sincerely,

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