



United States Department of the Interior

FISH AND WILDLIFE SERVICE



October 8, 2004

IN REPLY REFER TO

Memorandum

To: Refuge Manager, National Bison Range Complex

From: Managers, National Wildlife Refuge System and National Fish Hatcheries (See Attached List)

Subject: Draft Fiscal Year 2005 Annual Funding Agreement Between FWS and CSKT

Our respective offices are included in the Department of the Interior's 2004 annual list of programs that may be eligible for inclusion in annual funding agreements to be negotiated with self-governance Tribes. Since future negotiations for these types of agreements could be affected by an agreement reached between the Department of the Interior and the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT), we believe it is appropriate for us to provide our input on the draft annual funding agreement for the National Bison Range Complex. We offer these observations not as part of the public comment process, but in the spirit of maintaining effective communication, coordination, and system-wide consistency in the management of America's National Wildlife Refuge System and National Fish Hatcheries, as provided for by law.

We found the current draft agreement to be very vague. No dollar amount is identified; Attachment B does not provide adequate information for review and/or comment. The number of National Wildlife Refuge System employees impacted by the use of IPAs and RIFs is not identified. The agreement makes certain government equipment, materials, and supplies (including Real Property) available to CSKT for performing the work, but nothing specific is identified. (Except that, any horse owned by the United States is apparently part of that available property.) Attachments C and D are not available for review or comment. CSKT liaisons are not identified. Some of the activity descriptions (Attachment A) are so imprecise that it is difficult to understand exactly what CSKT will be doing for the Service. If these descriptions remain unclear it will be problematic to monitor and evaluate CSKT's performance. For example, one of the activities listed under the biological program is, *"In August and September, coordinate and conduct waterfowl banding in the physical area covered by this AFA."* There is no discussion of species to be targeted, numbers of birds to be banded, techniques to be used, State and Federal permit requirements, salvage of banding casualties, acceptable mortality rates, etc.

For the most part, timelines are not identified for completion of the activities. There is just a general statement under each activity, *"As specified in this AFA and discussed by the Refuge*

Manager and the Coordinator at weekly meetings, or as otherwise agreed upon by the Refuge Manager and the Coordinator." We found that this draft agreement is so indistinct, it is not possible to determine: 1) exactly what CSKT will be doing for the Refuges; 2) how much CSKT will be paid to do it; 3) how CSKT's performance will be measured; 4) how many National Wildlife Refuge System employees will be impacted; or 5) how to provide meaningful and constructive comments. We suggest postponing the review period until a more complete and comprehensible draft is developed.

One of the five activities covered under the draft AFA is "Management." Although this section is mostly about CSKT's management of their employees and volunteers, the use of the term management is misleading and could be confused with our inherently Federal responsibility to manage this Nation's National Wildlife Refuges for the benefit of present and future generations of Americans. (As a sidebar, we do not believe the Service should be paying contractors to manage their own employees.) In fact, we believe the draft agreement needs to be thoroughly evaluated from the perspective of ensuring that the U.S. Fish and Wildlife Service is not contracting any functions which are inherently Federal [as prohibited by section 403(k) of the Tribal Self-Governance Act; 25 U.S.C. § 458cc (k)].

We believe certain functions outlined in the draft represent inherently Federal functions. For example, it appears that CSKT will have ultimate control over Federal records and databases (Section 13. C. and Attachment A, B.); will be collecting, controlling, and accounting for Federal monies (Attachment A, E.); and will be directing and controlling Federal employees [see Section 5 (B) of the Federal Activities Inventory Reform Act of 1998]. Certainly the management recommendations that CSKT employees will be providing to the Refuge Manager (and the small Federal staff) on environmental education, fire management, grazing, habitat management, and the use of herbicides and pesticides are extensive.

Managers necessarily rely heavily on the recommendations of their staffs when making discretionary management decisions. So even though the draft states repeatedly that the Refuge Manager will have "*final responsibility and authority*," CSKT will have a great deal of influence over management decisions that affect Federal public lands within the National Wildlife Refuge System -- without the input of other interested parties. We do not believe that this was the Congressional intent of extending the Indian Self-Determination and Education Assistance Act to non-BIA Department of the Interior agencies. The cumulative effect of the activities that are to be performed by CSKT goes far beyond providing routine services. Some of the activities that will be provided by CSKT require a thorough knowledge of the laws and policies of the National Wildlife Refuge System. The extensive recommendations and value judgments made by CSKT will in effect bind the U.S. Fish and Wildlife Service to a course of action. We believe, at a minimum, National Wildlife Refuge System employees with expertise in each of the major program fields need to be retained by the Service to validate or refute recommendations made by CSKT (or any other outside source).

There is a striking lack of information on budgets, costs, and personnel actions associated with this annual funding agreement. There are also other management issues that need to be addressed more clearly in the draft. For example, the safety and liability aspects of using a sovereign Tribe to accomplish hazardous work (fire management, bison round-ups, use of

herbicides and pesticides, etc.) are not clear. It is also unclear how the Refuge's extensive use of volunteers will be affected by this agreement. And finally, it is not apparent to us how this agreement will benefit the National Bison Range Complex and/or the National Wildlife Refuge System.

Although the draft AFA states that, *"The FWS will not provide the CSKT any funds or other consideration to pay for indirect costs . . ."* there is a provision in the draft for subsequent AFA's to include indirect or contract support costs. To ensure consistency within the National Wildlife Refuge System, we believe the issue of "allowable indirect costs" (25 CFR 1000.137) the Service will include in annual funding agreements for 403(c) programs needs to be reviewed, discussed, and resolved by Service leaders at the national level. The U.S. Fish and Wildlife Service, and all government programs, has been placed under increasing financial scrutiny (KPMG audits, OMB reviews, GAO and OIG reports, etc.) to ensure that public monies are spent wisely. We as an agency should ensure that annual funding agreements with Tribal Governments are held to the same level of accountability that we apply to all of our other programs. [We also note, the draft agreement indicates CSKT will be paid for the *"management, oversight, planning, reporting, and the supervision of CSKT Employees, CSKT Contractors, and CSKT Volunteers"* (Attachment A, Section 2). Are these not "indirect costs associated with performing the Activities covered by this FY 2005 AFA"?)

As a minor point, "Operational Standards" are defined in the draft as, *"a requirement of a law, regulation, written policy, approved written plan, or published FWS standard, whether or not existing on the date of execution of this AFA, that governs the performance of an Activity, and which the FWS would have to meet if the FWS itself performed the Activity."* Under Section 8, CSKT is required to perform each Activity in compliance with all applicable Operational Standards. Although we fully support this concept, as written, the draft would require CSKT employees to take safety and administrative training FWS employees are required to take by policy (e.g., Basic Watercraft and Aircraft Safety, EEO/Diversity, Ethics, First Aid/CPR, Information Technology Security, Hazard Communication, numerous National Wildland Fire Training Courses, New Employee Orientation, Sexual Harassment, Supervisory Training . . .). This would certainly complicate implementation of the agreement. We doubt that the intent of this provision was to require this level of compliance with our operational standards, but whatever the case, the requirement needs to be clarified.

From our years of experience and perspectives as managers of National Wildlife Refuges and National Fish Hatcheries, the agreement as written is too broad and comprehensive and lacks the specificity needed to make it work, or to even support a meaningful review. Throughout the agreement, the Refuge Manager clearly remains responsible and accountable for all Refuge operations. However, the agreement does not ensure that the Manager has the authority to accomplish the Refuge mission. If the responsibility is there, which it clearly is, the authority must also be ensured. **No Refuge Manager, no matter how skilled, could successfully implement this agreement as it is written.**

The National Wildlife Refuge System has had many successes in establishing and maintaining government-to-government relationships with Native American organizations and tribes, and we fully endorse Region 6's efforts to work more closely with Tribal Governments in the

management of America's National Wildlife Refuges. Many of us are working on Refuges that have strong positive partnerships with local Tribes. However, we firmly believe that any annual funding agreements under the Tribal Self-Governance Act with Native American tribes for work on National Wildlife Refuges or National Fish Hatcheries should: 1) add value to the program, 2) have specific performance standards and ensure fiscal accountability, 3) be accomplished in a sound and competent manner, 4) be cost effective to the U.S. Fish and Wildlife Service and the American public, and 5) exclude inherently Federal functions and "programs where the statute establishing the program does not authorize the participation sought by the Tribe." As currently written, it is not clear that the draft annual funding agreement with CSKT meets any of these five criteria.

cc: Assistant Secretary for Fish and Wildlife and Parks
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Director, U.S. Fish and Wildlife Service
Chief, National Wildlife Refuge System
Regional Director, Region 6