

**PEER Scoping Comments on the Environmental Assessment
for the 2013-2016 Funding Agreement for the
National Bison Range Complex
Between the U.S. Department of Interior
and the Confederated Salish and Kootenai Tribes
May 15, 2012**

Introduction

The Fish and Wildlife Service has posted on the website of the National Bison Range Wildlife Refuge a “Notice of Intent to Prepare an Environmental Assessment Regarding the Interest of the Confederated Salish and Kootenai Tribes to enter an Annual Funding Agreement with the Department of Interior, U.S. Fish and Wildlife Service, for the Operation and Management of Programs at the National Bison Range Complex,” soliciting written scoping comments on “suggested alternatives and concerns about significant issues regarding the proposed action.” The website also posted a draft of the subject Annual Funding Agreement (AFA) without the Appendices A through D referenced in the text. It does not appear that either the Notice of Intent or the AFA itself have been published in the Federal Register.

The Notice lists potential issues stemming from the draft AFA, including whether the action could violate federal or state law imposed for protection of the environment; whether the action could affect an area identified for protection by federal, state or local government; whether the action could adversely affect an endangered or threatened species or its critical habitat; whether the action could generate controversy on environmental grounds; whether it has effects on the environment which are highly uncertain and involve unique or unknown risks; whether the action is related to other actions with might have cumulatively significant impacts; whether it will establish a precedent that could lead to future environmental actions with significant effects; and whether the action could affect public health and safety. These factors track the “significance factors” of the CEQ regulations which direct when an EIS must be prepared. 42 C.F.R. § 1508.27.

Public Employees for Environmental Responsibility (PEER) submits these comments in response to the Notice of Intent. PEER contends that the AFA likely violates federal law, is likely to have significant environmental effects on the protected area which is the National Bison Range Complex Wildlife Refuge (NBRC), could adversely affect endangered and threatened species, will generate controversy on environmental grounds, has highly uncertain effects on the environment, could affect public health and safety, is related to other actions with cumulatively significant environmental impacts, and will set a precedent that could lead to future environmental actions with significant effects. For all of these reasons, in accordance with the Council on Environmental Quality (CEQ) regulations, the action should be the subject of a full Environmental Impact Statement (EIS) which explores all of these issues, and not just an environmental assessment (EA). A Finding of No Significant Impact (FONSI) would be unwarranted under the

circumstances and could not comply with the requirements of the National Environmental Policy Act (NEPA).

The current draft AFA for FY 2013-2016 duplicates, with minor changes, a predecessor FY 2009-2011 AFA between the Fish and Wildlife Service (FWS) and the Confederated Salish and Kootenai Tribes (CSKT). That agreement was invalidated by the U.S. District Court for the District of Columbia for failure to comply with NEPA in litigation brought by PEER and four former Bison Range refuge managers whose tenures spanned 40 years, a former Chief of the National Wildlife Refuge System and Nathaniel Reed, former Assistant Interior Secretary during the Nixon and Ford administrations, as well as a Bison Range employee whose job was displaced. *Reed v. Salazar*, 744 F. Supp. 2d 98 (D.D.C. 2009). The 2009-11 AFA, in turn, followed and expanded upon an FY 2005 AFA which the FWS summarily cancelled in December 2006 citing a host of performance-related issues on the part of the CSKT, as well as reported mistreatment of FWS employees by the CSKT.

The FWS cancellation letter described –

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

The District Court found that the performance problems which caused FWS to cancel the FY 2005 AFA required that FWS do a NEPA analysis for the FY 2009-2011 AFA. The Court rejected arguments that no NEPA analysis was required because it was merely speculative that the CSKT would have the same sort of performance problems under a new AFA, and that no NEPA analysis was necessary because the CSKT disputed FWS’s claims of poor performance. The Court pointed out that potential environmental impacts must be considered even if they are not entirely certain. 744 F. Supp. 2d at 118.¹ *See also* 40 C.F.R. § 1508.3. (effects on the environment include actions which “will or *may* have an effect on” the environment) (emphasis added). Thus, in order to comply with the Court’s order, the environmental review of this AFA must consider the potential environmental impacts resulting from performance problems similar to those under the FY 2005 AFA.

¹ There was never any written evaluation by the FWS of the CSKT’s performance under the FY 2009-2011 AFA before it was cancelled.

While the Court did not address whether the environmental analysis should be in the form of an EA or an EIS, in fact a full EIS is required due to the actual significant impacts on the environment engendered by the FY 2005 AFA and the potential for similar impacts from the current draft AFA, as well as the potential for significant impacts stemming from the precedential nature of this AFA and the resulting loss of federal management and control over numerous other federal Refuges and National Parks.

1. The AFA Violates Federal Law

The Plaintiffs in the *Reed* case challenged the FY 2009-2011 AFA as violative of several federal statutes in addition to NEPA: namely the National Wildlife Refuge System Administration Act (NWRSA) (because it allowed administration of a National Wildlife Refuge by a party other than the Secretary of Interior, through the FWS); the Indian Self-Determination and Education Assistance Act (ISDEAA) (because it conferred upon the CSKT functions that are inherently Federal and because the statute establishing the existing program (the NWRSA) did not authorize the type of participation accorded the CSKT in the AFA); the Freedom of Information Act (FOIA) (because it purported to exempt Tribal records created pursuant to the AFA from FOIA); and the Intergovernmental Personnel Act (IPA) (because the AFA permits the CSKT to terminate IPA agreements, resulting in the position and its funding transferring to the CSKT for the remainder of the AFA, effectively abolishing the federal employee's position without any provision for the employee to return to his position or otherwise continue in the civil service).

A companion case brought by the Blue Goose Alliance and other plaintiffs challenged the FY 2009-2011 AFA as violative of some of the same statutes as well as the Endangered Species Act. Because the Court invalidated that AFA on NEPA grounds, it did not reach the other statutory claims. The current draft AFA fails to remedy the statutory violations inherent in the prior AFA and thus it has the potential to violate federal law impacting the environment.

In particular, the current draft AFA continues to delegate inherently federal functions and transfer administration of the NBRC away from the Secretary and the FWS, in violation of the NWRSA and the ISDEAA. Although §7 of the agreement explicitly states that “the Refuge Manager will retain final responsibility and authority for directing and controlling and administering the operation of the NBRC,” and other sections of the AFA disclaim the delegation of inherently federal functions, *e.g.* §23.B, the merely repetition of those claims does not make it so. Even the functions expressly reserved to the FWS Refuge Manager under §7.B are “to be exercised in a collaborative fashion” with the CSKT, and could be subject to the onerous dispute resolution procedures in §20, as well as to appeals under the ISDEAA (§20B) – essentially negating the Refuge Manager's purported authority.

In addition, by its terms the agreement vests within the CSKT the authority over the inherently federal functions of:

1. Supervising federal employees working under an IPA;
2. Managing the Biological, Fire, Maintenance and portions of the Visitor programs at the NBRC through a newly created Wildlife Refuge Specialist who is supervised by the Manager of the CSKT Division of Fish, Wildlife, Recreation and Conservation;
3. Selecting and supervising refuge volunteers; and
4. Selecting and managing additional employees and functions when positions other than the Refuge Manager, Deputy Refuge Manager and Refuge Law Enforcement Officer are vacated (leaving only three positions to the FWS); and
5. Jointly with FWS officials writing the Work Plan for the NBRC and setting work priorities.

2. The AFA Could Affect the Environment of the Federally-Protected NBRC

The AFA is entirely centered upon a federally-protected area, which is given special consideration under NEPA. The FWS found that the operation of the 2005 AFA had numerous adverse environmental effects on the Refuge and its wildlife. An EIS must explore the possibility that such effects or similar effects will recur with the transfer of the same sort of management responsibilities and replacement of federal employees with Tribal employees which occurred under the prior AFA.

The question of the environmental impacts on this federally-protected land is particularly salient because the purpose of the AFA is not to improve operations of this unit of the National Wildlife Refuge System or to benefit wildlife which relies upon the Refuge. Instead, the purpose behind this agreement is to satisfy an essentially political demand made by the CSKT to create a partnership “in operating and maintaining all programs of the NBRC.” AFA §2.A.

Although the AFA also describes its purpose as “an on-the-ground partnership...to accomplish common goals and objectives to benefit wildlife, habitat and people” (§2A), and claims that there will be benefits from “close collaboration with the Native people” and from cooperation with the employees of the CSKT Division of Fish, Wildlife, Conservation and Recreation, (§2.C.1.d and e), nowhere in the agreement are these benefits spelled out. Rather than benefit the Refuge and its wildlife, this agreement seeks, at best, to minimize the degree of harm that will be done to accomplish its ends of shifting operational control and payrolls from experienced FWS Refuge personnel to the CSKT. Whether and how the Refuge could be benefitted by this AFA, when a previous AFA with the same party was cancelled due to all the harm it caused to the NBRC, must at the least be fully explored in an EIS.

The likelihood that similar performance issues will arise and not be remedied is increased by the fact that the AFA provides that any evaluation of the CSKT’s performance must be “joint” with the CSKT and that any disagreement by the CSKT with any evaluation must be presented in the evaluation document. AFA §12.A.1 and 2. In addition, FWS is subject to onerous requirements for raising any performance deficiencies, which may

only be raised by the Refuge Manager with prior approval of the Refuge Supervisor, and which must contain detailed justifications and must allow time for the CSKT to either correct or dispute the deficiency. AFA § 12.A.3.b.ii. Failure to follow all of these procedures precludes any action based on that deficiency. AFA § 12.A.3.b.iv.

In addition, provisions of this AFA which were not in the FY 2005 AFA and were untested in the FY 2009-2011 AFA have the potential to paralyze the management of the NBRC and therefore negatively impact its environmental resources. This AFA repeats the dispute resolution process in the FY 2009-2011 AFA with minor modifications. AFA §20. A CSKT official can invoke the process “if the Refuge Manager has decided not to accept a CSKT recommendation ... and the CSKT believes the Refuge Manager’s decision is arbitrary or capricious” (§7.D.5), or the CSKT “disagrees with the Refuge Manager’s decision” and finds it arbitrary and capricious. AFA §20.A.2. In that event, the issue is subject to a four stage dispute resolution process where the issue is taken over the Refuge Manager’s head to the Refuge Supervisor, the Regional Director, and finally to the FWS Director. AFA §20. Either before or after this process, the dispute may also be subject to appeals under the Tribal Self-Governance regulations. AFA§20.B.

In short, this “Dispute Resolution” process is a bureaucratic nightmare designed to daunt even the most adamant Refuge Manager from making any decision or taking any action with which the CSKT may disagree. Thus, while the AFA alludes to the “final authority” and “final responsibility” of the Refuge Manager (§7 A and B), as a practical matter, every action of the Refuge Manager is subject to a numbing gauntlet of appeals that may continue regardless of the merits of the dispute and seem calculated to end only when the CSKT agrees with the outcome.

3. Potential Impacts on Endangered or Threatened Species

The NBRC is the home of a number of threatened and endangered species including but not limited to the grizzly bear, grey wolf, Canada lynx and bull trout, and contains critical habitat for bull trout. The presence of these species supports the existence of significant impacts requiring an EIS, and the potential impacts on these species of the changes to the operation and management of the NBRC occasioned by the AFA must be examined.

4. Effects on the Environment which are Likely to be Highly Controversial

The AFA presents potential effects on the environment which are likely to be highly controversial, as evidenced by the FWS’s cancellation of the 2005 AFA largely based on environmental harms and the court invalidation of the FY 2009-2011 AFA based on violation of NEPA. The plaintiffs in the District of Columbia lawsuit and others have contended that operation of the FY 2009-2011 AFA, as well as the FY 2005 AFA, caused significant environmental harm to the NBRC. CSKT has denied this, and it is unclear what the FWS’s position is.

5. The AFA is Likely to Have Highly Uncertain Environmental Effects and Unknown Risks

The environmental effects and risks of the draft AFA are highly uncertain and unknown, because it is not known which of the adverse environmental effects stemming from previous AFAs will be repeated. In addition, the current draft AFA poses additional uncertain and unknown environmental effects and risks, because it aims to incorporate the management of the NBRC into the overall management of Tribal lands – an unprecedented action for a National Wildlife Refuge, which, in accordance with the NWRSA, is to be managed “managed to fulfill the mission of the System, as well as for the specific purposes for which that refuge was established.” *Id.* § 668dd(3)(A). *See* draft AFA §. 2.2.c. describing a benefit to the CSKT from the agreement as it “better enables CSKT to holistically address natural resources management issues on it Reservation, due to the NBRC’s central location within the Reservation;” and §8.A, stating the intent of AFA to integrate fire management on Refuge system lands with the CSKT’s professional wildland fire management program. The NWRSA directs that a Refuge be managed as part of the greater Refuge System, not as part of another non-Federal entity’s land.

As it stands, commenters cannot know the potential impacts of the AFA on resources of the NBRC as well other Refuges in the System, because the draft AFA which has been posted does not include its four appendices – most importantly the budget, which would reveal the amount of monetary resources accorded to various functions and whether the budget for the AFA will result in resources being taken from other Refuges because it will be more expensive to manage the Refuge under the AFA than it has been to manage it under federal control. Even if the budget were available, it is subject to change each fiscal year – meaning that the entire cost of the AFA cannot be known in advance. AFA §14.B. Thus, the effects are highly uncertain and unknown.

The environmental effects of the AFA are also highly uncertain because the AFA itself contains many uncertainties as to what activities and functions it will cover and how resources will be allocated. For example, the AFA provides that the CSKT may redesign the functions it will perform under the AFA and reallocate funding between such activities with approval of the Refuge Manager. AFA §6.B. Much of what will occur under the AFA is left to be developed in the Work Plan to be jointly developed by the parties and to additional decisions by the Refuge Leadership Team. AFA §7.D.2 and 3; 7.E. As federal positions are vacated, new and yet unknown functions will be transferred to the CSKT. AFA §13.F.4.

Moreover, additional uncertainties are added by the fact that the effective date for CSKT performance of activities is uncertain and may be phased in due to the need to hire necessary staff. AFA §25.A; §14.B. The qualifications and experience of the CSKT staff are not specified, other than to state that they will be “well-qualified.” AFA §13.A.3. Consequently, it is not known when and at what level the CSKT will be able to perform the functions outlined in the agreement.

Finally, the AFA is structured to restrict the public's right to know what is happening at the NBRC, and therefore builds in an ongoing uncertainty as to the environmental effects of the agreement. The AFA provides that "records of the CSKT shall not be considered Federal records for the purpose of the FOIA." AFA §11.D. Moreover, the agreement stipulates that the CSKT will provide financial records of expenditures to the FWS only "to the extent the Service requires them for its budget appropriation or apportionment process" (§10C 1) – phrasing strongly suggesting that the CSKT is under no obligation to open its accounts to any outside review. In addition, the only "Activity" record that the CSKT is required to maintain must merely "document the nature of the Activity and when, where, and by whom it was performed" (§10B). Thus, members of the public seeking to determine the basis behind wildlife management decisions may run into a brick wall of fragmentary data and no way to penetrate beyond that wall.

6. *The AFA could affect public health and safety.*

The 2005 AFA was cancelled in part because "[s]everal of the highest priority Activities, such as those that influence public health and long-term maintenance of vehicles and heavy equipment, were not completed at a satisfactory level." This fact supports a finding of "significance" requiring an EIS, and must be explored in the environmental review.

7. *The AFA is Related to Other Actions with Cumulative Significant Effects, and Sets a Precedent for Future Actions with Significant Effects*

This AFA is the first such agreement of such scope and breadth on a National Wildlife Refuge. Therefore it is like to be a precedent for similar agreements on other Wildlife Refuges, as well as National Parks and other public land managed by the Department of Interior. Another 18 refuges in 8 states, including all of the Alaska National Wildlife Refuges, are also eligible for similar agreements. These eligible refuges constitute 80% of the land area of the entire National Wildlife Refuge System. Similarly, over 60 National Park Service units in 19 states are eligible for similar tribal agreements, including national parks such as Redwood, Glacier, Voyageurs, Olympic and Cape Cod National Seashore. See "List of Programs Eligible for Inclusion in Fiscal Year 2012 Funding Agreements To Be Negotiated With Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs," 76 Fed. Reg. 57068 (Sept. 15 2011).

Despite this fact, DOI has approached the NBRC negotiations on an *ad hoc* basis, with no overall policy or considered approach. By acting without policy guidance, DOI officials may unwittingly be creating a template for future agreements without any idea of whether this one is a model deserving replication.

8. *The FWS has Proposed Insufficient Alternatives*

The Notice of Intent proposes only two alternatives: the new AFA or "continue current management," "with no type of formal partnership or contract with CSKT or any other entity." In addition, the description of the proposed action makes it unclear as to whether

the proposed action is in fact the draft AFA or whether it is the summary described in the Notice of Intent, which presumably could be fleshed out in an AFA with unknown provisions – clearly an unacceptable level of specificity for an alternative.

Even assuming that the proposed action is the draft AFA, the all or nothing choice is not sufficient. Members of the public should have the option to choose a revised AFA or cooperative agreement which, for example, contracts fewer activities, eliminates joint management, and eliminates other objectionable provisions.