



# PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY

2000 P Street NW, Suite 240 ♦ Washington, DC 20036

Phone: (202) 265-PEER ♦ Fax: (202) 265-4192

Email: [info@peer.org](mailto:info@peer.org) ♦ Web: <http://www.peer.org>

Laura King, Planning Division  
National Bison Range Complex  
58355 Bison Range Road,  
Moiese, MT 59824

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[bisonrange@fws.gov](mailto:bisonrange@fws.gov)

**Re: Comments on Environmental Assessment for the Proposed Annual Funding Agreement with the Confederated Salish and Kootenai Tribes; National Bison Range Complex, Moiese, MT; FWS-R6-R-2014-N092**

**Submitted via U.S. Mail & Email**

Dear Ms. King:

Public Employees for Environmental Responsibility (PEER) submits these comments in response to the *Federal Register* Notice of August 5, 2014. Our comments are divided into three parts: 1) several overarching comments about the review process and the preferred alternative; 2) detailed comments concerning environmental impacts not adequately assessed; and 3) an analysis of how the preferred alternative will disrupt refuge operations and create adverse impacts on both this refuge unit and its employees.

## **I. Overview Comments**

### **A. Compliance with the National Environmental Policy Act**

As detailed below, PEER contends that the AFA which is the preferred alternative in the draft Environmental Assessment (DEA) 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).

Most basically, this is because the DEA does not actually analyze the potential environmental impacts of the proposed action or other alternatives, which is the whole purpose of NEPA review. Instead, the DEA merely assumes that there will be no environmental impacts from the proposed change in management structure and the substitution of less experienced personnel occasioned by the AFA which is the preferred alternative, and to varying degrees, by the other alternatives. While containing a comprehensive description of the “Affected Environment,” (Chapter 6), when it comes to the “Environmental Consequences of the Proposed Action and Alternatives” (Chapter 7), the DEA simply assumes that “none of the proposed alternatives would result in physical impacts or disturbance to resources,” “none of the proposed alternatives would result in a change to resource management objectives, approaches or implementation,” and that “the staffing and administrative structure proposed in each [alternative] would be fully and successfully implemented.” DEA at 94. As detailed below, the FWS actually found none of those assumptions to be true with regard to the 2005 AFA, and the EA affords no basis for concluding that this AFA will have entirely different results.

With regard to each category of functions of refuge management and environment considered, the DEA limits its analysis to the effects on the environment of the total number of staff under each alternative, without any consideration of the change in management structure and the loss of highly experienced FWS employees, and draws brief conclusions that essentially say that more staff is better, less staff is worse. DEA at 95-96 (Habitat Management); 96 (Bison Management); 97 (Big Game Monitoring and Management); 97-98 (Research, Inventory and Monitoring); 98-99 (Visitor Services); 99 (Cultural Resources); 99-100 (Operations); 101 (Employment and Income Effects); 102 (Economic Activity Effects). Or, the DEA simply claims ignorance of what the effects will be. DEA at 96 (Habitat Resources and Wildlife Management); 104 (Cumulative Effects on Wildlife and Habitat Management).

These unwarranted and unsupported assumptions and lack of analysis do not satisfy the requirements of NEPA or the direction in the decision of the U.S. District Court, discussed below.

It should be noted that the current draft AFA for FY 2013-2016 which is the preferred alternative in the DEA 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.<sup>1</sup> *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. The DEA does not do this.

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.

### **B. No Benefit to Refuge or Wildlife**

The purpose of the agreement is not to improve operations of this unit of the National Wildlife Refuge System or to benefit wildlife which relies upon the refuge. No specific wildlife objective is mentioned in the agreement. Instead, the purpose behind this agreement is essentially to satisfy a political demand made by the CSKT. *See* DEA at 9: “The purpose of this action – an AFA – is to fulfill our desire to enter into an expanded partnership under the authority of the

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

Tribal Self-Governance Act of 1994 . . . . An AFA is needed to carry out the Tribe’s desire for tribal involvement in activities on the National Bison Range Complex . . . .”

Although the preamble of the agreement alludes generally to “an on-the-ground partnership...to accomplish common goals and objectives to benefit wildlife, habitat and people” (§2A) nowhere in the agreement are these benefits spelled out. By contrast, the agreement appears to contemplate that, at least initially, it will actually result in a diminution in the quantity and quality of services as the agreement acknowledges that FWS will provide and pay for training for CSKT Employees. (AFA §13 D)

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 away from experienced FWS refuge personnel.

### **C. Public Has No Recourse for Complaints**

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

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

### **D. Agreement Boils Down to Outsourcing**

The agreement states that the CSKT will fill positions with “well qualified CSKT employees” but does not stipulate what those qualifications are (§ 13 A 3) nor is there any requirement that CSKT hire the best qualified employees. Similarly, those selected need not be current CSKT tribal members, and in fact important positions in the last AFA were filled by non-tribal members.

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

### **E. No National Policy Means *Ad Hoc* Negotiations**

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

Despite the fact that some 75 national parks and wildlife refuges are eligible for similar tribal transfers, DOI has approached the NBRC negotiations on an *ad hoc* basis, with no overall policy

or considered approach. Yet for several years, a proposed national policy on tribal AFAs has been pending at DOI without action.

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

#### **F. “Annual” Funding Agreement Is Actually Multi-Year Agreement**

The implementing regulations for agreements governing non-Bureau of Indian Affairs programs speaks of “annual funding agreements” (25 CFR Part 1000.121). In addition, the agreement defines itself as an “annual funding agreement” (§2).

Yet the agreement has a titular (“Fiscal Years 2013-2016”) multi-year duration without apparent legal authority for anything beyond an annual contract.

## **II. Environmental Concerns**

### **A. 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);
- 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);
- Freedom of Information Act (FOIA) (because it purported to exempt Tribal records created pursuant to the AFA from FOIA); and
- 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

NWRSAA 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 mere 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.

#### **B. The AFA Could Significantly 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 FY 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 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 (§§12A1 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 (§ 12A3bii). Failure to follow all of these procedures precludes any action based on that deficiency (AFA §12A3biv).

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 (§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" (§7D5), or the CSKT "disagrees with the Refuge Manager's decision" and finds it arbitrary and capricious (§20A2).

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 (§20). Either before or after this process, the dispute may also be subject to appeals under the Tribal Self-Governance regulations (§20B).

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.

### **C. 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.

Chapter 7.3 of the DEA declares that "The effects of any of the alternatives on actual wildlife populations, including threatened and endangered species, are unknown." In essence, the DEA is saying the impacts are both unknown and unknowable. This deliberately myopic position ignores the negative effects experienced under two prior AFAs and is inherently insufficient to comply with FWS's obligations under NEPA to analyze potential environmental effects.

### **D. 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. The EA does not address the issue or analyze any relevant facts.

### **E. The AFA is Likely to Have Significant Environmental Effects and Risks**

The environmental effects and risks of the draft AFA are potentially significant because it is not known which of the adverse environmental effects stemming from previous AFAs will be repeated. In addition, there are certain to be environmental effects from the disruptions in refuge management and programs caused by the transition to a different management system and the replacement of experienced refuge personnel with inexperienced tribal employees who will need to be trained for their jobs. The 2008 AFA recognized "the first year of this AFA will be a transition year as new employees learn their jobs and the leadership team develops a close working relationship necessary for success." DEA at 38. The new proposed AFA does not

acknowledge this fact, but that does not make it any less true. It has been nearly four years since the 2008 AFA was rescinded by the court and CSKT employees left the refuge. This new AFA would require starting over with new employees and a new management structure.

In addition, the DEA recognizes (at 30) that the 2008 AFA presented challenges in recruiting and retaining qualified CSKT staff, but does not consider the environmental impacts stemming from a lack of qualified staff. The fact that that the CSKT can offer no more than five year contracts to employees under the AFA (DEA at 36), combined with the history of untimely terminations of the last two AFAs, will discourage the most qualified people from seeking employment under the AFA.

Significantly, the current draft AFA poses additional 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). The draft AFA (at §2C2c) describes a benefit to the CSKT from the agreement as it “better enables CSKT to holistically address natural resources management issues on its Reservation, due to the NBRC’s central location within the Reservation;” and at §8A states the intent of AFA to integrate fire management on Refuge system lands with the CSKT’s professional wildland fire management program.

By contrast, 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.

The AFA also poses risks of unknown environmental effects due to 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 (§6B). 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 (§§7D2 and 7.E). Further, as federal positions are vacated, new and yet unknown functions will be transferred to the CSKT and to less experienced employees. (§13F4).

Finally, 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 (§§14.B and 25A). The qualifications and experience of the CSKT staff are not specified, other than to state that they will be “well-qualified” (§13A3). Consequently, it is not known when and at what level the CSKT will be able to perform the functions outlined in the agreement.

#### **F. 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.



### **G. 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).

### **H. The FWS Insufficiently Considered Alternatives**

Besides the preferred alternative, the DEA rejected alternatives such as limiting an AFA to Fire and Visitor Programs (Alternative C) and /or adding to this alternatives with incremental addition of more CSKT staff in other programs (Alternatives D and E).

The DEA compares the impact of these alternatives with conclusory findings of “negligible” or “minor” benefits with no real explanation behind those conclusions. Since the DEA does not adequately consider negative impacts experienced with past AFAs, it also fails to consider the reduced risks and impacts from a more limited or phased-in approach. These alternatives should be seriously considered in order to minimize environmental damage. Selection of the AFA alternative merely because the CSKT wants it, with no serious analysis of the other alternatives, cannot meet NEPA’s requirement to consider alternatives.

In addition, the DEA declares that the following alternatives were not considered:

- Using authorities such as the Federal Pathways Programs for students to develop, train, and hire CSKT members and other Native Americans enrolled at Salish Kootenai College and other accredited institutions to fill professional, technical, administrative, and skilled trade positions at the refuge complex;
- Entering into conservation partnerships with Tribes under Executive Order 1299; and
- Assignment of qualified CSKT employees to fill all seasonal positions and any permanent positions at the refuge complex that are not currently encumbered by FWS permanent or term employees

The stated rationale for this decision to eliminate consideration of these alternatives is that none went as far in implementing the Self-Governance Act with non-BIA agencies. That is an improperly reductionist view of FWS’ duties and its NEPA responsibilities. As detailed in these comments, there are several countervailing risks and impacts which may outweigh whatever Self-Governance Act goals may be achieved.

In short, the EA contains insufficient consideration and an inadequate array of alternatives.

### **III. Negative Effects on Effects of NBRC, NWRS and Employees Not Analyzed by DEA**

The DEA concludes that the preferred alternatives will have “negligible benefits” for overall refuge management and key management components. That conclusion ignores several factors:

#### **A. Dispute Resolution Process May Paralyze Refuge Management**

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

Thus, while the AFA alludes to the “final authority” and “final responsibility” of the Refuge Manager, 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.

#### **B. Acceptable Performance Becomes Negotiable**

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

The AFA provides any evaluation be “joint” with the CSKT and does not allow for independent review (§12A). If any “significant perceived performance deficiency” is found by the Refuge Manager, he or she must provide a written justification of what legal authority mandates that the work be done in a specified manner and “why the performance of the CSKT does not meet that requirement” and then provide “the CSKT a reasonable amount of time to remedy the performance or demonstrate to the Refuge Manager that no performance deficiency exists” (§12A3biii). These cumbersome requirements negate the ability of the Refuge Manager to assure acceptable performance under the AFA.

#### **C. Public Right-To-Know Suspended**

The agreement provides that the Freedom of Information Act “does not apply to records solely maintained by the CSKT” (§11D). 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.

Thus, the AFA is structured to restrict the public’s right to know what is happening at the NBRC in a fashion that is contrary to law.

#### **D. Financial Incentive to Cut Corners**

Under the agreement, 100% of agreed upon base funding shall be paid upfront to the CSKT (§14E). Similarly, the CSKT keeps any interest generated by federal funds (§14F).

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

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

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

#### **E. Financial Incentive to Harass or Drive Away Federal Employees**

Similarly, the agreement stipulates that the CSKT will be awarded the unused salary and benefits of any FWS employee who quits, transfers or is terminated by the CSKT (§§13E5ciii and 14C). This provision gives the CSKT a financial incentive to drive away federal employees.

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

#### **F. No Specified Remedy for Harassment or Mistreatment of Employees**

Despite declaring a “zero tolerance policy” for “discrimination, retaliation and harassment of any type” (§9A), the agreement does not provide any direct remedy or sanction in the event that such abuse occurs.

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

The agreement does provide for a “joint” investigation and report by CSKT and FWS managers concerning “any allegations” but does not specify what happens if the CSKT and FWS representatives disagree about what occurred or what should be done about it (§9A).

In 2006, the CSKT and FWS fundamentally and vociferously disagreed about the merits of FWS staff allegations of harassment and abuse leading to the cancellation of the earlier AFA. If the same events occurred under this new AFA, presumably the dispute would be elevated again to the Secretary of Interior.

#### **G. Whistleblowers May Be Compromised**

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

“The Service will promptly notify the Manager of the CSKT Division of Fish, Wildlife, Recreation and Conservation in writing of each written comment and documented oral comment received from third parties concerning the CSKT performance of any Activity. The Service will promptly provide to the CSKT a copy of each written comment or documented oral comment without requiring any request from CSKT, in accordance with disclosure practices under FOIA and the Privacy Act. The Service will not take any action regarding the CSKT’s performance on the basis of any oral comment that the Service did not document in writing, or any comment the Service did not promptly provide to the Manager of the CSKT Division of Fish, Wildlife, Recreation and Conservation.” (§ 12A3a)

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

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

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

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

## **H. Flexibility of Refuge System Diminished**

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 – likely resulting in environmental harms -- 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 (§14.B).

The AFA is crafted to lock payment levels, staffing and even bison herd totals in place through a five-year period. It makes no provision for FWS being able to reallocate or prioritize other refuge needs. Nor is there provision for FWS to reallocate funds or personnel due to disease

(such as infectious conditions threatening wildlife and/or domestic livestock), drought or other emergency.

### **Conclusion**

The potentially significant environmental effects of the proposed action require an EIS. The current DEA is wholly inadequate to support a FONSI because it fails at the most basic level to consider the environmental impacts of the proposed AFA and its alternatives.

###