

June 9th, 2003

The Honorable Gale Norton, Secretary
United States Department of the Interior
1849 C Street NW
Washington, DC 20240

VIA FIRST CLASS MAIL

Re: Bison Range Initiative

Dear Secretary Norton:

Public Employees for Environmental Responsibility (PEER) has reason to believe that the U.S. Department of Interior is violating the law with regard to its planned action to turn operations and management responsibilities of the National Bison Range and affiliated National Wildlife Refuges (NWRs) to the Confederated Salish and Kootenai Tribes (CSKT).

PEER recognizes that many tribal governments have skilled natural resources staff and a commitment to resource conservation. Our concern is not with tribal governments but with a proposal that divests the federal government of its interest and oversight of federal lands.

In this letter, PEER raises three concerns:

- 1) The plan as outlined in public statements by Paul Hoffman, the Deputy Assistant Secretary for Fish Wildlife & Parks appears in conflict with the Indian Self-Determination Act;
- 2) The proposed course of action announced by Mr. Hoffman would violate the National Environmental Policy Act;

? and—

- 3) No consideration appears to have been given to a range of potential adverse environmental and management impacts and what, if any, preventive or curative steps the Department will be able or intends to take to obviate damage to the resource.

PEER is a national nonprofit organization made up of local, state, and federal resource professionals whose mission is to promote open, ethical and accountable governmental administration of environmental laws and regulations throughout the United States. This letter

reflects concerns and questions raised to us by current and retired Fish and Wildlife Service employees who are serving or have served in every region of the country.

The National Bison Range is 18,800 acres of Palouse Prairie, forests, wetlands and streams. Elk, deer, pronghorn, black bear and coyote share the land with between 350 and 500 bison. More than 200 species of birds, including eagles, hawks, and meadowlarks, make their home on the Range.

All Americans have an interest in the survival of this unique ecosystem. Congress understood these values when it established the National Wildlife Refuge System (NWRS) one hundred years ago. The proposed action to turn operational and management functions over to non-governmental control rolls back a century of history, and undermines the values and legal obligations of the NWRS.

The Indian Self-Determination Act

In 1975, Congress passed P.L. 93-638, the Indian Self-Determination and Education Assistance Act. The intent was to allow recognized tribes to assume some functions that had been managed by USDOJ agencies, particularly the Bureau of Indian Affairs (BIA).

In the fall of 1994, Congress again addressed the subject and passed amendments to P.L. 93-638. The result was a number of significant changes. Now known as P.L. 103-413, the Indian Self-Determination Act Amendments of 1994. Title IV of these amendments contained a number of provisions that had the affect of substantially changing the focus of the original Act with regard to USDOJ lands and functions *other than* those of BIA.

With regard to the National Wildlife Refuge System (NWRS), the most striking change or addition was Sec. 403 (B.) (c.), "Additional Activities." This had the effect of allowing the Secretary and tribes to "...also include other programs, services, functions, or portions thereof, administered by the Secretary (USDI) which are aware of special geographic, historical, or cultural significance to the participating Indian Tribe requesting a compact."

Consequently, in a debate entered into the Congressional record on October 7, 1994, Senator John McCain (AZ) entered Disclaimer Section K, which ensured that "inherently federal responsibilities" would not be transferred. This Disclaimer was added primarily at the request of the International Association of State Fish and Wildlife Agencies, who feared fragmentation of cooperative and other Fish and Wildlife Programs.

For a decade, no serious efforts were made to implement the compacting of administrative, biological, visitor services or other functions to tribes under the Act, with the understanding that these duties were "inherently federal" in nature, as per the law. [25 USCS s. 458cc (k)]

Today, your office has reinterpreted these long-understood principals. The tribes have requested that they be allowed to "operate the full range of activities provided at the National Bison Range, which is all programs, services, activities and functions provided at the NBR and ancillary

property.” Under this arrangement, the land would still be owned by the United States government but these management federal functions, the very definition of “inherently federal,” would no longer be under the control of the federal government. Therefore, further action by Mr. Hoffman to negotiate away continued USDOJ operational control conflicts with the very Indian Self-Determination Act that Mr. Hoffman purports to be implementing.

The National Environmental Policy Act

In 1969, Congress passed the National Environmental Policy Act (“NEPA”) to ensure that all federal agencies consider the environmental impacts of major federal actions that affect the “quality of the human environment.” 42 U.S.C. § 4332(2)(C) One of the statute's primary purposes is to make certain that the FWS, “in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, (1989); see also *City of Grapevine, Texas v. Department of Trans.*, 17 F.3d 1502, 1503-04 (D.C. Cir. 1994) (discussing the agency's mandate to take a “hard look” at the environmental consequences of its decision to proceed with a project).

In addition to providing crucial information to the agency, NEPA also “guarantees that the relevant information will be made available to the larger audience that also plays a role in both the decision-making process and the implementation of the resulting.” *Robertson*, 490 U.S. at 349 This larger audience includes the Congress, which has authorized the agency's actions; and the public, which receives the “assurance that the agency 'has indeed considered environmental concerns in its decision-making process,’” *Sierra Club v. Watkins*, 808 F. Supp. 852, 858 (D.D.C. 1991) (quoting *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983)), as well as the product of the opportunity to comment.

NEPA has twin goals:

- (1) To ensure that the agency takes a “hard look” at the environmental consequences of its proposed action; and
- (2) To make information on the environmental consequences available to the public.

The public may then offer its insight to assist the agency's decision-making through the comment process. *DuBois v. United States Dept. of Agric.*, 102 F.3d 1273, 1285 (1st Cir. 1996) NEPA sets forth procedural safeguards to execute this “hard look” and ensure proper consideration of environmental concerns See *City of Carmel-by-the-Sea v. United States Dept. of Transp.*, 123 F.3d 1142, 1150 (9th Cir. 1997). The cornerstone of NEPA's procedural protections is the Environmental Impact Statement (“EIS”), a detailed statement that discusses: the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term

productivity, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332 (C)

PEER's concern with respect to NEPA focuses on the environmental impact the change in the management status poses to the National Bison Range, along with affiliated National Wildlife Refuge due to Congressional action. The proposal to turn management responsibilities of the National Bison Range and affiliated NWRs to the CSKT constitutes a "major federal action," and as such requires adherence to the impact assessment and public notice provisions of NEPA.

Two aspects of the way this major shift is being handled are striking: the lack of national hearings on the transfer, and the lack of involvement from NWRS staff professionals.

Interior has used the public notification process to treat this major federal action as a local issue. Only one public hearing has occurred, in Ronan, Montana this May, even though this management transfer would have a significant impact on the entire Refuge System, and federal lands in general.

In contrast, PEER has learned that the plans are being promoted exclusively from the Interior's Washington Office. Interior officials have signaled that local and regional staff members are only minor players in this process, notwithstanding that they are the experts in the management responsibilities and the ecology of the Range itself.

By his own account, Mr. Paul Hoffman, is personally and exclusively overseeing the process. In the *Missoulian* (May 20, 2003), Hoffman described his role being "to ensure that everybody is playing well in the sandbox." The simplistic nature of Mr. Hoffman's public statements point to precisely why NEPA review is warranted. One political appointee, no matter how Solomon-like he thinks he is, holding one local hearing in Montana is not nearly adequate to meet the NEPA public participation requirements.

Mr. Hoffman has further stated that questions regarding "inherently federal" functions will be resolved as the process moves forward. Again, this idea flies against the intent of the NEPA process, which is to plan major actions with input and care before they are initiated.

Because of the far reaching, implications, the precedent-setting nature, and the potential on-the-ground environmental impacts to this unique piece of federal land, the Department of Interior must hold hearings around the country, so that all interested parties may have their opinions weighed. This point is that **a wholesale turnover of federal land management to any private group, corporation or sovereign nation is a matter of significant national interest.**

Beyond Bison Range

Last spring, your office re-interpreted Indian Self-Determination Act by publishing a list of programs eligible in FY 2003 for Annual Funding Agreements for possible self-governance in the *Federal Register* (Vol. 67/No. 66/ April 5, 2002). This notice included all 16 Alaskan

NWRs, 15 additional refuges in the lower 48 states, and 9 National Fish Hatcheries in 8 states. The notice also listed 34 national park units in 15 states.

Earlier this year, the Department of Interior announced that the National Bison Range and its affiliates, Ninepipe and Pablo National Wildlife Refuges, would become the test case to transfer management functions CSKT. Yet, in proceeding on this test case, USDO I has abdicated responsibility for addressing a range of adverse environmental and management effects:

- CSKT has announced plans to build anew visitor center, a new entrance and a new road near Ravalli Pond. Besides being a bird-watchers paradise, Ravalli Pond provides important pronghorn and elk habitat. Once management of the refuge is turned over to CSKT, by what mechanism will USDO I prevent management actions incompatible with the needs of the refuge wildlife?
- CSKT also maintains a stock car raceway and a gravel pit near to refuge lands. If, after transferring management control to CSKT, the tribe chooses to expand these commercial operations in a manner that negatively affects refuge resources, what recourse will USDO I have?
- Some CSKT leaders have announced an intention to displace all NWRS staff and replace them with tribal members or with tribally operated contractors. Does USDO I intend to enter into agreements that would authorize hiring discrimination on the basis of race or ethnicity on a federal facility?

The precedent set at the National Bison Range has deep implications for the entire NWRS. Using the full authority Mr. Hoffman claims to turn over complete operational and management control of more than 30 units of a national system of lands to a collection of sovereign nations with exceedingly diverse cultural assets, economic needs, leadership capabilities, agendas, relative wealth, and other important factors will indeed diminish much of what makes the NWRS a “system.”

Such an action taken on the centenary of the NWRS system would threaten the promises made at the recent celebrations of this milestone to keep the system intact and preserve its promise to future generations of all Americans.

Also left unaddressed are the impacts upon the hundreds of local refuge staff across the United States—families that have been the glue that holds these programs together, year after year, as managers come and go. It now looks as if scarce federal refuge dollars will be given to tribes to hire contractors to fulfill the tasks that are currently being expertly administered by federal employees.

The influx of contractor positions into NWRS will also aggravate current operations and maintenance backlogs. As you know, there never have been clear delineations of tasks on NWRs. Because of historic under-funding and under-staffing, administrators lead tours, ORP’s

create budgets, administrative assistants drive tractors, and maintenance mechanics do everything that DoD facilities would require fifteen different job titles.

The NWRS has a current operations and maintenance backlog of more than 1.6 billion dollars. It will not get better in these austere times. Mr. Hoffman has incorrectly stated that these compacts would provide more money for refuges. This ignores the reality of how refuges are funded, and threatens to make worse an already bad situation.

In short, your subordinates have made clear that the management transfer of the National Bison Range will not be an isolated case. As such, an even greater level of scrutiny is warranted that has been provided by Mr. Hoffman's ad hoc and very limited approach to this matter.

At the very least, PEER would request that the Department of Interior delineate its policy on what functions it considers to be "inherently federal" and thus not subject to negotiation. We would also suggest that if the Interior Department intends to use this action as a test case for a series of such transfers, nothing short of a full Environmental Impact Statement, including national hearings around the country, is needed to meet the requirements of NEPA for this major federal action.

Thank you for your attention to this matter.

Respectfully,

Gene Hocutt
PEER Refuge Keeper

Dan Meyer
PEER General Counsel

CC: Senator Conrad Burns
Senator Max Baucus
Congressman Dennis Rehberg
Deputy Undersecretary Paul Hoffman
Director Steven Williams
NWRS Chief William Hartwig
Region 6 Director Ralph Morgenweck
Region 6 Chief Rick Coleman
Refuge Manager David Wiseman