

Oct.12, 2004

Mr. Steve Kallin, Refuge Manager

National Bison Range Complex

132 Bison Range Road

Moiese, MT 59824

Dear Mr. Kallin:

These comments on the proposed Annual Funding Agreement (AFA) between the U.S. Fish and Wildlife Service (FWS) and the Confederated Salish and Kootenai Tribes (CSKT) are submitted by Public Employees for Environmental Responsibility (PEER). PEER is a national non-profit 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.

PEER's comments reflect concerns and questions raised by current and retired FWS employees who are serving or have served in every region of the country. PEER recognizes that many tribal governments have skilled natural resources staff and a strong commitment to resource conservation. Our concern is not with tribal governments. Instead, we are concerned with a proposal that divests the federal government of its interest and oversight of federal lands.

PEER's fundamental opposition to this agreement, as developed and written, is that we believe it is poor public land stewardship and poor public land administration for the U.S. Department of Interior (USDO I) or any other federal entity to explore or entertain the turnover of funding, staffing, and/or management of dedicated federal trust lands to ANY outside group – whether tribal, state, private, or international. Further, we question the Secretary's decision to virtually ignore the compendium of important elements that should have been considered during this undertaking, including public hearings, congressional oversight, consultation with partners (NGO's) and full compliance with the National Environmental Policy Act (NEPA).

PEER also recognizes that many of these issues have been raised in comments submitted by the Blue Goose Alliance and by the National Wildlife Refuge Association. PEER understands and strongly supports the conclusions of both organizations. Rather than burden the record by restating their points, we will attempt to supplement the record they have created.

PEER's specific concerns follow:

I. Wildlife Protection Becomes Secondary to Politics

The Secretary's actions are entirely based upon a single fairly generalized (and ambiguous) section of the Indian Self-Determination and Education Assistance Act (ISDEAA, P.L. 93-638) that encourages tribes to operate "other Interior programs" to "benefit their members." Nowhere in the Act does it call for or even mention stewardship or continued protection of lands and waters of the National Wildlife Refuge System (NWRS).

It is also apparent that enhancing the protection of natural resources within the National Bison Range Complex (NBRC) is not the object of this AFA – at best, the resources have been an afterthought.

For example, CSKT has been out of compliance with NWRS regulations for many years (in some cases decades) around the boundaries of portions of the NBRC. CSKT noncompliance has involved gravel mining, encroachment of a stock car track, placement of overhead power lines, grazing, farming and other issues. Previously, FWS made it clear that there could be no AFA until CSKT came into compliance with NWRS regulations. Consequently, the Service has agreed to partial compliance, after again appealing to USDO. The Department has ruled that the willingness to comply would be satisfactory for FWS to perform the AFA. If resource protection was a paramount consideration, full CSKT compliance with wildlife compatibility requirements would be a pre-condition for any AFA.

The method for cancellation of the AFA also illustrates that resource protection is not a priority. To cancel the AFA the "Regional Director, on behalf of the Secretary, finds and notifies the CSKT in writing that the performance of the CSKT under this AFA is causing imminent jeopardy to natural resources or public health and safety, or that the CSKT is in material-breach of this AFA." If protection of natural resources was central to the Agreement the standard required for cancellation would be less stringent than "imminent jeopardy." Such language makes it clear that the quality of wildlife protection is not a primary consideration in this arrangement.

II. Effective Refuge Operation Hampered

The NWRS has been operating in the face of an estimated \$2 billion deficit in Operations and Maintenance, insufficient staff and budgets that have declined in each of the past four years. As a consequence, the Refuges have been forced to hold things together with a combination of baling wire and ingenuity.

This AFA, however, is written from the viewpoint of an organizational chart, with neat boxes of responsibilities that do not overlap. Thus, the AFA's division of responsibilities is unrealistic and ill-advised:

- 1) Limited staff and funds for decades has bred generations of maintenance mechanic "generalists" on refuges who drive tractors, fix tractors, do water control, assist with animal capture and marking, farm, mow, fight

fires, etc. Administrative people assist with field work, visitor services, cleaning, etc. Biological staff also, farm, help with administrative routine, perform visitor services, drive tractors, do census activities, etc.

- 2) The AFA calls for "specialists" who clean and pick garbage, work at a visitor center, work as firefighters or do other specialized and specific tasks. Such defined "roles" do not reflect the realities of 21st Century refuge management.
- 3) The NWRS has never had the funds and/or staff to permit specialists. Consequently, groups of generalists have evolved on most refuges when jobs get done precisely because of high levels of teamwork and cooperation. This typically means backing up other employees in tasks totally outside one's job description.
- 4) The NWRS does not operate on a typical work-week schedule. Wildlife patterns, visitation peaks, facilities breakdowns, high water, wildfires and other emergencies all contribute to unpredictable work demands. The generalists in the NWRS must often step outside their job descriptions and normal hours to work for the greater good of the resources and the team.
- 5) High levels of training and safety standards exist across all disciplines on refuges throughout the NWRS. These were hard fought and have developed over the past 20 years or so. Whether on a tractor, in a ditch, on a frozen water control structure, in a canoe in swift water, in an airplane or elsewhere, FWS training and experience assures that each employee knows what their partner(s) will and will not do. Many of the duties placed upon NWRS employees are inherently dangerous and responsible for a number of deaths and many serious injuries.
- 6) Refuge staff are frequently detailed to other refuges for emergencies and special programs. In the event of floods, emergency repairs or special events it is imperative that qualified and highly trained veteran refuge generalists are available.
- 7) Refuge management in the 21st Century is a cohesive task requiring strong teamwork for planning, a flexible and need-based approach to funds and tasks, and a sense by all employees that the welfare of the refuge supersedes individual employee egos.
- 8) Budgeting in regional offices and for individual National Wildlife Refuges (NWR) within a region is a complex and sometimes thankless task. USDOJ budgets for a given fiscal year are often not available until late winter or even spring. Once available, numerous shifts in dollars (and staff) are necessary because of constantly changing circumstances. There is no room for a static AFA, such as this one, that lacks flexibility.
- 9) Perhaps the greatest impracticality in the entire scheme is that of having a Tribal Coordinator as a "gatekeeper" between the Refuge Manager and all of the Tribal employees and/or contractors. This divided supervision of staff is a recipe for friction, frustration and miscommunication.

III. Affected NWRS Employees Placed In an Untenable Position

This agreement affects the rights, lives, families, well being, and pride of hard-working, career federal employees at NBRC. Under the AFA, eleven of the eighteen employees will be gone with the stroke of a pen. All of the remaining positions, except for the Refuge Manager, will go over to the Tribe as soon as their positions become vacant. Clearly, this arrangement encourages workplace dissension that will be uncomfortable for those who remain.

Displaced NBRC employees are being given a choice of separation, transferring elsewhere (if anything is available), going to work for the Tribe or staying with FWS, but under Tribal supervision. These are not choices for dedicated employees for whom the area is home as their families are there, and they are mostly in a mid-career age group.

More importantly, life disruptions of this magnitude are not mandatory; they are purely discretionary on the part of the Secretary's office. In so doing, the Secretary has put these affected employees in a legal no-man's land where it is unclear whether their rights are governed by tribal or federal law. Thus, the application of Equal Employment Opportunity laws, merit system performance standards, hard-won safety standards, and numerous other federal protective regulations would be in question.

Given the length and detail of these negotiations, the lack of specificity on these matters determining the quality and terms of employment by the affected federal public servants is disturbing.

IV. Bison Range Will Be Turned Into a Political Minefield

One of the most troubling aspects of the AFA negotiated by the Secretary is that CSKT has confirmed that disagreements with FWS can be resolved in their favor by taking their complaints to the Secretary.

Most assuredly, this same strategy will have to be employed in the future because of the vagueness of the AFA. The NBRC AFA is not so much a working operational agreement as it is a set of imprecisely written grants by USDOJ to the Tribe – without dollar amounts, measurable performance standards, or any other objective definitions. Thus, at every turn in the road, the imprecise document is written in a manner that encourages USDOJ intervention in refuge operations.

As noted, the AFA is a departmentally directed, non-specific and open-ended turnover of NWRS funds to a tribal government. Based upon their appeals during

April-June 2004, CSKT may also request waivers of government regulations with which they disagree, or find difficult to meet. At the same time, CSKT will also be permitted to "lobby" Congress for more funds, staff, or other needs. As a consequence, any management disputes at NBRC are also likely to end up in the halls of Congress.

V. This Is a Major Federal Action That Merits a Full Environmental Impact Statement

NEPA provides that a federal agency must prepare an environmental impact statement (EIS) for "proposals for...major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1502.3. The NEPA process requires the acting agency to first determine whether the action is one that normally requires an EIS. 40 C.F.R. § 1502.3. An agency action does not normally require an EIS if it falls within a categorical exclusion. If an agency chooses not to prepare an EIS and does not invoke a categorical exclusion, the agency is required to prepare an environmental assessment to determine whether an EIS is necessary. *Id.* §§ 1501.3, 1501.4(a) & (b), 1508.9.

Because the AFA appears to substantively alter management practice on the NBRC an EIS is justified. In addition, the impacts of the precedent set by this AFA reach far beyond the boundaries of the NBRC:

- 1) There are over 500 recognized tribes in the U.S. In view of the sad legacy of Native American displacement in this country, it is likely that most tribes located near any one of 544 refuges in the System either are, or will be in the future, under ISDEAA as written, entitled to claim rights based upon either a historical, cultural, or geographical nexus.
- 2) A limited AFA was reached in Spring 2004 at Yukon Flats NWR in Alaska, which is located just south of Arctic NWR, where major controversy exists over energy exploration. Despite the totally different stakes and implications of the Alaska AFA, which involved only \$59,000 and did not displace career employees, CSKT and the Secretary hailed this as a model for an agreement that will displace eleven of eighteen long-term career employees. In fact, USDOJ is already hailing the NBRC AFA as a model for other NWRs and federal trust lands.

VI. This Agreement May Place a Cost Burden on the National Wildlife Refuge System

Under the AFA, the FWS will be responsible for open-ended cost items such as unemployment coverage and tort claim coverage for Tribal employees or contractors. In addition, government-owned vehicles, heavy equipment, oil and fuel, repairs and maintenance costs, work materials, supplies, etc., will be provided without charge to CSKT.

In public hearings, FWS officials have verbally estimated that the CSKT arrangement will cost between \$300,000 and \$500,000 over and above current expenses during the first year alone. In a press release dated today (the close of the public comment

period) USDO I and CSKT are publishing much lower cost estimates. The tardiness of this disclosure, however, precludes any meaningful examination of the true costs of this agreement before it is finalized.

Conclusion

In summary, the current AFA effort at NBRC should be taken back to the drawing board to address aspects that threaten natural resources, the efficient operation of the refuge and the rights of affected federal workers.

Rather than negotiating these agreements behind closed doors, USDO I should conduct public hearings where the taxpayers, whose monies will be used to implement the agreement, can meaningfully participate. In addition, Congressional oversight is required to insure that the cost figures recently published are reliable and that the compensatory cutbacks required will not further undermine wildlife protection.

In addition, FWS itself requires greater protections against USDO I political interference and micro-management.

The issue of tribal involvement in the management of federal trust lands will surface again and gain greater prominence with each passing month. USDO I and FWS should seek new and creative methods for identifying, educating, and recruiting Native American youths to work within the NWRS.

Sincerely,

Grady E. Hocutt

Director

PEER Refuge Keeper