



*Protecting
America's
Wildlife*

National Wildlife Refuge Association

1010 Wisconsin Avenue, NW, Suite 200, Washington, D.C. 20007
202.333.9075 ♦ Fax 202.333.9077 ♦ www.refugenet.org

August 20, 2004

U.S. Fish and Wildlife Service
National Bison Range
132 Bison Range Road
Moiese, MT 59824

**RE: U.S. Fish and Wildlife Service and Confederated Salish and Kootenai Tribes
Draft Annual Funding Agreement at the National Bison Range Complex**

Dear Sir or Madam:

The National Wildlife Refuge Association (NWRA) appreciates the opportunity to comment on the Federal Register Notice issued July 14 concerning the draft annual funding agreement (AFA) with the Confederated Salish and Kootenai Tribes (CSKT) for the management of programs on the National Bison Range and ancillary properties within the Flathead Indian Reservation (Northwest Montana Wetland Management District and Pablo and Ninepipe national wildlife refuges (NWR)).

The NWRA is a 501(c)(3) nonprofit, national membership organization, established in 1975. The NWRA's mission is to protect, enhance and expand the National Wildlife Refuge System (NWRS), lands and waters set aside by the American people to conserve our country's diverse wildlife heritage. Over the years we have worked to make the Refuge System stronger and better able to address the growing challenges of conserving wildlife in our country.

Under the "Indian Self-Determination and Education Assistance Act" (ISDEAA), Public Law 93-638, as amended by the "Indian Self-Determination Act Amendments of 1994," Public Law 103-413 (also known as the "Tribal Self-Governance Act of 1994"), native tribes can enter into AFAs with agencies within the Department of the Interior (DOI), including the Fish and Wildlife Service (FWS). These AFAs authorize tribes "to plan, conduct, consolidate, and administer programs, services, functions and activities" administered by the DOI that are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact. As authorized by the ISDEAA, the FWS has negotiated with the CSKT to develop a draft annual funding agreement between the CSKT and FWS for that portion of the National Bison Range Complex (NBRC) within the Flathead Indian Reservation.

Summary

The NWRA has serious concerns regarding the draft AFA issued for the NBRC and strongly opposes its adoption. First, the agreement will effectively diminish FWS's ability to manage the refuge—an inherently federal function. Second, the purpose of the agreement is to benefit the CSKT; the refuge, wildlife and Refuge System as a whole will receive no clear benefits as a result of implementation. Third, the costs to implement the annual funding agreement appear to be substantial; however, the actual costs are not stated in the agreement. Finally, there are a number of unresolved problems and serious issues that make the approval of this AFA unacceptable.

Diminishes FWS's Management Authority

A February 27, 1976, amendment to the National Wildlife Refuge System Administration Act of 1966, commonly known as the Game Range Act, established that all units of the NWRS shall be administered by the Secretary through the United States Fish and Wildlife Service, and cannot be transferred or disposed of unless otherwise directed by an act of Congress. Accordingly, management authority of a refuge is effectively an inherently federal function. In our view, an AFA that abrogates the refuge manager's management authority represents a violation of the Game Range Act.

While the agreement calls for the refuge manager to retain final decision-making authority for the refuge, the actual effect of the CSKT AFA would be a diminished authority by the FWS to manage the NBRC. The agreement's added administrative burdens would have the effect of impeding the management abilities of the refuge manager. Throughout the agreement, the refuge manager is required to consult and confer with the CSKT Contract Coordinator in making management decisions for the refuge, produce written notices on management issues for the CSKT and develop various reports for the CSKT. For example, Section 10(A)(3)(a) requires that the FWS "promptly will notify the [CSKT] Coordinator in writing of each written comment and documented oral comment received by the FWS concerning the CSKT's performance of any Activity."

In addition, the revised management structure creates further management complications for the FWS. For example, the addition of a Contract Coordinator (GS-11/1) position and the reporting structure established by the AFA adds unnecessary bureaucracy while simultaneously creating a reporting structure that effectively bypasses the refuge manager for most management decisions regarding CSKT activities. Circumvention of the refuge manager is clearly illustrated in sections 7 and 11 of the agreement, which call for the CSKT to manage the activities performed by its employees, contractors and volunteers.

Section 9 of the agreement, "Records and Other Information," lacks any requirement for auditing the CSKT budget or financial records related to the AFA. Specifically, the agreement only calls for the CSKT to provide such information to the FWS "to the extent the FWS requires them for its budget appropriation and apportionment processes...." To ensure the FWS's ability to effectively manage operations at the NBRC, while remaining

accountable to the public, the CSKT's financial records and other documents related to administering the AFA must be made available to the FWS, and a comprehensive auditing of activities and expenditures of funds must be performed by the FWS prior to negotiation of any subsequent AFAs.

No Benefit to the Refuge, Wildlife or Refuge System

Any work contracted out by the FWS must further the mission of the National Wildlife Refuge System of "conservation, management and...restoration of the fish, wildlife and plant resources and their habitats...." In fact, the NBRC Web site prominently states, "America's National Wildlife Refuges...where wildlife comes first." However, as written, the purpose of the AFA with the CSKT is not to further the mission of the Refuge System. Rather, the agreement is designed principally to benefit the CSKT without regard to wildlife and habitat of the Bison Range. Clearly, this is not compatible with the mission and purposes of the National Wildlife Refuge System.

Section 3 of the agreement, "Authority and Interpretation," specifically cites Title IV of the ISDEAA as governing legislation for administering the AFA. However, to clearly show compatibility with the mission and purposes of the National Wildlife Refuge System, Section 3 must cite the National Wildlife Refuge System Administration Act as equally important legislation for governing the annual funding agreement.

Section 11(C) states, "The CSKT will ensure...sufficient training, skill, and experience to properly and safely perform each Activity the CSKT assigns [CSKT personnel] to perform." The FWS employs detailed qualification standards for its positions at the NBRC and throughout the Refuge System, including series-specific minimum requirements, certifications for performing certain tasks, and other qualification requirements. The CSKT should be required to employ, at a minimum, the same standards that FWS uses for job qualifications and position requirements.

Further, the agreement is resource intensive, requiring extensive time to carry out operation and fulfillment of the AFA by the refuge manager, administrative personnel and program staff. For example, Section 13 of the AFA requires the FWS to perform a detailed inventory of all Available Property for the CSKT. The exhaustive personnel time, budget and other resources required would all be diverted from the NBRC's mission of providing a refuge for the herd of bison and a refuge and breeding ground for native birds. The bottom line is this annual funding agreement would not result in any improvements for the NBRC or the Refuge System as a whole and, in fact, would hinder the refuge's ability to meet its conservation objectives.

Drain on FWS Resources

In 1995, the CSKT submitted a formal request to compact for management of the National Bison Range and ancillary properties within the Flathead Indian Reservation. Since 1995, an exorbitant amount of time, money, personnel, and other FWS resources have been dedicated to negotiating an agreement with the CSKT. Similarly, Section 6(C)

of the CSKT AFA states, “The FWS will negotiate with the CSKT in good faith to explore and implement opportunities for adding activities to subsequent AFA’s [sic].”

As shown by the negotiations leading to the current proposed AFA with the CSKT, unlimited negotiations can result in a tremendous drain on FWS resources. As a result, the NWRA strongly recommends reasonable limits be placed on the negotiations of any future AFAs.

“Attachment B” of the agreement lists the personnel positions to be turned over to the CSKT. Many of the approximately 11 positions being transferred to the CSKT are current jobs performed by FWS employees, while some are new positions created for the agreement. However, no information is provided to distinguish which positions are new and require additional monies. For example, the GS-11/1 position is newly created for the specific purpose of administering the agreement. This is an added cost to the NBRC and one of many examples of how this agreement will take away resources that should be directed towards conserving wildlife and habitat.

Further, in addition to the direct costs listed in Attachment B, Section 12(C) of the agreement allows for the CSKT to dictate the “Contract Support Costs” for subsequent AFAs. This effectively gives the CSKT the power to set the funding level for future AFAs. Based on this language in the agreement, the actual costs of this and future AFAs between the FWS and CSKT at the NBRC are completely unknowable.

Nevertheless, it is clear actual costs associated with the agreement will be substantial. Due to the exhaustive administrative requirements placed upon the FWS to carry out day-to-day operation of the agreement, substantial NBRC resources will be expended.

Currently, the Refuge System suffers from a \$2 billion operations and maintenance funding backlog, which, if the current rate of funding continues, will never be eliminated. Because of this, refuges struggle to meet even their most basic wildlife conservation objectives. In fact, funding shortfalls have led to the decline of refuge habitats and wildlife populations, aging facilities and infrastructure and the cancellation of many refuge public use programs. Even more troubling, more than 1/3 of the nation’s 544 refuges do not have any staff, and nearly half do not have a staff biologist.

With such a crippling budget situation facing the NWRS and no funding relief expected in the near future, the FWS must manage the System in the most cost-effective, efficient manner possible.

Volunteers

The draft AFA between the CSKT and the FWS does not address the issue of liability coverage for federal volunteers at the NBRC. Volunteers are an integral part of the Refuge System; at the NBRC they contribute more than 5,000 hours—equal to 2.5 full-time staff positions—annually. According to the CSKT, they “will need to ensure a corresponding amount of volunteer activity for the Tribe in order to perform the same

level of activities under the funding proposed by FWS for the AFA.” Federal volunteers have liability coverage through the federal government. However, the CSKT cannot bring volunteers within the scope of the United States’ waiver of sovereign immunity as it applies to tribal employees. The CSKT has no legal authority to extend the United States’ limited waiver of sovereign immunity. Further, the FWS itself explicitly stated during negotiations with the CSKT:

“For budgetary reasons and the associated programmatic impacts on the FWS’s ability to achieve its program mandates and policy goals, the FWS declines to include in an AFA any term requiring the FWS to fund insurance coverage apart from that provided by the United States under the Federal Tort Claims Act.”

Without liability coverage, the CSKT agreement would leave refuge volunteers exposed to liability issues. In an agency memorandum, the FWS itself stated that the volunteer issue “should not be compromised due to either legal restraints or setting precedent for Title I incorporation in this or future AFAs.”

Uniforms

According to “Attachment A” of the AFA, Visitor Services is one of the five categories of activities to be performed by the CSKT. Often, the only interaction refuge visitors have with refuge staff takes place at the visitor’s center. This is an opportunity for FWS employees to engage visitors about the refuge and explain the mission and activities of the Refuge System and FWS. Section 11(D)(1) of the draft AFA allows for CSKT employees to wear their own uniforms, independent from the FWS uniform. While recognizing the value of clearly identifying the CSKT’s presence and work on the refuge, the NWRA strongly feels that visitor services staff at national wildlife refuges should represent the FWS, the agency authorized to administer the Refuge System under the National Wildlife Refuge Administration Act of 1966. The NWRA believes a FWS uniform with a patch identifying the worker as a tribal employee is the best policy for the Tribe, FWS and refuge visitors.

Reliable Partner?

The CSKT has not proved itself a reliable partner of the FWS and the NBRC. Throughout the CSKT and FWS negotiation process for the draft AFA at the NBRC, the FWS repeatedly urged the CSKT to resolve the incompatible uses of NWRS lands by the CSKT. In a letter dated March 5, 2004, the FWS again conveyed to the CSKT the need to resolve incompatible uses by the Tribe involving grazing on the Ninepipe NWR and grazing and farming on the Pablo NWR. Despite attempts by the FWS to resolve these outstanding issues, the CSKT repeatedly ignored FWS requests and the incompatible uses continue to take place today. The federal government has a duty to the American public to make responsible business decisions that benefit taxpayers. Entering into an agreement to transfer significant FWS activities to an entity with a history of violating refuge regulations, unresponsiveness to FWS requests and continued disregard for FWS authority is negligent and fiscally irresponsible.

In addition, documents obtained through a Freedom of Information Act request show that the CSKT [repeatedly] appealed to higher-up Department of the Interior authorities when the FWS failed to meet the Tribe's demands. This sort of history does not bode well for a productive future relationship with the FWS. With an agreement that gives the refuge manager final authority on issues related to the AFA, the precedent set by the CSKT's behavior on past disagreements with the FWS suggests the Tribe may employ similar tactics of circumvention.

For the reasons stated above, the National Wildlife Refuge Association must oppose the draft annual funding agreement between the Confederated Salish and Kootenai Tribes and the U.S. Fish and Wildlife Service.

Thank you for the opportunity to address this proposed action. If you have any questions regarding this letter or need additional information, please do not hesitate to contact me at (202) 333-9075.

Sincerely,

A handwritten signature in black ink, appearing to read 'Evan Hirsche', with a long horizontal flourish extending to the right.

Evan Hirsche
President

cc: Steven Griles
Craig Manson
Paul Hoffman
Steve Williams
Matt Hogan
Ralph Morgenweck
William Hartwig
David Anderson