

CHAPTER 3

Background

We manage the National Bison Range Complex, established in 1908, as part of the Refuge System, which has a mission

to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.

Located in northwestern Montana, most of the refuge complex is within the boundaries of the Flathead Indian Reservation, a 1.3 million-acre area established in 1855 through the Treaty of Hellgate with CSKT. The CSKT comprise the Bitterroot Salish, Pend d'Oreille, and Kootenai Tribes. Under the authority of the Indian Self-Determination and Education Assistance Act of 1975 (Self-Determination Act) (USHR 1975), as amended, CSKT is recognized as a self-governing tribe.

The Self-Determination Act was intended to assure “maximum Indian participation in the direction of educational as well as other Federal services to Indian communities....” 25 United States Code [U.S.C.] § 450a(a), Public Law No. 93-638, 88 Statute 2203 (1975). The Self-Determination Act authorizes the Secretary of the Interior to enter into contracts with Indian tribes to have them perform programs, functions, services, or activities, including administrative functions that would otherwise be performed by the U.S. Department of the Interior for the benefit of Indians. 25 U.S.C. § 450f(a)(1). In 1994, the act was amended when Congress passed the Self-Governance Act, which has given tribes the opportunity to exercise their inherent self-governing powers through greater control over tribal affairs and enhanced tribal governmental responsibilities. CSKT has exercised this authority and has negotiated for the administration of many programs, particularly those administered by the Bureau of Indian Affairs (BIA) and the Indian Health Service.

As part of negotiating for agreements under the Self-Governance Act for BIA and non-BIA programs otherwise available to Indian tribes or Indians (section 403[a] and [b]), each self-governing tribe may also request negotiations for other non-BIA Department of the Interior activities as described in section 403(c) of the Self-Governance Act:

403(c) Additional Activities. Each funding agreement negotiated pursuant to subsections (a) and (b) of this section may, in accordance to such additional terms as the parties deem appropriate, also include other programs, services, functions, and activities, or portions thereof, administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.

On November 11, 2010, CSKT requested negotiations, under the authority of section 403(c), for an AFA on the refuge complex. This is the third negotiated AFA with CSKT in the last 10 years. The two previous AFAs were not renewed or rescinded, as described at the end of section 3.6 below. New

negotiations for an AFA concluded in March 2012, and the resulting draft AFA is the proposed action (alternative B) in this EA and is being evaluated along with four alternatives.

The units of the refuge complex affected by this proposal are in the Mission Valley of northwestern Montana within the boundaries of the Flathead Indian Reservation. The refuge complex headquarters is located in Moiese, Montana, in Lake County, about 45 miles north of Missoula. This proposal does not include Lost Trail National Wildlife Refuge, the conservation easement program, or those units within the Northwest Wetland Management District in Montana that are located outside the boundaries of the Reservation.

The refuge complex is located on the gently rolling, glacial till deposits of ancient Lake Missoula and terminal moraines (mass of rocks and sediment) creating high densities of small wetlands. More than 205 bird species have been recorded in the area, a host for migrant birds of the Pacific flyway. Of these species, many are known to nest on the refuge complex and the remainder can be seen during the spring and fall migrations when peak numbers occur. The units of the refuge complex are generally surrounded by private land that is predominantly used as livestock pasture and for hay or other crop production. Refuge complex lands also border some State and tribal lands that are managed for conservation purposes.

The refuge complex is best known for the bison herd that roams the Bison Range. The beautiful setting of the Mission Valley combined with this diversity of wildlife species attracts almost 150,000 visitors to the refuge complex annually. These visitors are accommodated in the visitor center and on the 19-mile Red Sleep Mountain Drive that travels through the various habitats found on the Bison Range.

NATIONAL BISON RANGE

Located about 40 miles north of Missoula, Montana, the National Bison Range is a national wildlife refuge within the Refuge System. Established in 1908, “for a permanent national Bison Range for the herd of bison to be presented by the American Bison Society.” the Bison Range (figure 2) is one of the oldest units of the Refuge System. Totalling 18,800 acres, the range was established by special legislation (35 Statute 267) and was the first refuge for which Congress appropriated funds for land acquisition.

We are responsible for managing, sustaining, and enhancing the herd of bison, averaging 350 animals, and other wildlife, including migratory birds, that use the diversity of grasslands, forests, and streams found on the refuge.

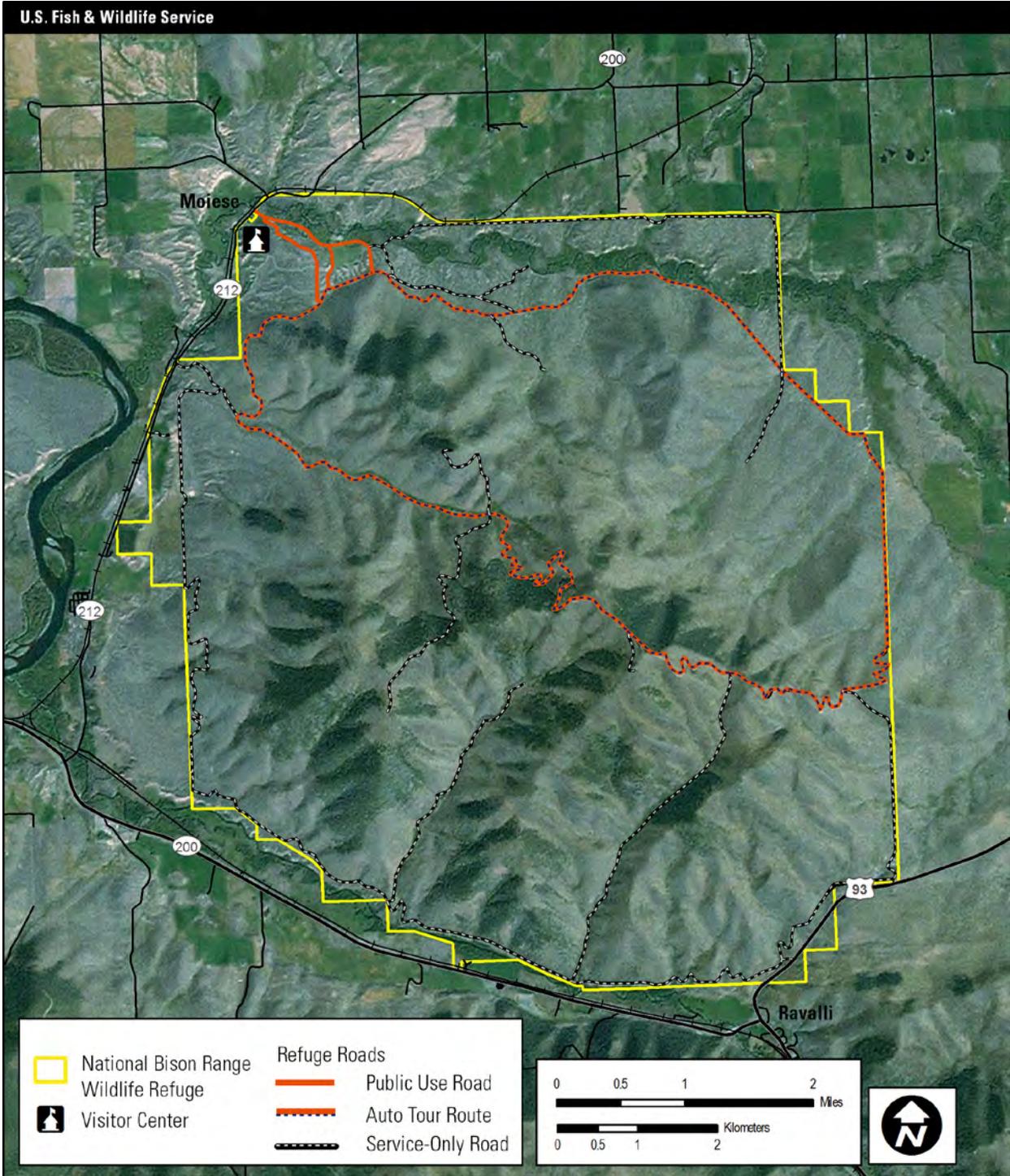


Figure 2. Base map of the National Bison Range, Montana.

The refuge is open to the public year-round, although part of the Red Sleep Mountain Drive is closed in the winter. The most popular public use activity is wildlife observation and photography. The entire refuge is closed to hunting, but fishing is permitted on designated sections of Mission Creek.

NINEPIPE AND PABLO NATIONAL WILDLIFE REFUGES

Ninepipe National Wildlife Refuge (figure 3) encompasses 2,062 acres and is approximately 5 miles south of Ronan, Montana. Pablo National Wildlife Refuge (figure 4) is 2,542 acres and is approximately 2 miles south of Polson, Montana.

Both of these refuges are located on CSKT tribal trust lands. In 1910, these tribal trust lands were first designated as irrigation reservoirs as part of the Flathead Irrigation Project. In 1921, President Harding signed Executive Orders 3503 and 3504, which established these same lands as national wildlife refuges for migratory birds. It was not until 1948 that the Federal Government compensated CSKT for past and future reservoir operations at these refuges. At that time, the Government also bought an easement from CSKT for the right to operate these lands and waters as national wildlife refuges. In this easement agreement, it was written that CSKT “shall have the right to use such tribal lands, and to grant leases or concessions thereon, for any and all purposes not inconsistent with such permanent easement.”

The refuges have relatively flat terrain and contain both natural and managed wetlands and grasslands. These refuges provide nesting and breeding habitat for migratory birds such as waterfowl, shorebirds, grassland birds, and wading birds. The Ninepipe Refuge is surrounded by State land managed by the Montana Department of Fish, Wildlife, and Parks as a wildlife management area.

Both refuges are open seasonally for compatible public use, primarily fishing and wildlife observation and photography. These refuges are not open to hunting and are closed seasonally to provide refuge areas primarily for migrating and nesting birds.

NORTHWEST MONTANA WETLAND MANAGEMENT DISTRICT

The Northwest Montana Wetland Management District was established in the 1970s. The Lake County part of the district encompasses nine waterfowl production areas totaling 3,268 acres: Anderson, Crow, Duck Haven, Ereaux, Herak, Johnson, Kickinghorse, Montgomery, and Sandsmark. All these units contain both wetland and grassland components that we manage for nesting, breeding, resting, and feeding areas for a variety of wetland-dependent migratory birds.

These waterfowl production areas are open to the public year-round for wildlife observation and photography. Hunting of waterfowl and upland gamebirds is permitted under both State and tribal regulations. Big game hunting and trapping is permitted, but the Flathead Indian Reservation regulations permit only tribal members to harvest big game and trap wildlife within reservation boundaries.

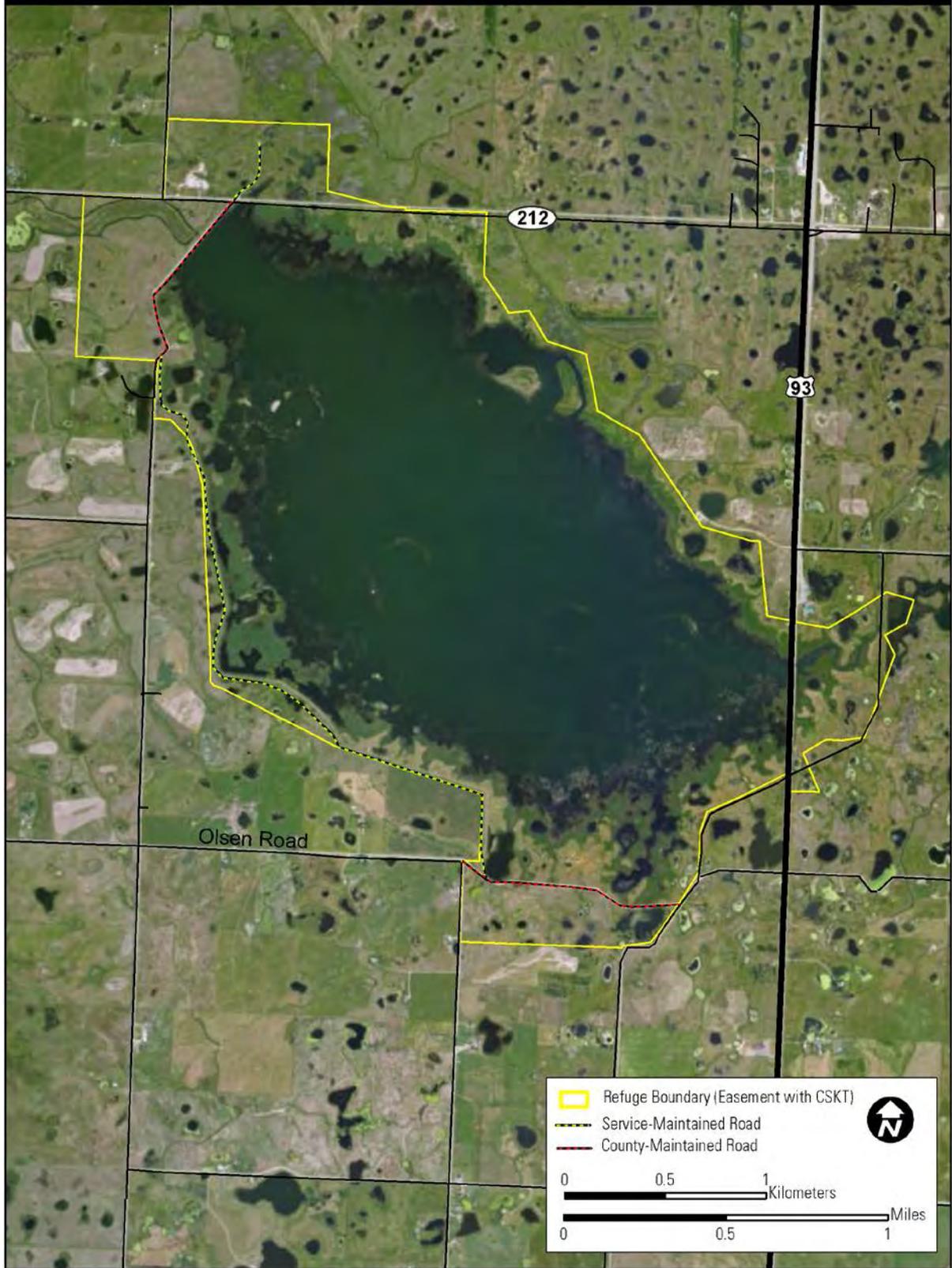


Figure 3. Base map of the Ninepipe National Wildlife Refuge, Montana.

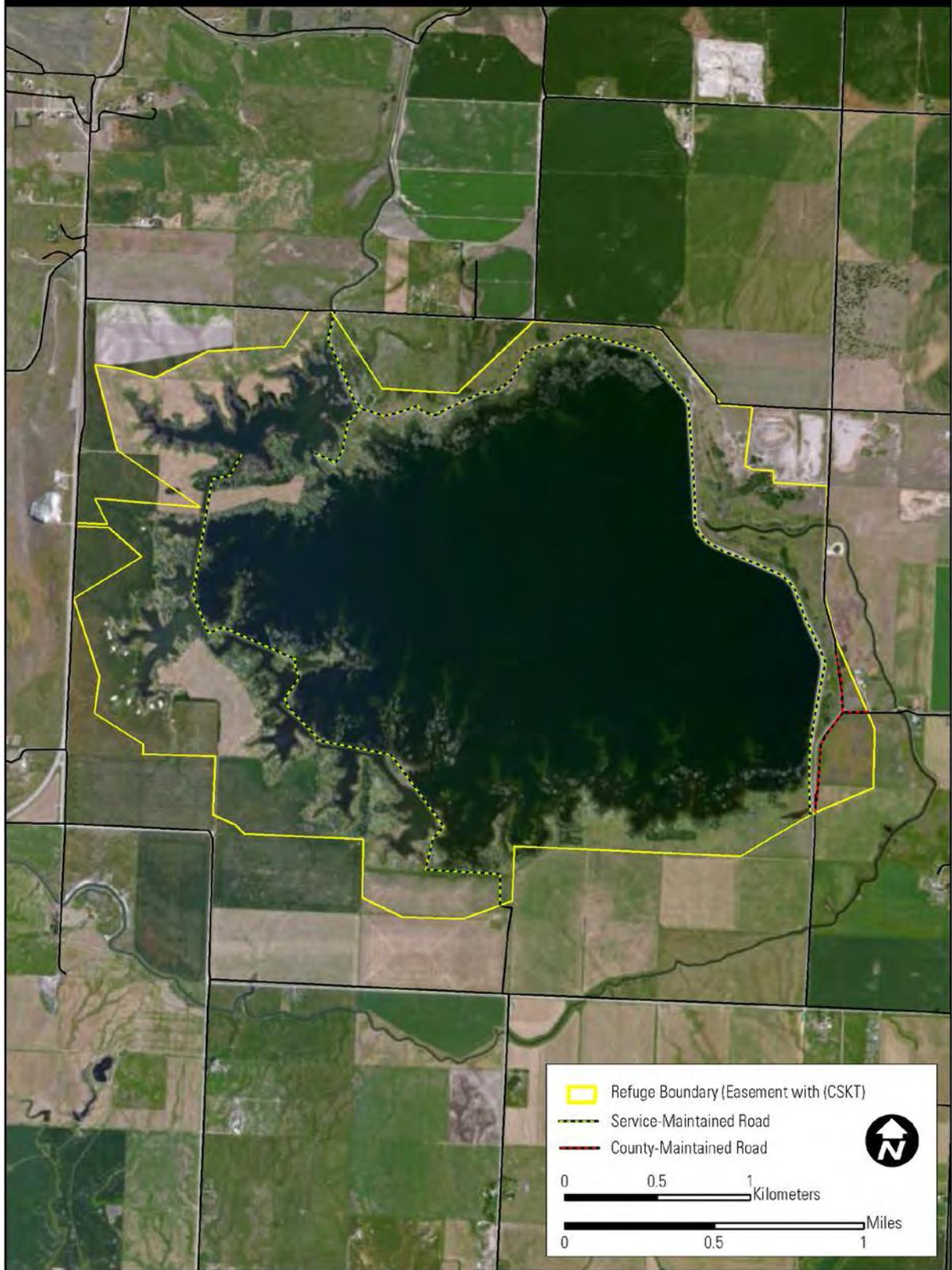


Figure 4. Base map of the Pablo National Wildlife Refuge, Montana.

The Confederated Salish and Kootenai Tribes comprise primarily Salish (sometimes known as the Bitterroot Salish or Flathead), Pend d'Oreille (also known as Kalispel), and Kootenai Tribes. The 1.317 million-acre Flathead Indian Reservation is now the home of CSKT, but their ancestors' aboriginal territory encompassed most of what is now known as western and central Montana, parts of Idaho, eastern Washington, British Columbia, and Wyoming. Their home territory was mostly in the Columbia River drainage. However, the aboriginal territories of the Tribes encompassed vast areas on both sides of the Continental Divide, as documented in recorded oral histories, historical records, and many sources that credibly describe their tribal cultures. In the 19th century, the aboriginal territory of the Tribes west of the Continental Divide exceeded 20 million acres, most of which they ceded (surrendered) to the United States in the 1855 Treaty of Hellgate (12 Statute 975). In this treaty, negotiated with Washington Territorial Governor Stevens, CSKT reserved for themselves certain areas including the Flathead Indian Reservation as well as the "right of taking fish at all usual and accustomed places, in common with citizens of the Territory...together with the privilege of hunting [and] gathering roots and berries...."

3.3 The National Wildlife Refuge System

Beginning in 1903 with President Theodore Roosevelt's designation of Pelican Island, Florida, as a bird sanctuary, and continuing through the 1960s, Congress and Presidents used a variety of authorities for wildlife conservation purposes. They used Executive orders, special acts of Congress, and general legislative authorities such as the Migratory Bird Conservation Act and the Fish and Wildlife Coordination Act to create hundreds of refuges. However, until 1966 there was no Federal law that tied these many refuges together. That year, Congress passed the National Wildlife Refuge System Administration Act (Administration Act) that created the National Wildlife Refuge System and, among other things, required that each unit of the Refuge System be managed to fulfill its establishment purposes (USHR 1966b).

Congress has twice amended the Administration Act—under the 1976 Game Range Act (USHR 1976) and under the 1997 National Wildlife Refuge System Improvement Act (USHR 1997). The Game Range Act added a new requirement that the Secretary of the Interior must administer the Refuge System through the U.S. Fish and Wildlife Service.

Besides the Administration Act, on March 1996, President Clinton issued Executive Order 12996, "Management and General Public Use of the National Wildlife Refuge System" (FWS 2009). This Executive order established a mission statement and four guiding principles for the Refuge System. The order provided direction to the Secretary "in carrying out his trust and stewardship responsibilities for the Refuge System."

In the 1997 National Wildlife Refuge System Improvement Act, Congress significantly amended the Administration Act, giving much of the language of Executive Order 12996 the force of law, but

also changing some of its guidance including revising the Refuge System’s mission statement as follows:

To administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of current and future generations of Americans.

It is the intent of Congress that the Refuge System be managed as a true system, rather than as a collection of disparate units. The Secretary and, through delegation, the Service, is required to manage each unit to fulfill the purposes for which the unit was established and to fulfill the mission of the Refuge System.

3.4 National Bison Range Complex Purposes

Every refuge has one or more purposes for which it was established. This purpose is the foundation on which to build all refuge programs, from biology and public use to maintenance and facilities. We are required to manage each Refuge System unit to fulfill its establishment purposes and allow no third party or public uses that materially interfere with or detract from these purposes, in accordance with the 1997 National Wildlife Refuge System Improvement Act. Refuge purposes are derived from the laws, Executive orders, permits, or other legal documents that provide the authorities to acquire land for a refuge. The following sections describe the establishing purposes for each unit of the refuge complex.

NATIONAL BISON RANGE

The 18, 800-acre Bison Range was established for the following purposes under the authorities shown:

- “For a permanent national bison range for the herd of bison to be presented by the American Bison Society.” 35 Statute 267, May 23, 1908
- “As refuges and breeding grounds for birds.” Executive Order 3596, December 22, 1921
- “To provide adequate pasture for the display of bison in their natural habitat at a location readily available to the public.” 72 Statute 561, August 12, 1958
- “Suitable for—(1) incidental fish and wildlife-oriented recreational development, (2) the protection of natural resources, (3) the conservation of endangered species or threatened species.” 16 U.S.C. § 460k-1
- “The Secretary ... may accept and use ... real ... property. Such acceptance may be accomplished under the terms and conditions of restrictive covenants imposed by donors.” 16 U.S.C. § 460k-2, Refuge Recreation Act of 1962, as amended

- “For the development, advancement, management, conservation, and protection of fish and wildlife resources.” 16 U.S.C. § 742f(a)(4)
- “For the benefit of the United States Fish and Wildlife Service, in performing its activities and services. Such acceptance may be subject to the terms of any restrictive or affirmative covenant, or condition of servitude.” 16 U.S.C. § 742f(b)(1), Fish and Wildlife Act of 1956

NINEPIPE NATIONAL WILDLIFE REFUGE

The 2,062-acre Ninepipe Refuge was established for the following purposes under the authorities shown:

- “Reserved, subject to Reclamation Service uses ... as a refuge and breeding ground for native birds.” Executive Order 3503, June 25, 1921
- “For use as an inviolate sanctuary, or for any other management purpose, for migratory birds.” 16 U.S.C. § 715d, Migratory Bird Conservation Act

PABLO NATIONAL WILDLIFE REFUGE

The 2,542-acre Pablo Refuge was established for the following purpose under the authority shown:

- “As a refuge and breeding ground for native birds.” Executive Order 3504, June 25, 1921

NORTHWEST MONTANA WETLAND MANAGEMENT DISTRICT

Nine waterfowl production areas cover 3,228 acres in the district, which was established for the following purposes under the authorities shown:

- “As Waterfowl Production Areas subject to ... all of the provisions of such Act [Migratory Bird Conservation Act] ... except the inviolate sanctuary provisions.” 16 U.S.C. 718(c), Migratory Bird Hunting and Conservation Stamp Act
- “For any other management purpose, for migratory birds.” 16 U.S.C. § 715d, Migratory Bird Conservation Act

3.5 The Self-Governance Policy of the United States

Since the Nixon Administration, the Federal Government’s policy toward tribes has been one of self-determination and self-governance. Congress first codified the policy of self-determination and self-governance in the Self-Determination Act. It was enacted to ensure “effective and meaningful participation by the Indian people in the planning, conduct, and administration” of Federal services and programs provided to the Tribes and their members. 25 U.S.C. § 450a (b). As amended, this law (1) established the Self-Governance Demonstration Project, (2) outlined how tribes could achieve self-

governance status, and (3) authorized Indian tribes and organizations to contract for and run Federal service programs that directly benefited tribes and tribal members within agencies like BIA and Indian Health Service.

The CSKT was one of the first tribes to achieve self-governance status under the Self-Determination Act. Between 1991 and 2012 the number of tribes participating in the U.S. Department of the Interior self-governance program has grown from 7 tribes to 251 (44 percent of the 566 federally recognized American Indian and Alaska Native Tribes) (BIA 2012). This program adds, on average, two to three tribes every year.

In 1994, Congress amended the Self-Determination Act, passing the Self-Governance Act, which requires the Secretary of the Interior to carry out a permanent Self-Governance Program.

3.6 The Self-Governance Act and Annual Funding

The passage of the Self-Governance Act established the tribal self-governance program. 25 U.S.C. § 458aa. Under this amendment, tribes have the authority to request and enter into negotiations for AFAs with non-BIA Department of the Interior agencies, which includes the U.S. Fish and Wildlife Service (USHR 1994). The Self-Governance Act, 25 U.S.C. § 458aa, *et seq.*, provides, in part:

(a) Authorization. The Secretary shall negotiate and enter into an annual written funding agreement with the governing body of each participating tribal government in a manner consistent with the Federal Government's laws and trust relationship to and responsibility for the Indian people.

(b) Contents. Each funding agreement shall--

...

(2) subject to such terms as may be negotiated, authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior, other than through the Bureau of Indian Affairs, that are otherwise available to Indian tribes or Indians, as identified in section 405(c) [25 USCS § 458ee(c)], except that nothing in this subsection may be construed to provide any tribe with a preference with respect to the opportunity of the tribe to administer programs, services, functions, and activities, or portions thereof, unless such preference is otherwise provided for by law;

...

(c) Additional Activities. Each funding agreement negotiated pursuant to subsections (a) and (b) may, in accordance to such additional terms as the parties deem appropriate, also include other programs, services, functions, and activities, or portions thereof, administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.

...

Disclaimer. Nothing in this section is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize the Secretary to enter into any agreement under sections 403(b)(2) and 405(c)(1)[subsection (b)(2) of this section and 25 USCS § 458ee(c)(1)] with respect to functions that are inherently Federal or where the statute establishing the existing program does not authorize the type of participation sought by the tribe: Provided, however an Indian tribe or tribes need not be identified in the authorizing statute in order for a program or element of a program to be included in a compact under section 403(b)(2) [subsec. (b)(2) of this section].

The Self-Governance Act requires the Secretary of the Interior to annually publish: (1) a list of non-BIA programs, services, functions, and activities that may be eligible for inclusion in agreements under the self-governance program; and (2) programmatic targets for these bureaus (section 405[c], 25 U.S.C.). Non-BIA programs need not be listed to be eligible for negotiation with eligible tribes. The annual notice was last published in the Federal Register on January 23, 2013 (appendix B).

NON-BIA ANNUAL FUNDING AGREEMENTS

There are eight active AFAs for non-BIA programs across the Nation. AFAs are in force for a term up to 5 years. Examples include an AFA for operating maintenance and construction programs at Grand Portage National Monument in Minnesota and various elective projects at Isle Royal National Park, and an AFA for the development of on-reservation water resource projects managed by the Bureau of Reclamation on the Rocky Boy's Reservation in Montana.

Other than two previous AFAs at the Bison Range noted below, the only other AFA in the Refuge System was one with the Council of Athabascan Tribal Governments at the Yukon Flats National Wildlife Refuge in Alaska. Activities run by those tribes included harvest data collection, planning a meeting to discuss moose management needs, and maintenance of Federal property around Fort Yukon. That AFA is no longer active because of a lack of funding for the agreed-on activities; however, negotiations for a new agreement and activities are ongoing.

PAST ANNUAL FUNDING AGREEMENTS AT THE NATIONAL BISON RANGE

There have been two prior AFAs at the Bison Range in the last 10 years; one in 2005 and again in 2008. Both AFAs were cancelled—the first one by the Service and the second one by the courts.

2005 ANNUAL FUNDING AGREEMENT

On April 23, 2003, the CSKT submitted a letter to the Secretary of the Interior expressing their interest in negotiating an AFA pursuant to the Self-Determination Act for the operation and management of the National Bison Range and ancillary properties on the Flathead Reservation. The Service began negotiations with the CSKT in the summer of 2003. Department of the Interior (DOI) officials also participated in these negotiations. The parties submitted the draft AFA for public comment and announced the public comment period in the Federal Register. On December 15, 2004, the parties signed the Fiscal Years 2005–2006 Annual Funding Agreement Between the United States

Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes of the Flathead Reservation (2005 AFA). On March 15, 2005, following a 90-day congressional review period, the 2005 AFA became effective.

This 18-month long AFA called for the CSKT to perform activities in five general categories: management, biological program (including habitat management), fire program, maintenance program, and visitor services. CSKT was provided funding to recruit their own employees in all of these refuge programs, including a Tribal Coordinator who would supervise all CSKT staff. Service staff working in these programs signed Inter-Governmental Personnel Act of 1970 (IPA) agreements, assigning them to work for the Tribes. CSKT was responsible for the activities identified in the AFA, subject to the final authority of the Service refuge manager. The refuge manager was responsible for evaluating and reporting on the implementation of the AFA.

Implementation of the 2005 AFA resulted in a number of successes:

- bison round-ups in 2005 and 2006
- mid-winter aerial waterfowl survey
- waterfowl banding
- wildfire suppression operations
- release of biological controls to manage invasive species
- disease monitoring assistance
- visitor center staff interaction with refuge visitors and visitor center maintenance
- willingness by Service staffs to train new CSKT staff (providing 325 hours of training)
- development of a detailed work plan describing procedures and expectations

Although the 2005 AFA enjoyed some success, both parties encountered challenges in the following areas:

- maintenance of vehicles and heavy equipment
- maintenance of fencing, grounds and trails
- bison husbandry
- SAMMS (Service Asset Maintenance Management System) database reporting
- wildlife monitoring standards and survey protocols
- personnel management issues

In April 2006, the Service began negotiations for a new AFA since this agreement was set to expire, after which the Service administered an extension of the AFA. Prior to these negotiations (March 2006), the refuge manager submitted a report evaluating the performance of CSKT staff during

the first year of the agreement. As stated by the refuge manager, the intent of this report was to “identify ways to improve the implementation and effectiveness of the AFA in FY-2006 [fiscal year] for the benefit of the NBRC natural resources, and to strengthen the long-term working relationship between CSKT and the FWS.” CSKT was provided a copy of this report and provided numerous rebuttals challenging some of the performance ratings. On December 11, 2006, the Service’s Regional Director ended all further negotiations and allowed the extension of the AFA to draw down.

While there is disagreement among the parties involved about the specific actions and lack of action leading to deficiencies in management of the refuge complex, it is generally understood that the agreement needed improvement in order to be implemented successfully. The objective of these second AFA negotiations was to address some of these deficiencies and issues that occurred in this first agreement.

2008 ANNUAL FUNDING AGREEMENT

A Memo dated November 26, 2007 to the Service’s Regional Director, Mountain-Prairie Region, from Assistant Secretary for Fish, Wildlife and Parks requested that the Service negotiate a second AFA as the lack of a resolution regarding a refuge complex AFA was “distracting the Interior Department from fulfilling its mission,” a view the Assistant Secretary noted was shared by Montana’s congressional delegation.

In January 2008, the Service entered into negotiations with CSKT. In an effort to improve upon the concerns and deficiencies identified during the 2005 AFA, negotiations for the second AFA were markedly different than the first AFA. The negotiations were facilitated by skilled, mutually agreed upon mediators and each agency assigned lead negotiators. The second AFA was fully implemented on January 1, 2009.

Building on the experiences gained during the 2005 AFA, all parties sought to improve coordination and implementation. During negotiations for the second AFA the following changes were made:

- A Refuge Leadership Team composed of the Service refuge manager, Service deputy refuge manager, co-equal CSKT deputy refuge manager, and CSKT lead wildlife biologist was established. The team was required to meet weekly and the primary responsibility was to collaborate in the management of refuge complex. Specific duties included jointly developing the annual work plan, setting work priorities, and preparing periodic status reports and other reports required by the AFA. The team was directed to develop and use consensus-decision making in all of its decisions including addressing personnel management issues.
- The refuge manager and CSKT deputy refuge manager submitted periodic status reports to Interior officials summarizing work completed under the AFA.
- A dispute resolution and appeals process was added which could be elevated to the Department of Interior.
- CSKT was provided a General Schedule (GS)-12 co-equal deputy project leader position.

- Annual work plans were required for each fiscal year which included activities to be performed based on consensus of the leadership team.
- Monthly status reports were required and were submitted to the CSKT, the Service regional leadership and then to the DOI senior management team and the Director of the Office of Self-Governance.
- All base funding (operations and maintenance) was transferred to CSKT.
- CSKT was provided all one-time, non-recurring funding for special projects such as deferred maintenance, vehicle replacement, challenge cost share agreements, and other flexible funding.
- CSKT was provided contract support cost (indirect cost) based on a percentage calculation of the total base funding--approximately 18-20 percent of the total base funding.
- An expectation section was added that clearly stated that “the 2008 AFA represented a significant change in the operation and maintenance of the NBRC, and that many new CSKT employees will be assigned to the NBRC. The parties understand that 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.”
- A baseline data section was added that stated, “These parties agreed on a set of NBRC baseline data that will establish the biological conditions and conditions of facilities and equipment existing at the NBRC at the time the AFA becomes effective. Any evaluation of CSKT performance will be measured against the jointly agreed upon baseline data and duties identified in the annual work plan. The first year annual work plan was required to be limited in scope and include only basic fundamental activities necessary to provide for the biological integrity of the NBRC, ensure maintenance of critical infrastructure and equipment and provide basic visitor services.”
- A training section was added that required that, not less than annually, all Service and CSKT employees participate in training to foster a workplace free of discrimination and harassment. Training included cultural awareness, team building, and communication skills.
- A joint monitoring section was added. The Service and CSKT will jointly monitor refuge complex operations and provide each with notice of any concerns. Guidelines were established on how performance management issues would be handled. These included notification orally and in writing to CSKT and the level of notification depended on the severity of the deficiency.
- CSKT was provided funding that allowed them to recruit 16 employees, including a lead biologist, a fish and wildlife biologist, biological science technicians, maintenance staff, visitor center staff, and a co-equal deputy refuge manager.

The first year of the agreement was also considered a ‘training’ year for the new CSKT employees. During that time, the refuge manager and staff were asked to provide added assistance and avoid rating their performance while they learned how to perform their new duties. It was during this

time that the Office of Inspector General (OIG) received allegations of problems, including performance issues involving both CSKT and the Service. The OIG found no evidence to support allegations of inadequate law enforcement coverage, poor bison containment or fence maintenance, improper pesticide applications, or that management of the Bison Range was adrift. A minor deficiency was found in the preparation of annual work plans although this deficiency was within the normal range of annual work planning proficiency that typically occurs within the Region 6 refuge program (DOI Office of the Inspector General 2011).

Under the 2008 AFA the parties built a more constructive partnership; the most successful being the relationship developed between the refuge manager and head of the Confederated Salish and Kootenai Tribes' Division of Fish, Wildlife, Recreation, and Conservation (FWRC) who worked together in an attempt to resolve the operational and administrative issues that arose. The successes of the partnership are a matter of record at all levels of the Service and the DOI as the following examples show:

- An August 3, 2009, email from Refuge Supervisor to CSKT Chairman states that, “[a]ll indications are that our partnership is working well and that wildlife and visitors are being well-served by the combined efforts of the NBR [National Bison Range] staff.”
- A September 1, 2009, email from Refuge Supervisor to CSKT Chairman states that, “[a]ll reports I have are that our folks are working very well together on the ground and that our partnership is working well.”
- A September 10, 2009, email from Refuge Supervisor to CSKT Chairman states that, “Our partnership is getting a lot of very good work done. I was impressed in the August accomplishments on all fronts... [T]he partnership is well meeting public expectations.”
- July 9, 2010 testimony by the Associate Deputy Secretary of the Interior before the House Committee on Natural Resources states that a true partnership and spirit of cooperation has developed from the history of controversy between the Service and the CSKT of the Flathead Nation over the National Bison Range Complex in Montana.
- CSKT recruited some qualified and dedicated staff.
- The CSKT roads, bridges and dams division handled all National Environmental Policy Act (NEPA) compliance and contracting for the Recovery Act bridge replacement project.
- Service employees were willing to train and mentor CSKT staff.
- The CSKT fire program assisted with the Bison Range fire management plan.
- CSKT assisted and participated in refuge complex events.
- The CSKT cultural committee assisted in developing interpretive programs.
- The Service participated in CSKT events including the Annual River Honoring.
- CSKT staff participated in a variety of Service-sponsored trainings (including a comprehensive conservation planning course and refuge management academy).

Regardless of these provisions and successes there were some administrative challenges with the 2008 AFA including:

- the recruitment and retention of qualified CSKT staff,
- operational budget tracking and purchasing,
- efficiencies when the Service was required to follow CSKT purchasing regulations,
- the inability of the refuge manager to manage CSKT staff, which left no recourse to directly resolve conduct and performance issues.

The second agreement was rescinded by the court September 28, 2010 in *Reed v. Salazar*, 744 F. Supp. 2d 98 (U.S. District Court, District of Columbia 2010), not because of the performance of the agreement but on procedural grounds centering on our compliance with NEPA. The court did not cite allegations of poor conduct as influencing its decision under NEPA. The court also did not reach the issue of whether the Tribes had performed poorly under the first AFA and stated the “FWS might have reasonably concluded that the allegations of the CSKT’s poor performance were speculative and thus could be disregarded for purposes of NEPA. Such a decision would be afforded great deference under the [Administrative Procedure Act].”

PROPOSED ANNUAL FUNDING AGREEMENT

On November 11, 2010, CSKT requested that we enter into government-to-government negotiations for a third AFA that would allow the Tribes to receive funding and manage programs on the refuge complex. Based on the successes under the 2008 AFA, the Service is interested in continuing the Self-Governance partnership with CSKT on the refuge complex. The negotiated draft AFA (appendix A) is the proposed action (alternative B) that we evaluate in this document.

In proposing a third AFA with CSKT, the agency has taken some steps to remedy issues of the past AFAs and to improve chances for success. To address the concerns of the two previous AFAs, some improvements have been incorporated to aid performance, and we have sought to satisfy the court’s decision with regard to our compliance with NEPA by preparing an environmental assessment of the proposed action including alternatives to the proposed action. Specifically, this AFA builds on the experience gained from past AFAs in the following areas:

- A leadership team composed of the Service refuge manager and deputy refuge manager, the CSKT wildlife refuge specialist, and the FWRC manager would develop annual work plans, set work priorities, address performance and conduct issues, prepare periodic status reports, and resolve disputes. In the 2008 AFA, the CSKT lead biologist served on the leadership team.
- The CSKT GS-12 co-equal deputy project leader position from the second AFA would be replaced with a GS-11 wildlife refuge specialist.

- The dispute resolution and appeals process would be adjusted from the level of the Service Secretary to the Service Director.
- The operations budget would be retained and managed by the Service. This would include all one-time, non-recurring funding for special projects such as deferred maintenance, vehicle replacement, challenge cost share agreements, and other flexible funding.
- The Service would pay a flat rate of \$5,000 per full-time employee for indirect costs. This would be pro-rated for temporary employees.
- For Service-affected employees subject to an IPA agreement, the options of reassignment or reduction in force would be removed.

These changes seek to improve communication between the Service and CSKT and to create an environment in which leadership over refuge management, cultural resource protection, fire management, the biology program, visitor services, and the maintenance program can be successfully transferred from the Service to CSKT.

