

# CSKT Input for the Draft Environmental Assessment Regarding an Annual Funding Agreement at the National Bison Range Complex

August 22, 2012

The Confederated Salish & Kootenai Tribes (CSKT, or Tribes) have reviewed the comments submitted to the U.S. Fish & Wildlife Service (FWS, or Service) in response to FWS' Notice of Intent (NOI) to Prepare an Environmental Assessment (EA) regarding CSKT's request to enter into a new Annual Funding Agreement (AFA) under the Tribal Self-Governance Act for programs at the National Bison Range Complex (NBRC).

Although there were few commenters (17 in total), they raised a variety of issues. While CSKT does not believe that the comments provide any information that would require the Service to change its course from preparing an EA, the Service should fully address all of the issues raised. In this document, CSKT submits its input for the Service's consideration. For the Service's convenience, at the end of this document there is a summary of CSKT's recommendations for easy reference.

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## I. Allegations Under First AFA and Requests for an EIS

### Allegations Under the First AFA

A number of commenters stated their belief that approval of the draft AFA would require an environmental impact statement (EIS) in order to comply with the National Environmental Policy Act (NEPA). Some commenters based this assertion on the allegations under the first (FY 2005-06) AFA between CSKT and FWS (*e.g.*, comment of Public Employees for Environmental Responsibility [PEER], at p. 3, asserting that a "full EIS is required due to the actual significant impacts on the environment engendered by the FY 2005 AFA."). These comments confuse, perhaps intentionally, bare allegations with actual facts or the type of findings that are made after providing due process and opportunity to respond.

One party asserted that, in response to its litigation challenging the last AFA, a federal district court had "required that FWS do a NEPA analysis for the FY 2009-11 AFA." (*See* PEER comment at pp. 2-3). Contrary to the inference in that comment, the court had not required the Service to conduct either an EA or an EIS in conjunction with the contested AFA. In its 2010 decision rescinding the last (FY 2009-11) AFA, the federal district court held only that, based upon the record before it, and in light of potential extraordinary circumstances, FWS needed to explain its invocation of a categorical exclusion for its decision to approve the AFA. Specifically, the court said the following:

The agency's failure to explain its application of a categorical exclusion, in light of substantial evidence in the record of past performance problems by the CSKT, is arbitrary and capricious.

*Reed v. Salazar*, 744 F.Supp.2d 98, 118 (D.D.C. 2010).

With respect to the referenced "record of past performance problems", the court acknowledged that: CSKT had disputed those alleged performance problems and had submitted detailed responses to them; CSKT had appealed the AFA termination on those grounds to the Interior Board of Indian Appeals (IBIA); and other individuals had criticized FWS staff for being hostile towards CSKT. *Reed v. Salazar* at 107. Ultimately, the court found that

the persuasiveness of the evidence in the record as to the CSKT's performance is not a question for this Court to decide in the first instance. 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 APA.

*Id.* at 118.

Although the Service terminated the first AFA in December 2006, before CSKT was provided with any information about the allegations, it never made any specific determinations or conclusions regarding the allegations after having received CSKT's responses to them. CSKT viewed the Service's decision to enter into a second AFA, and thereby settle CSKT's IBIA claims, as an acknowledgement that it had been a mistake to have accepted the allegations as having merit without providing due process to CSKT.<sup>1</sup> The second AFA was documented to have been successful and was commonly acknowledged as such, further calling into question the allegations that had been made against CSKT under the first AFA.<sup>2</sup>

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<sup>1</sup> This position found support in, among other things, a December 29, 2006 memo from the Interior Deputy Secretary, in which she expressed her "disappointment that problem resolution mechanisms set forth in the AFA may not have been properly utilized" and that the AFA termination "did not follow expected procedures – those that require the identification of problems and afford a reasonable opportunity to correct them". See memo at p. 3 (copy attached to this document as Appendix "A").

<sup>2</sup> The periodic status reports on AFA implementation reflect this success. In a September 10, 2009 email transmitting one such report, FWS Refuge Supervisor Dean Rundle stated that:

*(footnote continued on next page)*

CSKT agrees that the Service needs to address the allegations which had arisen under the first AFA, taking into consideration CSKT's responses. As the Service stated in its above-referenced Notice of Intent, the Service's termination of the first AFA did not follow the procedures in that agreement and CSKT had not been afforded any opportunity prior to the termination to either demonstrate that the alleged performance deficiencies did not exist or correct any actual deficiency. Once CSKT was provided the information upon which the allegations were based, which was well after the AFA was terminated, CSKT provided the Service with detailed responses largely denying the allegations.<sup>3</sup> The EA should explain the Service's decision to enter into a second agreement after the allegations which had arisen under the first AFA and CSKT's responses to them.

In its comment, the Blue Goose Alliance (BGA) referenced an investigator's report regarding FWS staff allegations involving tribal staff (*see* BGA comment at p.7). Although FWS had hired the investigator (an ex-federal employee) in the fall of 2006 to look into the allegations, FWS had provided no information to CSKT as to what the exact allegations were, thereby preventing CSKT from trying to determine whether there was any merit to the allegations. The first AFA had included a mechanism to notify CSKT of any performance issue so it could investigate and either prove that no deficiency existed or correct any true deficiency. *See* Section 10.A.3.b(2) of the FY 2005-06 AFA. Unfortunately, FWS never utilized that mechanism to afford CSKT due process. CSKT's attempts to get information regarding the allegations through the FOIA process, including an administrative appeal, were denied. Due to

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[o]ur partnership is getting a lot of very good work done. I was impressed in the August accomplishments on all fronts, from the biological program – particularly the work addressing invasive weeds, and bison research – to the public use program where visitation was up significantly over the same period in 2008. I suspect that lower fuel prices are part of the reason for increased visitation – but its clear [that] the general public is viewing the operation as seamless, and that the partnership is well meeting public expectations.

A year later, in Associate Deputy Secretary Laura Davis' June 9, 2010 testimony before the House Natural Resources Committee regarding Tribal Self-Governance legislation, she stated that “[a] true partnership and spirit of cooperation has developed from the history of controversy between the FWS and the Confederated Salish and Kootenai Tribes . . . over the National Bison Range Complex in Montana”, noting that “the bison round-up event in October 2009 was highly successful.” *See* Appendix “B” for the excerpt of this testimony.

Office of Inspector General Report No. NM-EV-FWS-0001-2010, discussed later in this document and attached as Appendix “C”, had found no merit to a number of allegations of performance problems under the second AFA, instead stating that

Interviewees told us that the FWS manager and the CSKT tribal deputy manager worked well together and collaborated on operational decisions. They stated that managers sought out experienced NBR staff regarding their opinions on various issues and did not differentiate according to whether they were FWS or CSKT employees. Interviewees also said that free and open communication existed between FWS and CSKT employees.

OIG Report at p. 4.

<sup>3</sup> In addressing the issue of the allegations under the first AFA, it would be useful to include the dates on which CSKT was first provided information supporting the allegations.

this withholding of information, CSKT did not make its staff available to the investigator hired by FWS.

The investigator's report, while noting that his lack of access to CSKT staff resulted in the tribal side being unknown, went on to largely just repeat the allegations made by FWS staff. In one of the few instances where the investigator had tried to corroborate an allegation, he found that the allegation by an FWS staff member was not true.<sup>4</sup> Despite this red flag, and despite the fact that the FWS staffers who had made the allegations had signed a letter opposing the AFA before it was even signed,<sup>5</sup> the investigator's report continued to treat the allegations as facts even in the absence of any corroborating evidence. This type of outdated hearsay information is no longer relevant to the draft AFA, but the Service needs to directly address the issue in order to put the matter to rest.

When CSKT officials discussed this issue with the Director of the Interior Department's Office of Civil Rights, they were told by the Director that the FWS "investigation" had problems and that the matter was being referred to the Department's Equal Employment Opportunity (EEO) office. During that EEO process, CSKT provided information to one of the counselors assigned to the matter and offered to make its staff available for interviews. After speaking to EEO counselors, who also advise potential complainants of the consequences for filing fraudulent complaints, none of the FWS staffers filed formal EEO complaints regarding their allegations. This failure to file formal complaints further calls into question the investigator's "findings" as described in his report.

The misrepresentation of CSKT's performance under the first AFA was widely recognized. In their May 15, 2007 joint letter to the Interior Secretary regarding the NBRC, the Chairman and Ranking Minority Member of the House Natural Resources Committee said that they were "concerned that the lack of support of [the first AFA] by some individuals within the FWS may have resulted in a distorted record concerning NBR activities under the AFA."<sup>6</sup> The Montana Human Rights Network (MHRN), in a January 31, 2007 letter to PEER, questioned the

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<sup>4</sup> The investigator's report stated that "[FWS employee] Skip Palmer had told me that his son-in-law, Jereme Nicholuson [*sic*], had found tribal member and NBR maintenance worker TJ Hanes [*sic*] on his property in the distant past hunting elk illegally. I asked Nicholuson about this and he said that wasn't true." See investigator's report at p. 27. Mr. Palmer is one of the individuals who submitted scoping comments, in response to the Service's recent NOI, in which he continues to make allegations against CSKT.

<sup>5</sup> In their letter, dated October 8, 2004, and addressed to then-Regional Director Ralph Morgenweck, the signatory FWS NBRC employees stated their opposition to the proposed FY 2005-06 AFA. They stated that the AFA: would provide "biased opportunity" to tribal members; "is offensive to us as employees and Americans"; and "would convert the special purpose of the NWRS from 'Wildlife First' to a social program for a select segment of society." See letter (without attachments), attached as Appendix "D", at pp. 3-4. Skip Palmer was one of the signatories to this letter.

<sup>6</sup> A copy of this letter is attached as Appendix "E" to this document.

merit of the accusations against CSKT staff, noting one federal staffer's connections to what MHRN designated the "anti-Indian movement".<sup>7</sup> The court's opinion in *Reed v. Salazar* also took note of individuals who had criticized the FWS Project Leader and other FWS staff for being "hostile towards the CSKT."<sup>8</sup>

While some of the commenting parties may be interested in characterizing allegations as "actual significant impacts", the EA should address the fact that the record does not support such a characterization when taking into account: CSKT's responses to the allegations; CSKT's appeal of the AFA termination to the IBIA; FWS' subsequent decision to enter into a second AFA; CSKT's performance record under the second AFA; and the Interior Office of Inspector General's evaluation, and disproving, of allegations made by PEER regarding performance under the second AFA. While it characterizes the allegations as facts in its comment, PEER itself concedes that CSKT has denied the allegations and that "it is unclear what the FWS's [sic] position is." See comment of PEER at p. 5.

CSKT believes that, in the EA, the Service needs to explain/clarify its position with respect to the allegations made against CSKT under the first AFA. CSKT appreciates the Service's acknowledgement in its NOI that its termination of the FY 2005-06 AFA did not comply with the notice procedures in that AFA, and that CSKT had not been afforded a reasonable opportunity to either demonstrate that the alleged deficiencies were false or to correct any actual deficiencies (see NOI at p. 3). CSKT believes it is critical for the EA to include a clear explanation from the Service describing its rationale for approving the FY 2009-11 AFA in light of its termination of the first AFA.

### Request for an EIS

In addition to attempting to characterize past allegations as facts which represent significant impacts for purposes of NEPA, the commenters also try to portray the past NBRC AFA's, and the draft AFA, as something more than they are.<sup>9</sup> The draft AFA would not result in significant changes to the operations of the NBRC; rather, it would only create some changes in the parties involved – while maintaining overall FWS control over the Refuge Complex. The EA should acknowledge that, under the draft AFA, CSKT involvement in NBRC operations would

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<sup>7</sup> A copy of MHRN's letter is attached as Appendix "F" to this document. While MHRN's letter describes its concerns about FWS staffer Skip Palmer on the basis of Skip's father's long-time involvement with the anti-Indian movement, MHRN had earlier reported on Skip's own involvement in the movement, as discussed later in this document and in the Montana Human Rights Network report titled Drumming Up Resentment: The Anti-Indian Movement in Montana, attached as Appendix "G".

<sup>8</sup> *Reed v. Salazar* at 107 (citing the December 15, 2006 statement by Paul Bishop in the administrative record).

<sup>9</sup> E.g., comments characterizing the AFA as a program "aimed at achieving cultural and social goals" (BGA comment at p. 3), or describing the AFA's purpose as satisfaction of "an essentially political demand made by the CSKT" (PEER comment at p. 4).

represent a change in some of the people involved, but the EA should clearly set out the Service's determinations that:

- 1) the draft AFA, as with the past AFA's, would not significantly change the way the Service manages the NBRC, but would simply involve CSKT participants in that management, as provided under the Tribal Self-Governance Act;
- 2) the physical, ecological and social aspects of NBRC management would not substantially change due to the draft AFA;
- 3) ownership and overall management and administration of the NBRC would remain with the Service under the draft AFA;<sup>10</sup> and
- 4) based upon the Service's professional judgment and expertise, there would be no significant on-the-ground consequences of incorporating CSKT involvement in the operations of the NBRC because the draft AFA, as with past AFA's, would ensure that the fundamental aspects of NBRC management would remain the same.

The EA should also make clear that the draft AFA would not permit CSKT to by itself create significant impacts to the NBRC, such as constructing buildings, altering the size of the bison herd, building new roads, or making other profound changes to the landscape or ecology. Any significant changes in management or operations would need to be approved by the FWS Refuge Manager. The EA should explain how, under the draft AFA, as with past AFA's, the visiting public would experience the NBRC in largely the same manner as it does in the absence of an AFA.

Some commenters assert that an EIS is required due to the alleged presence of various "significance factors" identified in the Council on Environmental Quality (CEQ) regulations. *See* 40 CFR § 1508.27(b). CSKT addresses those factors in Section III of this document.

One commenter stated that FWS should prepare a programmatic EIS which would take into account the potential for future AFA's (*see* comment of BGA at pp.7-8). The Service may want to respond to that suggestion in the EA. CSKT understands that any future AFA's will be evaluated on their own merits, and that the draft AFA is not part of any larger initiative on the part of the Service. Based upon that, and the fact that there does not seem to be any great increase in other tribes requesting AFA's with FWS, CSKT does not see a need for a programmatic EIS.

In summary, CSKT believes that the Service's decision to analyze the issues through the preparation of an EA is appropriate. CSKT has encouraged and supported the incorporation of robust public participation as part of the process and believes that the comments will result in better evaluation and analysis.

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<sup>10</sup> The EA should similarly note that, under the draft AFA, beneficial ownership of the lands upon which the Ninepipe and Pablo National Wildlife Refuges are located would remain with CSKT.

## II. Range of Alternatives

Several parties wanted the EA to evaluate more than the two alternatives identified in the NOI. Some of the comments suggested alternatives involving FWS contracting fewer programs to CSKT, or involving a non-Self-Governance contracting vehicle such as a cooperative agreement.

The range of alternatives to be evaluated will obviously be determined by the Service's stated purpose and need for the proposed action. CSKT agrees that it would be a good idea for the EA to evaluate other alternatives in addition to the two identified in the NOI. Such alternatives could include an AFA contracting more activities to the Tribes, as well as an AFA that contracts fewer activities.

While CSKT understands that, to some, a cooperative agreement or other similar arrangement may appear to be a reasonable alternative to an AFA, such vehicles would not fall within the laws and regulations established under the Tribal Self-Governance Act and would therefore neither: 1) advance federal Self-Governance objectives as set forth in both the Tribal Self-Governance Act and federal regulations; nor 2) advance CSKT's Self-Governance objectives, allowing CSKT to operate within the parameters established by law and regulation. Included in the Congressional declaration of Tribal Self-Governance policy is the intent to "permit each Tribe to choose the extent of its participation in self-governance." 25 C.F.R. §§ 1000.4(b)(2). One of the commenting parties specifically recognized this, expressing its strong belief that the FWS-CSKT partnership "should be formalized through a new self-governance AFA. . . ." *See* comment of National Wildlife Federation at p. 1.

For these reasons, CSKT believes that a cooperative agreement would not fulfill the federal or tribal purposes of CSKT's request for a Self-Governance AFA, hence it may be more appropriate for the Service to have the EA identify cooperative agreements as a suggested option, but explain why it would not warrant further analysis as an alternative. CSKT strongly encourages the Service to similarly identify in the EA all suggested, or otherwise considered, alternatives and, for those that would not fulfill the stated purpose/need, explain why they do not warrant further analysis as alternatives.

One commenter encouraged having both tribal and federal employees working within each contracted program, but recommended not contracting whole programs to the Tribes (*see* comment of Tim Miller). CSKT believes that a categorical policy of not contracting whole programs at a relatively small operation like the NBRC would undermine, if not entirely contravene, federal Self-Governance policies. CSKT has long maintained that contracting of whole programs at the NBRC is generally the most effective and efficient way to realize Self-Governance objectives at that particular facility. Some commenters suggested that the Service should consider contracting some very limited activities but retaining some or most of the

program's activities. *See, e.g.*, BGA comment at p. 2. However, such piecemeal contracting would do little to effectively advance federal and tribal Self-Governance objectives.

One commenter cited *Trustees for Alaska v. Watt*, 524 F. Supp. 1303 (D.Alaska 1981), for the proposition that "administration" equates to "management" (*see* comment of BGA at p. 4). The comment said that the NEPA analysis should "include alternatives that would retain full federal control and supervision of the public use program" at the NBRC. The EA should distinguish the draft AFA from the situation before the court in *Trustees for Alaska*, and explain how the draft AFA already includes the retained federal control and supervision referenced by the commenter: under Section 7, the federal government (through the Refuge Manager) retains full control and supervision over the entire NBRC operation, including the public use programs. This contrasts sharply with the facts in the case of *Trustees for Alaska*, in which Interior Secretary James Watt had transferred to the U.S. Geological Service (USGS) lead responsibility for development of a report and exploration regulations concerning oil and gas exploration at the Arctic National Wildlife Refuge. No duty or responsibility which CSKT would contract under the draft AFA, or which it had contracted under past AFA's, even approaches the sort of administrative control that the USGS had been given in the situation of *Trustees for Alaska*, and which the court in that case found to have violated the National Wildlife Refuge System Administration Act (NWRSA).

CSKT believes that development and evaluation of alternatives involving other AFA's would be helpful and it encourages the Service to do so.

### III. NEPA Significance Factors

As part of the regulations it promulgated under NEPA, the CEQ provided guidance for interpretation of the term "significantly", within the context of NEPA's requirements for federal actions that significantly affect the human environment. The regulations state that such interpretation requires considerations of both context and intensity. 40 C.F.R. § 1508.27. Subsection § 1508.27(b) then provides a list of factors that "should be considered in evaluating intensity". These are commonly referred to as "significance factors".

In this section, CSKT provides its perspectives on CEQ "significance factors" identified in the scoping comments. For the sake of clarity, CSKT believes that the EA should address all of the factors identified in 40 CFR § 1508.27(b), explaining the Service's consideration of each.

**A. Public Health and Safety.** One commenter cited public health and safety issues as requiring an EIS. The commenter simply cited an unspecified statement that the first AFA was cancelled in part due to some activities which involved public health and long-term maintenance of vehicles and heavy equipment, allegedly not having been completed at a satisfactory level (*see*

comment of PEER at p. 7). No further information was included in the comment beyond the reference to those allegations. The CEQ regulations describe this significance factor as follows:

The degree to which the proposed action affects public health or safety.

40 CFR § 1508.27(b)(2)

The allegations which had accompanied the termination of the first AFA are addressed by CSKT in Section I of this document. Taking this input into account, as well as the experience under the FY 2009-11 AFA and the OIG report disproving allegations made during that agreement, the Service should address in the EA the degree to which the proposed action would affect public health or safety.

**B. Unique Characteristics of the Geographic Area.** At least one commenter appeared to implicate the CEQ significance factor involving unique characteristics of a geographic area (*see* comment of PEER at pp. 4-5). The CEQ regulations describe this factor as follows:

Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

40 CFR § 1508.27(b)(3)

PEER's comment is again predicated on its characterization of allegations under the first AFA as facts. It then asserts that those allegations, along with PEER's generalized grievances regarding other parts of the draft AFA, demonstrate the potential for significant impacts on the environment at the NBRC. With respect to the allegations upon which PEER bases its concerns, CSKT refers to Section I of this document.

In addressing this comment and its corresponding significance factor, CSKT believes FWS should: 1) identify in the EA the unique characteristics of the NBRC and explain how those characteristics would not be altered under the draft AFA; 2) explain how the Service has taken the NBRC's unique characteristics into account when evaluating the draft AFA and its alternatives; and 3) explain why approval of the draft AFA would not result in any significant impacts to these unique characteristics.

**C. Controversy.** A few parties asserted that the presence of controversy supported or required preparation of an EIS. The CEQ regulations describe this factor as follows:

The degree to which the effects on the quality of the human environment are likely to be highly controversial.

40 CFR § 1508.27(b)(4)

The EA should acknowledge the fact that federal courts have made clear that, in order for a matter to be deemed “highly controversial” within the meaning of this regulation, there has to be something more than just people who are opposed to a proposed action and who may be willing to litigate it. Instead, there must be a substantial dispute about the size, nature or effect of an action rather than just opposition to it. Courts have also recognized that just because a party may be able to cherry-pick information out of an administrative record does not mean that a proposed action is highly controversial or highly uncertain.

In justifying their assertions of “highly controversial” effects, the commenting parties do not identify a substantial dispute about the size, nature or effect of the draft AFA, nor do they describe any sort of scientific controversy about the effects of the AFA. Instead, they rely almost exclusively on the disputed allegations which had arisen under the first AFA. One party incorrectly asserts that “controversy” had caused FWS to terminate the first AFA, but otherwise identifies no specific disputes that are “highly controversial” (*see* BGA comment at pp. 6-7). Another commenter asserts that the draft 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. . . .” *See* PEER comment at p. 5.

With respect to these references to the allegations under the first AFA, CSKT refers to Section I of this document. As mentioned in that section, the Service has since admitted that it acted upon those allegations without affording due process to CSKT and without complying with AFA provisions for notifying CSKT of alleged performance deficiencies. Once the Service had the benefit of CSKT’s responses, and after CSKT had filed an administrative appeal of the termination with the IBIA, FWS chose to enter into a new AFA with CSKT, thereby settling the appeal. The record is devoid of any determinations by FWS, after it had the benefit of CSKT responses, that any of the allegations cited in its termination of the FY 2005-06 AFA had merit. There is accordingly little support for the commenting parties’ characterization of the allegations as constituting either significant impacts or a “highly controversial” matter requiring preparation of an EIS, bearing in mind that, in order meet this standard, there must be a genuine environmental controversy and not just differing viewpoints or subjective impressions.

Further undermining the allegations, and the attendant claims that they make the draft AFA “highly controversial” for NEPA purposes, is the fact that one of the commenting parties had made similar allegations under the second AFA, and had requested an investigation by the Interior Office of Inspector General (OIG), which subsequently found no merit to any of the

substantive allegations. Aside from a work plan that had not been updated as called for in the FY 2009-11 AFA,<sup>11</sup> the OIG's March 2011 report "did not find any current evidence to support allegations of operational deficiencies in the other programs included in the PEER allegations." See Appendix "C", at March 30, 2011 transmittal memo found at beginning of the report.

While the record reflects opposition to the draft AFA, the commenting parties do not provide any evidence or credible claims that the draft AFA is "highly controversial", within the meaning of NEPA, regarding effects on the human environment. Once the Service addresses the issue of the allegations under the first AFA, and once it provides a full explanation as to why it does not believe that the proposed action is "highly controversial", CSKT believes that the record will demonstrate that there is no basis under this CEQ standard for a finding of significant impact. To this end, CSKT believes the Service should:

1. acknowledge the opposition to the draft AFA, as well as past AFA's, and fully explain why this opposition or controversy does not involve "highly controversial" effects on the quality of the human environment;
2. distinguish between policy disputes versus actual controversies or disputes about potentially significant impacts that may occur on the ground as a result of the draft AFA; and
3. ensure that the EA: demonstrates the lack of highly controversial effects under the draft AFA; identifies and analyzes any likely impacts of the draft AFA; and, if any impacts, identifies and discusses any mitigation measures put in place for such impacts.

**D. Highly Uncertain Effects and/or Unknown Risks.** One commenter asserted that environmental effects of the draft AFA are unknown or highly uncertain (*see* comment of PEER at p. 6). The CEQ regulations describe this factor as follows:

The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

40 CFR § 1508.27(b)(5)

In support of its assertion of highly uncertain effects or unknown risks, PEER cites the following:

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<sup>11</sup> Putting this issue in perspective, the OIG investigators noted that, although a 2009 work plan had not been completed, "NBR managers said they followed the 2008 work plan for 2009 operations and that operations had not changed significantly between those years." OIG Report at p. 3. The report found no negative impacts from the use of a prior year's work plan.

1. It is “not known which of the adverse environmental effects stemming from previous AFA’s will be repeated”;
2. The draft AFA “aims to incorporate the management of the NBRC into the overall management of Tribal lands”;
3. The draft AFA released by FWS does not include its four appendices, including the budget;
4. The draft AFA “contains many uncertainties as to what activities and functions it will cover and how resources will be allocated”;
5. The effective date of the draft AFA is “uncertain” and “may be phased in”; and
6. The draft AFA “is structured to restrict the public’s right to know what is happening at the NBRC, and therefore builds in an ongoing uncertainty as to the environmental effects of the agreement.”

PEER comment at pp. 6-7.

CSKT addresses each of the above assertions in turn and encourages the Service to address them in the EA:

1. **Prior Allegations.** In asserting highly uncertain effects or unknown risks, PEER’s initial justification is that it is “not known which of the adverse environmental effects stemming from previous AFA’s will be repeated.” As CSKT discusses in Section I of this document, and as the record reflects, no determinations of adverse environmental effects had been made by FWS under the first AFA once CSKT was able to respond to the allegations made against it and its staff. Under the second AFA, the Interior Office of Inspector General refuted PEER’s allegations regarding bison care, pesticide application, management problems, etc. *See* Appendix “C”.  
PEER provides no support for its conclusory statement falsely attributing adverse environmental impacts to previous AFA’s. Nor does PEER explain how the allegations constitute “unknown” or “highly uncertain” effects. The Service should address that issue for the record in this EA. Once the record more directly addresses the issue of the allegations under the first AFA, it will be clear that they, as with the disproven allegations under the second AFA, do not result in unknown or uncertain effects under the draft AFA.
2. **Incorporation of NBRC Management into Overall Management of Tribal Lands.** After a listing of AFA benefits to the Service, Section 2.C.2.c of the draft AFA states that one of the benefits to CSKT is that the AFA “better enables CSKT to holistically address natural resources management issues on its Reservation, due to the NBRC’s central location within the Reservation.” This simply reflects the fact that, if CSKT

has a role in NBRC operations, it can be more effective in coordinating natural resources issues that transcend the boundaries between the NBRC and the surrounding Flathead Indian Reservation. It also reflects the fact that two of the NBRC refuges (Ninepipe and Pablo) are located on lands for which CSKT is the beneficial owner and for which CSKT has obvious natural resources management interests.

PEER misconstrues and/or misrepresents this as aiming “to incorporate the management of the NBRC into the overall management of Tribal lands”, insinuating that somehow CSKT would be removing NBRC from FWS management and subjecting it to a different tribal management regimen. PEER can cite no support for such an assertion, and the draft AFA itself repeatedly makes clear that NBRC management will continue to be under federal control and will continue to be performed in conjunction with all existing laws, regulations and operational standards governing refuges. *E.g.*, draft AFA at Sections 1, 2.A, 3.C, 7.A, 7.B, 7.D, and 10.A.

The Service’s Native American Policy, in discussing the agency’s efforts to seek partnerships with Indian tribes, observes that such partnerships “provide opportunities to better address ecological systems as a whole and do so with maximum assistance and support.” Policy at p. 1. The draft AFA provision that causes PEER concern therefore actually furthers the Service’s own goals for ecology-based partnerships.

3. **Draft AFA Does Not Include Its Appendices.** PEER attributes outsized importance to the fact that, intentionally or not, the Service did not include any of the draft AFA’s referenced attachments when it released the draft AFA along with its NOI. CSKT supports inclusion of the appendices/attachments as part of the release of the draft EA. CSKT also recommends that the draft EA be accompanied by copies of the past two NBRC AFA’s, along with their attachments, so members of the public can compare the three and see the past budgets for the AFA’s. CSKT disagrees that the present absence of the attachments to the draft AFA supports claims of highly uncertain environmental effects and/or unknown risks, and PEER has provided no credible support for such a claim.
4. **AFA Contains Many Uncertainties as to What Activities/Functions It Covers.** Contrary to PEER’s claims, the draft AFA describes the covered Activities in a similar manner as did the last AFA. *See* Section 6.A of the draft AFA. Given that PEER itself states that the draft AFA “duplicates, with minor changes, a predecessor FY 2009-2011 AFA”, and given that there were no uncertainties under the prior AFA as to what activities/functions would be covered, PEER provides no information to support its assertion of highly uncertain effects and/or unknown risks. *See* PEER comment at p. 2.

5. **Uncertain Effective Date and/or Phase-In of AFA.** The provisions cited by PEER in Section 25.A of the draft AFA are nearly identical to the corresponding provisions in the last AFA. PEER does not claim that the provisions in the last AFA resulted in any highly uncertain environmental effects or unknown risks, nor does it cite any reason for how such provisions in the draft AFA could result in such effects or risks. Given the timeframe uncertainties of the AFA negotiations, the attendant NEPA process, and any finalizations, it seemed to make little sense to try to identify a specific date in the draft AFA as the effective date for the agreement.
6. **Restricting the Public's Right to Know.** PEER's final rationale for why the draft AFA involves highly uncertain environmental effects or unknown risks is its allegation that the AFA "is structured to restrict the public's right to know", thereby resulting in unknown risks. For support, PEER outlines its belief that the AFA's provisions regarding the Freedom of Information Act (FOIA) and its provisions regarding maintenance of Activity Records could somehow result in less information being made available in response to public requests. PEER provides no support for such a claim. PEER has made repeated FOIA requests to the Service's NBRC staff during past AFA's and, to CSKT's knowledge, has never contested, appealed or disputed any of the Service's FOIA responses to those requests. Given PEER's statement that the draft AFA "duplicates, with minor changes" the predecessor NBRC AFA, PEER cites no justification for its assertion of highly uncertain effects and/or unknown risks.

In addition to PEER's claims regarding alleged uncertainties, BGA's comment asserted that

[a]ttempting to install an untested program with untrained employees having divergent motivations and uncertain supervision aimed at achieving cultural and social goals rather than the "wildlife first" mandate of the refuges represents a major deviation in the normal operation of every refuge in the national system.

BGA comment at p. 3.

This assertion is wrong on a number of levels. First and foremost, it is inaccurate to describe CSKT's Natural Resources Department, which has staffed the NBRC under the past AFA's and would continue to do so under the draft AFA, as an "untested program with untrained employees". While the Service is well aware of NRD's management record, CSKT is including for the record a list of sample accomplishments (*e.g.*, establishment of first tribally-designated wilderness in the nation, species reintroductions, staff awards, etc.). *See* Appendix "H" to this

document. Additionally, the National Wildlife Federation noted in its scoping comments that, earlier this year, it awarded CSKT with its National Government Conservation Achievement Award.

BGA provides no explanation or support for its allegations of “divergent motivations” and “uncertain supervision” with respect to CSKT, nor does the record under the past AFA support either contention. While BGA’s belief that the AFA’s purpose is to achieve “cultural and social goals”, rather than wildlife-centric objectives, is similarly unsupported, it speaks volumes about the motivation for its opposition to Self-Governance partnerships at the NBRC. One could argue that BGA’s insistence that only federal employees should perform certain Refuge work is intended to achieve its own “cultural and social goals” rather than wildlife-based objectives.

**E. Precedent.** Several comments raised the issue of precedent in asserting that an EIS should be prepared. The CEQ regulations describe this factor as follows:

The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

40 CFR § 1508.27(b)(6)

In most respects, Tribal Self-Governance AFA’s are nothing new for the Interior Department. Since the Tribal Self-Governance Act was signed into law in 1994, the Bureau of Indian Affairs (BIA) has entered into hundreds or thousands of AFA’s with tribal governments for everything from natural resources management, to law enforcement, to land management. The National Park Service (NPS) was the first non-BIA agency to enter into an AFA when it did so with the Grand Portage Band of Lake Superior Chippewa in 1998 for work at the Grand Portage National Monument. FWS first entered into an AFA in 2004 with the Council of Athabascan Tribal Governments (CATG) regarding work at the Yukon Flats National Wildlife Refuge in Alaska. The Bureau of Reclamation has also entered into AFA’s with tribes.

The EA, in acknowledging the differences between the draft AFA and other non-BIA AFA’s, should explain how: differences amongst AFA’s have always existed and will continue to exist; each AFA is evaluated according to its individual merits, purposes and need; and approval of one is not dependent on other AFA’s. The differences amongst AFA’s reflect not only the different situations and needs of the subject facilities and operations, but also the differences amongst tribal governments.

Non-BIA agencies have discretion as to whether or not they will enter into AFA’s under 25 U.S.C. § 458cc(c), which authorizes agreements for programs which are of special

geographic, historical or cultural significance to the requesting tribe. In addressing comments regarding precedent, the Service should explain, and provide examples of, how:

1. the Service considers requests for an AFA under this authority on a case-by-case basis, evaluating each on its own merits, including the qualifications of the requesting tribe and the needs of the subject Refuge;
2. a decision to enter into an AFA with one tribe for a certain facility does not constitute, under either the law or past practice, a decision to enter into any future agreements with other tribes for other facilities;
3. AFA's are for limited terms, with FWS retaining the discretion for continuing the agreements in future years;
4. AFA's are always subject to reassumption by the Service, consistent with Self-Governance statutes and regulations; and
5. the Service would have to comply with the requirements of NEPA for any future decisions to approve an AFA.

The Service's Native American Policy specifically recognizes the case-by-case basis upon which its relationships with tribal governments, including under the Indian Self-Determination and Education Assistance Act, are based. The Policy states that the Service's working relationships with tribal governments "will vary according to the legal basis and management requirements of each relationship." Policy at p. 1. The Policy also recognizes that its relationships with tribal governments will be guided by tribal-specific treaties, reserved rights doctrines, and other authorities. *Id.*

None of the comments appear to state that a decision by the Service with respect to an AFA at the NBRC represents a decision in principle about any future AFA within the meaning of the above-cited CEQ standard's last clause. There is good reason for this: the history of non-BIA AFA's does not support a contention that any past AFA has become a decision in principle about how future AFA's with other tribes for other federal programs would look. The past two NBRC AFA's were quite different from those that FWS had entered into with CATG, which predate the NBRC AFA's. A survey of AFA's between tribes and the National Park Service also shows a diversity that would undermine any assertion that one AFA becomes a cookie cutter model for the substance of later AFA's. This is a logical reflection of the vast differences amongst tribes and refuges (or parks). While some boilerplate provisions in non-BIA AFA's are duplicated, some are not and the substance and extent of programs being contracted are quite different from one agreement to another.

The commenters who cite precedent as justification for an EIS appear to be basing their positions on the first part of § 1508.27(b)(6): the degree to which the action may "establish a precedent". Their comments express concern that, as stated by PEER, the Interior Department

“may unwittingly be creating a template for future agreements” (*see* comment of PEER at p. 7). As explained above, one AFA does not constitute, “unwittingly” or otherwise, the establishment of a precedent. A particular AFA provision may be justified in one situation due to unique aspects of the Refuge and/or tribe involved, whereas it may not be justified in a situation involving a different Refuge and different tribe. By way of example, the Act creating the Grand Portage National Monument had provided a statutory role for the Grand Portage Band of Lake Superior Chippewa in the operation of the Monument, making the NPS negotiations with that tribe unique from other AFA’s. *See* 16 U.S.C. § 4500o *et seq.*

The circumstances of the NBRC and CSKT are highly unique and readily distinguishable from any other situation, undermining any claims that a precedent would be set by the draft AFA. The EA should identify these distinctive characteristics:

1. the National Bison Range and all of the NBRC properties subject to the draft AFA are located wholly within the exterior boundaries of the Flathead Indian Reservation;
2. CSKT is the beneficial landowner of two of the NBRC Refuges (Ninepipe and Pablo Refuges) and retains rights at both locations;<sup>12</sup>
3. CSKT has a documented history with the NBR bison in that the present herd descends in large part from a herd owned by CSKT tribal members that predated the establishment of the National Bison Range; and
4. FWS and CSKT have a decades-long history of successfully working together on projects of mutual interest.<sup>13</sup>

The Service should ensure that the EA addresses how:

1. the draft AFA would not establish a precedent or template for approval of any AFA involving other Refuges or FWS facilities, nor would it be a first step in an FWS initiative to replicate similar agreements with other tribes for other FWS facilities;
2. the programs contracted to CSKT under the draft AFA are those that have long been identified in Federal Register listings as being eligible for Self-Governance contracting;
3. the draft AFA has been tailored to the specific situation and needs of the NBRC; and

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<sup>12</sup> CSKT’s reserved rights in the lands upon which the Ninepipe and Pablo Refuges are located were recognized by Congress in § 5(b) of the Act of May 25, 1948 (62 Stat. 269). That Act, while granting FWS perpetual easements for Refuge purposes, reaffirmed that CSKT “shall have the right to use such tribal lands, and to grant leases and concessions thereon, for any and all purposes not inconsistent with such permanent easement.”

<sup>13</sup> Examples of past CSKT cooperation and coordination with FWS include: peregrine falcon reintroduction; trumpeter swan reintroduction; grizzly bear management; noxious weed management; surplus elk and pronghorn antelope relocation; bald eagle surveys, and migratory waterfowl projects and surveys.

4. at the end of any AFA's term, the Service retains the discretion as to whether or not to continue the agreement

Anecdotally, over the 18 years that the Tribal Self-Governance Act has been in effect, CSKT is unaware of many tribes expressing interest in Self-Governance contracting at National Wildlife Refuges. Nonetheless, CSKT believes that the Service needs to fully address the comments regarding precedent and explain why approval of the draft AFA would neither "establish a precedent" nor represent "a decision in principle about a future consideration" within the meaning of the CEQ regulations. As part of its response, it would be helpful for the EA to describe other Service contracts or relationships, past or present, with non-federal entities for the types of work that CSKT would perform under the draft AFA.

**F. Cumulative Impacts.** One commenter asserted that the AFA is related to other actions with cumulative significant effects (*see* comment of PEER at p. 7). The CEQ regulations identify cumulative impacts as a factor in determining significance, as follows:

Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

40 CFR § 1508.27(b)(7)

The only support PEER made for its assertion of cumulative impacts is that the AFA is likely to be a precedent for similar agreements at other Wildlife Refuges. CSKT addressed the precedent factor in the preceding section of this document. PEER did not identify any other cumulative impacts, nor did any other commenter. CSKT is not aware of any cumulative impacts that would be involved with approval of the draft AFA, but CSKT encourages the Service to address this issue in the EA and explain how cumulative impacts are not involved in the proposed action or, if the Service believes that any cumulative impacts exist, to identify them and explain why they would or would not result in significant impacts.

**G. Endangered/Threatened Species.** One party mentioned endangered or threatened species in passing (*see* BGA comment at pp. 5, 7), and one party asserted that the "presence" of listed species supports preparation of an EIS (*see* PEER comment at p. 5). The CEQ regulations describe this factor as follows:

The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

40 CFR § 1508.27(b)(9)

As the plain language of the CEQ regulations make clear, the presence of an endangered or threatened species, or its habitat, does not automatically require preparation of EIS. Instead, the regulations require a federal agency to take into account whether, and to what degree, an action may affect one or more listed species. CSKT understands that, prior to approval of the draft AFA, the Service would conduct an intra-Service consultation, as laid out in the FWS Endangered Species Consultation Handbook, to determine whether the evaluated actions would have any effects. The EA should: identify any listed species relevant to its analyses; explain why the draft AFA would involve no significant impacts to such listed species; and describe in detail how the Service would fulfill its responsibilities under the Endangered Species Act and NEPA if it approved the draft AFA.

With respect to listed species, CSKT's Tribal Wildlife Program has compiled a brief status summary of present and former listed species for the Service's consideration. *See* Appendix "I". If the Service has information that conflicts with this status summary, this could be identified and discussed in the EA.

**H. Violation of Federal Laws.** Several commenters cited alleged violations of federal laws as a basis for preparing an EIS. The CEQ regulations, at 40 CFR § 1508.27(b)(10), describe this factor as follows:

Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

The commenters primarily allege that the draft AFA would violate the NWRSA, as amended, and/or the Tribal Self-Governance Act. Some commenters claim that the draft AFA would violate the Tribal Self-Governance Act's prohibition on contracting out "inherently Federal" functions; two commenters asserted that the draft AFA would contract programs to CSKT that are not authorized by the NWRSA, thereby violating both the NWRSA and the Tribal Self-Governance Act's prohibition on contracting out programs whose underlying statutes do not

authorize such participation. *See* 25 U.S.C. § 458cc(k).<sup>14</sup>

### Inherently Federal Functions

With respect to claims that the AFA would contract inherently federal functions to CSKT, none of the commenters provide any legal or other support for such claims. One party makes the conclusory statement that “the biological program on refuges is at the core of the inherently federal functions to be performed”, but provides no support for such an assertion (*see* comment of BGA at p. 4).

PEER’s comment alleges the following five contracted activities to be inherently federal functions: 1) supervising federal employees working under an Intergovernmental Personnel Act assignment; 2) managing contracted programs, or portions of programs through a newly-created Wildlife Refuge Specialist; 3) selecting and supervising refuge volunteers; 4) selecting and managing additional employees when positions other than the Refuge Manager, Deputy Refuge Manager, and law enforcement officers are vacated; and 5) jointly developing the Work Plan for the NBRC and setting work priorities. CSKT addresses each of these as follows:

1. **Supervising Federal Employees Working Under an IPA Assignment.** One of the purposes of the Intergovernmental Personnel Act (IPA) is to provide for assignment of federal employees to State, local and/or tribal governments. The IPA defines “local government” to include federally-recognized Indian tribes. 5 U.S.C. § 3371(2)(C). The statute provides that “supervision of the duties of an employee on detail may be governed by agreement between the Federal agency and the State or local government concerned.” 5 U.S.C. § 3373(a). That provision recognizes that, for the limited purposes of an IPA assignment, the manner of supervision may be negotiated between the federal agency and the state/local/tribal government involved. This is not a new concept, and has been addressed in another context in a June 23, 1986 memo from the Bureau of Indian Affairs’ Office of the Regional Solicitor, Pacific Northwest Region, which had found other statutory authority for tribal government direction of a federal employee. *See* memo, attached as Appendix “J”.

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<sup>14</sup> 25 U.S.C. § 458cc(k) reads as follows:

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 subsection (b)(2) of this section and section 458cc(c)(1) of this title 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 subsection (b)(2) of this section.

[italics in original]

Under past NBRC AFA's, federal employees assigned to work with the Tribes under the AFA had received day-to-day direction from CSKT strictly with regard to the activities contracted under the AFA and for which the federal employees had been assigned under the IPA. They remained under the ultimate control of the FWS Refuge Manager. This would continue under the draft AFA, with all of the disciplinary, payroll, performance evaluation, and related personnel functions remaining with FWS. *See* draft AFA at Section 13.B.1 and B.2.

In short, nothing in the draft AFA runs counter to the IPA statute or regulations, nor would the limited tribal day-to-day supervision of IPA employees assigned to work with CSKT constitute an inherently federal function.

2. **Managing Contracted Programs Through a Wildlife Refuge Specialist.** PEER does not provide any reasons for its claim that CSKT's use of a tribally-contracted Wildlife Refuge Specialist position would somehow implicate an inherently federal function. Since PEER describes the Specialist position as being supervised by the Manager of CSKT's Division of Fish, Wildlife, Recreation and Conservation, it appears to insinuate that this tribal supervision is the problem, but it is unclear due to the absence of any sort of explanation.

While any CSKT staff work under the AFA will necessarily involve some level of tribal supervision, it also bears repeating that, for any such work, the Service's Refuge Manager would retain ultimate decision-making authority under Section 7 of the draft AFA. Section 13.B.2 further clarifies that the Refuge Manager shall provide day-to-day direction to the CSKT Wildlife Refuge Specialist. PEER provided nothing to justify or otherwise support its claim that use of a contracted Wildlife Refuge Specialist position under the draft AFA could be deemed an inherently federal function.

3. **Selecting and Supervising Refuge Volunteers.** Section 6.A.5 of the draft AFA makes clear that CSKT would not be contracting, or otherwise responsible for, volunteer coordination activities. Section 13.I.2 provides that CSKT will select and direct volunteers working in the activities contracted by CSKT under the AFA, and FWS will select and direct the work of volunteers working in activities retained by the Service. PEER's comments provide no explanation for how CSKT selection and direction of volunteers working in contracted activities would be any different than CSKT selection/direction of tribal employees working in its contracted activities, or how it could constitute an inherently federal function.
4. **Selecting and Managing Additional Employees.** Section 13.A.3 of the draft AFA would allow for the possibility of CSKT contracting additional positions at the NBRC, with the exceptions of the Refuge Manager, Deputy Refuge Manager and Law Enforcement Officer positions. Tribal selection and management of any

additional staff under the AFA would be conducted in a similar manner as tribal employee selection and management performed at the outset, and through the duration, of the agreement. Section 13.A.3 of the draft AFA section includes a caveat confirming that, under any such additional contracting, the Service would not transfer to CSKT any work that is inherently federal. PEER's comment fails to explain how tribal selection of tribal employees for as-yet-unspecified additional work contracted under the AFA: A) is different from initial tribal hiring of employees at the commencement of the AFA; or B) could be interpreted as an inherently federal function.

5. **Jointly Developing the NBRC Work Plan and Setting Work Priorities.** PEER's comment seems to oppose the general concept of collaborative work by FWS with an Indian tribe (*see* PEER comment at pp. 3-5). It is not clear whether PEER has similar reservations about collaborative work with States. In any case, a decision by federal officials to work cooperatively with another entity does not constitute the contracting out of an inherently federal function within the meaning of the Tribal Self-Governance Act. This is especially true in a case where, as here, the other entity owns land upon which some of the Refuges are located. This sort of cooperation is not only explicitly intended by the Self-Governance Act, but it is encouraged by the NWRSA, as amended, as well as by Executive Order No. 12996 and the Service's own policy manual. *See* 16 U.S.C. § 668dd(a)(4)(E) and 603 FW 2.10(B)(1). If such cooperative or collaborative work were somehow interpreted to infringe upon "inherently" federal functions, then the cooperative agreements with State fish and wildlife agencies authorized under 16 U.S.C. § 668dd(b)(4) would similarly be disallowed, yet PEER appears to have made no such claim with respect to cooperation with States.

With regard to setting of priorities, PEER provides no support for its contention that CSKT would set work priorities under the draft AFA. The draft AFA would actually establish the opposite, with the Service's Refuge Manager retaining full authority for setting work priorities. *See* Sections 7.E.1 and 10.A of the draft AFA.

In addressing claims that the AFA involves inherently federal functions, it would be helpful for the EA to reference the types of contracting that the Service engages in with non-federal parties at other facilities, whether they are Refuges or not. If an activity is "inherently federal" then its performance would be reserved for federal employees regardless of location or agency involved. It may also be useful to address work performed for the National Park Service by the Navajo Nation at Canyon de Chelly National Monument and by the Lakota Sioux at Badlands National Park. While that work is not done under the Tribal Self-Governance framework, any activities performed by tribes at those locations could not be claimed to be "inherently" federal elsewhere.

### NWRSAA Authorization for Types of Programs

Two parties commented that the draft AFA would violate the NWRSAA and the Tribal Self-Governance Act by including programs which the NWRSAA does not authorize to be contracted to tribes (*see* comments of BGA at 2, and PEER at 3). BGA claims that this is so because the NWRSAA only allows FWS to enter into cooperative agreements with “State” fish and wildlife agencies (*see* BGA comment at pp. 1-2). PEER claims that the draft AFA would “transfer administration of the NBRC away from the Secretary and FWS” in violation of the NWRSAA requirement for the Interior Secretary to administer the Refuge System through the FWS (*see* PEER comment at p. 3).

BGA cites a portion of legislative history, as well as unspecified comments by then-Secretary of Interior Bruce Babbitt, for the proposition that Congress had intentionally limited the reach of what would become 16 U.S.C. § 668dd(b)(4) to only State fish and wildlife agencies. BGA subsequently claims that the NWRSAA does not authorize the type of participation sought by CSKT since that Act only authorizes agreements with States.

This misconstrues the plain language of the Tribal Self-Governance Act, which only prohibits contracting of programs if the programs’ underlying statute does not authorize the “type of participation” sought by a tribe. The Self-Governance Act makes clear in the very next line that Indian tribes “need not be identified in the authorizing statute in order for a program [to be contracted].” 25 U.S.C. § 458cc(k); *see also* 25 C.F.R. § 1000.130. The Act further requires the Interior Secretary to interpret “each Federal law and regulation”, which includes the NWRSAA, in a manner that facilitates “the inclusion of programs” into Self-Governance agreements. 25 U.S.C. § 458cc(i)(1). The EA should acknowledge these statutory provisions, as well as legislative history stating congressional intent that “any federal activity carried out by the [Interior] Secretary within the exterior boundaries of [a] reservation shall be presumptively eligible for inclusion in [a] Self-Governance funding agreement.”<sup>15</sup>

BGA’s comment disregards the fact that it is the Tribal Self-Governance Act that authorizes the agreement between FWS and CSKT. Since the NWRSAA authorizes the “type of participation”, via its provision allowing agreements with States for management of refuge programs, the program does not fall within the above-referenced prohibition and is therefore eligible for inclusion in an AFA under the Tribal Self-Governance Act. This interpretation has been communicated directly to BGA in the past by federal officials. In a June 26, 2008 letter, then-Assistant Secretary for Fish, Wildlife and Parks Lyle Laverty stated the following:

Additionally, a number of Congressional findings provide additional guidance in determining what level of management on NWRS lands can be accomplished by entities other than the Service. This includes House Report 105-106, and the proceedings of the

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<sup>15</sup> House Report No. 103-653 (accompanying HR 3508) at p. 10.

Committee on Resources, in reporting on H.R. 1420 (which became the Refuge Improvement Act). The intent of Congress is clear that it did not intend to allow any present or future National Wildlife Refuges to be transferred, and we will not allow the NBRC to be transferred to the control of the CSKT. However, it is also clear that the Secretary of the Interior is authorized to enter into cooperative agreements with State fish and wildlife agencies to manage programs on a refuge, “subject to standards established by, and the overall management oversight” of the Service.

We find the discussions of State involvement in refuge management to be instructive, and believe that it is appropriate to follow the guidance provided by Congress for involving States in refuge management when applying the mandates of Indian tribal self-governance to the NWRs to allow Tribes to manage programs on refuges, subject to Service standards, and with final decision authority retained by the Service. In doing so, we have not exceeded our authority to define “inherently federal functions”, since no inherently federal functions will be included in any AFA with any Tribe. . . . The best way to move forward for the NBRC is to recognize the validity of both self-governance and refuge laws, and work in partnership with the CSKT in legal and appropriate ways through a new AFA.

Laverty letter at pp. 1-2 (attached as Appendix “K”).

PEER includes little support for its generalized claim that the draft AFA constitutes a “transfer of administration” away from the FWS in derogation of the NWRsAA. PEER dismisses the terms of the draft AFA, which repeatedly acknowledge the Refuge Manager’s authority over the Refuge, simply by saying that “the mere repetition of those claims does not make it so.” *See* PEER comment at p. 3. Under its own logic, PEER’s repetition of its claim that the draft AFA results in a loss of FWS control over the NBRC also fails to “make it so”- especially in the absence of any evidence demonstrating that the FWS loses its administrative control over the Refuge when it enters into an AFA with CSKT. The previously-referenced OIG report evinced no indication that FWS had lost any such control under the last AFA. To the contrary, in response to PEER allegations regarding management problems at the NBRC, the OIG report stated that it “did not find any significant information to support this allegation.” Appendix “C” at p. 4.

In support of its assertion that the draft AFA would illegally transfer authority away from FWS, PEER speculates that the existence of the draft AFA’s dispute resolution process, as well as other administrative appeal remedies provided under law, “could” subject the Refuge Manager to “onerous” procedures that, PEER claims, could essentially negate the Refuge Manager’s authority (*see* PEER comment at p. 3). PEER provides no support, legal or factual, for its claim.

The record under the last AFA shows that CSKT never once availed itself of the dispute resolution procedures, nor did it otherwise appeal any decision of the Refuge Manager. Dispute resolution is addressed in some more detail on pp. 30-31 of this document.

#### Freedom of Information Act

While none of the comments directly alleged that the draft AFA would violate the Freedom of Information Act (FOIA), PEER's comment noted that its prior lawsuit against federal officials over the last AFA had included allegations of FOIA violations; the comment then stated that the draft AFA "fails to remedy the statutory violations inherent in the prior AFA" (*see* comments of PEER at p. 3). PEER's comment elsewhere expresses concern that information will be less available through FOIA under the draft AFA. BGA's comment suggests, without support or explanation, that FWS may need to "maintain additional federal employees" at the NBRC for the sole purpose of collecting and filing records that could be requested pursuant to FOIA (*see* BGA comment at p. 9). Federal guidance has made clear that assisting a federal agency with a FOIA response is not an "inherently governmental" activity. *See* 48 C.F.R. § 7.503(d)(10). A more recent Policy Letter issued by the Office of Federal Procurement Policy (and discussed in the next section) confirmed this by including "preparation of responses" to FOIA requests on a list of activities that are not considered to be inherently governmental. *See* OFPP Policy Letter 11-01, Appendix B, §1(f).

CSKT addressed related FOIA comments on p. 14, noting that PEER has not appealed or otherwise disputed responses to its past FOIA requests to FWS under the prior AFA. It may be helpful for the EA to recognize that the FOIA provisions in Section 11.D of the draft AFA repeat almost verbatim the text found in federal statutes and regulations.

#### OFPP Policy Guidance

One commenter stated that FWS should identify "critical functions" at the NBRC, in accordance with guidance recently issued by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). *See* comment of BGA at pp. 11-12. BGA asserted, without explanation, that the number of federal employees was insufficient under the draft AFA to assure that CSKT did not "intrude" upon any unspecified inherently federal functions. *Id.* at 12.

The OFPP published the final text of Policy Letter 11-01 on September 12, 2011. 76 Fed.Reg. 56227, 56236. The stated purpose of that Letter is to

assist agency offices and employees in ensuring that only Federal employees perform work that is inherently governmental or otherwise needs to be reserved to the public sector. The policy is further intended to help agencies manage functions that are closely

associated with inherently governmental functions and critical functions, which are often performed by both Federal employees and contractors.

76 Fed.Reg. at 56236.

The Letter recites the definition of “inherently governmental function” that is found in the Federal Activities Inventory Reform Act (Public Law 105-270, *see* 31 U.S.C.A. § 501 note) but also creates the new term “critical function”, which the letter defines as “a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations.” *Id.* at 56236. The letter encourages agencies to give consideration to such functions when contracting work to non-federal entities.

CSKT believes that the Service has already given such consideration with respect to Self-Governance contracting at the NBRC. One example of this is found in Section 7.B of the draft AFA, which reiterates the Refuge Manager’s ultimate authority over the NBRC and enumerates various actions reserved to the Refuge Manager. Related deliberation also took place during the negotiations for the second AFA, as evidenced by then-Assistant Secretary for Fish, Wildlife and Parks Lyle Laverty’s January 9, 2008 letter to the Blue Goose Alliance, in which he stated the following:

Some of the confusion surrounding any AFA concerns the issue of inherently federal functions. Congress did not define this term in the Tribal Self-Governance Act. We will use a common sense approach in determining what work at NBRC is “inherently federal,” as they [*sic*] enter negotiations with the CSKT. There are certain refuge functions that are “inherently federal,” including making Appropriate Use and Compatibility Determinations; decisions on the contents of CCPs and other refuge management plans; other decisions about what wildlife population and habitat management activities shall be conducted, and other decisions on work priorities necessary to administer/manage refuges. This responsibility does not preclude a collaborative decision [*sic*] environment, but it remains clearly the responsibility of the Refuge Manager.

However, it is incorrect to assert that National Wildlife Refuge System and National Parks are entirely inherently federal responsibilities. It is quite clear that many operational and maintenance functions at refuges do not have to be, and are not now, performed only by federal employees. The Service routinely contracts and cooperates with private and public entities to perform a variety maintenance [*sic*], construction, biological, planning, and other work at refuges. Such functions are eligible and available

through government-to-government negotiations for inclusion in AFAs with qualifying tribes.

Lavery letter at p. 2 (attached as Appendix "L").

While the contracted AFA activities do not include any that are described in Appendix A of the Policy Letter, it may be helpful for the Service to address in the EA, or the accompanying record, how it has handled the Letter's guidance, including the management responsibilities described in Section 5-2 of the Letter.<sup>16</sup>

**I. Weeds and Invasive Plants.** A number of parties addressed the issue of weeds and/or invasive plant species in their comments. The CEQ regulations do not include weeds as a separate significance factor, but the issue is identified elsewhere as an 'extraordinary circumstance' which could bar the use of a categorical exclusion. The Interior Department regulations describe this circumstance as follows:

Contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species (Federal Noxious Weed Control Act and EO 13112).

43 C.F.R. § 46.215(I).

CSKT believes it would be helpful for the EA to address whether, and how, the proposed action would affect the Service's ability to discharge its responsibilities under federal law and Executive Order No. 13112 regarding noxious weeds and non-native invasive species.

One party appeared to assert in his comment that the presence of noxious weeds on the NBRC was due to CSKT's management of tribal lands on the Flathead Indian Reservation (*see* comment of Gravning). No explanation or support was provided with the allegation. Such comments from tribal opponents are not new but, as most Montanans know, the problem of noxious weeds and non-native invasive plants is hardly unique to the NBRC or the Flathead Reservation.

One commenter posited that, under the 2008 AFA, "the Tribes set priorities for management decisions." *See* comment of Palmer at p. 2. The comment goes on to critique weed

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<sup>16</sup> While item #11 of the Policy Letter's Appendix A lists "direction and control of Federal employees" as an inherently governmental function, the limited tribal day-to-day direction of IPA-assigned employees comports with federal law, as described on p. 20 of this document. Section 7 of the draft AFA is clear that the Refuge Manager would retain ultimate direction and control over the NBRC, including its employees.

spraying and concludes that the Tribes “should not be allowed to set priorities or work plans.” (*Id.*).<sup>17</sup>

Mr. Palmer’s allegations regarding weed management provided almost no supporting details and seemed to primarily be the springboard for his comment that the Tribes should not be able to set priorities. The second AFA clearly stated that CSKT’s activities under the AFA were [s]ubject to the final authority of the Refuge Manager”. Section 7.A of FY 2009-11 AFA. It also stated that the Refuge Manager “will retain final responsibility and authority for directing and controlling the operation of the NBRC” and that the Refuge Manager shall retain “sole and final authority” with respect to “[s]etting work priorities through the NBRC Work Plan”. *Id.* at Sections 7.B and 7.B.1. The draft AFA would maintain these provisions and would further recognize the Refuge Manager’s authority for prioritization in Section 10.A (“Operational Standards”). Given these AFA provisions, the allegations involving noxious weeds do not implicate CSKT decision-making authority.

One commenter made references to the Palouse prairie lands within the National Bison Range, at one point citing “reports” from unnamed “locals” who have “raised concerns about deteriorating Palouse Prairie habitats” within the Bison Range (*see* BGA comment at pp. 5, 7). While the commenter does not draw any direct connections between past AFA’s, or the draft AFA, and the NBRC Palouse prairie lands, it may be helpful for the Service to address the fact that neither management objectives nor day-to-day operations for those lands is altered when an AFA is in effect.

The above-referenced comments and allegations do not provide any information demonstrating that the Service’s prioritization and direction regarding weed control are in any way negatively impacted or altered while an AFA is in effect. To the contrary, under the last AFA, the Service had indicated that it was impressed with work done by CSKT regarding invasive weeds, and the previously-referenced OIG report had determined that allegations of deficiencies in pesticide application by tribal staff were baseless.<sup>18</sup> Clarifying this issue in the EA would be helpful.

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<sup>17</sup> As an initial matter, this commenter (“Skip” Palmer) is not an entirely disinterested party. Mr. Palmer had chosen not to be assigned to work for CSKT under the second (FY 2009-11) AFA; he instead chose the option of transfer to another Refuge. More information on Skip Palmer’s history with the NBRC and CSKT is provided on pp. 5 (fn. 7) and 33 (fn. 21) of this document, as well as in the Montana Human Rights Network’s Drumming Up Resentment: The Anti-Indian Movement in Montana, attached as Appendix “G” to this document.

<sup>18</sup> For FWS recognition of CSKT staff’s work with invasive weeds, see footnote 2 on pp. 2-3 of this document. For the OIG determination, see pp. 2-3 of that report (attached to this document as Appendix “C”).

#### IV. Other Issues Raised

##### A. Absence of Comprehensive Conservation Plan and National Policy Regarding AFA's.

Several commenters asserted that, prior to entering into a new AFA, the Service should: complete a Comprehensive Conservation Plan (CCP) for the NBRC; and/or establish a Service-wide policy concerning negotiation and implementation of Self-Governance agreements. The NWRSA, as amended, requires each Refuge to have a CCP in place by October 8, 2012. CSKT understands that there are numerous Refuges across the country that will not meet that deadline, including the NBRC. Nothing in the NWRSA requires that the CCP be in place before an AFA may be implemented. It is worth noting that CSKT's initial 1994 request for an AFA at the NBRC predates the 1997 NWRSA amendments which established the CCP requirement. In any case, addressing this comment in the EA, including the current status of a CPP for the NBRC, would be helpful.

Over recent years, the Service has initiated development of a draft FWS policy on AFA negotiations. The Service has not yet circulated a draft for tribal consultation or comment. Whether or not a Service AFA negotiation policy is adopted, Departmental guidance for AFA's, including non-BIA agreements, already exists in the form of regulations. *See, e.g.*, 25 C.F.R. Part 1000, Subpart "F" ("Non-BIA Annual Self-Governance Compacts and Funding Agreements"). This Departmental regulatory guidance is supplemented and complemented by the Service's existing Native American Policy, which expresses support for agreements under the Indian Self-Determination and Education Assistance Act (which includes the Tribal Self-Governance the Act).<sup>19</sup> Furthermore, FWS has already entered into Self-Governance agreements and is currently implementing one at the Yukon Flats National Wildlife Refuge. Given these facts, delaying an AFA at the NBRC, or anywhere else, pending adoption of an AFA negotiation

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<sup>19</sup> The FWS Native American Policy states the following:

##### *Support for Self-Determination*

The Service favors empowering Native American governments and supporting their missions and objectives in assuming program management roles and responsibilities through contracting and other mechanisms. Therefore, the Service supports the rights of Native Americans to be self-governing, and further supports the authority of Native American governments to manage, co-manage, or cooperatively manage fish and wildlife resources, and to protect their Federally recognized authorities.

##### *Indian Self-Determination and Education Assistance Act (Public Law 93-638, as amended)*

The Service is committed to entering into contracts, cooperative agreements, or grants with Native American governments at their request for the administration of fish and wildlife conservation programs under the terms, conditions, and to the extent provided by the Indian Self-Determination and Education Assistance Act.

policy would be an arbitrary action. As with the above-referenced CCP, CSKT encourages FWS to address the comments regarding an AFA negotiation policy as well.

**B. Evaluations, Program Redesign and Reallocation of Funds.** Two commenters address the topic of evaluations under the draft AFA (*see* comments of BGA at pp. 5-6, and PEER at pp. 4-5). Both appear to take issue with the fact that the draft AFA seeks to ensure that any report or evaluation includes the views of both parties in the event of any disagreement. *See* Draft AFA at Sections 12.A.2, 12.B. Aside from basic notions of fairness and due process, these draft AFA provisions are intended to prevent any recurrence of allegations being prematurely acted upon, as under the unfortunate circumstances of the first AFA. It may be helpful for the EA to reiterate that nothing in the draft AFA prevents the Service from undertaking its own evaluation.

Serving some of the same purposes as an evaluation, the parties had prepared periodic status reports under the second AFA regarding work performed under that agreement. This worked well and would be continued under Section 12.C. of the draft AFA.

BGA alleged that the draft AFA provisions addressing the ability of CSKT to redesign programs, reallocate funds, or request a waiver of regulations, offer “stark contradictions of statements in the document of intent to abide by refuge policies, practices, regulations, and standards.” *See* BGA comment at p. 5 (*see also* PEER comment at p. 6). In reality, those draft AFA provisions simply reflect the law found in 25 U.S.C. §§ 458cc(b)(3) and (i)(2). CSKT did not request to waive any regulations under either of the two past AFA’s. In accordance with federal law and Section 6.B of the draft AFA, program redesign and reallocation of funds for non-BIA programs would require concurrence by the Refuge Manager. Section 14.F of the draft AFA would continue the provision in past NBRC AFA’s that require CSKT to use any AFA funds, or interest from those funds, only for programs covered under the AFA.

**C. Dispute Resolution and Collaboration.** Two commenters were critical of: 1) the dispute resolution procedures contained in Section 20.A of the draft AFA; and 2) the collaborative approach described in the draft AFA. *See* comments of BGA at pp. 8, 10, and PEER at pp. 3, 5.

Dispute Resolution. The dispute resolution procedures represent the parties’ best efforts to create an efficient system for informally resolving any disputes that may arise. The procedures represent a good faith, proactive approach towards prevention of any significant or protracted disputes. Establishment of dispute resolution procedures in agreements is common and is not new to the Service. *E.g.*, Cooperative Agreement Between the U.S. Fish and Wildlife Service and the Nisqually Indian Tribe, signed on February 23, 2005, at § 18.

Both BGA and PEER employ hyperbole when they assert that the very existence of these procedures would somehow negatively impact the Refuge Manager’s decision-making. BGA

characterizes the procedures as creating a “sword of Damocles” over the Refuge Manager’s head (*see* BGA comment at p. 10). PEER calls the dispute resolution procedures “a bureaucratic nightmare designed to daunt even the most adamant Refuge Manager from making any decision (*see* PEER comment at p. 5). Neither commenter provides any support for such apocalyptic predictions.

The record under the past AFA, which included essentially the same framework, contradicts these alarmist claims. Under that AFA, CSKT never invoked the dispute resolution procedures. Far from dissuading the Refuge Manager from making any decision, the procedures provide him with the knowledge that, even if CSKT were to disagree with a decision, a defined process exists by which any disagreement would be resolved in a timely manner. The dispute resolution procedures in the draft AFA involve only FWS officials, unlike the last AFA which, although never utilized, included other senior Departmental officials at the final level of appeal.

Collaboration. BGA and PEER’s criticisms of the collaboration described in the draft AFA offer some transparency regarding those organizations’ general opposition towards Self-Governance agreements with Indian tribes (*see* comments of BGA at pp. 8, 12, and PEER at pp. 3-4). BGA claims, without support, that CSKT’s involvement under the draft AFA would be so extensive as to “effectively preempt [*sic*] Federal officials’ decision-making processes.” (BGA at p. 12). Consistent with its focus on federal employees, BGA states in the very next line that “[t]he number of federal employees available to oversee the project is insufficient”. PEER expresses its worry that the draft AFA would encourage the Refuge Manager to exercise authorities in collaborative fashion (PEER at p. 3).

Both BGA and PEER gloss over the fact that the draft AFA states, as did the previous AFA, that the Refuge Manager has final decision-making authority and that, if collaborative efforts fail, the Refuge Manager’s decision shall prevail. *See* Sections 7.A, 7.D.5. The draft AFA, while explicitly preserving the Refuge Manager’s authority, encourages the same kind of collaboration espoused in both the NWRSA and Executive Orders. *See* 16 U.S.C. § 668dd(a)(4)(C), (E), (M), and Executive Order No. 12996. This is consistent with the numerous other activities for which the Service and CSKT have collaborated over past decades.<sup>20</sup> It would be useful for the EA to address how the Service retains its decision-making responsibilities while collaborating under past, and proposed, AFA’s with CSKT.

**D. Budget-Related Issues.** A couple of commenters raised various issues relating to the budget (*see* general comments of BGA and PEER). CSKT lists and addresses them in turn:

Lack of Information Regarding Costs. BGA and PEER both take issue with the fact that the draft AFA released by the Service did not include Attachment “B”, which would identify the funds to be transferred to CSKT. That information is not yet available, as it would depend on

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<sup>20</sup> See footnote 13 of this document for a sampling of FWS-CSKT collaborative work.

several factors, including when during the fiscal year the AFA would become effective. Elsewhere in this document, CSKT has encouraged the Service to include with the draft EA copies of the last two AFA's, both of which utilized similar Attachments to identify funding to be transferred to CSKT. With this information, the public would be able to see the general type of budgetary detail that would accompany the draft AFA. Both BGA and PEER already have copies of the past two AFA's, including the Attachment "B" funding and budgetary information.

Retrocession or Reassumption. BGA asserted that NEPA review should address the ability of the Service to obtain the return of funding under any retrocession or reassumption of duties under the AFA (*see* BGA comment at p. 10). The Interior Department has already addressed this issue in federal regulations. 25 C.F.R. Part 1000, Subparts "M" ("Reassumption") and "N" ("Retrocession"). The draft AFA addresses these matters in Section 18. CSKT believes it could be helpful for the Service to address this fact in the EA.

Carry-over. BGA asserts that the funding "carry-over" provisions in the draft AFA "holds great potential for CSKT to assume inherent federal responsibilities" [*sic*] (BGA comment at p. 10). BGA does not fully explain exactly how such a result could occur, nor does it address the fact that carry-over of funding is allowed by law under the Indian Self-Determination and Education Assistance Act. 25 U.S.C. §§ 458cc(1) and 450j-1(a)(4)(B); *see also* 25 C.F.R. § 1000.402. Given the existing statutory authority, BGA has not met its burden in supporting its claim that the existence of carry-over constitutes a problem, much less implicates inherently federal functions within the meaning of the Tribal Self-Governance Act.

**E. Compatibility.** One commenter claimed past "undisputed violations" of the NWRSA by CSKT, consisting of alleged incompatible grazing activities at the Ninepipe Refuge and overhead power line installation at the Pablo Refuge (*see* comment of David S. Wiseman at p. 3). The commenter is incorrect on both counts: the allegations were disputed, and they were not violations of the NWSRAA. CSKT addressed this issue in detail in a May 3, 2004 letter to then-Regional Director Ralph Morgenweck.

Among other things, that letter clarified that the overhead power lines at the Pablo dam had been installed as part of the Bureau of Indian Affairs' irrigation project for which the dam had been built, and for which the United States holds the primary easement over the Pablo reservoir property (*see* p. 6 of the May 3<sup>rd</sup> letter). In any case, CSKT had agreed to have the overhead power lines buried, and it did so after the letter was sent.

A copy of the May 3, 2004 letter is attached to this document as Appendix "M".

## F. Social/Cultural Impacts; Impacts on Federal Employees.

### Social & Cultural Impacts

One commenter claimed, without any detail or supportive explanation, that the draft AFA would “further divide the community socially and culturally” (*see* comment of David S. Wiseman at p. 4). His real concern is somewhat illuminated by a later comment on the same page where he asserted that implementation of the draft AFA would “degrade non-tribal members [*sic*] sense of community by giving the CSKT government another influence over their lives after such areas as water rights, electric utilities, and hunting and fishing privileges.” He does not explain how additional tribal government “influence” would result in a degradation of non-tribal members’ “sense of community”.

CSKT does not believe the claim has any merit. With respect to the fears of community members, the last AFA was the subject of little, if any, visible local public opposition during its term prior to the September 2010 court decision rescinding it. Nor did the negotiations for the draft AFA, which were the subject of local media coverage, result in any significant or visible public opposition. To the extent that some members of the Reservation community have generally opposed tribal “influence”, the Montana Human Rights Network compiled an informative report in 2000 that describes some of that opposition. *See Drumming Up Resentment: The Anti-Indian Movement in Montana*, attached as Appendix “G” to this document. Although it is now dated, the report includes a section specific to the National Bison Range and local opponents of CSKT’s participation at the Range. Appendix “G” at pp. 35-37. The description of the activities and vocal opposition to a CSKT presence at the NBRC in the 1990’s contrasts greatly with the near absence of such hostility/opposition over recent years, including the entire term of the last AFA and up until the present.

Of course, there remain some individuals and organizations that still harbor general resentment towards CSKT, or Indian tribes generally. For example, one commenter, who had previously been a board member for what was deemed an anti-Indian group, maintained that “any” AFA – regardless of its form or content - would “split” the NBRC away from the rest of the Refuge System (*see* comment of Palmer at p. 1).<sup>21</sup> Another commenter maintained, without

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<sup>21</sup> The Montana Human Rights Network documented Skip Palmer as a 1990’s board member of a group called “All Citizens Equal” (ACE), which the Network described as an anti-Indian organization. *See* Appendix “G” at pp. 34, 38, and 43. Mr. Palmer worked as an FWS employee at the NBRC during this period. During the first AFA, Mr. Palmer had been assigned to work with CSKT under an IPA agreement. Mr. Palmer did not work at the NBRC by the time the second AFA was implemented, having chosen to be transferred to a different Refuge.

In his scoping comment, Mr. Palmer alleges that he “was told that I would not be returning to the NBR under any circumstances, because the Tribe would not negotiate with the FWS in good faith if I were there.” (Palmer comment at p. 2). Mr. Palmer does not say who made the alleged statement.

Far from expressing any refusal to negotiate with FWS while Mr. Palmer was employed at the NBRC, CSKT and FWS negotiated and signed the FY 2009-11 AFA during Mr. Palmer’s tenure as an NBRC employee. CSKT then negotiated with federal officials over the terms of IPA agreements for FWS employees affected by the AFA, including Mr. Palmer. After IPA agreement terms had been negotiated, CSKT understood that Mr. Palmer at

explanation, that “[n]ot only is the tribe not capable of managing the land and wildlife, they have also shown themselves incapable of dealing with the personnel, finances, and public.” *See* comment of Gravning. Such comments were countered by others who spoke out in favor of the draft AFA. *See* comments of National Wildlife Federation, Whisper Means, and Kathleen Huntley. The National Wildlife Federation, for example, stated its belief that an FWS-CSKT partnership under the draft AFA “will produce numerous long-term benefits to the Tribes, the Service and all Americans” (*see* NWF comment at p. 2). The Federation described CSKT’s qualifications as follows:

The CSKT is unparalleled in their methods, efforts, conservation ethic and follow through to achieve sustainable conservation outcomes. Known throughout the country for their scientific and cultural knowledge, their partnerships with other governments and long history of conserving, managing and restoring wildlife habitat, the CSKT Division of Fish, Wildlife, Conservation and Recreation are more than qualified to partner with the Service to manage NBR’s resources.

NWF comment at p. 1.

CSKT understands that FWS will address these issues in the EA.

#### Impacts on Federal Employees

A number of commenters addressed alleged impacts on federal employees. The comments largely disregard: 1) the federal purpose of, and objectives behind, Tribal Self-Governance; 2) the fundamental role that tribal contracting plays within the Self-Governance framework; and 3) CSKT and FWS efforts to provide employment options to federal workers, despite there being no requirement to do so. CSKT believes that, from a NEPA perspective, these comments greatly overstate any potential impacts on federal workers.

Some of the commenters asserted impacts on FWS staff based upon the allegations raised under the first AFA, which included claims of CSKT staff harassing FWS staff at the Bison Range. Putting aside the fact that CSKT employees had been quite surprised that they were being accused of harassment, rather than the other way around, CSKT addressed the issue of those allegations under the first AFA in Section I of this document.

CSKT believes that an objective evaluation of impacts on federal employees will not demonstrate any significant impacts for the purposes of NEPA, and CSKT believes the EA should address this point. Ever since the first AFA was negotiated, CSKT and FWS have jointly endeavored to provide as many employment options as possible to impacted federal staff. These options, which would continue to be offered in Section 13.F.3 of the draft AFA, include several

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that time had exercised his option under the AFA to be relocated to another Refuge. The Service may want to address Mr. Palmer’s allegation for the record.

choices allowing the employee to maintain either federal employment or federal benefits. The commenters' concerns are further undermined by the fact that, under the second AFA, CSKT recruited a former FWS NBRC maintenance worker, who had relocated to another Refuge, to return to the NBRC as a federal worker and perform AFA work under an IPA assignment. The FWS employee accepted and is still employed at the NBRC.

BGA's comment included an erroneous assertion regarding federal staffing levels at the NBRC. It asserts that "[p]rior to installing the first AFA at the Complex (*circa* 2000), the refuge staff was much larger (up to 21 federal employees and a number of active volunteers)." (*See* BGA comment at p. 4). BGA incorrectly describes the first AFA as having been implemented around the year 2000 when it actually went into effect in March 2005. This is significant because, according to what is apparently an FWS document, the federal staffing levels BGA describes actually fluctuated up and down well before the first AFA. The document shows that the staffing level at the NBRC was increased from 14 FTE to 27 FTE between 2001 and 2002, and was then reduced from 27 FTE to 15 FTE in between 2002 and 2003 – well before the first AFA was signed and implemented (*see* Appendix "N" for copy of apparent FWS document showing actual or planned NBRC staffing levels between 2001 and 2008). BGA's efforts to tie reduced staffing levels to AFA implementation do not find support in the record.

## V. Conclusion

CSKT appreciates the Service's decision to invite public comments as part of the scoping process. While several commenters identified a number of issues or allegations which they believe support preparation of an EIS rather than an EA, the comments do not provide any information supporting such contention. CSKT believes that the Service's decision to prepare an EA is appropriate and, as discussed in this document and its recommendations, CSKT believes that the Service can appropriately respond to the issues raised in the comments.

Immediately following this memo are: 1) a summary of the core CSKT recommendations discussed in this document; and 2) the Appendices referenced in this document.





King, Jeff &lt;jeff\_king@fws.gov&gt;

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## AFA national policy

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**King, Jeff** <jeff\_king@fws.gov>

Wed, Jan 15, 2014 at 4:23 PM

To: Will Meeks &lt;Will\_Meeks@fws.gov&gt;

Will,

You mentioned on the all employee call today that the chiefs meeting was held last week. Did Mitch Ellis from R7 bring up AFA policy during the meeting? I heard that it was going to be discussed and I wanted to get your take on how that went.

Thanks,

jk

***Jeff King, Project Leader***

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58355 Bison Range Road  
Moiese, MT 59824  
(406) 644-2211, ext. 204



King, Laura <laura\_king@fws.gov>

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**FW: Fw: Draft tribal AFA policy being loaded into DTS for directorate review - PRIVELEGED & CONFIDENTIAL**

1 message

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**Jeff King** <jeff\_king@fws.gov>  
To: Laura King <Laura\_King@fws.gov>

Tue, Jul 15, 2014 at 8:48 AM

Thanks,

jk

***Jeff King, Project Leader***

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(406) 644-2211 ext. 204

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**From:** Paul Steblein <Paul\_Steblein@fws.gov>  
**Sent:** Monday, August 08, 2011 3:36 PM  
**To:** Dean\_Rundle@fws.gov  
**Subject:** Re: Fw: Draft tribal AFA policy being loaded into DTS for directorate review - PRIVELEGED & CONFIDENTIAL

Hi Dean,

I drafted the response, although a number of others gave comment. I will check tomorrow on DTS to see if signed copy was loaded. If not, will chase it down.

We'll catch up tomorrow.

Paul

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Paul Steblein

Critical Issues & Policy

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To Paul Steblein/NWRS/R9/FWS/DOI@FWS

cc Bud Oliveira/R6/FWS/DOI@FWS,  
[deborah\\_rocque@fws.gov](mailto:deborah_rocque@fws.gov), Jeff King/R6/FWS/DOI@FWS,  
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Dean Rundle/R6/FWS/DOI08/08/2011 05:21 PM

Subject Re: Fw: Draft tribal AFA policy being loaded into DTS for directorate review - PRIVELEGED & CONFIDENTIAL

Thanks Paul - I'll try to give you a call tomorrow to discuss. Rick was out today, so I didn't have a chance to discuss with him. I have a call in to Jeff as well.

I had another question for you though. Some time back, CSKT sent a letter to the Acting Director, asking if the Service was going to consult with tribes in promulgation of the new AFA policy. This correspondence was initially routed to R6 for a draft response, but was kicked back to HQ as a Washington Office issue. I never saw any response. Thought maybe it landed on your desk. Do you know if the Service has responded or not? Do you intend to consult with tribes in the promulgation of this new policy?

I'll try to find and forward you the messages on that letter from CSKT - in case it didn't land on your desk.

Dean

To Dean Rundle/R6/FWS/DOI@FWS

cc Bud Oliveira/R6/FWS/DOI@FWS, Jeff King/R6/FWS/DOI@FWS, Rick Coleman/R6/FWS/DOI@FWS, [deborah\\_rocque@fws.gov](mailto:deborah_rocque@fws.gov), [jeff\\_rupert@fws.gov](mailto:jeff_rupert@fws.gov)

Paul Steblein/NWRS/R9/FWS/DOI08/08/2011 02:02 PM











copies for the paper package.

Thank you,

Paul

[attachment "AFA Final Draft Policy.final draft.4Aug11.docx" deleted by Dean Rundle/R6/FWS/DOI] [attachment "Directors Memo.Tribal AFA draft Policy Review.4Aug11.doc" deleted by Dean Rundle/R6/FWS/DOI] [attachment "Note to Reviewers.Tribal AFA Draft Policy.4Aug2011.docx" deleted by Dean Rundle/R6/FWS/DOI]

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King, Laura <laura\_king@fws.gov>

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## powerpoint presentation

1 message

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**King, Laura** <laura\_king@fws.gov>

Mon, Oct 28, 2013 at 4:03 PM

To: Will Meeks <will\_meeks@fws.gov>, Jeff King <jeff\_king@fws.gov>

Hi Will,

Attached is the powerpoint presentation for the alternatives. I included some additional slides at the end just for reference--as needed during your discussion with Noreen or CSKT. I will be here tomorrow if you want to visit or need me to make any changes.

Laura

### ***Laura King, Refuge Program Specialist***

U.S. Fish and Wildlife Service, Division of Refuge Planning

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Moiese, MT 59824

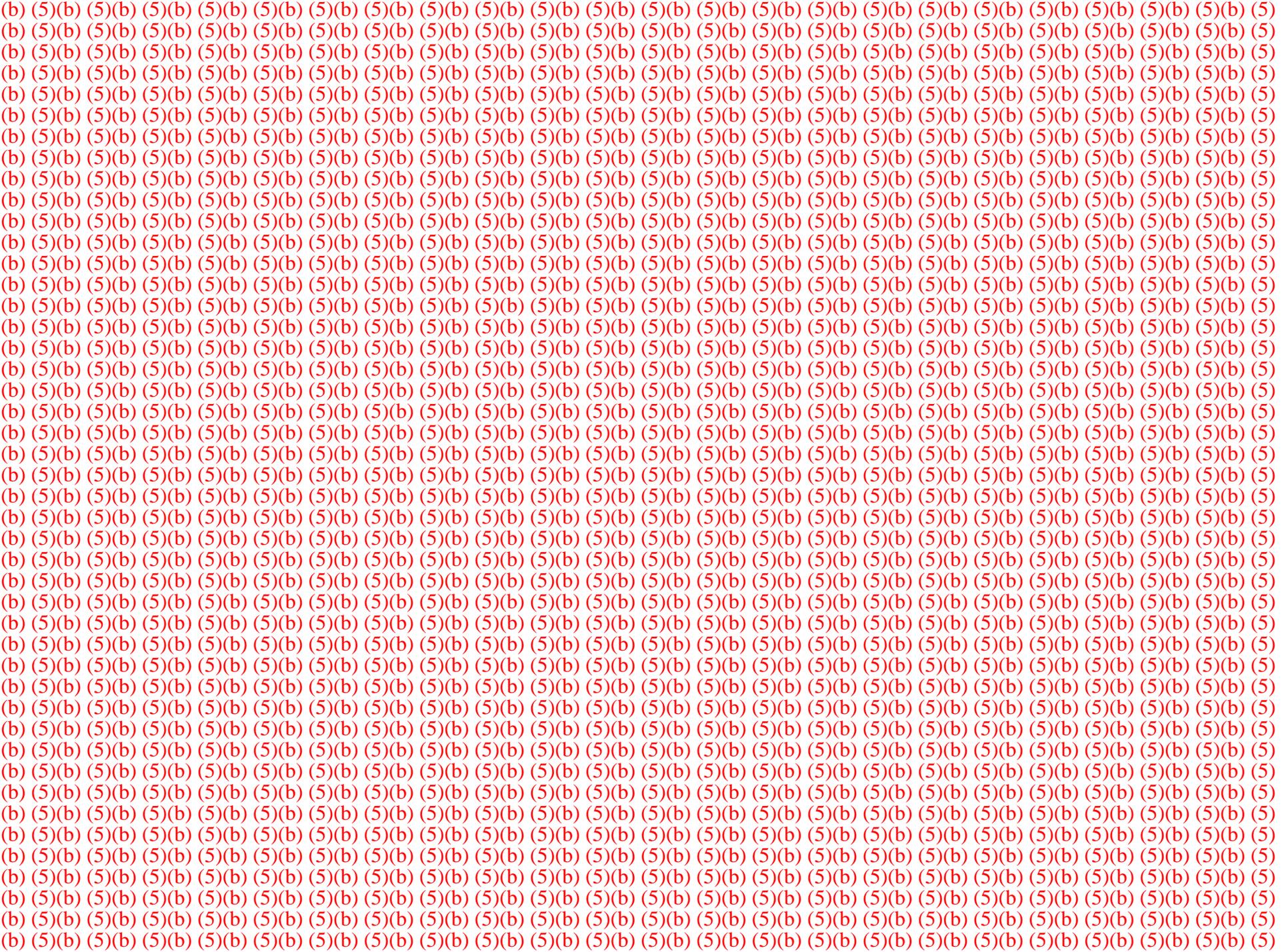
phone, 406-644-2211, ext. 210

fax, 406-644-2863



**to Will for briefing with Noreen and CSKT Current Draft Alternatives.pptx**

7154K















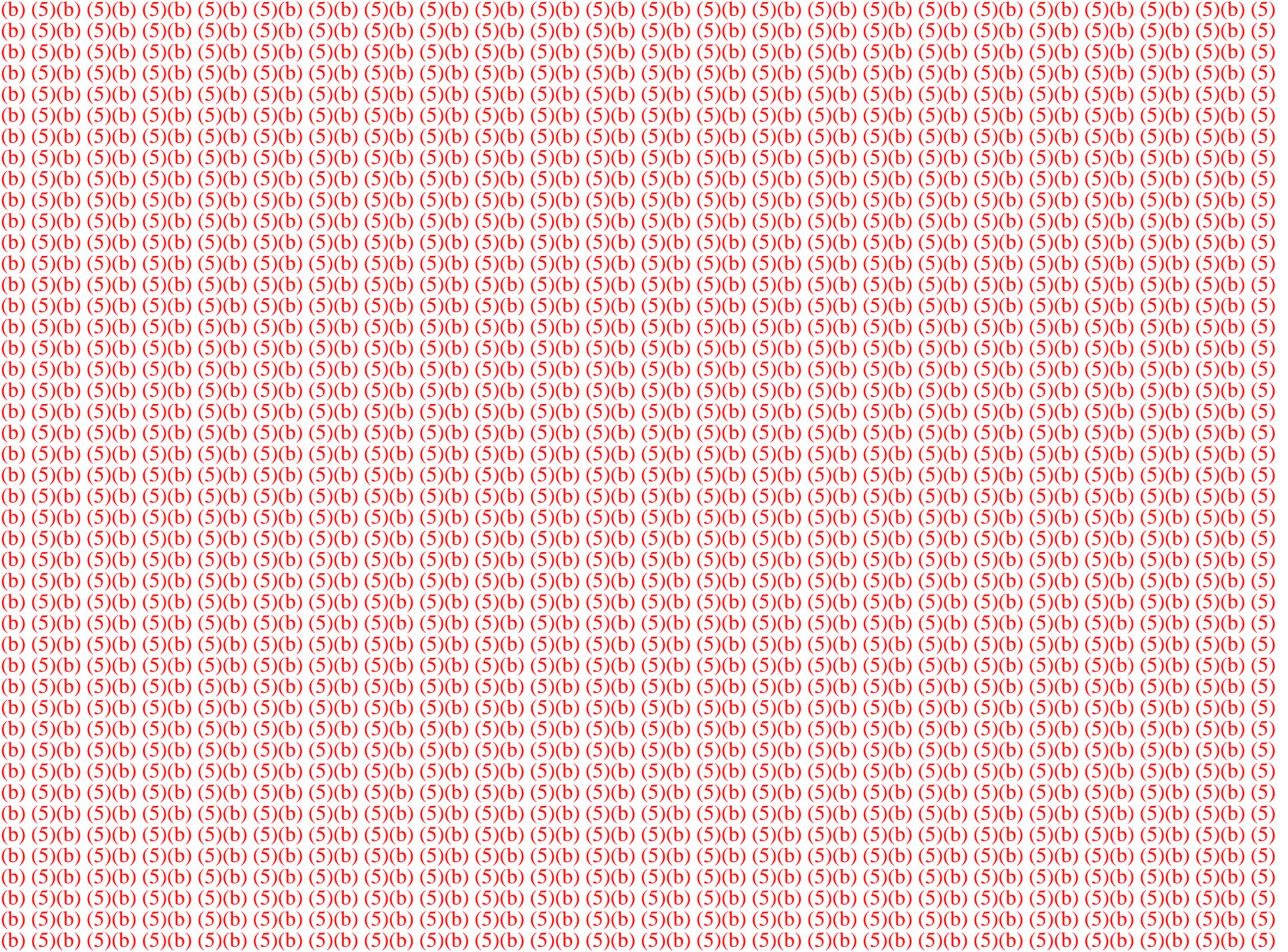


















letter letting explaining our plans and ask that we continue to coordinate with the service. After talking to our team, it is our preference, and hopefully yours, that we get together in person and share our strategy with you and your team before submitting a formal letter. Would you all be available the week of the 15th, preferably the 18th or 19th?

In the meantime, we continue to work on the BCS and the Eagle Management Plan and look forward to sharing that with you.

Kind regards,  
Christine Watson Mikell  
801-455-1045

***We have a new mailing address:***

4525 S Wasatch Blvd  
Suite 120  
Salt Lake City, UT 84124  
[www.wasatchwind.com](http://www.wasatchwind.com)



*clean energy. clean air. clean earth.*

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--  
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--  
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Division Chief - Water, Energy and Climate

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take of birds unless directed otherwise. I suggested a follow-up conference call with you and including the Division of Migratory Birds. I advised Wasatch that it would be best to provide a letter identifying what actions they are requesting of the USFWS.

I have left a phone message describing this with Steve Oberholtzer. He is out of the office until next week.

---

Patricia (Trish) Sweanor  
Fish and Wildlife Biologist  
Wyoming Energy Program Coordinator  
U.S. Fish and Wildlife Service  
5353 Yellowstone Rd, Suite 308A  
Cheyenne, Wyoming 82009  
(307) 772-2374 x 239  
cell (307) 256-2987

On Wed, Apr 3, 2013 at 4:28 PM, Christine Mikell <[christine@wasatchwind.com](mailto:christine@wasatchwind.com)> wrote:  
Hi Trish,

Thank you for your time last week while we shared with you our plans for the Pioneer Wind Project. You had suggested that the next step would be for us to get on the phone with you and your colleagues or send you a letter letting explaining our plans and ask that we continue to coordinate with the service. After talking to our team, it is our preference, and hopefully yours, that we get together in person and share our strategy with you and your team before submitting a formal letter. Would you all be available the week of the 15th, preferably the 18th or 19th?

In the meantime, we continue to work on the BBCS and the Eagle Management Plan and look forward to sharing that with you.

Kind regards,  
Christine Watson Mikell  
801-455-1045

***We have a new mailing address:***

4525 S Wasatch Blvd  
Suite 120  
Salt Lake City, UT 84124  
[www.wasatchwind.com](http://www.wasatchwind.com)

Wasatch Wind for signature

*clean energy. clean air. clean earth.*

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receive for the addressee) you may not use, copy, print or disclose to anyone this message or any information contained in the message and any attachments. If you have received this communication in error, please advise the sender by reply and delete this message.

--

Dave Carlson  
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US Fish and Wildlife Service, Region 6  
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--

Pamela Repp  
U.S. Fish and Wildlife Service  
Mountain-Prairie Region  
Division Chief - Water, Energy and Climate  
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--

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--

Tyson Powell  
Office of the Regional Solicitor  
Rocky Mountain Region  
U.S. Department of Interior  
755 Parfet Street, Suite 151  
Lakewood, CO 80215  
303-231-5353, ext. 222

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[diana\\_whittington@fws.gov](mailto:diana_whittington@fws.gov)

"The survival of man, in a world in which decency and dignity are possible, is the basic reason for bringing man's impact on his environment under informed and responsible control." Senator Henry Jackson, 1969

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Hi Donald,

I've finished updating the draft policy on tribal annual funding agreements, briefed Deb, and this needs to be loaded into DTS as soon as possible (today if at all possible). Greg Siekaniec is waiting for these. Let me know if you have any questions on routing (in general, follow what was done for mosquito policy). I'm dropping off paper copies for the paper package.

Thank you,  
Paul

[attachment "AFA Final Draft Policy.final draft.4Aug11.docx" deleted by Dean Rundle/R6/FWS/DOI]  
[attachment "Directors Memo.Tribal AFA draft Policy Review.4Aug11.doc" deleted by Dean Rundle/R6/FWS/DOI] [attachment "Note to Reviewers.Tribal AFA Draft Policy.4Aug2011.docx" deleted by Dean Rundle/R6/FWS/DOI]

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Paul Steblein  
Critical Issues & Policy  
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4401 N. Fairfax Drive, Room 653B  
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P: 703-358-2678  
C: 571-232-6043  
F: 703-358-1929  
E: Paul\_Steblein@fws.gov  
[www.fws.gov/refuges/](http://www.fws.gov/refuges/)

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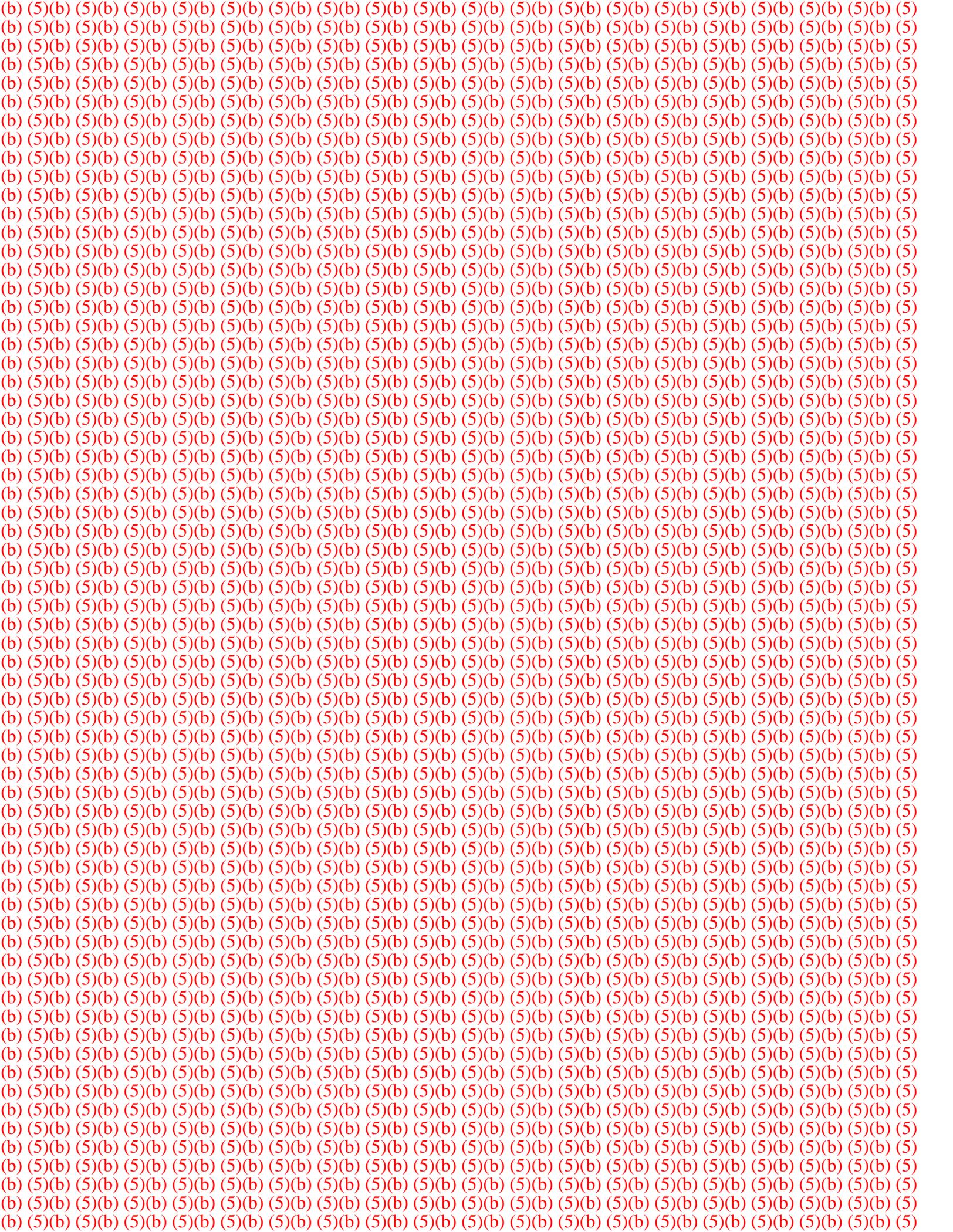








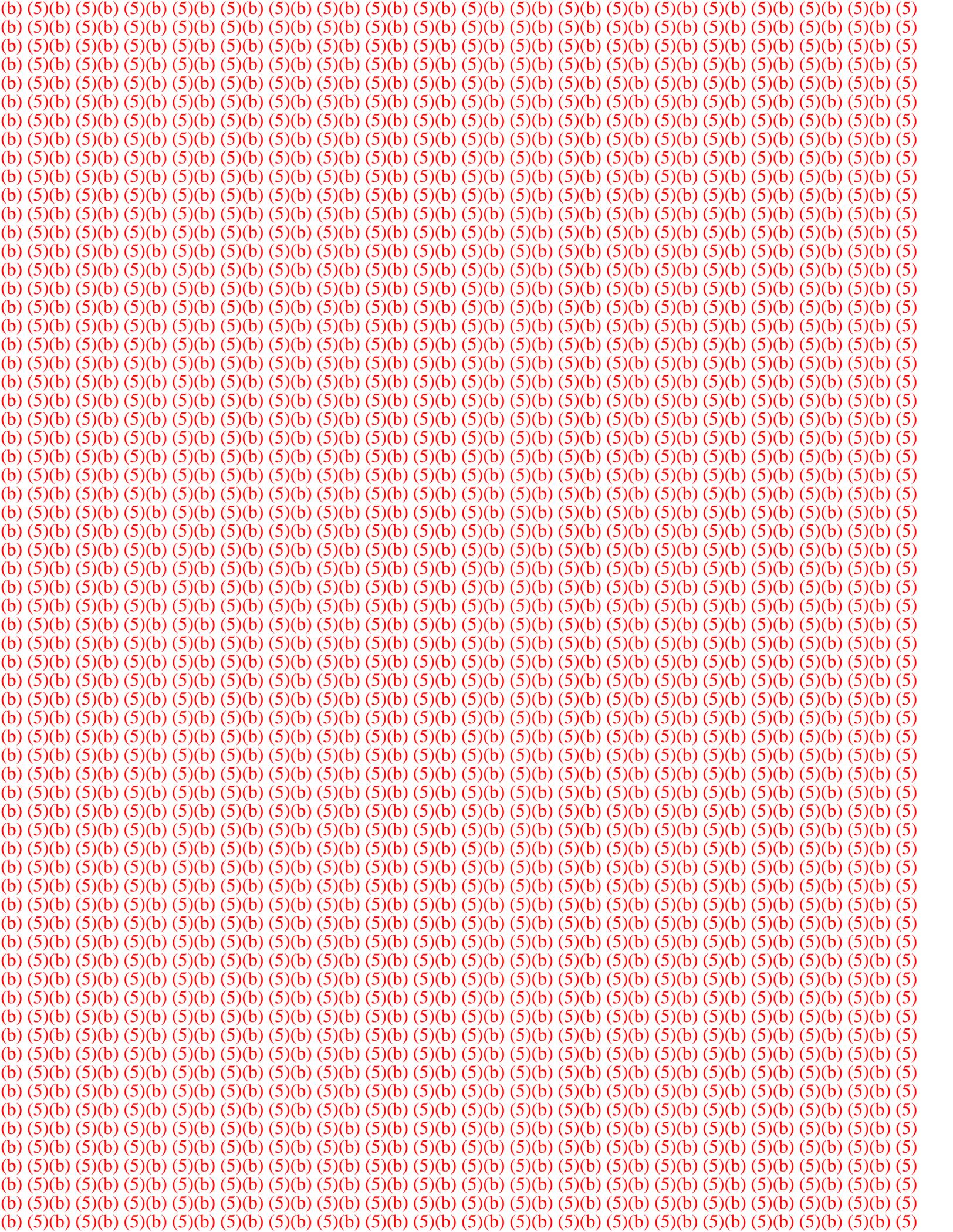




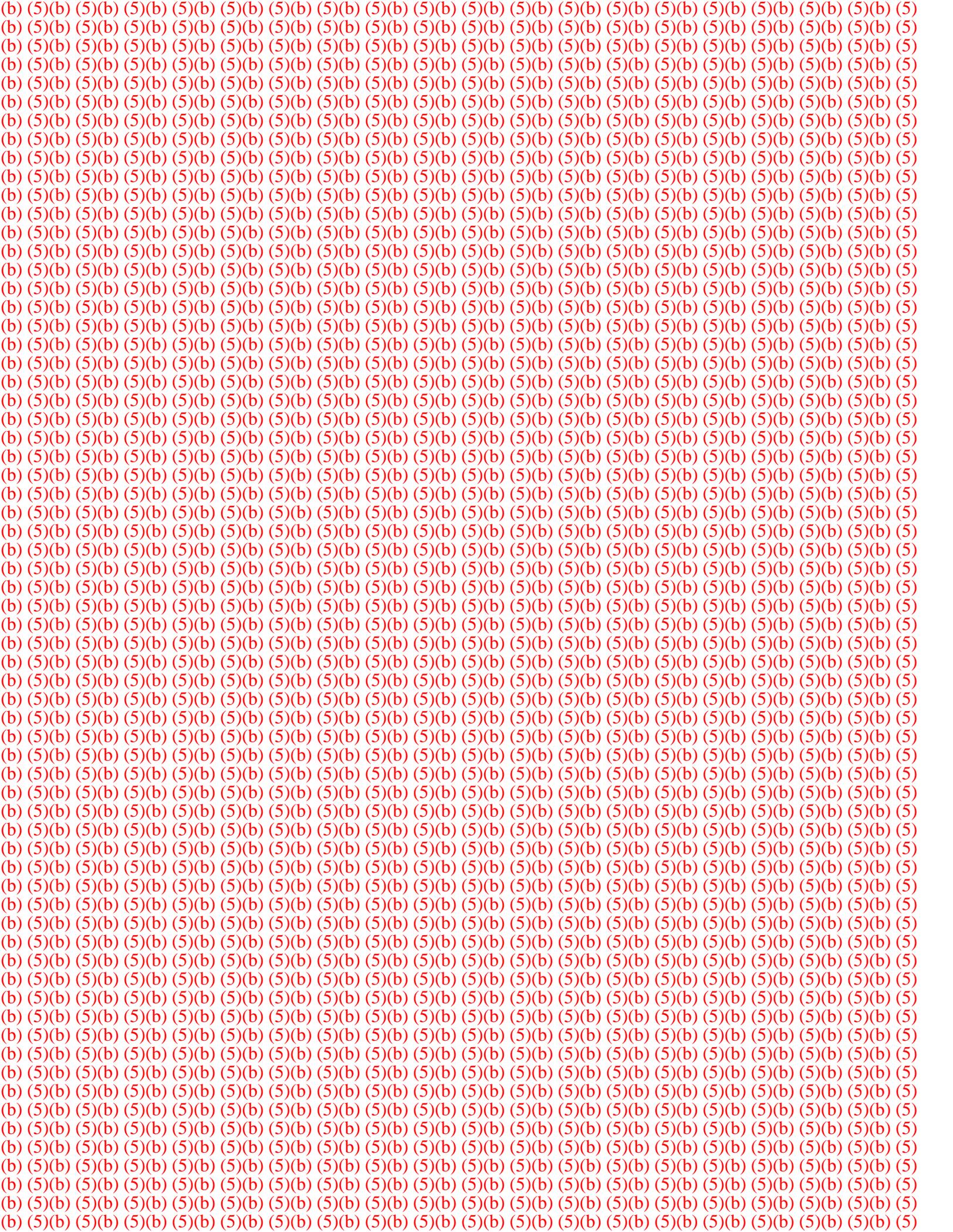












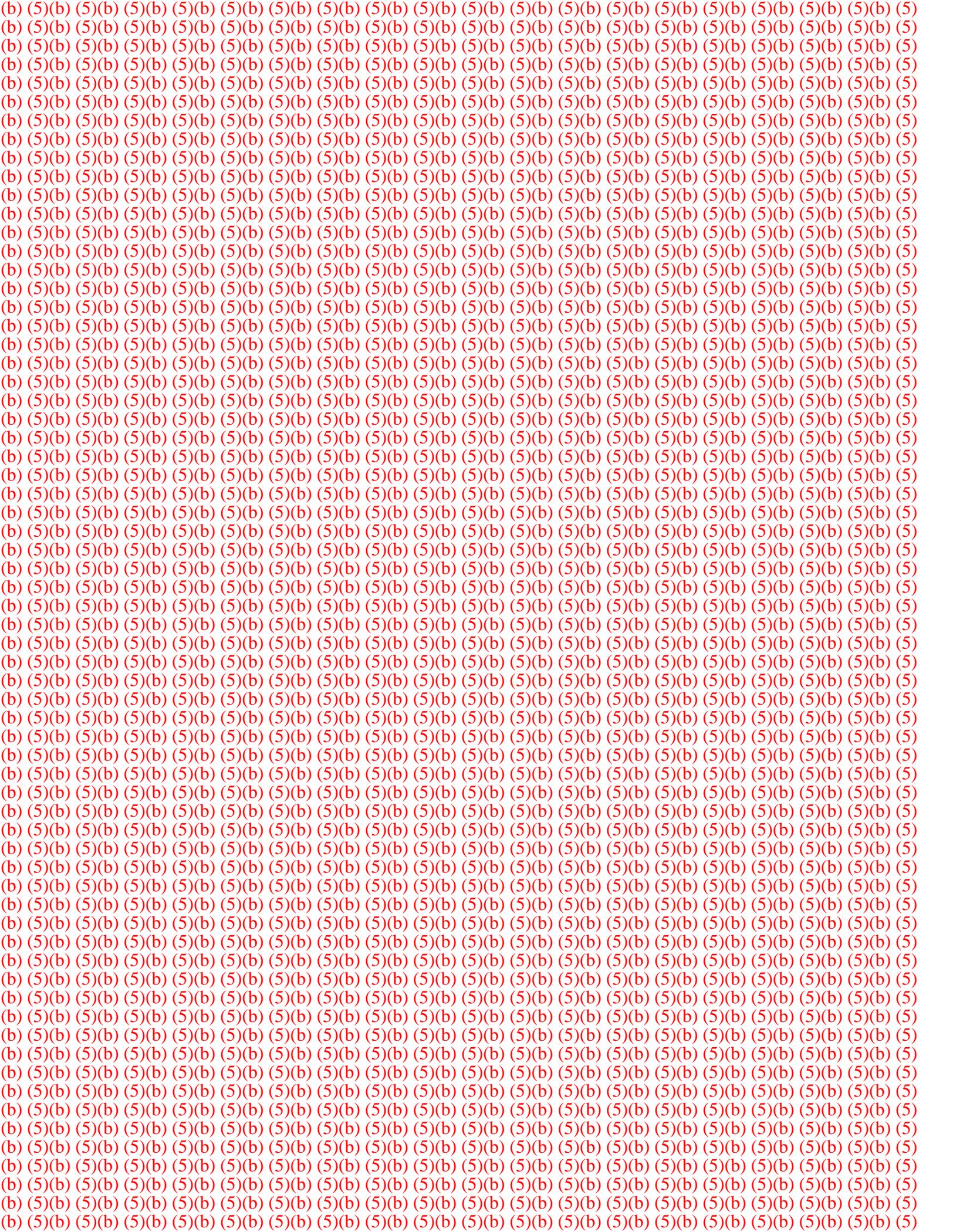


































Dear Dr. Morgenweck:

10/08/04

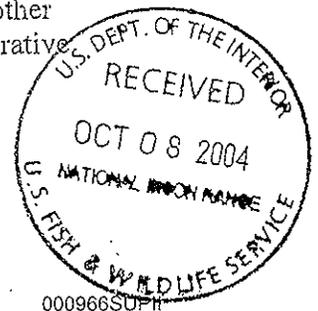
We, the employees of the National Bison Range Complex (NBRC), ask you not to sign the draft Annual Funding Agreement (AFA). It is in direct conflict with accomplishing the Mission of FWS with respect to managing the National Wildlife Refuge System (NWRS). There are several provisions of the draft agreement that are clearly destructive to the agency's authority to control the NWRS decision-making process. Congress did not intend to diminish FWS's ability to manage public land when they passed the Indian Self Determination and Education Assistance Act (ISDEAA) and its amendments. We want to support you as you make a very tough decision and we realize this is a politically motivated agreement that is harmful to the NWRS. Neither you nor FWS Director Williams should feel compelled to sign such an agreement.

This agreement will cost American taxpayers more than the current funding levels of refuge management. The AFA adds another layer of bureaucracy with associated increased expenses and provides less staff to perform on-the-ground activities. It is an inefficient way of conducting government business, yet AFA does not reveal this inefficiency to the public. Signing the AFA as it stands will do our public land heritage a great disservice.

Americans believe the NWRS is a resounding success story of our country's culture and our history. After 100 years it makes a loud statement about who we are and how we compare with other countries and cultures, pre-historic and present day, with respect to wildlife protection. Remember, until 1908 Americans had never spent tax dollars to buy land exclusively for wildlife protection. The Bison Range was the very first time in our nation's history that Congress did so. It is with this set of values and with great concern for the precedence of this draft that we ask several issues be resolved.

The waiver clause (Section 8 C) undermines FWS ability to pursue its mission. Why would you, the Regional Director of the FWS, choose to sign a document that allows the Confederated Salish and Kootenai Tribes (CSKT) to circumvent FWS law, policy and regulations? All federal code quoted in Section 8 C is Indian law. Such language does not protect the NWRS. Please add NWRS check and balance language to this section.

Section 12 G of the AFA would allow the CSKT to approach congress and lobby around the budget process of the American government. This is a precedent setting provision, and it directly illuminates the special treatment that a "closed-door" negotiation has born. Why not use standard "no lobby" language as used by other DOI agencies and FWS when making agreements with other governments? Language used in standard DOI agreements would limit the Confederated Salish and Kootenai Tribes (CSKT) from draining NWRS budget away from other refuges to bolster CSKT budgets at the National Bison Range. Here is sample language: "The CSKT will not seek appropriations from Congress to support any ongoing or proposed (CSKT) activity or project relating to the subject matter of this Agreement or sub agreements thereto, including without limitation federal appropriations for x activities, etc.....". Region 6 Contracting office requires other governments to sign a standard document "Certifications for Grants and Cooperative



000966SUPR

Agreements" (attached). Why is CSKT being privileged with respect to such important agreement language?

Section 14 A would have the American people pay the tort claims that may result from injury or property loss related to those who volunteer for CSKT. Is this really provided for in U.S. law? Please have your solicitor cite the CFR in the agreement. Volunteers are unsure of whether they will be covered or not. This matter must be resolved. What happens if the 30 volunteers with thousands of hours of experience in working the bison through roundup leave because they are not comfortable with uncertain tort claims coverage? CSKT should have to purchase an insurance policy like other contractors or cover tort claims like other governments. This is especially bad policy when the U.S. and FWS will have no control over the selection, supervision or skill and safety training of CSKT employees or volunteers.

Section 11 C will allow CSKT to determine how much training, skill and experience is sufficient to safely perform each activity. Nowhere in the agreement is our health or safety protected by agreement language that holds them accountable if safety performance is poor. The AFA needs language that allows the Manager to control the safety performance for all AFA and FWS employees. Please keep in mind that we are the people whom you are asking to implement this agreement, and we are concerned for our safety under this AFA. CSKT should be responsible for the ultimate consequences for any safety related non-compliance with the agreement. The agreement language should allow reassumption if CSKT action or inaction endangers FWS or AFA employees and volunteers.

Section 8 E. 1 indicates FWS will determine when it must comply with the National Environmental Policy Act of 1969 (NEPA). Why have you not required an Environmental Assessment (EA) or even an Environmental Impact Statement (EIS) on such a large Federal action when an EA is triggered for FWS employees proposing small actions? Why is FWS ignoring the potential for significant impacts, not only on the resources protected at the National Bison Range, but at other refuges in the entire NWRS? This AFA removes FWS employees capable of working on the entire refuge complex, replacing them with CSKT workers, who will only work on the AFA related properties. This action results in significant work left undone at refuges and WPAs outside of this AFA. This will negatively impact other refuge lands but no EA or EIS has analyzed the impact. For example, Lost Trail NWR and other satellite refuges of NBRC are already under-staffed, particularly in the field of maintenance. The AFA effectively eliminates NBR assistance with numerous maintenance issues on these satellite areas. This impacts Service facilities and the safety and welfare of visiting public. In addition, land management practices such as prescribed burning will also be reduced or eliminated. Proper management of these NWRS lands will be limited and FWS ability to meet its mission is significantly damaged. Does NEPA not apply to everyone?

Section 17 D would allow Tribal member preference in hiring practices by CSKT. Why would you or the FWS institutionalize racial preference hiring on US federal National Wildlife Refuge? CSKT has great latitude and many options to hire the persons they want through affirmative action or special hiring goals without implicating the United States in

such discriminatory practices. Where was the Civil Rights Act and Equal Employment Opportunity when FWS decided to allow this? The FWS is not the Bureau of Indian Affairs (BIA), and is not obligated by law to allow this practice. Is not this portion of the agreement discretionary to you? Please reflect on the consequences. Nearly all American citizens (99.9998%) will be denied the opportunity to work at a National Wildlife Refuge created for all Americans and perpetually funded with American tax dollars. Six thousand tribal members, with an already huge federally subsidized annual budget of \$362,000,000 will forever have biased opportunity. This is offensive to us as employees and as Americans.

Americans know and expect there to be laws, and a process to protect the NWRS. However, this agreement has caused both Refuge law and the NEPA process to be bowled over by Indian law and politics. We understand that you and your staff are dealing with conflict created by two different laws, but Congress never intended Indian law to take priority over "public land" law. As is evident in the wording of the ISDEAA: "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 ... where the statute establishing the existing program does not authorize the type of participation sought by the tribe (1994 amendments to ISDEAA Section 403 k). That specific provision was added to the law because Congress understood that Wildlife interests (International Association of Fish & Wildlife Agencies(IAFWA) were concerned about the otherwise heavy language of the ISDEAA amendments (See Congressional Record October, 1994).

It is apparent that CSKT has gone around the FWS to get special consideration from DOI. Documents acquired through the Freedom of Information Act record DOI intrusion into FWS negotiations. DOI intrusion into FWS jurisdiction has happened before. Congress and the President provided the 1976 Amendments to the National Wildlife Refuge Administration Act to protect the NWRS from such politically motivated maneuvers that compromise the NWRS system. These Amendments are commonly known as the Game Range Act. This law was court tested in 1981 (See Trustees for Alaska v. James G. Watt, Secretary of Interior, et al. attached). The court decreed Secretary Watt could not transfer authority over Arctic National Wildlife Refuge to any other agency. The Secretary also cannot provide for joint administration of Arctic NWR, because "joint administration over the Refuge is forbidden by Congress." This District Court decision was upheld by the 9th Circuit Court of Appeals decision in 1982. The CSKT has made it perfectly clear at every opportunity that they intend to take over complete management authority of the National Bison Range. Why test the law by signing this AFA?

The Game Range Act can best be applied in this case, if you do not sign. The draft AFA must be exposed to all Americans for what it is: "a political deal". Your refusal to sign will brighten the national spotlight on this issue, slow the process and involve all Americans in the discussion.

You are in the one position that can affect the wording of the draft. Please do not abdicate your FWS Trust responsibility to "be the principal Federal agency responsible for conserving, protecting and enhancing fish, wildlife and plants and their habitats for the

continuing benefit of the American People". This AFA would convert the special purpose of the NWRS from "Wildlife First" to a social program for a select segment of society.

The specific modifications we believe must be made to the AFA are attached in two documents. First are changes to the AFA attachment A that better reflect the programs, functions and activities normally conducted by National Bison Range employees affected by this AFA. A few additions and subtractions will help reflect a better annual work plan for the CSKT. Second are specific changes needed in the body of the agreement.

You, the Regional Director, can make your stand on the laws, mission, principals and purpose of the National Wildlife Refuge System. Remember, for fifty years, especially the last ten years, FWS has had great difficulty motivating the CSKT to end incompatible economic uses on easement Refuges. The asphalt stock car racetrack, large overhead power line, intensive farming, grazing and gravel mining are recent misuse of NWRS lands at Ninepipe and Pablo National Wildlife Refuges. These issues reflect the differences between CSKT and NWRS values. CSKT participation in management of National Wildlife Refuges should be accomplished using provisions of the 1966 National Wildlife Refuge Administration Act, thus making this a partnership with the Tribes, not a take-over.

We sincerely appreciate the opportunity our country offers us to present this letter and we thank you for your time and consideration of our concerns. Again, we want to offer our support and urge you to take seriously our proposals. Please believe that our comments and efforts in writing this letter to you are born of long hours of discussion, introspection, and examination of the U.S. Fish and Wildlife Service Mission, the National Bison Range Mission, and the protections to public land that the U.S. government has committed to providing. We have lost many nights sleep believing that the U.S. Fish and Wildlife Service has failed to rise up to its responsibilities, not only to FWS employees, but as guardians of public land that belongs to all Americans. We are asking you, as the Regional Director, to accept the ultimate responsibility and stand with us as FWS employees by not signing this draft AFA and by implementing our recommendations for altering the draft. Signing the current AFA should only be done by those persons politically motivated to do so, not by those who believe in the Mission of the USFWS.

Thank you,

U.S. Fish & Wildlife Service employees at the National Bison Range, Moiese, Montana

Dellert Dee <sup>(Skip)</sup>

William A West

D. S. Johnson

Lynn Verecarue

Pat Jameson

Sue Middlemist

Kevin Z. Bach

~~\_\_\_\_\_~~ (CRAIG TANNER)

Jean Krantz

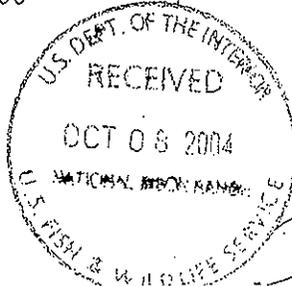
Robert King

Tim Discal

Shelley Frame

Lee C. Jones

~~\_\_\_\_\_~~



# National Bison Range Draft Alternatives to Date

Four Options (beyond the No Action,  
Current Management Alternative)



# Elements Common to All Alternatives

- The Refuge Manager, Deputy Manager, and Federal Law Enforcement Officer positions would remain with the Service
- The Service would retain the majority of the operating budget
- Construction and deferred maintenance project funding would be transferred to CSKT on a case-by-case basis
- Any positions transferred to CSKT would include indirect costs of \$5,000 per full-time employee (pro-rated for seasonal positions)

# Alternative B (Negotiated AFA alternative)

- Under direction of Refuge Manager, CSKT manages full programs (biology, fire, maintenance) and all associated permanent and seasonal staff positions
- Visitor Services program is split between Service and CSKT
- Affected permanent Service staff would be requested to sign an Intergovernmental Personnel Agreement (IPA) for assignment to CSKT
- Vacant Service positions would be transferred to CSKT for recruitment
- CSKT provided funding to recruit a GS-11 (equivalent) Wildlife Refuge Specialist to direct day-to-day work of staff/programs operated by CSKT. Receives day-to-day direction from Refuge Manager/Deputy
- 2-8 temporary seasonal positions provided to CSKT for recruitment (depending on annual funding)
- Service staff on Term Appointments would not have Terms extended, positions transfer to CSKT on expiration of Term.
- Leadership team comprised of Service and CSKT staff conducts workforce and operations planning

# Alternative C (Fire Program and Visitor Services)

- CSKT Division of Fire operates fire program
- Visitor Services program
  - 2-4 seasonal positions (depending on annual funding)
    - Operate visitor center and greet all visitors
    - Assist with developing and programs and creating interpretive displays
    - Maintain visitor facilities
- Provide funding for CSKT to conduct annual aerial surveys (big game and waterfowl)

# Alternative D (Same as alternative C, plus Incremental integration of CSKT staff)

- Long term objective: Provide experienced CSKT employees with career positions over time
- Initially--most positions temporary
- 2-8 positions - Operate visitor center and assist with biological and maintenance programs
- Service would always retain the 3 'lead' positions in the biology, visitor services, and maintenance programs and the WG-8 maintenance position to maintain enough internal capability to achieve mission and train new employees
- As remaining Service employees transfer or retire, work with CSKT to evaluate the potential for transferring position to CSKT
- Experienced CSKT employees could also be competitive for retained Service positions
- Service program leads train and direct day-to-day activities of the Service and CSKT employees in their programs

## Alternative E (same as alternative D, plus Ninepipe and Pablo Refuges and the WMD )

- CSKT GS-11 (equivalent) Wetland District Manager, and WG-6 career seasonal maintenance worker (new positions) manage satellite refuges (tribal land) and WPAs, and assist with operations on the Bison Range.
- Visitor Services program: Provide funding to recruit a GS-9 visitor services specialist (new position) and 2-4 seasonals
- Maintenance program: Provide funding to recruit an additional career seasonal WG-6 maintenance worker at NBR
- Fire program—same as alternative C
- Biological Program - Provide funding to recruit a career seasonal GS-5 biological science technician and 1-2 seasonal biological science staff

# Remaining Steps

- Current Status: Contractor Reviewing Document through November 8
- Contractor drafts Socioeconomic Section and Cumulative Affects analysis
- Consequences Analysis Workshop (to be scheduled)
- Contractor drafts Consequences Analysis Section following the workshop
- Service reviews draft section
- Contractor revises drafts based on Service comments
- Contractor provides final version
- Brief Regional Director on the results of the analysis
- Service completes revisions, editing, and printing of draft EA for internal review
- **3-week Internal Review (Service, CSKT)**
- Address substantive comments and revise EA, as needed
- Prepare and submit NOA for public release of the draft EA
- 30-day public review
- Address substantive comments and revise EA, as needed
- Brief Regional Director
- Release final decision (NOA) and revised document to the public
  - Preferred alternative and FONSI or recommendation to proceed to an EIS
- Note: Following NEPA process, the AFA is subject 90-day Congressional Review



Sweanor, Patricia <patricia\_sweanor@fws.gov>

# RE: Wasatch Wind Pioneer Park Meeting April 26 follow-up letter, please review by COB May 6

1 message

**Brian Smith** <Brian\_w\_smith@fws.gov>  
To: Patricia Sweanor <patricia\_sweanor@fws.gov>

Mon, May 6, 2013 at 3:06 PM

I am not submitting comments (other than what is below), but Kevin might be...I was out all last week & asked him to review it while I was gone. I am WAYYYY behind on stuff! I took a quick look and the only thing that caught my eye was #3 on page 3. It stated:

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Thanks...

- BWS

-

-----Original Message-----

From: Sweanor, Patricia [mailto:[patricia\\_sweanor@fws.gov](mailto:patricia_sweanor@fws.gov)]  
Sent: Monday, May 06, 2013 10:24 AM  
To: Brian Smith  
Subject: Re: Wasatch Wind Pioneer Park Meeting April 26 follow-up letter, please review by COB May 6

Done. Are you sending me comments?? Thanks. Trish

---

Patricia (Trish) Sweanor  
Fish and Wildlife Biologist  
Wyoming Energy Program Coordinator  
U.S. Fish and Wildlife Service

5353 Yellowstone Rd, Suite 308A  
Cheyenne, Wyoming 82009  
(307) 772-2374 x 239  
cell (307) 256-2987

On Mon, May 6, 2013 at 9:28 AM, Brian Smith <[Brian\\_w\\_smith@fws.gov](mailto:Brian_w_smith@fws.gov)> wrote:

> If you haven't submitted this yet, please add Casey to the cc list  
> even though he did not attend the mtg. Thank you!

>

>

> - BWS

>

> -----Original Message-----

> From: Sweanor, Patricia [mailto:[patricia\\_sweanor@fws.gov](mailto:patricia_sweanor@fws.gov)]

> Sent: Wednesday, May 01, 2013 5:22 PM

> To: Mark Sattelberg; Pam Repp; Brian Smith; Kevin Kritz; Nathan

> Darnall; Terence Thibeault

> Subject: Re: Wasatch Wind Pioneer Park Meeting April 26 follow-up  
> letter, please review by COB May 6

>

> :) attachment

> \_\_\_\_\_

>

> Patricia (Trish) Sweanor

> Fish and Wildlife Biologist

> Wyoming Energy Program Coordinator

> U.S. Fish and Wildlife Service

> 5353 Yellowstone Rd, Suite 308A

> Cheyenne, Wyoming 82009

> (307) 772-2374 x 239

> cell (307) 256-2987

>

>

> On Wed, May 1, 2013 at 5:20 PM, Sweanor, Patricia

> <[patricia\\_sweanor@fws.gov](mailto:patricia_sweanor@fws.gov)> wrote:

>> Please review this letter which is a follow up to the April 26, 2013

>> meeting with Wasatch. Thanks to Pam and Terry for input to this

>> letter. Please have your comments back to me by COB Monday, May 6.

>> Thank you very much for your participation in this effort. I do

>> appreciate you!

>>

>> Trish

>> \_\_\_\_\_

>>

>> Patricia (Trish) Sweanor

>> Fish and Wildlife Biologist

>> Wyoming Energy Program Coordinator

>> U.S. Fish and Wildlife Service

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