

Blue Goose Alliance Bulletin

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Alliance Comments on Yukon Flats Annual Funding Agreement

Recently, Alliance President Bill Reffalt submitted comments to the refuge manager of Yukon Flats National Wildlife Refuge regarding a proposed annual funding agreement between the Fish and Wildlife Service (FWS) and the Council of Athabaskan Tribal Governments (CATG) for work projects on the Yukon Flats NWR. Below is the text of those comments.

March 17, 2004

Mr. Ted Heuer, Refuge Manager
Yukon Flats National Wildlife Refuge
101 12th Ave., Rm. 264, Box 14
Fairbanks, AK 99701

Dear Mr. Heuer:

The following are comments and recommendations regarding the subject annual funding agreement from the Blue Goose Alliance, a national non-profit conservation organization incorporated in 2001 under the laws of New Mexico. The Alliance, through analyses, education, outreach, and advocacy promotes strengthening of the National Wildlife Refuge System and establishment of the National Wildlife Refuge Service, as a separate agency within the Department of the Interior, to administer the System.

Basic Position of the Blue Goose Alliance

While the Alliance is broadly supportive of local hire programs, and giving preference to qualified native organizations located in proximity to Refuges having need for contract services, for reasons discussed below, the proposed AFA between CATG and the FWS for projects to be completed in Calendar Year 2004 on the Yukon Flats National Wildlife Refuge (NWR) should not be consummated. We believe that alternative contracting authority is available to the FWS and the Refuge and should be used to complete projects deemed essential to the program at this refuge. Use of authorities, guidelines and restrictions flowing from the Indian Self-Determination and Education Assistance Act (ISDEAA) should be avoided.

The AFA is described as being authorized by, and to be interpreted in a manner consistent with, Section 403(c) of the ISDEAA, and also in accordance with the Compact of Self-Governance between CATG and the Secretary of the Interior dated October 1, 1999. The proposal also cites sections of 25 U.S.C. and 25 CFR, and other provisions of Indian law as guidance on various issues. However, the AFA fails to mention provisions of section 403(k) of the Act, wherein annual agreements cannot include programs, functions, services, or activities (PFSAs), that are inherently federal, or where the statute establishing the program does not authorize the type of participation sought by the tribe.

The Compact does mention that AFAs covering non-BIA programs are subject to section 403(k), but because the Compact is incorporated by reference only, a reviewer of this AFA may not know that information.

The Alliance has previously argued, in matters concerning a proposed AFA for the National Bison Range in Montana, that management of National Wildlife Refuges in the United States is an inherently federal responsibility. The Alliance also contends that several provisions in the Compact, Titles I and IV of the ISDEAA, portions of 25 U.S.C. referred to in the Compact, the regulations at 25 CFR part 1000, and other conditions referenced in the AFA, or any of the documents, laws and regulations just listed, acting at the discretion of CATG can remove decision-making regarding the Yukon Flats NWR AFA from the Director of the FWS, explicitly requiring the decision be made by the Secretary. In 1976 the "Game Range Act" amendments to the Refuge Administration Act (16 U.S.C. 668dd-668ee) specified all refuges were to remain in the System and "shall be administered by the Secretary through the U.S. FWS." Thus, provisions of Indian law that require appeal to the Secretary and dictate specific decisions at that level contravene Refuge System law, and thereby requires disallowance of the Yukon Flats AFA under section 403(k).

Basis for Alliance Opposition

In spite of the initial appearance of simplicity, the AFA for the Yukon Flats NWR immediately becomes complex and difficult to interpret with the inclusion of numerous references to various provisions of Indian law, beginning with the incorporation of the Compact in the opening paragraph. From that point, the references continue building, but the reviewer must separately and individually seek out each item, law, regulation, agreement, and amendment as they are not included with the AFA itself. Aside from the initial burden placed upon the reviewer by this tactic, it substantially increases when the additional materials are compiled and their pages examined. Additional inclusions by reference are encountered, further necessitating delayed review and increasing the total number of pages to be comprehended. Ultimately this seemingly simple 12 pages of agreement and one page of signatures grows to over 150 pages of incorporated materials including complex laws, regulations, and guidance and limitations on interpretation.

Making matters even more complicated, a vast proportion of the referenced material seems to be extraneous to the needs of the Yukon Flats AFA, yet very biased in the manner in which any subsequent adjudication, arbitration panel review, judicial consideration, or Secretarial review must proceed. Matters originally designed to implement the ISDEAA within the context of the Bureau of Indian Affairs programs, are being applied (with limited exceptions spelled out in the AFA) far beyond that context and in matters normally extraneous to such provisions. But, the provisions are being applied, and "shall be binding on the parties" unless the AFA includes modifying particulars (even then, in some instances, the extra provisions may have strong influence in resolution of disputes, for example).

One negative effect of adding all this material, with its obvious bias and intent to heap added benefits upon the Native entity side of the agreement, and its complicating influence on the underlying agreements, is the change in the nature of the projects from natural resources related to Native program related. Thus, the work is no longer really intended to benefit the fish, wildlife, plants and habitats of the Yukon Flats NWR, but is intended to transfer money from the Refuge System accounts to the CATG.

Provisions in the AFA, and some in the Compact, also provide for annual review of all PFSAs in the Yukon Flats NWR by a representative of CATG and a representative of the Secretary, with recommendations for expansion of the AFA to cover additions wanted by CATG. The annual negotiation provisions in the agreement, provisions in Section 6 of the AFA, and those in Section 11 E, in concert with Article III, Section 3 of the Compact, can act together to create conditions for expansion of PFSAs, the contract amount, or both. There seems to be no provision for public review of such expansion.

Other questions arise concerning the funding arrangement for the AFA. It is wholly unique for the government to make full, complete payment up front for any contract. And, it is unique that there are no provisions for the return of funding if the work is not performed, not performed satisfactorily, or the calendar year ends too soon after the transfer to permit completion of the planned work (as when the Congress does not provide final funding until most of the year is past). Appropriate provisions for these normal occurrences would seem to be essential. Also, because the FWS does not budget for refuges on a line-item basis, there is considerable uncertainty as to how the agency, and CATG, are to determine if the money for this AFA, or a succeeding agreement, has been appropriated. To attempt to line-item budget for each PFSA covered, each year, is a burden that neither the agency or the Congress will want. Provisions for such matters are essential for good business practices. An agreement lacking such provisions is certain to cause disagreement between parties.

Section 14 of the Compact contains several provisions that raise questions and red flags of concern, and may ultimately threaten cooperation between the parties. In subsection (a) CATG is exempted from compliance with program guidelines, manuals, policy directives unless, and then only to the extent, specifically identified in the AFA. Subsection (b)(ii) permits CATG to request a waiver of any DOI, or FWS (or other agency?) regulations that it believes are an obstacle to its activities. Appeal to the Secretary would result in a mandatory finding for waiver unless the waiver is deemed to be prohibited by federal law. These provisions are wholly unwarranted and even dangerous to the orderly and necessary protection of the refuge resources and its visitors.

It seems that FWS attempted to locate and block provisions in the Compact that it considered undesirable. However, they obviously missed some that could threaten refuge operations. There are additional provisions referenced in the AFA and in the Compact that affect the AFA, such as Titles I and IV of the ISDEAA, and implementing regulations. Reviewers for the Alliance have attempted to locate threatening and wholly extraneous provisions, but they have no reason to believe that they found all that occur in such a large amount of text.

Other Factors Influencing Alliance Concerns

The five work projects described may appear benign, and as FWS officials have commented, it could improve relations with the villages. This proposal has implications far beyond the borders of the Yukon Flats NWR. If approved, it would be a precedent setting event which could eventually result in unwarranted and dire consequences to the management integrity of the entire NWR system. Neither is this particular proposal a one-time occurrence. Native spokespersons have already commented to the press that they view this agreement as an opportunity to get their foot in the door. Within 5-10 years they could be negotiating to assume all management responsibilities, and would expect the FWS to supply the funds. If that should occur, the public could not

expect their interests to be served in protecting the fish, wildlife, plant and other wildland resources.

Rather than a 45-day response period for public comments, there should be an extension to 90 days to permit reviewers to better understand the influences from the large amount of extra material included by reference. The FWS should initiate an Environmental Impact Statement at the very least. Possible implications of this agreement becoming a template for numerous additional AFAs on refuges throughout America should be thoroughly analyzed. And, unless the nature of the AFA is modified along the lines suggested by the Alliance, the EIS should also analyze the impacts of transferring substantial sums of money to Native entities through a program designed to benefit the Natives, not necessarily the wildlife resources for which refuges have an inherent responsibility.

At least two of the projects have been done in the past through cooperation with another FWS office (subsistence management) and with Alaska Fish and Game Department. In the case of the subsistence survey, it is important that it be coordinated with the other federal agencies and the ADF&G to maintain the sampling protocols, the statistical interpretations and applications, and the basic approach. The refuge should not become the basic sampling unit. Given that the survey has been successfully contracted from Anchorage Office of Subsistence Management, it should simply be returned to that office and the contract extended. One must ask just why it was even considered for assignment to the refuge level, given the needs of the program and its past success.

The refuge role in subsistence is carefully spelled out in the Alaska National Interest Lands Conservation Act it is to provide, in a manner consistent with conservation of fish and wildlife and habitats and the fulfilling of international treaty obligations related to fish and wildlife, the opportunity for continued subsistence uses by local residents. Overall control and regulation of subsistence uses rests at a higher level and requires careful cooperation and coordination with numerous state and federal agencies. That is best handled at levels above the refuge.

The work projects enumerated in the proposal that specifically require the application of biological sampling procedures, statistical analyses and extrapolation are part of an inherently federal (or State) responsibility. Having someone serve as an observer, once certified as being found qualified for that task, may be subject to contract if the refuge personnel are somehow unavailable to do that work. However, simple scheduling and assignment of appropriate priority to the job should resolve the availability of professionals from the staff handling this work.

The environmental education project may be suitable for contract as it is mostly an education function, once the material are developed and made available. It would seem to have a rather low priority however, and very well could be subject to loss of funding on a regular basis, especially during periods such as we are now experiencing. The refuge has ample authority to develop and sign contracts for this work, and the "observer" just mentioned. The Alliance would recommend using such authority if the agency and refuge believe the priority of these activities to be high enough.

In summary, the Blue Goose Alliance (BGA) opposes the proposed Yukon Flats AFA because it has enormous negative implications, including the long term, only partially controllable, commitment of funds, and subjects the refuge to unilateral application of the laws, regulations, policies and practices of another entity.

The question of whether CATG is endowed with some level of government authority, or not, remains uncertain at this time. It is an important issue and question, but is considered beyond the scope of these comments.

None of the foregoing comments or recommendations should be construed to mean that Yukon Flats NWR should not continue to cooperate with, or cease to recognize the special relationship that exists between the Refuge and CATG, neighbors with substantial common interests. Indeed, the Refuge has an inherently federal mandate to protect and manage wildlife and their habitats for the benefit of all citizens, be they Athabascan Indians, other Alaskans, or residents throughout the United States, as well as for other nations that have an interest in migratory species.

Thank you for providing an opportunity to comment.

William Reffalt, President
Blue Goose Alliance