

**UNITED STATES DISTRICT COURT
District of Columbia**

BLUE GOOSE ALLIANCE, et al.,

Plaintiffs,

v.

KEN SALAZAR, et al.,

Defendants.

Case No. 01-CV-00640 CKK,

Judge Colleen Kollar-Kotelly

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

The National Wildlife Refuge System (“NWRS”) is America’s only federal land conservation system devoted primarily to the conservation of native fish, wildlife, plants and their respective habitats. Refuges are found in all states and territories of the United States. Plaintiffs (“BGA”) bring this action for declaratory and injunctive relief to require Defendants, the United States Department of the Interior (“DOI”) and the United States Fish and Wildlife Service (“FWS”) (collectively “Defendants”) to: a) terminate implementation of and operations under the *Fiscal Years 2009-2011 Funding Agreement Between the United States Department of the Interior, Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation* (“AFA”) for operation and management of the National Bison Range Complex (“NBRC”), a unit of the NWRS located in Moiese, Montana; and b) retrieve any unspent funds already made available to the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (“CSKT”) under the AFA.

The Defendants’ decision to approve and implement the AFA is impermissible under the National Wildlife Refuge System Administration Act of 1966, as amended (“Refuge Act”), 16 U.S.C. §§ 668dd-668ee, the Indian Self-Determination and Education Assistance Act (“ISDEAA”), 25 U.S.C. §§ 450-450-n, as amended by the Tribal Self-Governance Act, 25 U.S.C. §§ 458aa-hh, and the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, since their approval of the AFA (in some cases the terms of the AFA itself) exceeded their authority under each of these statutes. Defendants’ also failed to comply with the requirements of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347, and the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, in connection with their approval of the AFA. In addition,

the determinations they made under each statute are arbitrary and capricious. The Defendants have taken action exceeding their statutory authority and have failed to comply with affirmative statutory obligations. Thus, this Court should grant BGA's motion for summary judgment.

II. JURISDICTION AND STANDING

This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. §§ 2201-2202, 28 U.S.C. § 1361, and the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201, 2202. In addition, the Court has jurisdiction over the ESA citizen suit claim under 16 U.S.C. § 1540. The United States has waived sovereign immunity with respect to the claims set forth herein in 5 U.S.C. § 702 and 16 U.S.C. §§ 1536, 1540. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) and 5 U.S.C. § 703.

For the reasons set forth in the Complaint and the declarations filed with the Complaint, Messrs. Redfearn and Reffalt, Mrs. Redfearn and Ms. Enright-Reffalt have standing as individuals. For example, as stated in the declarations, each of the individual plaintiffs has visited and /or volunteered at the NBRC, plans to visit the NBRC in the future, and has a continuing interest in the conservation of wildlife and wildlife habitat and in the proper management of the NWRS generally and the NBRC in particular as demonstrated by, among other things, visits the NBRC and other refuges over many years.

For the reasons set forth in the Complaint and the declarations filed with the Complaint, the BGA has organizational standing. BGA promotes, by means of public education, outreach, and reasoned advocacy, coordinated and integrated management of the NWRS in order to ensure the biological integrity, diversity, and environmental health of wildlife, plants, and habitats within the NWRS. BGA, through its members, visits the various refuges, including the NBRC,

engages in dialogue with FWS field employees responsible on a day-to-day basis for operating and managing the NWRS about problems and issues related to specific refuges, and provides information to FWS staff at the local, regional and headquarters level concerning the planning and management of the NWRS and specific refuges, including the NBRC.

III. STANDARD OF REVIEW

A. Summary Judgment Standard. Summary judgment is appropriate when the pleadings and the evidence demonstrate that “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

B. Administrative Procedure Act Standard. Courts review claims based on the ESA and NEPA using the standard of review established in the APA, 5 U.S.C. § 706. It also is appropriate to review the decision to approve the AFA under the APA standard of review. *Id.* § 706 The APA requires that the Court “hold unlawful and set aside agency action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A). Review is to be based on the full administrative record that was before the agency at the time it made its decision.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). The court may not set aside a decision that is rational, based on consideration of the relevant factors, and within the scope of the statutory authority delegated to the agency. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citations omitted). An agency decision is arbitrary and capricious if it violates the governing legal standard or if it has “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.*; *A.L. Pharma v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir.1995). Further, the

APA requires the agency to articulate a rational basis for its decision, and its determination can be defended only on that basis, and not on the *post hoc* rationalizations of counsel. *Williams Gas Processing – Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006), quoting *Point Park Univ. v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006); *Kansas City v. HUD*, 923 F.2d 188, 192 (D.C. Cir. 1991).

Courts “should perform a close and searching analysis” where an agency is interpreting the scope of its statutory authority. *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981). Deference to an agency’s construction of a statute is inappropriate if it is acting outside the bounds of its congressionally-established authority.” *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161-62 (D.C. Cir. 1998), *aff’d* 529 U.S. 120 (2000).

IV. STATUTORY AND REGULATORY BACKGROUND

A. The National Wildlife Refuge System Administration Act. The National Wildlife Refuge System Administration Act (“Refuge Act”) sets forth the guiding principles, policies and protocols for the administration and management of the NWRS by the Secretary of the DOI. 16 U.S.C. §§ 668dd-668ee. The original Refuge Act was enacted in 1966 and consolidated various federal authorities for managed areas devoted to fish and wildlife preservation. Pub. L. No. 89-669, 80 Stat. 926. Congress amended the statute in 1976 to prohibit the transfer or other disposition of land within the Refuge System without Congressional authorization and specified that the Refuge System was to be administered by DOI only through the FWS. Pub. L. No. 94-223, 90 Stat. 199.

By 1997, there were 509 refuges in each of the 50 states, and coupled with waterfowl production areas, the areas under FWS management totaled 93 million acres. H Rept. No. 105-

106, at 2 (1997). In response to concerns that the variety of refuges and authorizing legislation “has led to inconsistency in the management of refuges within the System,” *id.*, Congress passed the National Wildlife Refuge System Improvement Act of 1997. Pub. L. No. 105-57, 111 Stat. 1252. This Act is considered the organic act for the NWRS, and articulates the mission of the NWRS as the administration of “a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.” *Id.*, codified at 16 U.S.C. § 668dd(a)(2).

The Refuge Act requires the management of each refuge in a manner consistent with the purposes for which they were established and to fulfill the mission of the Refuge System. *Id.* § 668dd(a)(3)(A); 50 C.F.R. § 25.11(b). The Refuge Act requires the Secretary to propose a “comprehensive conservation plan” for each refuge or related complex of refuges and issue a final plan that is “consistent with the provision of this Act” and to the extent practicable, any fish and wildlife conservation plans of the State in which the refuge is located. 16 U.S.C. § 668(e)(1)(A). In preparing the plan, the Secretary (acting through the Director) consults with adjoining Federal, State, local, and private landowners and affected State conservation agencies and coordinate the development of the conservation plan with relevant State conservation plans. *Id.* § 668dd(e)(4).

B. The Indian Self-Determination and Educational Assistance Act. The ISDEAA, as originally enacted, was intended to assure “maximum Indian participation in the direction of educational as well as other Federal services to Indian communities” *id.* § 459a(a), by providing for agreements with recognized Indian tribes to perform programs, functions, services or activities previously administered by the Federal government for the benefit of Indians. *Id.* §

450f(a)(1). The Tribal Self-Governance Act amended the ISDEAA in 1994, Pub. L. No. 103-413, 108 Stat. 4250, and authorized the Secretary to enter into annual funding agreements (“AFAs”) to transfer control and management of programs, services, functions or activities that are of special geographic, historical, or cultural significance to the participating tribe. 25 U.S.C. § 458cc(c). The Tribal Self-Governance Act expressly prohibits the Secretary from entering into an agreement “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 . . .” 25 U.S.C. § 458cc(k).

C. The National Environmental Policy Act. NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1. The statute requires federal agencies to identify and consider the environmental impacts of proposed federal actions, the alternatives to the action, and measures that could avoid or reduce adverse impacts. For any proposed major federal action that may significantly affect the quality of the human environment, NEPA requires “a detailed statement” that fully analyzes “the environmental impact of the proposed action” and its alternatives. 42 U.S.C. § 4332 (2); 40 C.F.R. § 1502.14. As part of its duty to present a full and fair discussion of significant environmental impacts, an agency must include consideration not only of those impacts that may be directly attributable to the proposed action, but also indirect and cumulative impacts as well. Indirect impacts are those caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Cumulative impacts are those impacts that result from the incremental impact of a project when added to other reasonably foreseeable actions, regardless of who undertakes such other actions.

The NEPA process requires the agency to determine whether the action is one that normally requires an EIS. *Id.* § 1501.4(a)(1). An agency action that does not normally require

either an Environmental Assessment (“EA”) or an EIS is subject to a categorical exclusion. *Id.* § 1501.4(a)(2). “Categorical exclusion” is defined as “a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations.” *Id.* § 1508.4.

D. The Endangered Species Act. The ESA is the principal federal wildlife and vegetation protection law. 16 U.S.C. §1531 *et seq.* Section 7 of the ESA requires that each federal agency consult with FWS for terrestrial and fresh water species to ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of any critical habitat of such species. 16 U.S.C. § 1536(a)(2). Where FWS is the action agency, it is required to engage in intra-agency consultation. *Id.*

Section 7 consultation may be formal or informal. *See* 50 C.F.R. §§ 402.13, 402.14. For intra-agency consultation, the project leader for the proposed FWS agency action is required to assess which listed, proposed, and candidate species and which proposed or designated critical habitats may occur within the action area. U.S. FISH & WILDLIFE SERV., ENDANGERED SPECIES ACT, FINAL INTRA-SERVICE CONSULTATION HANDBOOK (“Intra-Service Handbook”), at E-17 (March 1998). If a listed, proposed, or candidate species, or its proposed or designated habitat, is present in the action area, the project leader must determine whether the action may affect the species or its habitat by completing an Intra-Service Section 7 Biological Evaluation Form. *Id.* at E-20. If FWS determines that the proposed action will have *no* effect on the species or its proposed or designated critical habitat, the informal consultation process is terminated, and no further action is necessary. *Id.* Otherwise, consultation continues. Formal consultation results

in the issuance of a biological opinion by the FWS indicating whether or not the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat

V. LOCAL RULE 7(H) STATEMENT OF FACTS

A. The History of National Bison Range Complex. The National Bison Range Complex (“NBRC”) in Montana includes the National Bison Range (“NBR”), as well as the adjoining Ninepipe National Wildlife Refuge (“NWR”) and the Pablo NWR and a portion of the Northwest Montana Wetland Management District in Lake County, Montana. The NBRC is comprised of approximately 32,865 acres and is located within the boundaries of the State of Montana. The NBR and associated NWRS, are located within the exterior boundaries of the Flathead Indian Reservation of the Confederated Salish and Kootenai Tribes (“CSKT”). AR000887SUPII. The NBRC provides important habitat for a number of other species, including elk, mountain goats, bighorn sheep, pronghorn antelope, and migratory birds. *Id.* The NBR is one of the oldest units of the National Wildlife Refuge System (“NWRS”) and was created by Congress as a “permanent national bison range for the herd of bison.” Act of May 23, 1908, ch. 192, at 35 Stat. 267, codified at 16 U.S.C. § 671 (2009). Bison were reestablished at the refuge after their numbers dipped to fewer than 100 in the wild. AR000887SUPII. In 1921, Executive Order 3596 broadened the purpose of the NBR to include a refuge and breeding area for birds.

The Ninepipe NWR is a unit of the NWRS established on June 25, 1921 by the President of the United States in Executive Order 3503 to function “as a refuge and breeding ground for native birds.” The refuge, which currently comprises approximately 4,027 acres, supports migratory waterfowl, including Canada geese and great blue heron, and other bird species, as

well as mammals and sport fish. AR000887SUPH. The Pablo NWR is a unit of the NWRS established on June 25, 1921 by the President of the United States by Executive Order 3504 to function “as a refuge and breeding ground for native birds.” The refuge, which comprises approximately 2,473 acres, supports migratory waterfowl, such as mallards, and other bird species, including bald eagles, as well as mammals and sport fish. AR000887SUPH.

B. Government’s Bison Conservation Policy. The FWS manages approximately 1,300 bison across eight NWRs. AR000897SUPH. A large-scale assessment of bison genetics conducted between 1999 and 2002 found the FWS and National Park Service bison herds “were the best genetic representatives of historic bison populations, containing wide diversity and very low levels of cattle gene introgression.” AR000896SUPH.

The FWS has a unique role in bison conservation. AR000896SUPH. In 2005, FWS bison managers and biologists outlined six main purposes of caring for bison on an NWRS; of those purposes, bison conservation was “identified as one of national scope and thus applicable to the National Wildlife Refuge System.” AR000896SUPH. In order to implement the goal of conservation, the Chief of Wildlife Health in FWS Region 6 drafted a plan for “FWS Refuges in the conservation of bison to meet DOI consensus goals for bison and for Refuges to fulfill a national role in the landscape conservation and restoration efforts.” AR000897SUPH. As part of the conservation plan, the FWS is instituting metapopulation management for bison located at the NWRSs. AR000898SUPH. This plan requires “[c]oordination among all units” because “[e]ach herd is one component of the metapopulation and cannot act completely independently of other units.” AR000898SUPH. If individual Refuges are culling herds, for example, each animal’s genes must be identified and “[f]eedback between management and monitoring, and adapting appropriately are essential.” AR000898SUPH.

As of 2007, there were approximately 280 bison at the NBR. AR000690SUPII. The bison herd at the NBR “is the most genetically unique Service herd and is free of regulated diseases.” AR002315. The NBR “is essential to the Refuge System bison metapopulation, and will be an important asset in the development of the bison conservation planning effort . . .” *Id.* See also AR002270. As a result of the genetic diversity in the NBR herd, the FWS determined that these bison alleles needed to be relocated to other sites. AR000899SUPII. Approximately 140 bison from the NBR herd have been shifted to other NWRs as part of this effort. AR000899SUPII. See also AR000690SUPII (approximately 80 bison shipped to other Refuges during 2007 roundup).

C. The 2005 Annual Funding Agreement. On April 23, 2003, the CSKT submitted a letter to the Secretary “expressing our interest to manage” parts of the NBRC. AR000510-13. In that letter, the CSKT stated that they desired to “operate the full range of activities provided at the NRC, which is all programs, services, activities and functions provided at the NBR and ancillary properties excluding the mutually agreed upon ‘inherent federal functions.’” AR000510. The DOI agreed to negotiations, but indicated that the statutory purposes of the NBRC and the mission of the NWS would not be “best served through an annual funding agreement under ISDEAA that transfers extensive management authority to CSKT.” AR00969.

Over the summer of 2003, the parties exchanged proposals addressing the scope of the AFA. See *id.* On August 5, 2003, the FWS provided the list of activities subject to contracting under an AFA, which included the performance and management of certain biological, fire, maintenance, and visitor services activities. *Id.* On September 4, 2003, CSKT presented FWS with a draft AFA that substantially expanded the scope and management of the NBRC by CSKT. AR002158-59. On October 14, 2003, the FWS Regional Director sent a letter to CSKT

Chairman Matt clarifying that the FWS would not agree to an AFA that was any broader in scope than the draft AFA presented by the FWS as part of the September 4, 2003 negotiations. AR002158-60. By spring of 2004, no agreement had been reached and CSKT sought the involvement of DOI. AR001958; AR000468-69. In June 2004, DOI headquarters sent a revised draft AFA to CSKT and the Regional FWS. AR001958.

On July 14, 2004, the FWS published the draft AFA for public comment. AR001995-6. The managers of the NWRS and National Fish Hatcheries sent a comment letter opposing the draft AFA on October 8, 2004. AR001333SUPI. The comment letter stated that “[t]he cumulative effect of the activities that are to be performed by CSKT goes far beyond providing routine services” and many activities “require a thorough knowledge of the laws and policies” of the NWRS. AR001334SUPI. The letter also emphasized that the draft AFA “does not ensure that the Manager has the authority to accomplish the Refuge mission . . . **No Refuge Manager, no matter how skilled, could successfully implement this agreement as it is written.**” AR001335SUPI. (emphasis in original)

On December 15, 2004, CSKT and FWS signed the 2005 AFA. AR002635-002698. Pursuant to the 2005 AFA, the CSKT performed 149 daily operational activities across “major programs.” AR001136-37; AR002517. These activities were grouped into five categories: management activities, the biological program, the fire program, the maintenance program, and visitor services. AR002642. The 2005 AFA provided that, subject only to the final authority of the Refuge Manager, the CSKT could “manage the Activities performed” by CSKT, as well as CSKT employees. 2005 AFA § 7.A., at AR002643. The Refuge Manager “set and revise[d] written priorities for the CSKT to follow in performing Activities” covered by the 2005 AFA. 2005 AFA § 7.C.

In September of 2006, the FWS agreed to extend the 2005 AFA for 90 days, from October 1, 2006 through December 31, 2006, while the parties continued negotiations for a new AFA. AR001633; AR000888SUPII.

The 2005 AFA was “the first of its kind to be implemented at a National Wildlife Refuge” and was “negotiated and implemented without the benefit of national FWS policy.” AR01136. On a number of occasions during 2005, the FWS received complaints regarding CSKT’s performance of the Activities under the 2005 AFA. *See* AR001330SUPI; AR001325SUPI. On one occasion, the NBRC project director wrote to CSKT expressing concerns with the collection and accuracy of waterfowl data under the 2005 AFA. AR001328SUPI.

On March 1, 2006, the FWS finalized the 2005 Annual Funding Agreement Report. AR001133-001345. The FWS concluded that 41% of the Activities performed by CSKT under the AFA were fully successful, 46% of the Activities were either unsuccessful or needed improvement, and 13% were not required. AR01137. In the Biology Program, some activities were not performed timely or by qualified personnel. AR001138. In the fire program, only one of the three required burns, which are “an important vegetation management tool,” were performed. AR001139. FWS concluded that activities in the maintenance and visitor programs also were being performed at an unsatisfactory level, and stated that the agency hoped the implementation would improve “for the benefit of NBRC natural resources.” AR001139, 001141, 001136. On April 27, 2006, the NBRC Project Leader issued a memorandum addressing CSKT’s failure to maintain fences. AR000934SUPII. This memorandum indicated the fences “are a vital tool in the management of the bison herd and refuge Palouse prairie

habitat” and stated that the “lack of fence maintenance has compromised our ability to manage both the bison herd and habitat according to planned management strategies . . .” *Id.*

On September 19, 2006, seven FWS employees at the NBRC, including *Reed* case Plaintiff Palmer, filed an informal grievance with the FWS Deputy Regional Director, alleging that a hostile work environment had existed at the NBRC since the commencement of the 2005 AFA. *See* AR002353-002392. After an investigation, the FWS Regional Director concluded based that “a chronic and pervasive workplace problem of considerable magnitude existed at the NBR,” and that ongoing conditions, including harassment and intimidation of FWS employees “could not be tolerated.” AR002353. On December 5, 2006, the NBRC Project Leader made a formal request to the Region 6 Assistant Regional Director for the FWS to take over bison feeding activities from CSKT. AR002340. The Project Leader expressed concern with the amount of hay CSKT had fed the bison, despite the fact the feeding protocol “was stressed to CSKT in the Annual Work Plan, after the 2006 Roundup, and again by the Project Leader on November 29, 2006,” AR002340, and stated that “CSKT has proven to be unreliable at following the FWS bison feeding protocol and husbanding these bison according to the required standard.” *Id.* On December 6, 2006, the FWS Regional Director requested the termination of the AFA. AR002353. He stated that CSKT “has not made significant improvements” in performance under the AFA “in spite of significant input and assistance from the Service.” AR002354. On December 7, 2006, the FWS withdrew the authorization for CSKT to perform the activity of husbanding surplus bison under the AFA. AR002393.

In January of 2007, FWS finalized the 2006 Annual Funding Agreement Report, finding that 51% of Activities were performed successfully, while 36% were either unsuccessful or in need of improvement and 13% were not required. AR002518. The Report noted that several of

the highest priority activities that influence wildlife health and safety, habitat management, and long-term maintenance of vehicles, equipment and infrastructure were not completed at a satisfactory level. AR002520. The Report includes inspection reports and memoranda outlining FWS concerns with fenceline maintenance and bison feeding. AR0002604-34. CSKT disputed the FWS' allegations of bison malnourishment on December 11, 2006 and in March of 2007. AR002440-50, AR000536-82. In May of 2007, CSKT issued its own performance report, in which it outlined "positive accomplishments." AR001070-84.

On December 11, 2006, the FWS withdrew CSKT's authority to extend performance under the expired 2006 AFA and re-assumed all responsibility for performing activities under the AFA. AR002429-39. The letter stated that CSKT had, *inter alia*: (1) failed to comply with FWS bison management standards, including herding, feeding, and fence maintenance standards; (2) failed to meet FWS wildlife monitoring and reporting standards and protocols; and (3) failed to complete two 2006 biological study plans. AR002432. On December 29, 2006, the Deputy Secretary drafted a memorandum affirming the December 11, 2006 termination, but expressing concerns with the process. AR002513-14.

D. The 2008 AFA. Negotiations for a new AFA began in 2006 with CSKT proposing a contract giving the Tribe responsibility for all of the functions at the NBRC, including "management and administration," to be phased in over a two-year period. AR002036-7, 002154; AR001287SUPI-AR001291SUPI. CSKT would contract for all the positions at NBRC, and operations at the complex would remain under "the general supervision" of FWS. AR02038; AR001288SUPI. This proposal reflected an agreement with senior DOI management that "by the beginning of FY 2010 the NBR would be **managed exclusively** by the Tribe." AR002512 (emphasis supplied). On December 11, 2006, when FWS re-assumed the functions

delegated by the 2005 AFA, the FWS also withdrew from negotiations for a new AFA. AR002429, 002432. A bare three weeks later, the Deputy Secretary directed senior DOI management and the FWS to “reestablish a working relationship with CSKT,” leading to a new AFA substantially similar to the 2005 AFA, while evaluating options for the longer term, including exclusive management by the Tribe. AR002514-002515.

The Tribe submitted a revised version of a draft AFA on May 4, 2007, which provided that CSKT take responsibility of management, the biological program, the fire program, and the maintenance program, and that those responsibilities would be delineated in a work plan to be developed jointly by FWS and CSKT rather than described in the AFA. AR001175SUPI, AR001181SUPI-AR001182SUPI. CSKT would also employ a “CSKT Manager,” who would meet weekly with the Refuge Manager and a representative from the CSKT Natural Resources Department to address issues concerning the management of the NBRC. AR001177SUPI, AR001182SUPI. While the CSKT draft accorded the FWS Refuge Manager final authority for running the NBRC, the Refuge Manager would be required to give written notice of changes in management direction and two weeks’ written notice of any changes to instructions or protocols. AR001182SUPI . The FWS Director and the Regional Office concluded this draft was unacceptable because of, *inter alia*, the lack of specificity in the assigned responsibilities and the requirement to mutually agree on the governing work plan abdicated FWS’ responsibility to implement the NWRSA and “place[d] the management in a negotiation posture . . . and remove[d] the final decision-making authority from the Refuge Manager.” AR001086, 001085-98. The DOI Solicitor’s Office also concluded that the FWS positions of Refuge Manager, Deputy Refuge Manager, and Outdoor Recreation Planner all involved inherently Federal functions, such as management and administration, controlling obligation of Federal funds, law

enforcement, and supervision of Federal personnel, that could not be transferred under the Tribal Self-Governance Act. AR001705-6, 001632-96, 001704-6.

In November 2007, the Assistant Secretary for Fish, Wildlife and Parks issued an “Action Plan” restarting negotiations with a third-party facilitator. AR002224-002230. CSKT asked to fill the Deputy Refuge Manager position at NBRC, but FWS insisted that the Refuge Manager, Deputy Refuge Manager and all law enforcement positions were “off the table” in order to satisfy the requirement to retain inherently Federal functions. AR000393-000449, AR000684. Instead, FWS agreed to the creation of a CSKT Deputy Refuge Manager, who would, along with the CSKT Lead Biologist, the FWS Refuge Manager, and the Deputy Refuge Manager, form a “Refuge Leadership Team” to collaborate on management of the NBRC. AR002706. The Tribe conceded on this issue but insisted in return that FWS agree to drop the option for current FWS employees to continue their Federal employment by assignment to CSKT under an Intergovernmental Personnel Act (“IPA”). AR000685. Further negotiations resulted in CSKT accepting the continuation of the IPA option so long as CSKT could cancel the IPA agreement for cause and FWS would agree that the particular employee could no longer work for FWS at the NBRC. AR000693, 000682-8, 000692-3. The 2008 AFA incorporates FWS’ agreement to this term. AR002718. The 2008 AFA was signed on June 19, 2008. AR02699-002761 (hereinafter, all references will be by AFA section number). The 2008 AFA became effective January 1, 2009 and expires on September 30, 2011. AFA § 24. According to the DOI, the scope of this AFA “is much larger” than the previous AFA. AR001625. The CSKT “will be directly involved with the management mission at the Bison Range” and will be responsible for “mission-critical” activities. AR001621; AR001948. The AFA “provides substantial opportunities for CSKT involvement in the day-to-day management decisions associated with

the operations” of the NBRC by “including staff in upper-level positions and by including ‘whole programs’ in the scope of this AFA.” AR001627.

Under the terms of the 2008 AFA, CSKT will perform “Activities” at the NBRC in five areas: (1) management; (2) the biological program (including habitat management); (3) the fire program; (4) the maintenance program; and (5) the visitor services program (phased in over two years). AFA § 6.A. “Activities” are defined as “a program, service, function, activity or portion thereof.” AFA § 4.

The 2008 AFA describes the arrangement between the CSKT and the FWS as a “management partnership.” AFA § 7.C. The defined “management” activities include creation of a new Deputy Refuge Manager position and the Administrative Support Assistant position to be filled by persons selected by and to be employed by the CSKT, and all Activities associated with those respective positions. AFA § 6.A. The Administrative Support Assistant’s contracted Activities include assisting the FWS Refuge Manager and the FWS Deputy Refuge Manager in “some of their retained administrative duties.” *Id.*

Pursuant to the 2008 AFA, the CSKT has the authority to redesign any Activity or reallocate funds between Activities if it receives the prior written approval of the Refuge Manager. AFA § 6.B. The decision of the Refuge Manager not to approve a request by the CSKT to redesign activities or reallocate funding is subject to the dispute resolution procedures provided in Section 19 of the 2008 AFA. *Id.* The 2008 AFA provides that the Refuge Manager retains final responsibility and authority for directing and controlling the operation of the NBRC and specifies a list of ten specific activities retained by the Refuge Manager. AFA § 7.B. This authority, however, must be “exercised in a collaborative fashion, with full and objective consideration of CSKT recommendations, through the work of the Refuge Leadership Team.”

Id. This includes providing CSKT with written notice of “changes in direction or prioritization of duties.” *Id.* The decisions made by the Refuge Manager, including those specifically reserved to FWS, are “[s]ubject to the dispute resolution procedures” set forth in Section 19 of the AFA. *Id.*

The 2008 AFA provides for two co-equal Deputy Refuge Managers: an FWS Deputy Refuge Manager and a CSKT Deputy Refuge Manager. AFA § 7.3. The Deputy Refuge Managers “are senior staff advisors to the Refuge Manager and provide substantive input to management decision-making at NBRC.” *Id.* The Refuge Leadership Team determines the allocation of duties between the two Deputy Refuge Managers, although the 2008 AFA assigns a number of responsibilities to each. *Id.* The FWS Deputy Refuge Manager supervises and conducts the Law Enforcement Program, supervises any subordinate FWS employees not assigned to CSKT, and performs specific duties negotiated with the Refuge Leadership Team. *Id.* Subject to the final authority of the Refuge Manager, which is in turn subject to the dispute resolution procedures, the CSKT Deputy Refuge Manager will “manage the Activities performed by the CSKT.” AFA § 7.A.

The CSKT Deputy Refuge Manager is to direct the day-to-day work of employees and volunteers in the programs who are assigned to the CSKT under the AFA, including federal employees assigned to the CSKT under the IPA. AFA § 7 C.3.a. The CSKT Deputy Refuge Manager alternates with the FWS Deputy Refuge Manager in serving as Acting Refuge Manager in the absence or unavailability of the Refuge Manager. AFA § 7 C.2. The Acting Refuge Manager is authorized to exercise all authorities of the Refuge Manager except those specifically reserved to the Refuge Manager in AFA § 7.B.

Pursuant to the 2008 AFA, the Refuge Leadership Team is made up of the Refuge Manager, the two Deputy Refuge Managers, and the CSKT Lead Biologist. AFA § 7.C.

Pursuant to the 2008 AFA, the Refuge Leadership Team must meet at least quarterly to discuss the performance of the FWS and the CSKT under the AFA. AFA § 7.C. Subject to the Refuge Manager's authority and the dispute resolution process, the Leadership Team jointly writes the "Annual Work Plan, set[s] work priorities, and prepare[s] the periodic status reports . . . and all other reports required by this AFA or by Service Operational Standards." *Id.*

The dispute resolution procedures of the 2008 AFA allow the Refuge Leadership Team to "formally resolve all disputes between the Parties at the field level." AFA § 19.A. Although the Refuge Manager's decision prevails in the event the Refuge Leadership Team cannot reach consensus, or if the decision "is unacceptable to the CSKT," the CSKT may elevate the dispute through four levels of dispute resolution. *Id.* The first level of review is through notification of the FWS Refuge Supervisor and the CSKT Natural Resources Department Head. AFA § 19.A. If the FWS Refuge Supervisor and the CSKT Natural Resources Department Head do not reach consensus, and the Refuge Supervisor's final decision "is unacceptable to the CSKT Natural Resources Department Head," CSKT may elevate the dispute to the CSKT Tribal Council and the Regional Director. *Id.* If the parties are unable to reach consensus, either the Tribal Council or the Regional Director may request the assistance of a mutually acceptable mediator. *Id.* If the parties cannot reach consensus through mediation, the Regional Director's position will prevail, but the Tribal Council may appeal to the DOI Senior Management Team. *Id.* The DOI Senior Management Team is comprised of the Deputy Secretary, the Associate Deputy Secretary, the Assistant Secretary for Fish, Wildlife and Parks, the Assistant Secretary for Indian Affairs, the Director of the FWS, the Director of the Bureau of Indian Affairs, and the Associate Solicitor for

General Law. AFA § 4. Without going through any of the levels of review within the DOI, or after they are completed, the CSKT may appeal disputes under the 2008 AFA to the Interior Board of Contract Appeals and then to court. AFA § 19.

Compliance with federal environmental law is to be jointly shared by the FWS and the CSKT. The Refuge Leadership Team identifies activities that will require review under the NEPA, the National Historic Preservation Act and other cultural resource laws. The parties are directed to work together to implement the required processes under those authorities. AFA § 9.C. The CSKT's performance under the AFA is to be jointly evaluated by the CSKT and the FWS. The CSKT has the right to jointly draft and approve its own evaluation. If there are disagreements about the CSKT's performance, the assessment report is to include views of both parties. AFA § 11.A.2.

E. Failure to Comply with NEPA. On September 7, 2004, in the form of an attachment to a decision document approving the 2005 AFA, the FWS issued a document titled CATEGORICAL EXCLUSION – Programmatic – National Bison Range Sanders and Lake County, Montana. AR2099-106. FWS asserted in the Programmatic Categorical Exclusion that the proposed action “will have no significant adverse effect on the quality of the human environment.” The FWS also asserted that and the “[p]rogrammatic agreement between FWS and the Tribe qualifies as a Categorical Exclusion under 516 DM 6, Appendix 1.4,” including research, inventory collection activities related to conservation of fish and wildlife; the operation, maintenance, and management of existing facilities and routine recurring management activities and changes that “result in only minor changes in the use, and have negligible environmental effects on-site or in the vicinity of the site”; and the use of prescribed burning for habitat improvement purposes. AR002106.

The Federal Register Notice announcing the adoption of the 2005AFA, stated that:

The Service does not believe the Agreement is a major Federal action that will result in significant environmental impacts. The Service considers the work that is identified in the Agreement to be part of the routine operations, maintenance, and management of the National Bison Range Complex (whether done by Service employees, CSKT employees, or another contractor). The Service has found that routine operation, maintenance, and management activities do not (individually or cumulatively) have a significant effect on the human environment and are, therefore, categorically excluded from NEPA compliance (516 DM 6).

AR000387.

Neither FWS nor any other entity performed an environmental assessment (“EA”) or an environmental impact statement (“EIS”) to assess the effect of the current AFA on the environment or the species found at the NBRC. U.S. Answer ¶¶ 124, 125. The FWS did not perform an EA or an EIS to assess the effect of: (1) the transfer of responsibility to run the biological program to the CSKT on FWS’ coordinated management of the bison herd under its jurisdiction prior to the execution of the current AFA; (2) having an inexperienced CSKT staff responsible for running the biological program, the fire program or the maintenance program on the wildlife and the habitat within the NBRC; or (3) the implementation of a “limited” Annual Work Plan on the wildlife and their habitat within the NBRC. U.S. Answer ¶¶ 125-128.

Prior to executing the 2008 AFA, the DOI Solicitor’s Office provided a memorandum to the Associate Deputy Secretary, asserting that “[w]hen the 2005-2006 AFA became effective, the FWS determined that NEPA did not apply because the AFA was within the terms of a categorical exclusion. The result holds for the current AFA as well.” AR000960SUPII.

In a letter responding to inquiries by Congressman John Dingell dated April 11, 2008, Assistant Secretary Lavery provided an attachment indicating that the AFA was not itself a major federal action significantly affecting the environment, and that the activities conducted under the AFA were part of the routine operations, maintenance and management of the NBRC

which the Service had found to be categorically exempt from NEPA. AR00906-7. There is no other documentation in the administrative record discussing or referencing FWS' NEPA compliance in conjunction with the approval and/or implementation of the AFA.

F. Failure to Comply with ESA Consultation Requirements. The Programmatic Categorical Exclusion included a Statement of Compliance that purported to evaluate the 2005 AFA's compliance with various executive orders and legislative acts, including the ESA.

AR002100-1. For compliance with ESA Section 7, FWS asserted the following:

The process of developing and negotiating the AFA, and the AFA itself, does not affect listed species. Any subsequent management actions on the National Bison will require approval by the Refuge Manager (AFA, Section 7(B)). The Refuge Manager will ensure that internal Section 7 consultations occur in accordance with Service policy and the Endangered Species Act.

AR002101.

FWS did not engage in Section 7 consultation to determine whether FWS's discretionary decision to execute the 2005 AFA would likely jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. FWS also did not prepare any evaluation of the AFA's compliance the ESA and did not engage in Intra-Service Section 7 consultation to determine whether the current AFA would likely jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. U.S. Answer ¶ 141. Like with the 2005 AFA, FWS did not assess which listed, proposed, or candidate species, or which proposed or designated critical habitats may occur within the NBRC. FWS also did not determine whether the current AFA may have affected those species or habitats or may have destroyed or adversely modified critical habitats by completing an Intra-Service Section 7 Biological Evaluation Form. As the Defendants admit, the NBRC is home to a number of species listed under the ESA as threatened or endangered, including but not limited to, the grizzly bear, the gray wolf, and the bull trout. *See* U.S. Answer

¶ 35. In addition, pursuant to the ESA, bull trout critical habitat has been designated within the NBRC. *Id.*

On January 5, 2009, pursuant to the citizens' suit provision of the ESA, 16 U.S.C. § 1540(g), BGA gave written notice to FWS of its failure to perform certain nondiscretionary duties under the ESA in connection with its the execution of the 2009 AFA. U.S. Answer ¶ 134.

G. Violation of FOIA. The AFA states that FOIA does not apply to “records maintained solely by the CSKT.” AFA § 10.D. The AFA requires the CSKT to collect, maintain and provide to the FWS all records specified in the AFA or an AWP that the FWS needs to comply with law or FWS policy. AFA § 10.A. The AFA also requires the CSKT and FWS to identify in the AWP “any Activity record” the CSKT must maintain. AFA § 10.B. Upon request, CSKT will provide “a copy” of an Activity record. AFA § 10.B. The AFA requires the CSKT to maintain financial records of CSKT’s expenditure of funds provided under the AFA and to provide them to FWS to the extent necessary for its budget appropriation and apportionment processes, or in the event of retrocession or reassumption. AFA § 10.C.1.

ARGUMENT

VI. THE AFA VIOLATES THE REFUGE ACT.

The plain language of the Refuge Act circumscribes Defendants’ authority to delegate administration of the NWRS or any individual refuge. The statute states explicitly that the NWRS must be “administered by the Secretary” *through* the FWS. 16 U.S.C. § 668dd(a)(1). Neither the statutory language nor its legislative history provide support for the proposition that Defendants may delegate to an Indian tribe any management authority over a refuge.

A. The Plain Language and Legislative History of the Refuge Act Prohibit Agreements to Share Management of a Refuge. Administrative agencies such as FWS are creatures of congressional enactment and “an agency’s power is no greater than that delegated to

it by Congress.” *Lyng v. Payne*, 476 U.S. 926, 937 (1986). *See also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002). Where Congress “has directly the addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken.” *Texas v. United States*, 497 F.3d 491, 502 (D.C. Cir. 2007); *United States v. Giordano*, 416 U.S. 505, 514 (1974).

Defendants have entered into an AFA that delegates management authority over NBRC to another party, which is contrary to the plain language of the Refuge Act and Congress’ express intent that refuge administration remain within the FWS. The Refuge Act designates a “National Wildlife Refuge System” to be “administered by the Secretary through the United States Fish and Wildlife Service,” for “the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas . . .” 16 U.S.C. § 668dd(a)(1). In administering the overall NWRS, each refuge must be “managed to fulfill the mission of the System, as well as for the specific purposes for which that refuge was established.” *Id.* § 668dd(3)(A).

Congress amended the Refuge Act in 1976 to make sure that FWS is “clearly designated as the agency through which the Secretary would be required to administer the units of the System.” S. Rep. No. 94-593, 94th Cong., 2nd Sess., reprinted in (1976) U.S. Code Cong. & Ad. News 288, 293 (“Refuge Act Report”). Concerned that FWS had shifted management of four wildlife refuges to BLM to the detriment of these refuges, Congress added this language to “eliminat[e] the possibility of the Secretary delegating his authority” to other agencies because “the goals of the National Wildlife Refuge System will best be served by assuring that the [FWS] has responsibility for wildlife management in all areas of the refuge system.” Refuge Act

Report, at 292. Congress stated that the delegation of authority, even if it constitutes “joint administration” by the FWS “and any other agency,” is prohibited by Congress. *Id.* at 293.

Citing to the “clearly expressed statutory language . . . well supported by the legislative history,” the only court reviewing a Secretarial delegation of administration of the NWRS held that the transfer of functions related to the refuge administration to another federal agency to be a “clear error of judgment and beyond his statutory authority.” *Trustees for Alaska v. Watt*, 524 F. Supp. 1303, 1309-1310 (D. Alaska 1981), *aff’d* 690 F.2d 1279 (9th Cir. 1982). The *Trustees for Alaska* case involved the delegation to the U.S. Geological Service (“USGS”) of lead responsibility for reports and exploration regulations under the Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. §§ 3101-3233, at the Arctic National Wildlife Refuge. 524 F. Supp. at 1307. The court determined that the delegation of these functions constituted the “administration” of the refuge and was contrary to the Refuge Act. *Id.* at 1309. Furthermore, the allowance for FWS concurrence on USGS exploration plans did not alter the court’s analysis because “[j]oint administration over the Refuge is forbidden by Congress.” *Id.* at 1310.

The express limitation on FWS’ authority to delegate management authority over refuges is consistent with the larger mission and policies of the Refuge Act. *Brown & Williamson*, 153 F.3d at 162 (emphasizing the “crucial role of context as a tool of statutory construction.”). Congress amended the statute in 1997 to include a mission statement and to address concerns that the NWRS “has been managed more as a collection of disparate units than as a true system.” H. Rep. No.105-106 (1997), at 3, 8. In doing so, Congress stated that refuges “cannot fulfill the mission set forth in this Section unless they are consistently directed and managed as a national system. This includes managing a series of refuges in a coordinated manner . . .” *Id.* at 8.

The congressional directive that individual refuges be administered by FWS as part of a national NWRS is particularly important for the refuges at NBRC. The bison on FWS refuges are subject to a NWRS-wide metapopulation management plan. AR000898SUPH. This plan explicitly requires “[c]oordination among all units” and “[f]eedback between management and monitoring . . .” *Id.* The bison at the NBR are “the most genetically unique Service herd” and are “essential to the Refuge system bison metapopulation.” AR002315. The NBRC is just one component of a whole, both in terms of the mission of the NWRS and the FWS’ bison conservation plan. Congress intended that the NWRS be managed as a whole, and to delegate management over refuges such that they are treated as stand-alone facilities contravenes the letter and spirit of the Refuge Act.

B. Agreements For Management of Programs at a Refuge Are Limited to State Fish & Wildlife Agencies. The Refuge Act does authorize FWS to enter into agreements that provide for the management of individual programs on refuges, with overall management oversight by FWS. These cooperative agreements, however, are statutorily limited to State fish and wildlife agencies. The Act does not authorize management authority by Indian tribes over refuges.

The Refuge Act authorizes FWS, subject to standards established by and the overall management oversight of the FWS, to “enter into cooperative agreements with *State* fish and wildlife agencies for the *management of programs* on a refuge.” 16 U.S.C. § 668dd(b)(4) (emphasis added).¹ A “State” is defined in the statute as “the several States of the United States, Puerto Rico, American Samoa, the Virgin Islands, Guam, and the territories and possessions of the United States.” *Id.* § 668ee(13). There is no mention of Indian tribes. When Congress

¹ The Refuge Act also requires the Secretary to “ensure timely and effective cooperation and collaboration with Federal agencies and State fish and wildlife agencies during the course of acquiring and managing refuges . . .” 16 U.S.C. § 668dd(5)(M).

intends to include tribes within a definition of a governmental entity, it does so expressly. *See e.g.* 33 U.S.C. § 1362(4) (defining a “municipality” for purposes of the Clean Water Act to include an “Indian tribe”); 42 U.S.C. § 6904(13) (same for Resource Conservation and Recovery Act). In this case, the definition unambiguously defines the term “State” without any reference to an Indian tribe, and “when a statute’s meaning is clear . . . the sole function of the courts is to enforce it according to its terms.” *Harbor Gateway Commer. Property Owners’ Ass’n v. EPA*, 167 F.3d 602, 606 (D.C. Cir. 1999). *See also Palestine Information Office v. Shultz*, 674 F. Supp. 910, 917 (D.D.C. 1987), *aff’d* 853 F.2d 932. To read an “Indian tribe” into the definition of a “State” impermissibly broadens the plain language of the Refuge Act and imposes meaning where there is only silence. *See United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941) (“It is not our function to engraft on a statute additions which we think the legislature logically might or should have made.”); *Texas*, 497 F.3d at 502, 505.

Furthermore, Congress had the opportunity to extend the reach of a cooperative agreement to Indian tribes in 1997 when it made substantial amendments to the Refuge Act. As part of these amendments, Congress broadened the definition of “State” to include “the territories and possessions of the United States.” Pub. L. No. 105-57, § 5, 111 Stat. 1253 (1997). Just three years earlier, Congress passed the Tribal Self Governance Act, which authorized the Secretary to enter into AFAs with Indian tribes with respect to certain programs administered by DOI. 25 U.S.C. § 458cc. Congress was presumably aware of the concept of AFAs when it considered the amendments to the Refuge Act. 2A SUTHERLAND STAT. CONSTRUCTION § 45.12 (2009) (it is assumed “that the legislature was aware of existing statutes”). If Congress had so intended, it could have provided for management authority by Indian tribes over refuges. But it did not, and this silence is powerful evidence of Congress’ intent.

C. The AFA Inappropriately Delegates to CSKT Authority to Co-Manage the NBRC. The Refuge Act expressly delegates the authority to administer refuges to FWS, and limits the opportunities for management of programs at a refuge to State fish and wildlife agencies. Defendants, however, have entered into an agreement that transfers extensive management authority to CSKT. The AFA executed by Defendants is conceived as a “management partnership,” AFA § 7.3, and shifts to CSKT operational and management authority over all but one program at the NBRC, including “mission-critical” activities. AR001625. Regardless of whether Defendants could enter into an AFA for the performance of activities at a refuge, this AFA goes far beyond the limits on delegation of authority articulated in the Refuge Act.

As a threshold matter, CSKT simply does not have the level of expertise or experience of FWS in management of a refuge, particularly one subject to an NWRS-wide bison management plan. As demonstrated by both the Calendar Year 2005 and 2006 Annual Funding Agreement Reports, CSKT performed less than half of the activities it had contracted under the previous AFA at a level considered “fully successful” by FWS. AR01137; AR002518. Indeed, it was CSKT’s failure to comply with FWS bison management standards and wildlife monitoring and reporting standards that led to the termination of the previous AFA. AR002432. Congress pointed to these problems of joint management authority over refuges, including deterioration of FWS standards, when it expressly delegated to FWS the exclusive authority to administer the NWRS. Refuge Act Report, at 291-93.

Despite the questions related to CSKT’s performance under the previous AFA, Defendants entered into a new AFA in which CSKT is a full co-manager of the NBRC. AFA § 7.C. Subject only to the authority of the Refuge Manager, CSKT “will manage the Activities

performed by the CSKT.” AFA § 7.A. Under the AFA, CSKT will conduct and manage all programs on the refuge, with the exception of law enforcement activities, by 2011.² AFA § 6. The AFA provides for a new position, the CSKT Deputy Refuge Manager position, which is “co-equal” to the FWS Deputy Refuge Manager. AFA § 7.C. The CSKT Deputy Refuge Manager will “provide substantive input to management decision-making at NBRC,” and subject only to the authority of the Refuge Manager, will oversee and direct the “day-to-day work” of those programs that are the responsibility of CSKT. *Id.* The FWS also has agreed that the parties “will collaborate in the management of the NBRC through the Refuge Leadership Team,” which is made up of the Refuge Manager, the FWS and the CSKT Deputy Refuge Managers, and the CSKT Lead Biologist. AFA § 7.D. Subject only to the Refuge Manager’s final authority, the Leadership Team writes the annual work plan, sets work priorities, and drafts status reports. *Id.*

The AFA creates the appearance of final authority vesting in the Refuge Manager, but the final responsibility for “directing and controlling the operation” of the NBRC is so circumscribed as to leave the Refuge Manager with final authority in name only. AFA § 7.B. The Refuge Manager’s authority “must be exercised in a collaborative fashion, with full and objective consideration of CSKT recommendations . . .” AFA § 7.B. And in a significant change from the previous AFA, all decisions of the Refuge Manager are subject to a four-part dispute resolution procedure. AFA § 19. At each level of the dispute resolution procedure, the CSKT may appeal an unfavorable decision by FWS, until the “DOI Senior Management Team” in Washington, D.C. makes a final decision. AFA § 19.A.4. The DOI Senior Management Team is made up of a high-level managers, including officials with no particular knowledge of or responsibility over

² The AFA provides that during the first two years of the AFA, the FWS’s Outdoor Recreation Planner will retain certain activities related to environmental education, cooperating association, and volunteer coordination. AFA § 6.A. All functions transfer to CSKT in 2011. *Id.*

the Refuge Act, such as the Assistant Secretary of Indian Affairs and the Director of the BIA.

AFA § 4. And at any time, the CSKT may appeal the decision to the Interior Board of Contract Appeals and then to court. AFA § 19.B.

This AFA simply does not leave FWS with the authority necessary to fulfill its statutory obligations under the Refuge Act. *See Trustees for Alaska*, 524 F. Supp. 1310. In *Trustees for Alaska*, the court concluded that “Congress intended FWS to ‘manage’ the refuge system,” which includes protection of wildlife and control of human access to refuges. *Id.* at 1308.³ The Refuge Act defines “manage” as “to sustain and, where appropriate, restore and enhance, healthy populations of fish, wildlife, and plants utilizing . . . methods and procedures associated with modern scientific resource programs.” 16 U.S.C. § 668ee(4). Under the AFA, it is CSKT, and not FWS, that is “managing” the NBRC and its associated resources, including the bison.

Congress entrusted the NWRS to the FWS because of its expertise in managing those resources the NWRS is intended to protect, *see* Refuge Report, at 292, and because Congress believed the NWRS should be managed as a whole rather than as “a collection of disparate units,” H. Rep. No. 105-106, at 5. By signing the AFA, Defendants abdicated this responsibility and acted beyond their statutory authority in direct contravention of the Refuge Act.

VII. THE AFA IS NOT AUTHORIZED BY TRIBAL SELF-GOVERNANCE ACT.

In 1994, Congress enacted the Tribal Self-Governance Act, 25 U.S.C. §§458aa-hh, which authorized, *inter alia*, the Secretary to negotiate and enter into written annual funding agreements that permit a qualifying tribe “to plan, conduct, consolidate, and administer

³ In the absence of a specific definition, “[i]t is fundamental that the plain and ordinary meaning of the statutory language controls.” *AFL-CIO v. Kahn*, 618 F.2d 784, 801 (D.C. Cir. 1979). The Merriam-Webster Dictionary defines “administer” as, *inter alia*, “to manage as an administrator . . .” WEBSTER’S II, NEW COLLEGE DICTIONARY (1995). This definition is supported by the Committee Report, which uses “administer” and “manage” interchangeably, Refuge Act Report, at 292.

programs, services, functions, and activities, or portions thereof administered by” DOI through the BIA, or administered by DOI other than through the BIA and “that are otherwise available to Indian tribes or Indians . . .” 25 U.S.C. § 458cc(b)(1),(2). Finally, any such agreement “may, in accordance to such additional terms as the parties deem appropriate, also include other programs, services, functions, and activities, or portions thereof, administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance” to the tribe. *Id.* § 458cc(c). The 2008 AFA is authorized under 25 U.S.C. § 458cc(c). AR 002700.

The statute further provides that, “[e]xcept as otherwise provided by law, the Secretary shall interpret each Federal law and regulation in a manner that will facilitate . . . the inclusion of programs, services, functions, and activities in the agreements entered into under this section” 25 U.S.C. § 458cc(i). However, the statute does not authorize the Secretary to enter into any agreement that: (1) involves inherently Federal functions; or (2) permits participation by the tribe that is not authorized by another statute establishing the program.

Section 403(k) provides that (25 U.S.C. §458cc(k)):

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 458ee(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

As DOI has recognized, Section 403(k)’s first limitation requires DOI to exclude from an AFA any functions that are “inherently Federal.” *See* 25 C.F.R. § 1000.129. There is, however, no definition of this term in the statute or in DOI’s regulations. *See id.* § 1000.2. Section 403(k) was added to the legislation on the Senate floor, where Senator McCain stated that one purpose of the amendment was to preserve the existing jurisdictional responsibilities of the Federal government, the states, and Indian tribes “over natural resources, including fish and wildlife

resources.” 140 Cong. Rec. S14678 (daily ed. Oct. 7, 1994). Senator McCain also stated that the term “inherently Federal functions” could include “discretionary administration of Federal fish and wildlife protection laws, promulgation of regulations, obligation and allocation of Federal funds, the exercise of certain prosecutorial powers, and other discretionary functions vested in Federal officials.” *Id.*

The Solicitor of DOI has provided further guidance on the meaning and application of Section 403(k) in a May 17, 1996 memorandum, which the defendants relied upon here. AR 001026-51; AR 001634; AR 001704.⁴ He directed DOI agencies applying the “inherently Federal” limitation to utilize Office of Management and Budget (“OMB”) Policy Letter 92-1, which was “in effect at the time section 403(k) was drafted and enacted into law.” AR 001036. This guidance addressed which Executive Branch functions are “inherently governmental,” and therefore may not be contracted out to private parties. AR 001040-001050. Policy Letter 92-1 stated that “inherently governmental functions” (AR 001041):

include those activities that require either the exercise of discretion in applying Government authority or the making of value judgements [sic] in making decisions for the Government.

The Solicitor also noted (AR 0001036) that the OMB guidance defined “inherently governmental function” as involving, *inter alia*, the interpretation and execution of Federal laws so as to:

- (a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

⁴ The Solicitor first concluded that Section 403(k)’s restriction is broader than any limitation under the non-delegation doctrine of the Constitution. AR 001031-32.

(c) significantly affect the life, liberty, or property of private persons;

(d) commission, appoint, direct, or control officers or employees of the United States; or

(e) exert ultimate control over the acquisition, uses or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

AR 001041.⁵ The Solicitor's adoption of OMB Policy Letter 92-1 and its definitions as guidance provides the criteria for judging whether the 2008 AFA violates the Tribal Self-Governance Act.⁶

A. The AFA transfers functions to CSKT that are inherently Federal. The 2008 AFA and its administrative record demonstrate that the 2008 AFA is an agreement with respect to inherently Federal functions in four separate ways.

1. The scope and structure of the 2008 AFA have the effect of transferring inherently Federal functions to CSKT. The 2008 AFA transfers to CSKT virtually all responsibility for implementing most of the major functions of the NBRC and creates an unprecedented structure for joint management that: (1) grants CSKT significant discretionary decision-making authority for implementing Federal law and policy; and (2) leaves DOI with effectively no meaningful oversight capacity. The combined effect is that for the transferred

⁵ OMB's definition in Policy Letter 92-1 of "inherently governmental functions" was subsequently codified verbatim in the Federal Activities Inventory Reform Act of 1998 ("FAIR"), which prescribed procedures for determining which functions are not inherently governmental. Pub. L. 105-270, § 5(2), 105th Cong., 2d Sess., 112 Stat. 2382, 2384-2385; note at 31 U.S.C. § 501. The FWS used the results of its annual "FAIR Act inventory" in determining the inherently Federal functions at the NBRC. AR 00274-00279.

⁶ OMB Policy Letter 92-1 has since been superseded by OMB Circular A-76 (May, 29, 2003), issued to implement FAIR. 68 Fed. Reg. 32,134 (May 29, 2003). While FWS now follows this guidance in complying with FAIR, there is no indication in this record that the Solicitor has rescinded the direction to agencies to utilize OMB Policy Letter 92-1 in applying Section 403(k).

functions, CSKT performs inherently Federal functions, and DOI has failed to retain sufficient discretionary authority to ensure proper implementation of Federal law and policy.

Section 6.A transfers functions to CSKT in five specified categories, described by the FWS as “mission-critical” functions. AR 002703, 001621, 001948. Although the FWS retains functions not specifically assigned to CSKT, the only category reserved for exclusive FWS responsibility is law enforcement. As Dean Rundle, FWS’ lead negotiator noted, all law enforcement positions were “off the table,” and FWS otherwise proposed to retain only the Refuge Manager position, the Deputy Refuge Manager position (primarily responsible for conduct and supervision of law enforcement functions), and environmental educational activities for the first two years of the AFA. AR 000449, 000526, 002705.

Moreover, CSKT, through its co-equal role on the Refuge Leadership Team and in the development of the annual work plan, will have a major role in setting tasks, expectations and performance requirements for the administration of the entire NBRC, not just those activities assigned to the Tribe under the AFA. AFA § 7.E. The CSKT Deputy Refuge Manager may also perform many of the Refuge Manager’s responsibilities when filling the role of Acting Refuge Manager. § 7.C.2. And, CSKT, through the CSKT Deputy Refuge Manager, will supervise all of the CSKT employees and volunteers performing activities within the Tribe’s assigned categories, which includes FWS employees assigned to CSKT under an IPA agreement.

Lastly, the agreement gives CSKT a significant role in assessing the performance of FWS employees assigned to CSKT under an IPA agreement, including decisions about the continuation of those employees’ employment at NBRC. Section 12.E.5.c.i provides that the employee, the Refuge Manager, and the CSKT Deputy Refuge Manager will “jointly develop” the employees’ performance plan and evaluations, and CSKT must be consulted if CSKT has

concerns about the performance or conduct of the employee. CSKT may also terminate the IPA agreement for “cause,” and in that event, FWS is obliged not to reassign the employee “to a position working within, or for, the NBRC” AR002717. In essence, CSKT has been given all major functions at NBRC with the exception of law enforcement, supervision of the remaining FWS employees, and the Refuge Manager’s overall responsibility.

Furthermore, the new structure for carrying out the management responsibilities at NBRC is weighted with features that effectively remove the residual authority FWS requires to meet its statutory duties under the Refuge Act. The agreement requires the Refuge Manager to exercise his overall authority in a “collaborative fashion” through the Refuge Leadership Team, which is tasked with jointly preparing the annual work plan, which identifies the year’s work, the priorities, and the expectations for performance. §§ 7.B., 7.D7.E. Since the 2008 AFA, in contrast to the prior AFA, fails to identify with any specificity the tasks and activities each party will be responsible for, most of the critical decision-making will necessarily be subject to the arrangement for exercising authority on a shared basis. Section 11.A addresses performance assessments, providing that FWS and CSKT will “jointly monitor” and “jointly evaluate” NBRC operations and that any written evaluation will be “jointly drafted and approved” and contain the disagreeing views of either party. AR 002712. In addition, as noted, CSKT has a major role in making personnel decisions about IPA employees.

In the normal management structure, the hierarchical chain of command enables the Refuge Manager to control and direct operations at NBRC by the exercise of delegated sovereign authority to implement Federal law and policy, and thereby discharge the FWS’ statutory responsibilities. Abandoning that structure in favor of management by committee inevitably makes negotiation a key avenue for reaching decisions, marked by the normal give and take

required to achieve consensus. The ability of one party to control the outcome will depend in large measure on that party's power to persuade and induce the other party to agree, and neither party enjoys the unfettered ability to exercise independent authority to control the result. As the Director of FWS recognized in evaluating the management provisions of the May 4, 2007 draft, such an arrangement "places the management in a negotiation posture . . . and removes the final decision-making authority from the Refuge Manager." AR 001086.

The AFA's dispute resolution procedures further compound this effect. Under Section 19, CSKT has a contract right to go over the head of the Refuge Manager and take its disagreements all the way to very highest management levels of DOI.⁷ This prospect could well lead the Refuge Manager to yield to the CSKT for the sake of agreement, thus presenting a clear risk of inhibiting the Refuge Manager's independent exercise of delegated authority. The management-by-committee structure of the 2008 AFA effectively eviscerates the Refuge Manager's authority to assure implementation of Federal law and policy, an exercise of sovereignty that cannot lawfully be delegated or bargained away. Accordingly, the language in Section 7.B reserving "final responsibility and authority" to the Refuge Manager for direction and control of NBRC operations has little more than a nominal effect.

In addition, the agreement fails to reserve the Refuge Manager's authority over specified management actions listed in § 7.B that FWS admits are inherently Federal. The Assistant Secretary, when responding to plaintiffs, conceded on two separate occasions that such functions are inherently Federal. AR 000151, 000638. He further stated that:

We do not believe that these functions can be best carried out by Service personnel off-site. We believe that an on-site Refuge Manager employed by the Service is necessary to make these decisions.

⁷ The only limitation is that CSKT can take its concerns about IPA employees no further than the second level of review. § 12.E.5.c.ii.

AR 000638. Section 7.B, however, provides that “[s]ubject to the dispute resolution procedures in Section 19.A below, the Refuge Manager will retain sole and final authority with respect to” those very same responsibilities. Where the Refuge Manager’s decision can be overturned by higher level officials in Washington, D.C. at the behest of CSKT, it is simply impossible for the Refuge Manager to retain “sole and final authority” for performing these inherently Federal functions. This extraordinary check on the Refuge Manager’s authority was inserted with no apparent discussion of its implications just two days before the agreement was signed, a most casual evisceration of the front line officer’s authority over these essential functions. *See* AR 001555, 001561 (version submitted 6/10/2008 for final headquarters DOI review); AR 001760, 001768 (version submitted 6/17/2008 for final regional DOI review); 00159SUPI, 000165SUPI (regional officials assured no substantive differences in the versions).

It is predictable that every disagreement over management direction having a significant impact on the NBRC will be taken to the DOI Senior Management Team in Washington, D.C. As the Regional Director noted after review of an earlier draft, based on the Tribe’s history, “every issue will be elevated . . . and land somewhere in the Secretary’s corridor.” AR 001086-87. Plainly, the terms of this agreement render the Refuge Manager’s management authority an empty shell, and decisions will be made by DOI officials far removed from the site, a scenario the Assistant Secretary conceded would violate DOI’s obligation to retain inherently Federal functions by vesting the authority to perform those responsibilities in the FWS on-site manager.

The unprecedented scope and structure of CSKT’s participation are plainly inconsistent with the OMB guidance adopted by DOI for applying Section 403(k). Because CSKT is essentially given co-administrator status, the Tribe will necessarily have virtually an equal role in “the exercise of discretion in applying Government authority or the making of value judgements

[sic] in making decisions for the Government.” AR 001041. More particularly, the Tribe will have a deciding role in the management, thus controlling FWS’ decision “to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise. . . .” *Id.* CSKT will also enjoy the right to “direct, or control officers or employees of the United States.” *Id.*

Moreover, the OMB guidance recognizes that if substantial portions of Federal responsibilities are delegated, the accountable Federal officials must preserve independent judgment and authority by providing sufficient oversight. Under the OMB policy, Federal officials must (AR 0001042):

Provid[e] greater scrutiny and an appropriate enhanced degree of management oversight . . . when contracting for functions that are not inherently governmental but closely support the performance of inherently governmental functions. . . .

As shown above, the AFA effectively eviscerates the Refuge Manager’s delegated sovereign power to control operations and management at the NBRC and places crucial decision-making authority in Washington officials whom DOI concedes do not have the capacity to conduct adequate oversight. *See* AR 000638. In addition, CSKT’s control of every function (except law enforcement) and all the staffing positions for those functions leaves the Refuge Manager with significantly diminished capacity to conduct necessary oversight.⁸ The management-by-committee structure, and its inevitable negotiation process, will drain additional resources from the Refuge Manager. Accordingly, this agreement not only grants CSKT the status of a co-administrator, but also fails to institute sufficient oversight capacity to prevent the loss of authority to perform inherently Federal functions. The OMB guidance recognized that inherently Federal functions cannot be given away either expressly or by the failure to retain

⁸ For example, the Refuge Supervisor recognized that FWS would no longer have the personnel for complying with NEPA and the National Historic Preservation Act. 000388-000389SUPI.

effective oversight. DOI's failure to follow and apply that guidance transgressed the first limitation of Section 403(k).

Furthermore, DOI made no serious attempt to justify such a patently illegal result. DOI provided no opportunity for public review and comment before the final agreement was signed. Instead, DOI announced the agreement in the Federal Register, simply declaring that the NBRC "will continue to be administered and managed by the [FWS] in accordance with" the Refuge Act and asserting that after "the conclusion of the negotiations in June 2008, the [FWS] and [DOI] conducted an extensive legal and policy review of the AFA to ensure it met all applicable requirements. . . ." 73 Fed. Reg. 39,714 (July 10, 2008). There is, however, no explanation either in the Federal Register notice or in the administrative record of how the AFA remains within the statutory restriction against transferring inherently Federal functions or follows the OMB guidance adopted for applying those restrictions. The agency simply did not address or explain how an agreement granting CSKT such a significant degree of administrative responsibility, coupled with a management structure that strips the agency of meaningful oversight capacity, can be reconciled with Section 403(k). Nor can DOI's decision be reconciled with the Assistant Secretary's admission that the Refuge Manager's on-site administration of the NBRC involved inherently Federal functions that cannot be effectively performed by off-site FWS officials. AR 000151, 000638. The agency's failure to supply a rational justification for its decision, consistent with its own guidance and with its own previous determination of the legal limits for cabining the Refuge Manager's authority, is the height of arbitrary and capricious decision-making. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *Williams Gas*, 475 F.3d at 326.

2. The AFA transfers an integral part of FWS' inherently Federal responsibility and authority to manage the Refuge System as a whole. The transfer of

inherently Federal functions at NBRC also results in an abdication of discretionary authority for administering the NBRC as one unit of the entire National Wildlife Refuge System. Congress mandated that National Wildlife Refuges be administered exclusively through FWS to ensure that each refuge fulfills its function in the entire system. This mandate applies with especial force to NBRC's major mission, conserving bison, which, under DOI policy, must be carried out in conjunction with the other units of the system where FWS and other DOI agencies manage bison. Assuring that the NBRC fills its assigned role is patently an inherently Federal function under the applicable criteria and guidance adopted by DOI. For the reasons set out above, that function has not been retained under the 2008 AFA, and DOI has not supplied a rational explanation of its decision with respect to this function. DOI's action is therefore contrary to law and arbitrary and capricious for this reason as well.

3. The AFA unlawfully impinges on FWS' inherently Federal function of directing and controlling Federal employees. With respect to IPA employees, the agreement transfers to CSKT the inherently Federal function of directing and controlling Federal employees, including whether particular Federal employees will be assigned to staff the NBRC. CSKT is permitted to join in the development of the IPA employee's performance plan, may raise performance issues with the Refuge Manager, and can participate in certain aspects of FWS' procedures for addressing performance. AFA § 12.E.5.c.i. CSKT is also given the right to terminate the IPA agreement for "cause," and in that event, FWS is obliged not to reassign the employee "to a position working within, or for, the NBRC" *Id.* § 12.E.5.C.ii-iii. "Cause" is defined only to the extent of stating it "includes" performance issues documented by CSKT, and therefore remains open to interpretation that includes other factors. *Id.* § 12.E.5.c.ii. CSKT can elevate any disagreement with FWS' decisions through the dispute resolution process.

The cumulative effect of these provisions gives CSKT a major role in the application of Federal personnel practices to a Federal employee. Most significantly, the FWS has given up its discretionary authority to determine whether a Federal employee will be assigned to work at the NBRC. Rather, that decision is controlled by CSKT's right to terminate the IPA agreement. The OMB guidance recognized that the authority to "direct and control" Federal employees was an inherently Federal function. AR 0001041. Moreover, the Solicitor's Office recognized here that supervision of Federal employees is an inherently Federal function because "it involves interpreting an[d] applying personnel laws and discretionary employment-related decisions." AR 001705. Surrendering this authority in the case of IPA employees violates Section 403(k).

4. The AFA transfers the concededly inherently Federal functions performed by the Outdoor Recreational Planner. The 2008 AFA's provision assigning the Visitor Services Program function to CSKT transfers functions DOI admitted are inherently Federal. The Solicitor's Office recognized the position of Supervisory Outdoor Recreation Planner included the inherently Federal functions of controlling Federal property and funds and supervising Federal employees. AR 001706; *see* AR 001041 (OMB guidance requires Federal official to exert ultimate control over Federal property and funds). Section 6.A.5 of the agreement, however, provides for the transfer of the entire Visitor Services Program to CSKT by October of 2011. The transfer is contrary to Section 403(k).

B. The AFA permits participation by CSKT in the management of the NBRC that the Refuge Act does not authorize. Section 403(k)'s second limitation on the Secretary's authority requires DOI to exclude from an AFA any functions where the statute establishing the existing program does not allow such participation by a tribe, as DOI has recognized in its implementing regulations. *See* 25 C.F.R. § 1000.129. As shown above, the Refuge Act bars

CSKT from participating in the administration and management of the NBRC in two distinct ways. First, the provisions of the Refuge Act bar CSKT from participating in the administration and management of the NBRC in any fashion. Accordingly, DOI's action permitting such participation through the 2008 AFA violated 25 U.S.C. § 458cc(k).

Second, even if the CSKT is an entity authorized by the Refuge Act to participate in the administration and management of the NBRC, the degree and extent of the CSKT's participation contravenes the Refuge Act's requirement that DOI administer the NBRC exclusively through the FWS. Consequently, the 2008 AFA violates 25 U.S.C. § 458cc(k). For these reasons as well, it must be declared unlawful and set aside. 5 U.S.C. § 706(2)(A).

VIII. FWS'S NEPA DECISION-MAKING PROCESS WAS ARBITRARY AND CAPRICIOUS.

A. FWS Did Not Do Any Analysis. FWS claims that NEPA compliance for the AFA was "satisfied through its formal invocation of a programmatic categorical exclusion in 2004 ... in conjunction with [FWS's] 2008 re-examination of the applicability of the previously invoked [CE]... Answer ¶ 124. The Record is devoid of any analysis by FWS to determine if NEPA compliance required preparation of an EA or EIS. The only document setting forth FWS's "analysis" is a memorandum from DOI's Solicitor's Office to a DOI Associate Secretary. The memorandum provides, in full:

1. Does NEPA apply to the AFA? When the 2005-2006 AFA became effective, the FWS determined that NEPA did not apply because the AFA was within the terms of a categorical exclusion. The result holds for the current AFA as well.

AR000960SUPII.

An agency must "state on the record the reasons why an EIS has not been prepared." *Nat'l Wildlife Fed'n v. Babbitt*, 835 F. Supp. 654, 670-71 (D.D.C. 1993). Further, an agency must provide "adequate justification" for its invocation of a categorical exclusion. *California v.*

Norton, 311 F.3d 1162, 1176 (9th Cir. 2002) (this responsibility is “heightened” if there is evidence that an exception to application of the categorical exclusion may apply), *Humane Soc’y of the United States v. Johanns*, 2007 U.S. Dist. LEXIS 27674 at *21-23 (D.D.C. 2007). Record of an agency’s NEPA analysis is necessary to provide a “basis for the judicial review of the agency’s decision.” *Nat’l Wildlife Fed’n*, 835 F. Supp. at 671 (quoting *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1246 (D.C. Cir. 1980)); *see also Norton*, 311 F.3d at 1175-76.

FWS did not state any reason for not preparing an EA or EIS for the 2008 AFA, nor did it provide any analysis to justify its purported invocation of a CE. On this basis alone, the Court should hold that FWS failed to comply with NEPA. *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1095 (11th Cir. 2004). In fact, there is no record the actual decisionmaker, FWS, considered NEPA at all, since the only record of any consideration is from the DOI Solicitor’s Office. The Record is simply devoid of the required NEPA analysis.

B. FWS Did Not Follow Its Policy for Invoking a CE. FWS has a policy for establishing an appropriate record of its NEPA-related decisions. *See* FWS MANUAL, DOCUMENTING AND IMPLEMENTING DECISIONS, 550 FW 3. This policy requires FWS to prepare an “environmental action statement” to “document a normally categorically excluded action that may be controversial.” *Id.* at 3.3(C)(2)(b); *see also* FWS MANUAL, ENVIRONMENTAL ACTION STATEMENT, 550 FW 3, Exhibit 4. FWS did not follow its own policy and complete an “environmental action statement” for the 2008 AFA. By contrast, FWS followed its policy when it invoked a CE for the 2005 AFA. AR002099-06. An agency’s “failure to follow its own well-established precedent without explanation is the very essence of arbitrariness.” *See Nat’l Treasury Employees Union v. Fed’l Labor Relations Auth.*, 404 F.3d 454, 457-58 (D.C. Cir. 2005).

C. FWS May Not Rely on the 2004 “Programmatic” CE. FWS’s Answer states that “NEPA compliance for the Service’s action in entering the 2008 AFA was satisfied through its formal invocation of a programmatic categorical exclusion in 2004. . . .” Answer ¶ 124. This statement implies that FWS thought that its NEPA analysis from 2004 would apply to future AFAs. However, the term “programmatic categorical exclusion” is not found in NEPA, CEQ’s NEPA regulations, DOI’s NEPA regulations, or anywhere in FWS’s policy. Certainly, a CE can be invoked by an agency for each new action that is covered by that CE, but there is no authority for a “programmatic categorical exclusion” that somehow satisfies an agency’s NEPA analysis for each future action.

As this Court held in *The Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142 (D.D.C. 1993), the Record must reveal a “contemporaneous consideration by the administrative decisionmaker of the applicability of a categorical exclusion.” *Id.* at 149. For the same reasons that an agency’s *post hoc* invocation of a categorical exclusion provides an inadequate basis for review, so does an agency’s pre-determined invocation of a categorical exclusion. *See id.* at 151; *see also Anacostia Watershed Soc’y v. Babbitt*, 871 F. Supp. 475, 481 (D.D.C. 1994). The purpose of NEPA is to ensure that federal agencies contemporaneously consider environmental concerns in their decisionmaking processes. *See Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1,13 (D.D.C. 2009); *The Fund for Animals, Inc.*, 814 F. Supp. at 149. It would defeat the purpose of NEPA to pre-determine the application of a CE to an action.

The 2004 “programmatic” CE can not itself establish a CE for future AFAs. As CEQ NEPA regulations make clear, a CE must be found to have no significant effect on the human environment “in procedures adopted by a Federal agency in implementation of these regulations . . .” 40 C.F.R. § 1508.4. Under 40 C.F.R. § 1507.3, agency procedures shall

include “[t]hose procedures required by . . . 1508.4,” and must be reviewed by CEQ as well as the public and be published in the Federal Register. *Id.* § 1507.3. Further, agency procedures must include “[s]pecific criteria for and identification of those typical classes of action: . . . [w]hich do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).” *Id.* § 1507.3(b)(2). None of these procedures were followed by FWS in developing the so-called “programmatic categorical exclusion.” Thus, in addition to no contemporaneous record of any FWS NEPA analysis for the AFA, the “programmatic categorical exclusion” can not apply to the AFA.

D. Approval of the AFA Was Not Covered by the Previously Relied Upon CEs. The 2004 “programmatic” CE actually was based on three pre-existing CEs. FWS found that the 2005 AFA qualified as a categorical exclusion under the following CEs:

(B1) research, inventory, and information collection activities directly related to the conservation of fish and wildlife resources, which involved negligible animal mortality or habitat destruction, . . . ; and

(B2) the operation, maintenance, and management of existing facilities and routine, recurring management activities and improvements, . . . [that] have negligible environmental effects . . . ; and

(B4) the use of prescribed burning for habitat improvement purposes,

AR002106.

None of these CEs apply to the AFA. The AFA is not a “research, inventory, and information collection activit[y];” and it does not merely authorize prescribed burns. Nor, as CSKT’s activities under the 2005 AFA demonstrate, does the AFA authorize operational activities “which . . . have negligible environmental effects . . .” For example, the AFA delegates responsibility for the Biological Program, including Habitat Management, to CSKT. AFA § 6.A. CSKT’s failure to maintain the fencing as required under the 2005 AFA resulted, *inter alia*, in the death of a bison – clearly an adverse impact. *See* discussion *supra* at 55. Moreover, the AFA

does not merely authorize CSKT to perform certain operational or maintenance tasks. As discussed more fully *infra* at 29-30, the AFA creates a new management structure for the NBRC and introduces a new entity – the CSKT, into the management of the NBRC. CE B4 simply does not apply to such an action. Significantly, the impetus for amendment of the Refuge Act to ensure that the NWRS would not “be transferred or otherwise disposed of except pursuant to an Act of Congress,” resulted from the proposed transfer of management to the Bureau of Land Management of three refuges administered by FWS. *See* H.R. Rep. No. 94-334, 94th Cong, 1st Sess., at 4-6 (June 25, 1975). Concerning that proposed transfer, the DOI Solicitor stated: “[i]f there is any proposal to modify the existing management practices or any other proposed action which would have future management implications, an environmental assessment should be prepared for the purpose of determining whether that proposal is or is not a major federal action significantly affecting the quality of the human environment, thereby requiring the preparation of an Environmental Impact Statement.” *See id.* at 6.

Moreover, the approval of the AFA is the approval of a “federal or federally assisted activit[y]” analogous to types of federally assisted or funded activities familiar to this Court. *See* 40 C.F.R. § 1508.18 (b). As the D.C. Circuit has held in a number of cases, at the time an agency approves an agreement to provide federal assistance or funds to a project, NEPA requires that it fully analyze the potential environmental effects of that project. *See, e.g., Citizens Against Burlington v. Busey*, 938 F.2d 190, 196-97 (D.C. Cir. 1991); *Found. on Economic Trends v. Heckler*, 756 F.2d 143, 155 (D.C. Cir. 1985); *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 55 n.30 (D.D.C. 2003). FWS failed to do the analysis.

E. Even if any CE Apply FWS May Not Rely Upon It. Even if any of the CEs discussed above applied, it may not be used when “extraordinary circumstances” exist. 43

C.F.R. § 46.205(c)(1).⁹ The DOI Department Manual provides that extraordinary circumstances exist for individual actions otherwise within a CE when the action:

- (a) [may] [h]ave significant adverse effects on public health or safety.
- (b) [may] [h]ave adverse effects on such natural resources and unique geographic characteristics as . . . refuge lands . . . and other ecologically significant or critical areas.
- (c) [may] [h]ave highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA Section 102 (2)(E)].
- (d) [may] [h]ave highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.
- (e) [may] [e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects . .
- (h) [may] [h]ave adverse effects on species listed, or proposed to be listed, on the List of Endangered or Threatened Species
- (i) [may] [h]ave the potential to violate a Federal law . . . or requirement imposed for the protection of the environment.

43 C.F.R. § 46.215. There is no Record evidence that FWS even considered whether there were any “extraordinary circumstances” precluding its use of a CE. The situation here is similar to the one in *Brady Campaign*, 612 F. Supp. 2d 1. There DOI assumed that no environmental impacts would result from the final rule. The Court found that the plaintiffs were highly likely to prevail on the merits because DOI failed to evaluate “all reasonably foreseeable environmental impacts.” *Id.* at 17. As the decision in *Brady Campaign* makes clear, FWS must not simply look at the activities authorized by the AFA, but at the foreseeable consequences that flow from the approval of the AFA. A failure to do so violates NEPA. *Id.*; *see also Norton*, 311 F.3d at 1177.

⁹ All text in 43 C.F.R. Part 46 are found at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=4c08a5cf4e8aab1d4634474ef24b8396&rgn=div5&view=text&node=43:1.1.1.1.42&idno=43#43:1.1.1.1.42.1.154.1>.

Furthermore, the Record contains substantial evidence that implementation of the AFA may result in “extraordinary circumstances.” Given the terms of the AFA and CSKT’s performance under the 2005 AFA, the extraordinary circumstances at 43 C.F.R. § 46.215 (a), (b), (d), (h) and (i) likely apply to FWS’s approval of the AFA. Experience under the 2005 AFA alerted FWS to the fact that implementation can result in significant environmental impacts. To assume that an even more far-reaching AFA would not have the potential for similar or greater impacts is totally unreasonable. FWS found that in 2005, only 41% of the Activities performed by CSKT under the AFA were fully successful. AR001137. Several Activities in the Biology Program were not done on time, and others were performed by unqualified personnel. *Id.* Only one of three planned prescribed burns, considered an important vegetation management tool, was completed. AR001139. “Several of the highest priority [maintenance] Activities, such as those that influence public health . . . were not completed at a satisfactory level.” *Id.* AR001139. Several of the highest priority activities that influenced wildlife health and safety, habitat management and long-term maintenance of vehicles, equipment and infrastructure were not completed at a satisfactory level. AR002520. Bison husbandry was substandard, possibly compromising the health of the bison. AR002391, AR 000704SUPPII. Electric fences not being maintained to standard resulted in a “serious loss of grazing management control.” AR 000704SUPPII, AR 000934SUPPII. Bison escaped several times due to inadequate fence maintenance. AR 002611; AR 000935-36SUPPII.

In sum, the experience under the 2005 AFA alerted FWS that implementation of the AFA might result in adverse environmental impacts. FWS’s apparent reliance on a CE to “comply” with NEPA was improper. FWS’s failure to consider any of the extraordinary circumstances applicable to its approval and implementation of the AFA shows that FWS failed to base its

decision on a consideration of the relevant facts. Thus, FWS's decisionmaking was arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

F. NEPA Required FWS to Prepare an EA or an EIS. NEPA requires that an EA or EIS be prepared if an action "will or *may* have an effect on" the environment. 40 C.F.R. § 1508.3. An agency must still undertake a NEPA analysis even for an action with uncertain effects on the environment, *see Anacostia*, 871 F. Supp. at 483. This is not a case where the "nature of an action's effects on the environment" are uncertain. *Id.* Here, there is substantial information in the Record concerning of the 2005 AFA environmental impacts, yet FWS ignores this information without explanation and fails to evaluate any reasonably foreseeable environmental effects of its approval and implementation of the 2008 AFA.

The Record demonstrates that: (1) FWS invoked a CE (or CEs) that does not apply to the AFA; (2) FWS did not evaluate whether the existence of "extraordinary circumstances" rendered the CE (or CEs) inapplicable; and (3) there is substantial evidence that extraordinary circumstances existed. In addition, FWS failed to follow DOI and FWS procedures relating to NEPA compliance and CEQ regulations. Its decisions are arbitrary, capricious and not in accordance with NEPA and NEPA regulations. "Pursuant to the case law in this Circuit, vacating a rule or action promulgated in violation of NEPA is the standard remedy." *Humane Soc'y*, at *42, *citing Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). The Court should enjoin the Defendants from further implementation of the AFA, including disbursement of funds, until FWS complies with NEPA.

IX. THE FWS VIOLATED SECTION 7 OF THE ESA

Section 7(a)(2) of the ESA requires federal agencies to "insure that any action, authorized, funded, or carried out by [the] agency . . . is not likely to jeopardize the continued

existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” 16 U.S.C. § 1536(a)(2). The ESA requires that federal agencies comply with this substantive obligation to avoid jeopardy to listed species or destruction or adverse modification of critical habitat by consulting with the Secretary of the Interior through FWS. *Id.* The fact that the AFA is a FWS-proposed action does not exempt the action from Section 7’s consultation obligations. FWS must engage in intra-agency consultation. *See Sierra Club v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 2d 684, 691 (W.D. Mich. 2002). The FWS sets forth the procedures and responsibilities that apply to intra-agency consultation in the Intra-Service Handbook.

The Section 7 consultation requirements apply to any discretionary “agency action” that “may affect” listed species. 50 C.F.R. §§ 402.03; 402.14(a). What constitutes an “agency action” subject to consultation requirements has been broadly construed. FWS’s regulations define the term “action” as “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies,” specifically including “contracts” and “grants-in-aid.” 50 C.F.R. § 402.02; *see also Natural Res. Defense Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998) (construing the term “agency action” broadly); *Nat’l Wildlife Fed’n v. Brownlee*, 402 F. Supp. 2d 1, 9-10 (D.D.C. 2005).

It is indisputable that the AFA is an agreement to fund certain activities to be undertaken by the CSKT. AFA §§ 1, 2.A, 13.B. Thus, the FWS must determine if the AFA or the implementation of the AFA “may affect” a listed or candidate species or its proposed or designated habitat. The term “may affect” likewise has been broadly construed. As one court recognized, “[t]he phrase ‘may affect’ has been interpreted broadly to mean that ‘any possible effect, whether beneficial, benign, adverse, or of an undetermined character,’ triggers the

consultation requirement.” *Western Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1319-20 (D. Idaho 2008) (quoting the preamble to the Section 7 regulations); *see also Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 481 F. Supp. 2d 1059, 1097 (N.D. Cal. 2007) (the trigger is not whether the proposed action was likely to have adverse effects, but simply that it may affect listed species). Similarly, in its Intra-Service Handbook “may affect” is defined as : “the appropriate conclusion when a proposed action may pose **any** effects on listed species or designated habitat.” Intra-Service Handbook at E-13.

The procedure for intra-agency consultation set forth in the Intra-Service Handbook procedure is: 1) determine if there is a federal action; 2) determine if there is a listed, proposed or candidate species present or if its proposed or designated habitat is in the “action area;” 3) if a species or its habitat is present, determine if the proposed action “may affect” the species or its habitat by completing the Intra-Service Section 7 Biological Evaluation Form; 4) if the action “may affect” a species or its habitat, the FWS must continue informal consultation or initiate formal consultation but if the action will have “no effect” the consultation process ends. Intra-Service Handbook E-17 to E-20. The Administrative Record for this case does not include an Intra-Service Section 7 Biological Evaluation Form related to the current AFA although the FWS admitted in its Answer that the NBRC is the home of a number of threatened and endangered species and critical habitat for the bull trout is located within the NBRC. Answer ¶ 34. Nor is a similar analysis for the current AFA in some other format part of the Administrative Record. The Intra-Service Handbook states that in “determining the potential effect... the Project Leader needs to review enough information on the species and its habitat to assess whether the action may affect the species population, reproductive capability, food supply, cover needs... or other biological factors.” Intra-Service Handbook at E-20. There is no document in the

Administrative Record that states a conclusion as to potential effect. The Administrative Record indicates that no analysis was done. The FWS did not engage in the requisite analysis, and thereby violated Section 7.

Despite the absence of any biological or ecological analysis, the FWS has concluded that the agency's action would not affect any species. This conclusion is recorded in its 2009 reply to BGA's Notice of Intent to Sue wherein Mr. Stempel states: "We believe that the signing of the AFA is not an action that requires consultation, rather it is an action similar to executing a personnel action...." Letter from M. Stempel, Region Director, FWS to S. Snodgrass, Holland & Hart LLP (Feb. 27, 2009), attached as Exhibit A. The characterization of the action taken by the Defendants as analogous to a "personnel action" is incorrect. The AFA states: "The Parties understand that [the] AFA represents a significant change in operation and maintenance of the NBRC...." AFA § 7.E.1. Further, the AFA "provides the CSKT with a substantive role in the day-to-day management of programs...." *Id.* § 2.A. Subject to some oversight by the Refuge Manager, "the CSKT will manage the activities performed by the CSKT." *Id.* § 7.A. The plain language of the AFA establishes a fundamental change in the way the NBRC is managed. Signing the AFA does not merely result in a substitution of CSKT personnel for FWS personnel.

Equally important, the ministerial act of signing the AFA is not the relevant action under the ESA. Rather, it is the decision to authorize and to fund activities that constitute an "action" for purposes of the ESA regulations. 50 C.F.R. § 402.02. Furthermore, the analysis of the signing of the AFA can not be severed from the analysis of the actions that indisputably and automatically flow from and are caused by signing the AFA, namely the involvement of the CSKT in the day-to-day management of the NBRC. The "action" taken by Defendants was to

authorize CSKT to undertake certain functions and activities at the NBRC with federal funding. That is the “action” that should have been analyzed under the ESA, not the signing of the AFA.

The approach set forth in the Stempel letter is impermissible segmentation. By focusing only on the signing of the AFA, the Defendants assured that the effect of transferring functions (including management functions) and activities to the CSKT would never be subjected to analysis for purposes of Section 7. Assuming *arguendo*, the “action” is the signing of the AFA, the transfer of functions, activities and funds to the CSKT is an “indirect effect” of the “action.” During consultation, FWS must consider both the direct and indirect effects of the proposed action. *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1143 (11th Cir. 2008) “Indirect effects” are “those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.” 50 C.F.R. § 402.02. Courts have recognized that the threshold for triggering ESA consultation requirements is relatively low, because “*any possible effect*” triggers the need for consultation. *California ex rel. Lockyer v. U.S Dep’t of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009). This low threshold is consistent with the “conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” *Id.* (quoting *TVA v. Hill*, 437 U.S. 153, 185 (1978)).

The Record demonstrates that at the time the Defendants approved the AFA there was no basis for the conclusion that the transfer of functions, activities and funds to the CSKT, in other words, the implementation of the AFA, would have no effect on listed and candidates species and proposed and designated habitat. Therefore, FWS’s conclusion that the AFA would have no effect is arbitrary and capricious.

As noted above, the AFA states that the AFA “represents a significant change in operation and maintenance of the NBRC,” the AFA provides the CSKT “with a substantive role

in day-to-day management of programs,” and CSKT will manage the Activities performed by the CSKT. AFA §§ 2.A., 7.A. and 7.E.1. In addition, under the AFA the CSKT will perform functions in the Biological Program (which includes the Habitat Management program), the Fire Program and the Maintenance Program at the NBRC. AFA § 6.A. Also, through the newly-created CSKT Deputy Refuge Manager position, the CSKT will play a significant role in the management of the NBRC. AFA § 7. The Refuge Leadership Team, which is comprised of the Refuge Manager, the CSKT Deputy Refuge Manager, the Service Deputy Refuge Manager and the CSKT Lead Biologist, will manage the NBRC. AFA § 7.D. Finally, the signatories knew when the AFA was agreed to that some of the CSKT personnel would require on-the-job training. The AFA requires the Annual Work Plans to include “significant requirements for on-the-job training of new employees.” AFA § 7.E.4.a. In summary, the AFA contemplates co-management by a non-DOI entity that will provide employees who, in some cases, will require on-the-job training. To conclude based on terms of the AFA, without any analysis, that implementation of the AFA would have “no effect” was unreasonable.

At the time the Defendants were considering the AFA they not only were aware of the terms of the “new” AFA, but they also were aware of the performance of the CSKT under the 2005 AFA and the effect of the CSKT’s performance on the NBRC. The experience gained from the 2005 AFA demonstrates that transfer of functions to the CSKT has environmental impacts that “may affect” listed species. For example, in its Annual Funding Agreement Report for Calendar Year 2006, FWS concluded that under the 2005 AFA, CSKT personnel failed to, among other things, (1) survey for rare and unusual vegetation, including the ESA-listed *Howellia aquatica* and *Silene spaldingii*; (2) grade the public use roads in the National Bison Refuge, resulting in a delay in the application of the dust control chemical; (3) collect and

maintain data on timber stand health, including effects from insects, disease, drought, and fire; (4) collect and maintain data on cheatgrass and three-awn distribution, and develop and conduct studies to test management methods to improve habitats dominated by these invasive species; (5) haul non-burnable material to the recycling facility or landfill, including a large pile of scrap wire mixed with scrap iron; (6) properly feed and water the bison during the Roundup; and (7) repair fencing to prevent the escape of bison and facilitate the grazing rotation program, which resulted in the loss of habitat management capability and *the death of a bison*. AR 002524; 002532-33; 002535; 002547-48; 002560-61; 002580; 002582; 002588. Each of these implementation deficiencies resulted in on-the-ground impacts that had the potential to affect listed species. In light of this past experience and the nature of the activities delegated to the CSKT, FWS had an obligation to consider whether implementation of the current AFA “may affect” listed species or protected habitat. The failure to do so renders the “no effect” decision arbitrary and capricious.

In summary, as noted in the Intra-Service Handbook, if there are listed species or critical habitat present in the action area, FWS must determine if the proposed action may affect those listed species. Listed species and critical habitat are present in the NBRC. There is no dispute that FWS did not follow the process in the Consultation Handbook, or conduct a comparable analysis of the effects of the implementation of the AFA on listed species and critical habitat prior to approving the AFA. Courts have noted that the “strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.” *Forest Guardians v. Johanns*, 450 F.3d 455, 457 (9th Cir. 2006) (citations omitted). Failure to

undertake any analysis of the effects of an agency action is generally found to be an abuse of discretion in violation of the ESA:

In all of the cases that the court has found in which the agency determined that ESA did not apply or that formal consultation was not necessary prior to conducting any analysis or consultation, the Ninth Circuit has held that the agency abused its discretion, and has emphasized the importance of complying with ESA procedural requirements.

Citizens for Better Forestry, 481 F. Supp. 2d at 1096. Thus, FWS's failure to follow its own established process, or any comparable steps, to analyze the effects of its action on listed species and critical habitat at the NBRC violates the requirements of the ESA. Given the evidence in the Administrative Record, there was no basis for the FWS to conclude that the implementation of the AFA would have no effect. Thus, its determination that there would be no effect is arbitrary and capricious.

X. THE FREEDOM OF INFORMATION ACT

The AFA states that FOIA does not apply to "records maintained solely by CSKT." AFA § 10.D. All records relating to the functions and activities performed by the CSKT and records of CSKT's expenditure of the FWS funds are maintained solely by the CSKT. The AFA requires the CSKT to collect, maintain and provide to the FWS all records, specified in the AFA or an AWP, that the FWS needs to comply with law or FWS policy. AFA § 10.A. The AFA also requires the CSKT and FWS to identify in the AWP "any Activity record" the CSKT must maintain. AFA § 10.B. Upon request, CSKT will provide a copy of an Activity record. AFA § 10.B. The AFA requires the CSKT to maintain financial records of CSKT's expenditure of funds provided under the AFA and to provide them to FWS to the extent necessary for its budget appropriation and apportionment processes. AFA § 10.C.1. Pursuant to AFA § 10.D., none of the records discussed above, are subject to FOIA.

The Defendants may not alter the scope of FOIA by inserting terms in an agreement that purport to exempt agency records from FOIA. 5 U.S.C. § 552(d). FOIA, as amended in 2007, defines “record” to include “any information” maintained for “an agency by an entity under Government contract, for purposes of records management” if that record would be an agency record if maintained by the agency. *Id.* § 552(f)(2)(B). “Records” that FWS needs to comply with the law and FWS policy (the subject matter of AFA § 10.A) as it fulfills its obligations at the NBRC are records that absent this AFA would be created and maintained by the FWS. Thus, they are agency records, and 5 U.S.C. § 552(f)(2)(B) makes it clear that those records are not transformed into “CSKT records” because CSKT creates or possesses these records. Similarly, “Activity records” (AFA § 10.B) are agency records for purposes of FOIA. Each Activity record must contain “information sufficient to document the nature of the Activity and when, where, by whom it was performed.” AFA § 10.B. Further, the level of detail must be “adequate for Service purposes” *Id.* The Activity record provides documentation that would be provided by FWS personnel to supervisors, such as the Refuge Manager, if FWS personnel were performing the Activity in question. This is precisely the type of information that FWS would create if it were operating the NBRC using its employees. Recognizing that having such information is critical, the AFA provides that CSKT will provide a copy of any Activity record to FWS upon request. AFA § 10.B. Finally, as regards the records documenting CSKT expenditure of federal funds, the AFA states that those records must be provided upon request for FWS’ budget appropriation and apportionment processes. Once again, creating and maintaining records documenting expenditure of federal funds by a non-federal entity is the type of record traditionally maintained by a federal agency, or, as in this case, by contract the federal

agency requires the funds recipient to create and maintain for the future use by the Government. An essential element of contract management is knowing how the money was spent.

In summary, the records discussed in AFA §§ 10.A-C are records that are maintained by the CSKT pursuant to a contract with FWS in order to assist FWS in fulfilling its obligations with respect to the NBRC. The CSKT acts as FWS's agent: Pursuant to the AFA, CSKT collects and maintains information that FWS has determined it needs. Thus, for purposes of 5 U.S.C. § 552(f)(2), they are agency records and are subject to FOIA. To the extent the language in AFA § 10.D ("the FOIA does not apply to records maintained solely by CSKT") states otherwise it is contrary to FOIA and has no effect.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs summary judgment.

/s/ Sheila D. Jones
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October 20, 2009



United States Department of the Interior



FISH AND WILDLIFE SERVICE Mountain-Prairie Region

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FEB 27 2009

Ms. Sandra Snodgrass
Holland & Hart
P.O. Box 8749
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Dear Ms. Snodgrass:

We are in receipt of your January 5, 2009, notice of intent to sue the U.S. Fish and Wildlife Service (Service) on behalf of the Blue Goose Alliance (BGA) pursuant to the citizen suit provision of the Endangered Species Act (ESA).

You allege that the Service violated ESA Section 7(a)(2) by failing to conduct an intra-Service consultation before executing the Annual Funding Agreement (AFA) with the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Reservation regarding the National Bison Range Complex (NBRC) in Montana. We believe that the signing of the AFA is not an action that requires consultation, rather it is an action similar to executing a personnel action, and as such would not require consultation under Section 7(a)(2).

In addition, consultation is required when an action "may affect" a listed species. Your letter does not indicate which, if any species, may be affected by the AFA. Past intra-Service consultations have occurred on the NBRC for management actions that may affect listed species. Signing of the AFA was not such an action.

Under the AFA, management direction at the NBRC does not change. The only change is who is conducting the management actions (Refuge staff vs CSKT staff). The CSKT has an extensive history of work in endangered species management, including a great deal of cooperation with the Service. The CSKT were the first tribes in the United States to establish a tribally-designated wilderness, known as the Mission Mountain Tribal Wilderness Area. That 89,000-acre Wilderness Area, along with a 21,000-acre buffer area, protects a vast expanse of pristine land that is inhabited by both grizzly bears and bull trout. The CSKT does ongoing management work with the Service on grizzly bear activity in the Ninepipe Refuge area as well. The CSKT also has been involved with Canada lynx and gray wolf management efforts. The Service believes that CSKT would be more than capable of addressing listed species concerns should they arise at the NBRC.

If you have any further concerns or comments, please contact Rick Coleman, Assistant Regional Director for Refuges, at 303-236-4303.

Sincerely,

Mike Stempel
Regional Director
Acting Deputy

EXHIBIT A