

**UNITED STATES DISTRICT COURT
District of Columbia**

BLUE GOOSE ALLIANCE, et al.,

Plaintiffs,

v.

KEN SALAZAR, et al.,

Defendants.

Case No. 09-CV-00640 CKK,

Judge Colleen Kollar-Kotelly

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289-9037

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO CROSSMOTIONS

I. Introduction

This memorandum of law is submitted on behalf of the Blue Goose Alliance (“BGA”) and the individually named Plaintiffs (collectively “BGA”) in opposition to the Motions for Summary Judgment filed by the Federal Defendants (“Government” or “United States”) and the Confederated Salish and Kootenai Tribes (“CSKT”) and in reply to the opposition memoranda the Government and CSKT filed in response to BGA’s Motion for Summary Judgment. For the reasons set forth herein and in BGA’s opening memorandum of law (“opening brief”), the Court should grant BGA’s Motion for Summary Judgment and deny the motions filed by the Government and CSKT.

For convenience, BGA refers to the Government’s extant memorandum of law as “CrossMotion.” BGA refers to CSKT memorandum in support of its Motion for Summary Judgment as “CKST SJM” and CSKT’s memorandum in opposition to BGA’s motion as “CSKT Opp”.

II. CSKT’s Challenge to the Statement of Facts

CSKT challenges several factual assertions in BGA’s Local Rule 7 statement. CSKT Opp at 1-8. BGA’s response is set forth below. For ease of reference, we restate the original assertion.

- A. Plaintiffs’ statement:** “On September 4, 2003, CSKT presented FWS with a draft AFA that substantially expanded the scope and management of the NBRC by CSKT.” Mem. of P. & A. in Supp. of Pls.’ Mot. for Summ. J. at 10.

Whether CSKT presented its draft on September 4 or on September 25 or 26 is immaterial for this case. The material fact is that the draft substantially expanded the role and management of the NBRC by CSKT as compared to the first AFA between DOI and CSKT. CSKT does not dispute this point.

As to the timing of the submission, BGA relied upon a document in the Administrative Record. BGA was not present at any of the negotiating sessions and has no independent knowledge of when CSKT made its submission to the United States.

B. Plaintiffs' Statement: "The managers of the NWRS and National Fish Hatcheries sent a comment letter opposing the draft AFA on October 8, 2004." Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J. at 11.

The October 21, 2004 letter from Mr. Matt to Mr. Mansen, then DOI Assistant Secretary for Parks and Wildlife (AR000826 SUP II) is irrelevant to the point CSKT raises on page 2 of its Opposition and the point made by BGA in its opening brief. It does not identify the signatories to the October 8, 2004 letter or any other manager who subsequently joined the signatories of the October 8, 2004 letter in their opposition to the then-proposed AFA. The October 21, 2004 letter serves no purpose other than to allow CSKT to introduce a document in which CSKT responds to the points made by Refuge Managers in their letter.

The other document cited by CSKT is the document relied upon by BGA in its opening brief, AR001333SUP I-001342SUP I. According to that document, 23 Refuge Managers signed the October 8, 2004 letter and an additional 120 Refuge Managers joined their colleagues in expressing their opposition to the proposed AFA after the transmittal of the letter. AR at 001337 SUP I.

C. Plaintiffs' Statement: "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.” Mem. of P. & A. in Supp. of Pls.’ Mot. for Summ. J. at 11.

The statement by BGA is taken almost verbatim from Section 7A of the 2005 AFA.

CSKT does not contend the 2005 AFA does not accurately describe the relationship between the on-site FWS employees and the CSKT. Thus, CSKT does not dispute the assertion made by BGA. Rather CSKT introduces and focuses on a separate point – namely that CSKT is obliged to comply with Federal law (including regulations), written policy, standards and approved work plans applicable to an activity.

D. Plaintiffs’ Statement: “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.” Mem. of P. & A. in supp. of Pls.’ Mot. for Summ. J. at 12.

BGA relies upon the documents in the Government’s Administrative Record to establish the time line of the negotiations. For the document relied upon by BGA, Document B000027, the author identified on the document index is “DOI.” Document B000027 states: “The agreement period was March 15, 2005 through September 2006. The Service agreed to extend the agreement for 90 days, from October 1, 2006 through December 31, 2006. On December 16, 2006, the Service cancelled this extension and terminated negotiations with the Tribes.” AR 000888 SUP II. The document that CSKT relies on does not contradict Document B000027 with respect to the length of the extension. The document CSKT relies upon also is not inconsistent with the essential point made by BGA – while negotiating the terms of a new annual funding agreement DOI decided to allow CSKT to continue to perform certain tasks described in the 2005 AFA. The status did not change until December 2006 when FWS withdrew CSKT’s authority to perform under the 2005 AFA and re-assumed responsibility for performance of the

tasks delegated to CSKT under the 2005 AFA. CSKT does not dispute any of these material facts.

- E. Plaintiffs' Statement:** "On a number of occasions during 2005, the FWS received complaints regarding CSKT's performance of the Activities under the 2005 AFT." Mem. of P. & A. in supp. of Pls.' Mot. for Summ. J. at 12.

In an attempt to downplay the complaints received by FWS concerning CSKT's performance, in its Opposition CSKT asserts that the documents BGA cited demonstrates that FWS only received complaints on two occasions. The documents do not support this conclusion. The documents are focused solely on the complaints submitted on August 9, 2005 and October 15, 2005. Each letter discusses several events that were complained about and in the case of the letter received on October 15, 2005 the author refers to events that occurred during several visits. AR at 001325 SUP I.

CSKT also asserts that the complaint about a car traveling the wrong way on a one-way road was operated by FWS. The FWS correspondence states: ". . . I had verbally explained to the sender that the vehicle they observed . . . was a FWS law enforcement vehicle in the process of conducting law enforcement activities." AR at 001375 SUP I. The document does not identify the driver and neither does any other document cited by CSKT.

- F. Plaintiffs' Statement:** "On April 27, 2006, the NBRC Project Leader [a.k.a. Refuge Manager] issued a memorandum addressing CSKT's failure to maintain fences." Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J. at 12.

CSKT does not dispute the assertion that the Refuge Manager issued a memorandum on April 27, 2006 addressing CSKT's failure to maintain fences. CSKT merely points out the memorandum was not issued to the CSKT. BGA did not assert that the Refuge Manager issued

the memorandum to CSKT. Therefore, CKST's observations do not result in a challenge to the assertion made by BGA.

G. Plaintiffs' Statement: "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." Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J. at 14.

CSKT asserts the CSKT phase-in proposal was not given to FWS in April 2006 when the negotiations began. BGA asserts: (1) negotiations began in 2006; (2) CSKT made a proposal to FWS/DOI in the initial phase of the negotiations; and (3) the proposal gave CSKT responsibility for all of the functions at NBRC, including management and administration. CSKT only contests the third point, without any basis for doing so. The document CSKT quotes in support for its position states in relevant part:

The intent of the parties is to achieve Tribal Self Governance Act objectives through contracting of local management of the [NBRC] to the [CSKT] through a process to be fully implemented by fiscal year 2010 ... local operations will be contracted by the [CSKT] and administered according to applicable federal laws and regulations.

CSKT Opp at 4 (quoting AR at 002037-38).

Plainly, the document quoted by CSKT supports the assertion made by BGA. The reference to "local management" and "local operations" merely indicates that CSKT was supplanting the "local" team – the FWS staff that managed the NBRC – but not the entire FWS. In addition, the document CSKT cited provides additional support for BGA's assertion. In sum, CSKT has not presented any evidence that challenges the accuracy of the assertion made by BGA.

CSKT also states the phase-in proposal was not made during the initial phase of negotiations. CSKT does not contend it did not make the proposal. Whether the proposal was

made in the initial phase or during a subsequent phase, as CSKT suggests, is immaterial to this case.

H. Plaintiffs' Statement: "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.'" [*emphasis supplied by Plaintiffs*]. Mem. of P. & A. in supp. of Pls.' Mot. for Summ. J. at 14.

The assertion made in the Administrative Record document relied upon by BGA is that "...by the beginning of FY 2010 the [NBRC] would be managed exclusively by the Tribe." AR 002512. CSKT does not contest this point. BGA did not assert the refuge would be removed from the National Refuge System as CSKT suggests.

CSKT's assertion that the agreement was between senior DOI and FWS management is not, in BGA's view, a proper reading of the document since the author states the objective was communicated. AR 002512. Presumably, it was communicated to CSKT. However, BGA is willing to adopt CSKT's position namely that, in 2006 senior DOI and FWS management were willing to enter into an AFA whereby pursuant to "a phased transition of the management responsibilities for the NBR ... with a gradual transition of the remaining FWS positions at the NBR ... such that by the beginning of FY 2010 the NBR would be managed exclusively by the Tribe." AR 002512.

I. Plaintiffs' Statement. "The Tribe submitted a revised version of a draft AFA on May 4, 2007" Mem. of P. & P. & A. in Supp. of Pls.' Mot. for Summ. J. at 15.

Due to an error in the pagination of the Administrative Record there are two different documents listed on the Supplement I index with the opening page 001175 SUP I. Document B0001007 is the document BGA referred to in its opening brief.

The document (AR000395) that CSKT cites to clearly is a draft generated by CSKT and it was transmitted on February 6, 2007. That document states that CSKT will perform activities

in four categories – management, biological program, fire program and maintenance program (§6) and the specific activities to be performed by CKST will be set forth in the Work Plan jointly developed by FWS and CKST (§7F). Presumably, this is why CSKT does not dispute the substantive assertion made by BGA.

For this case, the date that CSKT submitted its proposal is immaterial. So while CKST has corrected the record, it has not disputed a material fact.

J. Plaintiffs’ Statement: “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.” Mem. of P. & A. in Supp. of Pls.’ Mot. for Summ. J. at 15-16.

CSKT contends that the document relied upon by BGA does not support BGA’s statement that the DOI Solicitor’s Office concluded that the Refuge Manager, Deputy Refuge Manager and Outdoor Recreation Planner positions all involved inherently federal functions.

The document quoted by CSKT at its Opposition page 6 (the same document BGA cited) states:

“We reviewed the organizational chart and position descriptions provided by the FWS with these criteria in mind. . . . We identified the following positions as implicating some inherently federal functions (with language from the position description that raises the concern):

Refuge Manager: Responsible for “administration and supervision of NWRS management, staff, and activities; . . . planning and budgeting fro both short-term and long-term operations and acquisition . . . coordination of refuge activities with Congress, Department of Interior [sic] and Agriculture agency staff . . .[d]evelops guidelines, policies and agreements for region wide, and in some cases, nationwide use. . . Regional representative and team member on Indian self governance negotiations, issues, and education . . .[d]rafts negotiation documents, cooperative agreements, and Annual funding Agreements . . . [r]esponsible for evaluating performance, approving leave, resolving or recommending resolution of complaints or grievances, effecting minor disciplinary actions. . .’ Deputy Project Leader: Incumbent “acts as project leader [refuge manager] in the absence of the project leader,” Supervises “Refuge Complex maintenance, visitor services, and biological staff including permanent, term, and

temporary employees and volunteers.” Serves “as a fully trained and commissioned Law Enforcement Officer of the National Wildlife Refuge System, conducts investigations, apprehends and arrests violators. . .”

Supervisory Outdoor Recreation Planner: Incumbent primarily performs environmental education, interpretation and visitor assistance; however, duties also include, “procurement, inventory, storage, maintenance, distribution, and tracking of outreach materials . . . [s]upervises up to four seasonal park ranger positions and all public use volunteers . . . [s]erves as fund manager for the Recreation Fee Program. . .”

These identified positions appear to involve a certain amount of functions that are inherently Federal.

It is our opinion that it may be possible to restructure some of these positions to remove some of the functions that appear to be inherently Federal or to put additional supervision in place to remove the discretionary component of the function. AR 001705-06. (Footnote deleted.)

The quoted document fully supports BGA’s assertion. CSKT’s attempt to suggest that the Solicitor’s Office does not reach conclusions about the nature of the functions performed by the Refuge Manager, the Deputy Refuge Manager, and the Outdoor Recreation Planner simply is incorrect. In addition, the reference to “additional research and analysis” is not a reference to additional research or analysis to determine if inherently federal functions are involved. The author of the quoted document states that “additional research and analysis will need to be performed in order to determine how [to restructure the positions or to put additional supervision in place to remove the discretionary component of the inherently federal function] . . . including particularly with respect to the law enforcement component.” AR 001706.

In sum, CSKT has not identified any evidence that disputes the factual assertion made by BGA.

K. Plaintiffs’ Statement: “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.” Mem. of P. & A. in Supp. of Pls.’ Mot. for Summ. J. at 16.

In the email cited by BGA and CSKT in its Opposition, Dean Rundle, a senior FWS employee and lead negotiator for FWS, states: “Those are the only positions that we (FWS) believe are inherently federal anyway.” AR 000393. Mr. Laverty, then DOI Assistant Secretary and the recipient of Mr. Rundle’s email, stated DOI’s position, namely that as a matter of policy the Refuge Manager, Deputy Refuge Manager and all law enforcement positions could not be assumed by CSKT. BGA, in its statement on page 16 of its opening brief, states that “FWS insisted” that those positions not be part of the negotiations. The documents relied upon by BGA support that statement. Moreover, CSKT does not challenge that point.

L. Plaintiffs’ Statement: “The 2008 AFA became effective January 1, 2009 and expires on September 30, 2011.” Mem. of P & A. in Supp. of Pls.’ Mot. for Summ. J. at 16.

There is no difference between BGA’s statement and CSKT’s statement. The agreement became fully effective on January 1, 2009.

M. Plaintiffs’ Statement: Section headings titled “Failure to Comply with NEPA”, “Failure to Comply with ESA Consultation Requirements”, and “Violation of FOIA.” Mem. of P. & A. in Supp. of Pls.’ Mot. for Summ. J. at 20, 22, and 23.

CSKT apparently does not like the section headings that BGA has used in its opening brief. Presumably, the section headings are not the basis upon the Court will decide the pending motions. Therefore, BGA will not waste the Court’s time responding to CSKT’s challenge directed at the headings.

N. Plaintiffs’ Statement: refers to “having an inexperienced CSKT staff responsible for running the biological program” Mem. of P. & A. in Supp. of Pls.’ Mot. for Summ. J. at 21.

FWS concluded that CSKT had an inexperienced staff responsible for running the biological program, the fire program and the maintenance program. CSKT does not challenge

the assertion that FWS drew those conclusions. Instead, CSKT asserts that FWS is wrong. For this case, whether the FWS was “wrong” is immaterial for purposes of determining if FWS failed to comply with its obligations under NEPA and ESA. The question framed by this case is: What was FWS’s obligation under NEPA and ESA, respectively, given the conclusions it drew about the implementation of the prior AFA and CSKT’s performance under that AFA?

- O. Plaintiffs’ Statement:** “There is no other documentation in the administrative record discussion or referencing FWS’ NEPA compliance in conjunction with the approval and/or implementation of the AFA.” Mem. of P. & A. in Supp. of Pls.’ Mot. for Summ. J. at 22.

CSKT has identified in the voluminous Administrative Record two additional documents that state the conclusion the United States drew regarding compliance with NEPA: The approval of the AFA is not a major Federal action that may have significant effect on the environment and pre-existing categorical exclusions apply to the activities to be performed under the 2008 AFA. The documents CSKT cites to do not introduce any new material fact. In addition, BGA agrees, as it stated in its factual summary, the United States concluded that approval of the 2008 AFA is not a major Federal action that may have a significant effect on the environment and that certain categorical exclusions applied. *See* BGA SJM at 21-22. CSKT does not challenge BGA’s assertion that the United States did not undertake an EA or EIS to determine if implementation of the AFA may have a significant effect on the environment.

III. Standing and Other Jurisdictional Issues

BGA’s claims are brought under the APA, asserting that the Federal Government’s (“Government”) decision to enter the 2008 AFA and the AFA itself violate various statutes, namely the National Wildlife Refuge System Administration Act (“Refuge Act”) (Count I), the Indian Self-Determination Education and Assistance Act (“ISDEAA”) as amended by the Tribal

Self-Governance Act (“TSGA”) (Counts II and III), the National Environmental Policy Act (“NEPA”) (Count IV and V, the Endangered Species Act (Counts VI and VII), and the Freedom of Information Act (“FOIA”) (Count VIII).

The Government asserts in a conclusory fashion that Plaintiffs lack standing generally (CrossMotion at 1). However, they specifically address standing only with regard to NEPA, ESA, and FOIA. CrossMotion at 18-23, 43-44.¹ They provide no argument that BGA lacks standing with respect to its claims under the Refuge Act or the TSGA. CSKT does not address standing under the particular statutes invoked, but claims that BGA generally lacks standing because BGA fails to meet the “injury in fact” element of standing. (CSKT SJM at 25-27).

In fact, Plaintiffs have demonstrated their standing with respect to each cause of action. Moreover, it is not necessary for all plaintiffs to have standing in order for the action to proceed, as long as at least one plaintiff has standing. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

There are three basic elements of standing: 1) injury in fact which is concrete, particularized, actual and imminent (not conjectural or hypothetical); 2) that is fairly traceable to defendants’ actions; and 3) which is likely to be redressed by a favorable judicial decision. *E.g.*, *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009); *Friends of Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180-181, (2000).

Here, Plaintiffs challenge the Government’s decision to approve the AFA with CSKT which Plaintiffs claim illegally transferred management authority over the NBRC from the FWS to the CSKT in violation of the Refuge Act and the TSGA without the environmental review required under NEPA and ESA, and which contains provisions that violate FOIA. When

¹ The Government also claims that BGA fails to state a claim under FOIA, and, in the alternative, if a claim has been properly pled, the claim is not ripe. CrossMotion. at 43-45. These contentions are addressed below.

evaluating evidence concerning standing, a court must “assume that on the merits the plaintiffs would be successful in their claims.” *Public Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289 (D.C. Cir. 2007) (citation omitted); *accord Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 924 (D.C. Cir. 2008).

The individual Plaintiffs have strong personal and professional ties to the NBRC and its lands and wildlife, and thus concrete interests in its proper management. In addition, the individual Plaintiffs have a strong interest in species and habitat conservation, having the NWRS managed in a coordinated and integrated manner as required by the Refuge Act, and having each refuge managed as part of the national system. Each of the individual Plaintiffs, except Ms. Redfearn, is a former employee of FWS. BGA is a public interest organization that advocates, *inter alia*, for the coordinated and integrated management of the NWRS. The Plaintiffs have alleged concrete injuries to their interests caused by the approval of the AFA. There can be no question but that these injuries flow from the approval of the AFA, and that the relief requested, compliance with FOIA, NEPA and ESA, will redress those injuries.

BGA’s Interests

The purpose of the organization is to educate Americans about the opportunities afforded by NWRS and to alert the public to the organizational and physical needs of NWRS. Complaint ¶8. BGA promotes, by educational efforts, outreach and advocacy, the strengthening of the integrity of the NWRS, the establishment of the National Wildlife Refuge Service as a separate agency within DOI to administer NWRS, and coordinated and integrated management of NWRS in order to ensure the biological integrity, diversity and environmental health of the wildlife and plants within NWRS, including listed species. *Id.* Thus, BGA has an interest in the management

of NWRS, and each refuge within it in accordance with the statutorily prescribed mission and purpose of the NWRS.

BGA, through its members, *inter alia*, provides written comments and recommendations to FWS local, regional and headquarters level personnel concerning problems and issues related to specific refuges and the planning and management of NWRS as a whole and individual refuges, including NBRC. *Id.* BGA also submitted comments opposing the approval of the prior AFA and the 2008 AFA, and a letter to the Chairman of the House Committee for Natural Resources calling for a congressional hearing and a General Accountability Office investigation into DOI's approval of the prior AFA. Complaint ¶¶8, 9. BGA relies upon communications with Government staff, and Freedom of Information Act requests for information concerning the management of specific refuges and NWRS. Complaint ¶¶8 and Exhibit 1 attached hereto.

Mr. Redfearn's Interests

Mr. Redfearn worked for FWS for thirty years in several capacities including Refuge Manager and Regional Supervisor for all wildlife refuges in Alaska. Declaration of Don E. Redfearn ("D. Redfearn") ¶¶2-3. He also is a founding member and officer of BGA. D. Redfearn ¶6. Mr. Redfearn has visited more than 100 NWRS refuges and has visited NBRC several times since his first visit in 1967. D. Redfearn ¶¶4,8. His most recent visit was in May 2008 when he participated in the Centennial Celebration and he intends to return to NBRC. D. Redfearn ¶8.

Mr. Redfearn's long career with FWS reflects his deep personal interest in conservation of wildlife and wildlife habitat conservation. D. Redfearn ¶5. He also has a personal interest in the management of NWRS as a coordinated system, instead of as a conglomeration of discrete units, in order to ensure effective species and habitat conservation. *Id.* ¶7.

Mr. Redfearn believes, the 2008 AFA removes NBRC from the coordinated management of NWRS. *Id.* ¶7. In addition, he believes that in order to ensure the preservation of the bison and other species found at NBRC, NBRC has to be managed in conjunction with those other refuges where NBRC-resident species are found as part of an integrated wildlife management system. *Id.* ¶7. Implementation of the 2008 AFA is inconsistent with managing NBRC as part of an integrated wildlife management system. *Id.* ¶7.

Approval and implementation of the 2008 AFA will adversely affect Mr. Redfearn's interest in the conservation of wildlife and wildlife habitat, including bison, his interest in the management of NWRS as a coordinated system, and his interest in having an integrated wildlife management system used to manage species populations located in different refuges. *Id.* ¶¶5,7, 11.

Mr. Reffalt's Interests

Mr. Reffalt worked for FWS for 26 years in various capacities, including Chief of Refuge Management and Chief of Wildlife Management. Declaration of William C. Reffalt ("Reffalt") ¶¶2-6. Mr. Reffalt is a biologist. Reffalt ¶3. He also is a founding member of BGA and an officer. Reffalt ¶9.

Mr. Reffalt has a deep and longstanding personal interest in the conservation of wildlife habitat. Reffalt ¶8. He also has a special interest in the conservation of American bison. *Id.* ¶10. He believes the bison located at the various refuges must be managed as part of a larger population *Id.* ¶10. He has conducted studies and research focused on several species found at NBRC. *Id.* ¶10. He believes that in order to ensure the preservation of bison and other species at NBRC, NBRC must be managed in a coordinated and integrated way with other refuges where the same species are found. Reffalt ¶10.

Mr. Reffalt collects information and data about various species found at NWRS, the history of the NWRS, and management of various refuges. *Id.* ¶11. He has an extensive personal library on NWRS. *Id.* ¶11. He has used the information in his library to prepare a briefing paper for BGA to respond to inquiries, to prepare comments, and to prepare for meetings. *Id.* ¶¶11, 16. He has submitted Freedom of Information Act requests to DOI and relies on the responses in his various information-gathering activities. *Id.* ¶11.

Mr. Reffalt believes his interests in wildlife and habitat conservation generally and American bison conservation in particular are injured by the approval and implementation of the 2008 AFA because of the management arrangement established under the AFA. He believes that arrangement will result in NBRC not being managed in a fully integrated and coordinated manner with other NWRS refuges where the same species are resident. *Id.* ¶10.

Mr. Reffalt visited over 35 refuges in the year before this lawsuit was filed, over 50 refuges since 2006 and has visited NBRC three times since 2002. *Id.* ¶¶12, 13, 15. His practice is to revisit refuges. *Id.* ¶¶13, 15. During his visit to NBRC during the Centennial Celebration, he participated in various activities over a two week period including bird surveys. *Id.* ¶12. He intends to return to NBRC. *Id.* ¶15.

He also has worked assiduously to analyze the proposed APAs with CSKT and to provide comments, written and oral, to DOI and FWS. *Id.* ¶¶16, 17. He also attended, at his personal expense, a meeting attended by DOI and FWS to discuss why the prior AFA failed. *Id.* ¶16

Ms. Enright –Reffalt’s Interests

Ms. Enright-Reffalt (“Enright”) is a former FWS employee and worked as a biologist. Declaration of Christine A. Enright-Reffalt (“Enright”) ¶¶2, 6. She has held several positions during her employment with FWS. Enright ¶¶2-6.

Ms. Enright has a deep and longstanding interest in the conservation of wildlife and wildlife habitat. *Id.* ¶7. Ms. Enright also has a deep and longstanding interest in the management of NWRS as an integrated system. *Id.* ¶9. Ms. Enright believes implementation of the 2008 AFA will result in NBRC not being managed as a fully integrated member or unit of the NWRS. *Id.* ¶9. She also believes species conservation can be assured only if wildlife populations at NBRC are managed in a coordinated and integrated manner with populations found elsewhere in NWRS. *Id.* ¶9. She is injured by the approval of the 2008 AFA because implementation of the 2008 AFA is inconsistent with managing NBRC as part of an integrated wildlife management system. *Id.* ¶9.

Ms. Redfearn's Interests

Ms. Redfearn has been visiting and volunteering at NWRS refuges for over 50 years. Declaration of Evelyn Redfearn (“E. Redfearn”) ¶¶2-3. Since 1967, Ms. Redfearn has visited NBRC several times. E. Redfearn ¶4. Her most recent visit was in 2008 during the Centennial celebration and she intends to return to NBRC. *Id.* ¶4.

Ms. Redfearn has a deep and longstanding interest in the conservation of wildlife and wildlife habitat. *Id.* ¶6. She believes that the performance of CSKT under the prior AFA resulted in management of NBRC to the detriment of wildlife and habitat at NBRC. *Id.* ¶6. Ms. Redfearn also has a longstanding interest in management of the NWRS as a coordinated system rather than a conglomeration of discreet units. *Id.* ¶8. She is injured by approval of the 2008 AFA because implementation of the 2008 AFA is inconsistent with managing NBRC as part of an integrated wildlife management system. *Id.* ¶8.

Plaintiffs' Declarations contain the same elements which the Supreme Court found adequate to support standing in *Summers*:

Affidavits submitted to the District Court alleged that organization member Ara Marderosian had repeatedly visited the Burnt Ridge site, that he had imminent plans to do so again, and that his interests in viewing the flora and fauna of the area would be harmed if the Burnt Ridge Project went forward without incorporation of the ideas he would have suggested if the Forest Service had provided him an opportunity to comment. The Government concedes this was sufficient to establish Article III standing with respect to Burnt Ridge.

129 S. Ct. at 1149.

Defendants' arguments that Plaintiffs lack standing under NEPA, ESA and FOIA in particular are addressed below. CSKT claims that Plaintiffs generally lack standing because they have not alleged concrete injuries that they have suffered or will suffer because of the AFA, but instead rely on "concerns" about the AFA and conclusory allegations about the CSKT's poor performance and speculation about future poor performance. The preceding discussion of Plaintiffs' Declarations demonstrates that they have in fact alleged concrete injuries that are not speculative.

While the CSKT denies that its performance under the previous AFA resulted in damage to the environment and wildlife of the NBRC, the FWS found that it did and took official action, namely cancelling the AFA, on that basis. Regardless of who was actually right about the CSKT's performance, based on the FWS's findings, the probability of harm from an AFA which cedes far more management authority to the CSKT than the prior AFA cannot be said to be speculative. In order to establish injury in fact, a plaintiff need not show a certainty, but rather a substantial probability, that the agency action will harm their concrete and particularized interests. *Laidlaw*, 528 U.S. at 198.

However, it is not necessary for standing to assume poor performance by CSKT. Injury in fact stems from the mere existence of an AFA which involves a major transition to a new form of management and new employees learning their jobs, as the AFA recognizes. AR002707,

AFA Sec. 7.E.1. The AFA itself also acknowledges that due to these factors, the initial Annual Work Plan will be “limited in scope” and will include only “basic, fundamental Activities” AR002707, AFA§ 7. Even after the first year, there will be a need for significant on-the-job training of new employees, development of working protocols, and orientation and training of the combined FWS/CSKT staff concerning the partnership. AR002707, AFA Sec. 7.E.4.a. The extensive resources devoted to the transition and the administration of the AFA mean less resources can be devoted to the mission of the NBRC and protection of its resources, regardless of whether or not CSKT performs well.² The very reports submitted by the CSKT also evidence these realities.³

In sum, Plaintiffs have presented evidence sufficient to support their standing in this case.

A. NEPA and ESA Standing : Legal Standard

Neither FWS nor CSKT cite the correct standards for establishing standing in a NEPA and ESA procedural injury case. *See* CrossMotion at 18-23; CSKT SJM at 25-28. Contrary to these parties’ contentions, the primary focus of the injury-in-fact requirement for standing to

² The Refuge Manager noted that approximately 2,000 staff hours were devoted to the administration of the first AFA in 2005, AR SUPPII 000938, and that “[t]he additional workload required to implement the AFA has been crushing.” AR SUPPII 000937.

³ For example, in January 2009, the activities reported included setting up the office, various procedures and files; developing an MOU concerning use of computers, internet access and data between USFWS and CSKT; meetings between the CSKT and FWS; and hiring and training of new employees. Dkt. 36-2 at 1. In February, work continued on office planning and procedures, hiring, training, and time and attendance reporting procedures. *Id.* at 3-4. In March, work continued on office planning and equipment, setting up billing and accounting procedures for purchases, and mail and file systems. Training and hiring also continued, and the CSKT met with FWS personnel to discuss Visitor Center procedures. *Id.* at 5-6. In April, office equipment was still being installed, by a contractor. New employees arrived. *Id.* at 7. Extensive training and orientation of new CSKT staff continued. *Id.* at 7-8. In May, the CSKT was still receiving and setting up office equipment. New employees arrived and more training and orientation was conducted. *Id.* at 10-11. In June and July, hiring and training continued. *Id.* at 13-14, 16. In August, positions were still being filled. *Id.* at 19.

bring claims of violations of NEPA or ESA procedures is not whether plaintiffs have imminent plans to return to the NBRC in the future. In such cases, where a party has been accorded a procedural right to protect his concrete interests, “the primary focus of the standing inquiry is not the imminence or redressability of the injury to the plaintiff.” *Florida Audubon Soc’y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 555, n. 7 (plaintiff can assert his rights “without meeting all the normal standards for redressability and immediacy”)). Plaintiffs bringing such claims have standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigants. *Massachusetts v. EPA*, 549 U.S. 497, 517, n. 7. “A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.” *Sugar Cane Growers Cooperative of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002).

In other words, plaintiffs must be seeking to “enforce a procedural requirement the disregard of which could impair a separate concrete interests of theirs.” *City of Dania Beach*, 485 F.3d 1181, 1185 (D.C. Cir. 2007) (quoting *Lujan*, 504 U.S. at 572). The D.C. Circuit has held that “[a] violation of the procedural requirements of a statute is sufficient to grant plaintiff standing to sue, so long as the procedural requirement was designed to protect some threatened concrete interest of the plaintiff.” *Id.* (quoting *City of Waukesha v. EPA*, 320 F.3d 228 (D.C. Cir. 2003) (internal quotation marks omitted)).

Citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), FWS and CSKT argue that Plaintiffs’ injuries are not “concrete and particularized” and “actual or imminent” because they “have not demonstrated any concrete plans to visit the Bison Range.” CrossMotion at 19-22;

CSKT SJM at 26-28. In *Lujan*, plaintiffs lacked standing to challenge a regulation regarding the geographic scope of a section of the ESA which they believed would threaten species in foreign countries. 504 U.S. 555. As FWS recognizes, CrossMotion at 21, the plaintiffs' claims that they intended to visit areas in foreign countries affected by the regulation, and would presumably be denied the opportunity to observe the threatened species, did not suffice to demonstrate an "imminent" injury. *Id.* at 564.

Plaintiffs' interests here are not so vague and amorphous. See discussion *supra*. Not only do all of the individual Plaintiffs intend to return to NBRC in the future, but they have visited NBRC on numerous occasions, volunteered numerous times at NBRC, gathered historical information on NBRC, and photographed the NBRC, among other things. See discussion *supra*. Further, BGA and the individual Plaintiffs have well-established and substantial interests in the conservation of wildlife and wildlife habitat and in the management of the NWRS generally and NBRC in particular.

1. NEPA Standing

As the Supreme Court has stated, the purpose of NEPA is to integrate environmental review into the agency's decisionmaking process to ensure that "environmental values and consequences have been considered during the planning stage of agency actions." *Id.* (quoting *Andrus v. Sierra Club*, 442 U.S. 347, 350-51 (1979)); see also *Lemon v. Geren*, 514 F.3d 1312, 1314-15 (D.C. Cir. 2008) ("The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what is proposed." (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989))). A "procedural injury" is established if "plaintiffs suffer harm from the agency's failure to follow NEPA procedures, compliance with

which might have changed the agency's mind" *Lemon v. Geren*, 514 F.3d at 1314-15 (citations omitted).

NEPA's procedural requirements are designed to protect the interests of BGA, and its members, including the individual Plaintiffs, by requiring FWS consider the effect of its proposed action on the preservation and conservation of wildlife, plants and habitat at NBRC, the management of NBRC as part of NWRS, and the management of the FWS' bison population. *See City of Dania Beach*, 485 F.3d at 1185; *Lemon v. Geren*, 514 F.3d at 1314-15. Plaintiffs need not establish that approval of the AFA will surely harm the environment. Plaintiffs only need show that in making its decision without following NEPA procedures, FWS created an increased risk of environmental harm. *Florida Audubon Soc'y*, 94 F.3d at 669; *see also Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 92 (D.D.C. 2006).

Had FWS followed NEPA procedures as it was required to do, it would have, among other things, considered the CSKT's poor performance under the 2005 AFA, including their failure to sufficiently implement the Biology Program, AR001138-39; failure to maintain fences, AR000934-36SUPII; failure to properly feed bison and follow husbanding standards, AR002340; and general failure to successfully perform Activities under the 2005 AFA, AR001137. In 2005, FWS found that only 41% of the Activities performed by CSKT under the AFA were fully successful. AR001137. FWS's failure to consider these findings created an increased risk of harm to Plaintiffs' interests in wildlife preservation and conservation and the management of NBRC in a coordinated and integrated manner as part of NWRS.

In addition, without regard to CSKT's performance under the past AFA, or its future performance under the 2008 AFA, had FWS followed NEPA procedures, as it was required to do, it would have considered the effect of the 2008 AFA on Plaintiffs' interests in having NWRS

managed as prescribed by 16 U.S.C. §668dd(a)(2) and (3)(A) as an integrated wildlife management system, and having NBRC managed as part of that system. By the very nature of the 2008 AFA, management of the NBRC is different. The 2008 AFA represents “significant change in operation and maintenance of the NBRC.” AR002707, AFA Sec. 7.E.1. Functions previously performed by trained FWS employees are transferred to CSKT, and NBRC loses the management by FWS employees. *See* Complaint at 20. New CSKT employees will be assigned to the NBRC at the time the AFA is implemented. AR002707, AFA Sec. 7.E.1. The transfer of management of NBRC to CSKT, a third-party, affects FWS’s ability to manage NBRC as a single refuge, and manage NBRC as part of its Refuge System. Likewise, FWS’s loss of control affects its ability to manage bison across the NWRS. Had NEPA been followed, FWS may not have entered the 2008 AFA, or it may have altered the 2008 AFA prior to approval. Here, the procedural step of considering the likely environmental consequences was directly “connected to substantive result.” *See Sugar Cane Growers Cooperative of Fla. v. Veneman*, 289 F.3d at 94-95.⁴

2. ESA Standing

As in the case of NEPA, the Supreme Court’s decision in *Lujan v Defenders of Wildlife*, 504 U.S. 555, 560-1 (1992) describes the test for establishing Article III standing in ESA cases.⁵ As demonstrated above, each Plaintiff has a particularized interest, whether it is scientific, informational and/or conservationist. As the discussion in the section of the brief concerning the Government’s ESA decisionmaking process shows those interests were harmed by the process

⁴ The question of whether the AFA will have significant environmental impacts is the question on the merits of the NEPA claim, and may not be determined against Plaintiffs to deny standing. *Defenders of Wildlife*, 532 F.3d at 924.

⁵ In ESA citizen suit cases plaintiffs need not satisfy the “prudential” test for standing. *Bennett v. Spear*, 520 U.S. 154, 162-66 (1997).

DOI and FWS engaged in. The injury is a procedural one-failure to comply with ESA when deciding to approve the AFA. That injury is redressable by relief granted by this Court. For these reasons, Plaintiffs have established standing.

B. FOIA Standing and Related Jurisdictional Issues

The United States asserts that the Court lacks jurisdiction to hear BGA's claim relating to Section 10 of the AFA because: (1) BGA seeks an advisory opinion since it has not alleged that DOI improperly withheld any records; (2) BGA does not have standing because it did not request disclosure of a record that DOI did not disclose; and (3) BGA fails to state a claim because the AFA provides a mechanism for DOI to obtain records when faced with a FOIA request.

CrossMotion at 44-45. The United States' arguments are meritless.

1. Standing

The essence of the United States' first argument is that there is no case or controversy between it and BGA because BGA does not allege there was an unlawful withholding of a record subject to FOIA. What BGA alleges is that by virtue of Section 10.D of the AFA the United States has declared that certain categories of records relating to NBRC are not subject to FOIA, some of those categories of documents are subject to FOIA and, thus, its approval of the AFA is not in accordance with law – specifically FOIA. The United States in its Answer and in its CrossMotion asserts that Section 10.D does not purport to render records otherwise subject to FOIA beyond the reach of FOIA. Therefore, there is a “controversy,” for purposes of Article III jurisprudence, between BGA and the United States.⁶ It is indisputable that a court has jurisdiction to hear a claim that an agency has exceeded its statutory authority. This Court has

⁶ As is demonstrated *infra* there also is an Article III controversy between BGA and CSKT.

jurisdiction under the Administrative Procedure Act to review DOI's decision to approve the AFA generally and Section 10 in particular. 5 U.S.C. § 706.

The United States' second argument that BGA lacks standing because it has not alleged improper withholding of a particular record also is without merit. Plaintiffs may challenge agency decisions, regulations, or policies which will generally restrict access to information under FOIA, even where they have not made a particular request. In *Better Government Ass'n v. Department of State*, 780 F.2d 86 (D.C. Cir. 1986), the D.C. Circuit entertained a facial challenge from frequent FOIA requesters to Department of Justice guidelines for FOIA fee waivers alleged to violate FOIA and the APA.⁷ See also *Public Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002) (Court reviews agency's date of request cut off policy both generally and as applied to a particular request); *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1987) (plaintiffs may challenge a general agency policy or practice applied to evaluating FOIA requests which could impair their access to information in the future); cf. *Venetian Casino Resort v. EEOC*, 409 F.3d 359 (D.C. Cir. 2005) (Plaintiff had standing to challenge FOIA regulations as inconsistent with FOIA and other statutes because it had demonstrated that the policy would harm its interests in confidentiality of information).

DOI has made a decision concerning which NBRC records it will disclose pursuant to FOIA that is set forth in Section 10. In order to challenge that decision, BGA does not have to allege it has not received a document after submission of a FOIA request. BGA asserts in its Complaint that: (1) its purpose is to educate the American public about the Refuge System and to alert the public to the organizational and physical needs of the Refuge System; (2) it has and will continue to provide written comments and recommendations to FWS staff at the local,

⁷ In that case, the fee waiver issue had been settled with regard to appellants' particular FOIA requests.

regional and headquarters level concerning the management of the Refuge System and specific refuges, including NBRC; (3) based on information it had received, it wrote a letter to Congressman Nick J. Rahall II calling for an investigation by the General Accountability Office and a congressional hearing into DOI's decision to enter into the prior AFA with CSKT; and (4) it submitted comments opposing approval of the prior AFA and the 2008 AFA. Complaint, ¶¶ 8, 9. BGA relies upon, among other sources, information obtained from FOIA to pursue its goals. Most recently in 2009, it submitted a FOIA request to DOI concerning NBRC. See Exhibit 1.

Mr. Reffalt, an individual plaintiff, also asserts that: (1) he has submitted FOIA requests to DOI concerning the implementation of the prior AFA; (2) he relies on the information obtained in response to FOIA requests to learn how NBRC is being managed; and (3) his interest in obtaining information regarding operations at NBRC is impaired by AFA Section 10.D. Complaint, ¶ 20 and Reffalt Declaration.

The effect of Section 10.D is to remove certain records from the group of records that would be reviewed upon receipt of a FOIA request relating to NBRC or potentially the Refuge System in general. The injury to the respective informational interests of BGA and Mr. Reffalt is a direct consequence of DOI's approval of the AFA. The Court can redress the injury by declaring the approval of the AFA void or striking the second sentence of Section 10.D. In sum, BGA and Mr. Reffalt have standing.

2. Related Jurisdictional Issues

The Government argues Plaintiffs' claim is not ripe. The claim is ripe. Under the test established in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967) a claim is ripe if the issue is "fit" for judicial review and there is a hardship to a party if the court does not consider the issue when raised. Under the fitness of the issue prong, the reviewing court must determine:

(1) whether the disputed claim raises a purely legal issue and, therefore, presumptively is suitable for review; and (2) whether the court or the agency would benefit from postponing review until the agency decision-making has sufficiently crystallized by taking a more definite form.

Venetian Casino Resort v. E.E.O.C., 409 F. 3d 359, 364 (D.C. Cir. 2005). BGA’s Complaint presents a purely legal issue the resolution of which will turn on an analysis of FOIA and ISDEAA. No factual development is necessary. In addition, since DOI has approved the AFA there is no benefit to postponing review. DOI is making decisions concerning FOIA requests based on Section 10 of the AFA. The circumstances presented in this case are like the circumstances presented in *Venetian Casino Resort*, 409 F.3d 359. Here, as there, the claim is “fit” for review. Whether or not DOI or FWS has failed to disclose any record BGA believes should be disclosed under FOIA, is immaterial to the ripeness analysis. *Electric Power Supply Ass’n v. FERC*, 391 F.3d 1255, 1262-63 (D.C. Cir. 2004).

Consideration of the claim by the Court now will not result in any hardship to the United States or CSKT. However, the failure to consider the claim now will result in a hardship to Plaintiffs. The Plaintiffs, like many citizens and organizations, rely on FOIA to obtain information from the Government about how the Government is conducting the peoples’ business. In the future when Plaintiffs request a record if it is not disclosed because of the implementation of AFA Section 10.D, they will have to exhaust administrative remedies and incur the cost, in time and money, associated with such proceedings to arrive where they are now – before a federal court seeking an opinion on a purely legal question.

Plaintiffs also may face a hardship because it is not clear that the United States and CSKT have the same legal position as to which categories of records are subject to FOIA. If they do not, resolution of Plaintiffs’ FOIA request may be delayed while the United States and CSKT

resolve the disclosure issue. It is worth noting here, that CSKT has possession of most or all of the records generated in connection with the implementation of the AFA. DOI literally cannot disclose what it does not possess.

The Government's final argument is that BGA fails to state a claim. CrossMotion at 45. BGA has pled a viable claim. The fact that pursuant to the AFA DOI can request records from CSKT in response to a FOIA request is not dispositive, as the Government suggests. It is axiomatic that DOI only has a legal obligation to provide an response to a FOIA request for "agency records." Subject to other legal constraints such as the Privacy Act or national security laws, it can voluntarily provide a record but it has no obligation to do so. Therefore, the Government's right to request and receive documents does not render BGA's claim non-viable or moot. Section 10.D, for example, unambiguously states: FOIA does not apply to records maintained solely by CSKT. AR002712. Given the legal relationship between CSKT and the Government that sentence purports to exclude from disclosure under FOIA records that are "FOIA-able." The fact that DOI can ask for documents does not alter the legal character of that sentence, or Section 10.D. Moreover, under FOIA, BGA is entitled to certain records when it submits a FOIA request. Whether it receives a requested document should not depend on the whim of an FWS employee. BGA has pled a viable and ripe claim.

IV. The AFA is Not Authorized by the Tribal Self-Governance Act

BGA's memorandum in support of summary judgment demonstrated that the AFA violates the TSGA's prohibition on contracting away inherently Federal functions because it creates a structure for joint management that gives CSKT significant discretionary authority and leaves DOI with effectively no meaningful oversight capacity. DOI and CSKT provide no

substantial rebuttal. DOI's defense consists of the conclusory and erroneous propositions that BGA failed to specify what inherently Federal functions have been transferred and that BGA's analysis of the effect of the AFA is mere speculation. These contentions, however, are simply a failed attempt to mask DOI's fundamental failure in this case. The agency, faced with an unprecedented plan for restructuring of the management of the NBRC, failed to analyze and evaluate the proposed provisions of the AFA to determine if the effect would be to transfer inherently Federal functions in violation of the TSGA. Nor does the Administrative Record have any articulation by the agency of its reasons why the AFA meets the statutory requirements. There is, accordingly, nothing there which the Court can review, much less defer to, and the agency's decision to enter into the AFA must be set aside.

BGA's argument rests not on speculation about how management of the NBRC will proceed under the AFA but on a reasoned analysis of the contract provisions' effect, precisely the exercise that the agency was required to undertake under the TSGA. The disclaimer provision, 25 U.S.C. § 458cc(k), bars DOI from entering into "any agreement . . . with respect to functions that are inherently Federal . . ." DOI's statutory duty, therefore, was to examine and analyze any proposed agreement to determine if the programs or functions have inherently Federal aspects and whether the contract provisions have the effect of transferring such functions away from Federal officials.

Indeed, DOI recognized this responsibility at earlier stages of the negotiations. In May 2007, the Solicitor's Office analyzed the management functions at the NBRC and concluded that the Refuge Manager, the Deputy Refuge Manager, and the Outdoor Recreational Planner discharged inherently Federal functions because they exercised discretionary authority for managing implementation of Federal policies and requirements, directed and controlled Federal

employees, and exercised control over Federal funds. AR 001704-001706. Although the Solicitor's Office suggested that it could be possible to restructure the management of the NBRC to avoid transferring inherently Federal functions, that office did not offer specific guidance because CSKT's proposal did not seek a "restructuring" of the management regime. AR 001706. The draft version of the AFA under review at that time simply identified four areas where CSKT would perform activities subject to the final authority of the Refuge Manager: management, and implementation of the biological, fire and maintenance programs. 001221SUPI-001222SUPI.

The final form of the AFA's provisions for a new management structure did not take shape until the spring of 2008. The draft of April 2, 2008, is the first to have the basic structure of the ultimate management-sharing arrangement, including the creation of the leadership team with equal representation for CSKT and FWS and the obligation for the Refuge Manager to exercise his final authority in a collaborative fashion. AR 000819. This version also recognized that particular functions would remain within the "sole and final authority" of the Refuge Manager, including *inter alia* approval of the use of the NBRC by third parties, supervision of Federal employees, expenditure of Federal funds not transferred to the CSKT, and issuing or changing any regulations regarding public use. AR 000820. The course of negotiations, as evidenced by the provisions of this draft, the Solicitor's 2007 analysis, and DOI's insistence that the positions of Refuge Manager and Deputy Refuge Manager and the law enforcement function had to be "off the table," establish that DOI recognized that administration of the NBRC involved significant exercise of inherently Federal functions at the refuge level. AR 000393, 000449, 000684. Indeed, on three separate occasions during the negotiations, the Assistant Secretary acknowledged that the **on-site** administration of the NBRC encompassed inherently Federal functions. AR 000151 ("[t]here are certain refuge functions that are 'inherently

Federal,” including functions that under §7 of the AFA are reserved for the final authority of the Refuge Manager); AR 00638 (same functions described as “inherently governmental” and “never contract[ed] to third parties;” “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”); AR 000907 (“inherently Federal functions” are “those functions and activities that occur ‘on the ground’ at the National Bison Range . . . that may only be undertaken by federal employees.”).

The issue, then, is not whether the on-site administration of the NBRC involves inherently Federal functions, but whether DOI provided a rational explanation that reconciles the unprecedented management restructuring with the requirement not to contract such functions to non-Federal parties. The record is barren of documentation that DOI undertook such an analysis of the final provisions of the AFA. As a result, DOI does not, and could not, dispute much of the analysis and arguments made by BGA. Specifically, DOI does not deny that the Refuge Leadership Team having equal representation for CSKT and FWS creates management by committee, that negotiation is likely to be prevailing mode for determining how to implement federal discretionary policies, that the more authority is contracted away, the greater oversight is needed to avoid abdication of inherently Federal functions, and that the Refuge Manager is left with no resources to conduct effective oversight. Nor does DOI dispute that the Assistant Secretary conceded adequate oversight could not be exercised by DOI officials off-site and that CSKT’s history of seeking relief at the highest levels of DOI is strong evidence that CSKT is likely to take its disagreements over the Refuge Manager’s head. Finally, DOI does not dispute that the agency’s effort to preserve some of the Refuge Manager’s authority was effectively eviscerated with no explanation by the last minute modification of the agreement to subject the

Refuge Manager's "sole and final authority" over specified management actions listed in §7.B to the dispute resolution provisions.⁸

DOI's sole defense of the AFA is that the agency retains ultimate authority because the last stage of the multi-step dispute resolution process leaves final decision-making authority with the DOI Senior Management Team in Washington. CrossMotion at 16-17. This argument fails in light of the agency's concession that the Refuge Manager must have final authority at the refuge level over the inherently Federal functions and that effective management or oversight cannot be conducted by off-site officials. DOI's claim also fails to recognize that it is the combined effect of the unprecedented restructuring to create joint management and the dispute resolution process that leaves the Refuge Manager with but nominal authority over the performance of inherently Federal functions. Moreover, contrary to the assertions of DOI, the normal chain of command for refuge management is not preserved by the AFA since the senior management team ultimately making decisions includes several senior DOI officials who have no responsibility for the refuge system management nor expertise in that field.

DOI also provides no response to BGA's argument that the AFA transfers the inherently Federal function of directing and controlling Federal employees. Under the express terms of the AFA, if CSKT terminates the Intergovernmental Personnel Act ("IPA") agreement for a Federal employee, FWS is obliged not to reassign the employee "to a position working within, or for, the

⁸ CSKT argues that this change was made 9 days, rather than 2, before the agreement was signed. CSKT Opp at 27 and n.5. Either way, this modification was plainly a last minute change, added several weeks after the chief negotiators represented that all the major substantive issues had been resolved. AR 001102-001103, 001019-001025. The version supplied on June 9, 2008, by counsel for CSKT to the FWS regional office for transmission to Washington for final review did not have this provision. AR 000180SUPI, 000186SUPI, 001555, 001561. From a new addition to the administrative record, it now appears this change was introduced in the revised version circulated on the afternoon of June 10, 2008, but not flagged for the attention of the FWS until June 17, 2008, two days before filing. AR 000006SUPIV; AR 001760-001761. Even then, the record is barren of any explanation of the reason for the change.

NBRC” AR002716, AFA § 12.E.5.c.ii-iii. DOI has plainly surrendered its authority to make discretionary decisions about the placement of Federal employees. DOI’s response incorporates by reference its arguments against the *Reed* plaintiffs’ claim that the AFA violates the IPA statute. CrossMotion at 16, n.1. But it is irrelevant to BGA’s claim whether the IPA statute and regulations have been violated. The issue is whether the IPA provisions of the AFA violate the TSGA’s independent restriction on the transfer of inherently Federal functions. DOI provides no argument addressing that issue.

DOI also fails to address BGA’s claim that the transfer of the functions of the Outdoor Recreation Planner violates the TSGA. DOI’s assertion that BGA’s argument did not specify the nature of the violation is disingenuous. Citing the Solicitor’s Office analysis (AR 001706), BGA plainly asserted that the Outdoor Recreation Planner’s control of federal property and funds was an inherently Federal function and that the AFA mandated the transfer of that position to CSKT. AR002703, AFA, § 6.A.5. The AFA has no provision that removes the Outdoor Recreation Planner’s authority over federal funds, and therefore fails to prevent the transfer of that inherently Federal function.⁹ Nor does the fact that the transfer is scheduled for the beginning of fiscal year 2011 (October 1, 2010) make BGA’s claim unripe. The AFA unequivocally requires the Outdoor Recreation Planner’s position to be transferred to CSKT at that time, and the violation of the TSGA was complete upon the execution of the AFA.

It is plain, therefore, that the final provisions of the AFA are a contract “with respect to functions that are inherently Federal” and therefore contrary to the TSGA. Nor does the Administrative Record contain any reasoned justification for entering into such an unprecedented

⁹ Contrary to the argument of CSKT at Opp 25, BGA was not required to show that the position would retain ultimate control of federal funds after being transferred to CSKT. It is enough that DOI acknowledged the risk of violating the TSGA by transferring this position to CSKT and made no provision in the AFA to prevent it from happening.

restructuring of the management regime at the NBRC. The agency, therefore, has forfeited any deference to its judgment or expertise in applying the TSGA to this contract. As the D.C. Circuit has repeatedly observed, where an agency provides no justification or simply recites the conclusory statement that the applicable statutory requirement has been met, there is no exercise of judgment or application of expertise to which a reviewing court can defer. *See Village of Bensenville v. FAA*, 376 F.3d 1114, 1122 (D.C. Cir. 2004); *American Lung Ass'n v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998); *St. Agnes Hospital v. Sullivan*, 905 F.2d 1563, 1568 (D.C. Cir. 1990), citing *Bowen v. Georgetown Hospital*, 488 U.S. 204, 212 (1988).

CSKT attempts to justify the agency's decision with additional arguments not raised by DOI either in the Administrative Record or in this court. Those contentions should be disregarded, however, since the agency's decision must rise or fall on whatever justifications the agency puts forth. *See SEC v. Chenery*, 318 U.S. 80, 87 (1943). The Tribe's arguments fail on their merits in any event.

First, CSKT's reliance on a later enactment of a definition of "inherently Federal functions" in another title of the ISDEEA is misplaced. That definition provides that such functions are those "which cannot legally be delegated to Indian tribes." 25 U.S.C. § 458aaa(a)(4). Because this definition was enacted in 2000, several years after enactment of the TSGA and the issuance of the formal guidance by the Solicitor for interpreting and applying the meaning of the term as used in the TSGA, it is of limited utility in determining how Congress intended the term to be applied under the TSGA. *See* Pub. L. 106-260, 106th Cong., 2d Sess., §4, 114 Stat. 712; AR 001026-001051. In any event, the definition is virtually useless in the context of the TSGA since it is effectively circular and provides no guidance on what functions can be legally delegated to an Indian tribe.

Second, the fact that DOI has contracted with Indian tribes to undertake other programs under other statutes, such as the administration of Indian trust property, sheds no light on whether the unique arrangement for sharing management found in the AFA has the effect of transferring inherently Federal functions. There is no evidence in this Record of how those contracts may be structured or that the circumstances are at all comparable.

Third, CSKT's and DOI's reliance on case law is misplaced. None of the cases arise under the TSGA or address situations at all comparable to the administration of the NBRC. In fact, almost all of the cited decisions do not consider whether specific functions are inherently Federal, but address distinctions between governmental and private entities in contexts that are completely irrelevant to the claims here. *See Murray v. Northrop Grumman Info. Tech.*, 444 F.3d 169 (2d Cir. 2006) (official immunity claim of municipal contractor); *Caban v. United States*, 728 F.2d 68 (2d Cir. 1984) (choice of law); *Fiallo v. Bell*, 430 U.S. 787 (1977) (standard of review for immigration decisions); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (whether conduct of private entity constituted "state action" under the Fourteenth Amendment); *Vincent v. Trend Western Technical Corp.*, 828 F.2d 563 (9th Cir. 1987) (same); *Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, 589 F. Supp. 885 (N.D. Cal. 1983) (same); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (whether jury selection in private diversity case subject to due process); *City of Gastonia v. Balfour Beatty Construction Corp.*, 222 F. Supp.2d 771 (W.D.N.C. 2002) (municipal sovereign immunity). In the remaining case, *National Federation of Federal Employees v. Cheney*, the D.C. Circuit dismissed a challenge to an agency decision to contract for certain services for lack of standing. 883 F.2d 1038 (D.C. Cir. 1989). The court's discussion of inherently governmental functions provided only background description of the controversy and led to no legal holdings. 883 F.2d at 1049 n.25.

Finally, CSKT mistakenly relies on the canon of statutory construction that resolves ambiguity in statutory language for the benefit of Indians. *See Red Lake Band of Chippewa Indians v. U.S.D.O.I.*, 624 F. Supp.2d 1, 25 (D.D.C. 2009). In this case, DOI did not offer or rely on a new interpretation of the term “inherently Federal functions.” *Cf. DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975) (while Indian canon is given “the broadest possible scope. . . . it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes”). Instead, the agency merely applied the limitation of the TSGA ostensibly in light of the previously issued guidance of the Solicitor. The issue is whether the decision here can be reconciled with the agency’s own prior guidance for making such a decision.

V. The Refuge Act Prohibits the Type of Participation Delegated to CSKT in the AFA

The TSGA explicitly prohibits DOI from entering into an arrangement under the Act whereby a Tribe performs a federal activity where the underlying statute “does not authorize the type of participation sought by the tribe.” 25 U.S.C. § 458cc(k). The underlying statute – the Refuge Act – jealously guards the authority of FWS to manage the NWRS and its individual units. Neither the Government nor CSKT provide any persuasive support for their arguments to the contrary.

A. The Refuge Act Does Not Authorize Subdelegation of Management Authority Over a Refuge.

Neither the plain language of the Refuge Act nor the legislative history can be read to provide for subdelegation of “co-management” authority over NBRC. AR 02705, AFA § 7.C (describing the arrangement between CSKT and the FWS as a “management partnership”). The

Refuge Act affirmatively delegates the authority to administer and manage the NWRS, and individual refuges, not just to DOI, but specifically to FWS. 16 U.S.C. §§ 668dd(a)(1). Where Congress has assigned to FWS the responsibility for administration of the NWRS, FWS is prohibited from subdelegating that authority to an outside entity, including an Indian tribe. The TSGA does not alter that result.

1. Federal agencies may not subdelegate to outside parties absent affirmative evidence of congressional intent. The D.C. Circuit has held that “federal agencies may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, [but] they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.” *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 556 (D.C. Cir. 2004). This prohibition is appropriate because “when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decisionmaking.” *Id.* at 565. Specifically,

“[D]elegation to outside entities increases the risk that these parties will not share the agency’s ‘national vision and perspective,’ and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme. In short, subdelegation to outside entities aggravates the risk of policy drift inherent in any principal-agent relationship.

Id. at 566. *See also Nat’l Park & Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7 (D.D.C. 1999) (the National Park Service cannot shift its responsibility for administration of a national park to a private actor). There is simply no “affirmative evidence” in the language of the Refuge Act or its legislative history that Congress intended that Defendants have any flexibility to subdelegate administration of a refuge to an outside entity. Indeed, the evidence is quite to the contrary.

2. The Refuge Act’s plain language and legislative history provide affirmative evidence that Congress intended to prohibit subdelegation outside FWS. The *United States Telcom Ass’n* case stands for the proposition that a federal agency or department may delegate its decision-making authority to a non-federal entity only when Congress affirmatively grants that authority. The failure to literally prohibit such a delegation, which is the case here, is not an affirmative grant of authority.¹⁰ This is especially so when Congress has expressly directed DOI to administer the NWRS through FWS. 16 U.S.C. §668dd(a)(1). Although resort to the legislative history is unnecessary given the clear Congressional directive to DOI, the relevant legislative history does not support the opponents’ arguments. The Refuge Act affirmatively states that the NWRS is to be “administered by the Secretary through the United States Fish and Wildlife Service . . .” 16 U.S.C. § 668dd(a)(1). The Refuge Act legislative history the Government and CSKT rely on does not provide any support for the proposition that DOI has been empowered to delegate its authority to administer the NWRS.

The Government provides a detailed discussion of the 1976 amendments to the Refuge Act that provides additional context for Congress’ decision to prohibit joint administration of the NWRS between FWS and other Federal agencies. CrossMotion at 9-12 (noting that Congress was concerned that differences in “interpretations of various public laws governing the management prerogatives of each Bureau . . . [and] differences in natural resources philosophy of each agency” had led to “irreconcilable conflicts” between the agencies. S Rep. No. 94-593, 94th Cong., 2nd Sess., reprinted in (1976) USCCAN 288, 289-90). This language cannot be read

¹⁰ The D.C. Circuit, has flatly rejected the line of argument suggested by Defendants. *Ry. Labor Exec. Ass’n v. Natl. Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (“Were courts to presume a delegation of power absent an express *withholding* of power, agencies would enjoy virtually limitless hegemony . . .”).

to expand upon the legislative mandate that FWS, and only FWS, administer the NWRS.¹¹ If Congress prohibited joint management of refuges between FWS and *federal agencies within the Department of Interior*, then FWS certainly does not have any discretion to subdelegate management responsibilities for a refuge to *an outside entity*. Indeed, the Government concedes that this legislative history “shows a recognition that the Service is best qualified to manage the Refuge System.” CrossMotion at 12.

Building on Congress’ directive in section 668dd(a)(1) that FWS administer the nation’s refuges, the 1997 amendments to the Refuge Act brought together the disparate threads of the NWRS into a cohesive whole. *See* H. Rept. No. 105-106, at 2 (1997) (amendments focused on the need to address “inconsistency in the management of refuges within the System.”). Intended as the organic act for the NWRS, the 1997 amendments articulate 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 generation of Americans.” 16 U.S.C. § 668dd(a)(2) (emphasis added). Each refuge must be “managed to fulfill the mission of the System, as well as for the specific purposes for which the refuge was established.” *Id.* §

¹¹ Neither the Government nor CKST dispute the court’s holding in *Trustees for Alaska v. Watt*, 524 F. Supp. 1303 (D. Alaska 1981), *aff’d* 690 F.2d 1279 (9th Cir. 1982), that FWS may not share administration of a refuge with another federal agency, but claim that the decision is inapposite. CrossMotion at 13; CSKT Opp. at 14. The essence of the Court’s decision is that the tasks delegated to the USGS involved administering the refuge because of the control the USGS exercised. 524 F. Supp. 1309-10. CSKT exercises control over the management of the NBRC. For example, the CSKT Deputy Manager supervises all CSKT employees (which includes FWS staff operating under an IPA) and volunteers at the NBRC. AFA § 7.C.3.a.i. It also jointly develops the Annual Work Plan. AFA § 7.E. Finally, as a result of the dispute resolution process in the AFA, FWS is not the ultimate decisionmaker with respect to any aspect of the management of the NBRC.

668dd(a)(3)(A). When the 1997 amendments are considered in conjunction with the 1976 amendments, Congress' directive is evident: FWS is delegated the authority to fulfill the mission of the Refuge Act by ensuring the refuges are "consistently directed and managed as a national system . . . [and] in a coordinated manner." H. Rep. No. 105-106 (1997), at 8.

It would be impossible for the NWRS to be managed as a "national system" in which each refuge is "managed to fulfill the mission of the System" if the Secretary had the authority to delegate the administration and management of individual refuges to third parties. *See United States Telecom Ass'n*, 359 F.3d at 566 ("Delegation to outside parties increases the risk that these parties will not share the agency's 'national vision and perspective' . . ."). As discussed in BGA's opening brief, the need for "national vision and perspective" is particularly true at the NBRC, where bison are being managed as part of a NWRS-wide metapopulation plan. BGA SJM at 9-10, 26. Although CSKT may dispute the circumstances surrounding the care of the bison and the Refuge under the prior AFA, the record demonstrates that the agency responsible for the management of the NBRC saw a conflict between its mandate and the actions of CSKT. AR002340; AR002393; AR002429-002439. It is exactly this type of conflict that the language of the Refuge Act – and the general prohibition on subdelegation to outside parties – is designed to protect against.

The United States argues that the Court, applying step 2 of the Chevron analysis, should defer to DOI's interpretation of the Refuge Act to the effect that the Act does "not prohibit the participation of the CSKT under the 2008 AFA." Cross Motion at 9. Deference is appropriate only if Congress has provided the agency with discretion to act and the interpretation is reasonable and consistent with the statutory purpose and legislative history. *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1049 (D.C. Cir. 1997). DOI has no discretion as

to which entity will manage the NWRS or individual refuges within it. This is not a case where Congress has merely authorized DOI to manage the NWRS and left to DOI which entity or entities will manage the refuges. Also as the discussion above and BGA's opening brief amply demonstrate, entering into arrangements with non-FWS entities to co-manage a refuge is not consistent with the statutory purpose that FWS administer or manage the NWRS (16 U.S.C. § 668dd(a)(1)). Nor is it consistent with the statutory purpose that each refuge be administered or managed to fulfill the mission of the NWRS, as well as the specific purposes for which that refuge was established. (16 U.S.C. § 668dd(a)(3)).

Furthermore, deference is appropriate only when the issue at hand calls for reliance on the agency's expertise. Neither DOI nor FWS has any expertise relative to the Court in interpreting federal statutes when the claim is that the agency does not have the authority to take a particular action. This lawsuit does not challenge, for example, FWS' decision to manage all bison under its control as a metapopulation.

3. The Refuge Act's provision allowing state fish and wildlife agencies to manage programs on a refuge is not contrary to the general prohibition on subdelegation of management of the NWRS. In support of their arguments, the Government and CSKT rely heavily on the provision in the Refuge Act allowing FWS to enter into "cooperative agreements with State fish and wildlife agencies for the management of programs on a refuge," as long as FWS retains "overall management oversight." 16 U.S.C. § 668dd(b)(4). CrossMotion at 13-14; CSKT Opp. at 15-16. The Refuge Act's limited delegation of authority to engage State fish and wildlife agencies for *program* management does not, as the Government implies, create a gap that provides DOI with the discretion to enter into an AFA of this scope. CrossMotion at 14. *See U.S. Telecom Ass'n*, 359 F.3d at 566; *Ry. Labor Exec. Assn.*, 29 F.3d at 671. Even if Indian

tribes could be read into the Refuge Act's definition of a "State," (which they cannot) the AFA is not a "cooperative agreement" to manage "programs" on a refuge. Indeed, CSKT explicitly rejected this type of an approach because it did not provide the Tribe with adequate responsibility for managing NBRC. *See* AR 001958. Instead, CSKT negotiated an AFA that makes no mention of Section 668dd(b)(4) of the Refuge Act and subdelegates management authority not just over the NBRC's "programs" (referred to as "Activities" in the AFA), but over the Refuge as a whole, with final management oversight ceded to a group composed of seven high-level DOI officials, only one of whom has day-to-day responsibility for managing FWS, the FWS Director. AR002701. AFA §§ 4 (definition of DOI Senior Management team), 19.A.

Executive Order 12996 of March 25, 1996, 61 Fed. Reg. 13,647, provides no additional authority for Defendants to enter into an AFA of this scope. CrossMotion at 14; CSKT SJM at 46. As a threshold matter, President Clinton signed the Order in 1996, one year *before* Congress overhauled the Refuge Act. Although Congress codified much of the Executive Order, including the mission of the NWRS and many of the Order's principles for management of the NWRS, Congress did not incorporate the language encouraging "conservation partnerships" and nowhere in the congressional enactment is there any indication that Tribes are to be provided special treatment under the statute. *See* 16 U.S.C. § 668dd. The language on which the Government and CSKT rely is a "Guiding Principle" and without a "distinct statutory foundation" and, thus, it cannot, as the Government asserts, be afforded the "force and effect of a statute." *Ass'n for Women in Science v. Califano*, 566 F.2d 339, 344 (D.C. Cir. 1977) (Executive Order based on statutory authorization for the President to "prescribe regulations for the conduct of employees in the Executive Branch."). This Executive Order cannot be read to provide DOI with any additional authority to enter into an AFA that provides any entity, including an Indian Tribe,

with the type of substantial management authority over a Refuge that this AFA subdelegates to CSKT.

4. The TSGA Does Not Alter the Refuge Act’s Prohibition on the Subdelegation of Management Authority Over Refuges. CSKT argues DOI has read the Refuge Act to allow FWS “to enter into agreements with State agencies for the management of Refuge programs . . . subject to . . . the overall management oversight of the FWS Director” and TSGA to allow DOI and FWS” to contract Interior activities to qualifying tribes, including Refuge programs.” CSKT SJM at 43. CSKT also argues that DOI’s interpretation is correct and should not be set aside because the Court has an obligation to interpret the Refuge Act and TSGA in a manner to give effect to both. CSKT SJM at 43. A holding that the approval of the 2008 AFA was a permissible exercise of DOI’s authority does not give full effect to either statute. As CSKT and the Government note, the Refuge Act requires DOI to administer the NWRS through FWS. CSKT Opp at 43; CrossMotion at 13. DOI also is authorized by TSGA to enter into annual funding agreements with certain tribes to “plan, conduct, consolidate and administer programs, services, functions and activities or portions thereof” so long as the function is not inherently Federal and the statute establishing the existing program does not prohibit “the type of participation sought by the tribe . . .” 25 U.S.C. §§458cc(b)(2) and (k). Clearly DOI may enter into an Annual Funding Agreement to allow a tribe to conduct services or activities at a NWRS refuge. What it is not authorized to do is to delegate some or all of its management authority to a tribe or transfer inherently Federal functions to a tribe.

CSKT also argues that the language of the TSGA and its legislative history evinces Congress’ authorization of DOI to enter into Annual Funding Agreements for the management of Refuge Act programs. CSKT Opp at 10. There is nothing in TSGA or its legislative history that

indicates Congress intended to repeal the Refuge Act with respect to tribes. To the contrary, in TSGA Congress recognizes that some statutes will preclude tribal participation of the type sought by a tribe, as the Refuge Act does.

The Government and CSKT also rely on a 2007 statement by leadership of the House of Representatives' Natural Resources Committee and a statement by a former DOI Solicitor in support of management partnerships of refuges under the TSGA. CSKT SJM at 44; CrossMotion at 14. This support, however, is directly contradicted by statements by one of the authors of the 1976 amendments to the Refuge Act, Representative John Dingell, who wrote that the "principle" of the delegation provisions of section 668dd(a)(1) is that "there should never be any attempt to establish a second National Wildlife Refuge System by delegating its authorities or transferring units or responsibilities to any other entity." 001268SUPI-001269SUPI. *See also* 000890SUPII-000891SUPII, 000894SUPII-000895SUPII. Moreover, the statements relied upon by the Government and CSKT are immaterial when interpreting Congress' intent where the plain language of the underlying statute and the legislative history evince a congressional intent to limit Defendants' authority to delegate management authority over refuges.

B. The AFA Unlawfully SubDelegates to CSKT Co-Management Authority Over the NBRC.

In response to Plaintiffs' argument that the AFA improperly subdelegates co-management authority over NBRC, both the Government and CSKT repeatedly assert that the AFA simply provides CSKT with the authority to perform tasks set forth by FWS, consistent with Federal law, and under the controlled oversight of FWS. This type of limited authority to perform tasks was explicitly rejected by CSKT in earlier AFAs, AR 002158-59, and the parties entered into the AFA with the understanding the CSKT "will be directly involved with the

management mission at the Bison Range” and responsible for “mission-critical” activities. AR 001621.¹² The language of the AFA reflects this intent.

Pursuant to the AFA, CSKT and FWS oversee NBRC in a “management partnership.” AR002705, AFA Sec. 7.C. The AFA does not simply contract work to CSKT, as asserted by both the Government and CSKT. CrossMotion at 10, 13; CSKT Opp at 14. The AFA was crafted to provide “substantial opportunities for CSKT involvement in the day-to-day management decisions associated with the operations” of the NBRC. AR001627. Under the AFA, all of the day-to-day work of the Refuge, with the exception of law enforcement, is (or will be) performed *and* overseen by CSKT. AR002703, AFA § 6.A (defining “Activities” to be performed by CSKT); AR002704, AFA § 7.A (CSKT Deputy Refuge Manager will “manage the Activities performed by the CSKT.”). But the scope of CSKT’s management authority is not limited to the oversight of these specified “Activities.” CSKT also is a management partner in the long-term planning for NBRC.

The long-term planning for NBRC is undertaken by the Refuge Leadership Team, which is made up of the Refuge Manager, the two Deputy Refuge Managers (one CSKT and one FWS), and the CSKT Lead Biologist. AR002704, AFA § 7.D. This team jointly writes the “Annual Work Plan, set[s] priorities, and prepare[s] the periodic status reports . . . and all other reports required by this AFA or by FWS Operational Standards.” *Id.* The FWS is most certainly not, as CSKT asserts, the “sole agency establishing the natural resource management regime under which CSKT must work.” CSKT SJM at 44. Indeed, the CSKT has the authority to redesign

¹² CSKT’s attempt to analogize the 2005 AFA with the 2008 AFA is not supportable. CSKT itself pressed for far greater management authority in the 2008 AFA. AR001175SUPI, AR001181SUPI-AR001182SUPI, and the scope of the final AFA is “much larger” than the previous AFA. AR001625.

any Activity or reallocate funds between Activities with prior written approval of the Refuge Manager. AR002703, AFA § 6.B.¹³

Both the Government and CSKT fall back entirely on the provisions in the AFA providing that the Refuge Manager retains final responsibility for directing and controlling the operation of the NBRC. *See* AR002704-002705, AFA § 7.B. But just repeating this statement is inadequate where there is no indication that this authority could be effectively asserted. *U.S. Telecom*, 359 F.3d at 568 (“Nor will vague or inadequate assertions of final reviewing authority save an unlawful subdelegation.”). Viewed in conjunction with the other provisions of the AFA, it is clear that the Refuge Manager does not retain final decision making authority. For example, the AFA requires that the authority of the Refuge Manager to direct and control operations at the NBRC be exercised in a “collaborative fashion, with full and objective consideration of CSKT recommendations. . . .” AR002704-002705, AFA § 7.B. If the Refuge Manager exercises this authority in a manner contrary to the desires of CSKT with respect to any aspect of the operations affecting wildlife and habitat, the Tribe simply may invoke the dispute resolution provisions of the AFA. AR002729-30, AFA § 19. Final decisionmaking authority does not even reside in the office of the FWS Director. *Id.* AFA §19.

¹³ In practice, it appears that CSKT has even more authority and discretion over planning and executing management of the Refuge than the AFA contemplates. The AFA directs a jointly written Annual Work Plan (AWP), which provides a means by which the FWS would at least collaborate with CSKT in decision-making concerning work plans and priorities for the upcoming year, and which results in the creation of a document against which the CSKT’s performance can be measured so that there can be accountability with respect to the mutually agreed-upon management regime. However, it appears that no AWP was prepared for 2009 at all even though that year has now passed, and no AWP has yet been prepared for 2010. The monthly reports submitted by CSKT indicate that work on the 2009 AWP occurred every month between January and June, 2009, Dkt. No. 36-2 at 2, 4, 5, 8, 11, and 14, but there is no indication that it was ever completed. The August report indicates work on developing the 2010 AWP. *Id.* at 19.

CSKT also argues that the dispute resolution provisions of the AFA incorporate DOI's "normal chain of command." CSKT Opp at 20. CSKT provides no record support for this assertion, and the Federal government does not take this position in its brief. Furthermore, it is inconceivable that every decision made by a Refuge Manager that is contrary to the interests of an outside entity requires FWS to go through a resolution process that results in the choice of a mutually-acceptable mediator and if consensus is not reached, elevation of the dispute to a "DOI Senior Management Team." AFA § 19.A. Indeed, the DOI Senior Management Team is created by the AFA for the explicit purpose of resolving disputes at NBRC. *Id.* Nearly every decision pertaining to the management of the NBRC, from the authority exercised by the Refuge Manager to determinations for setting work priorities and drafting the Annual Work Plan, is subject to final approval of the DOI Senior Management Team. AR002704-002705, AFA §§ 7.B, 7.C. Yet the DOI Senior Management Team is made up of seven members, only **one** of whom is engaged in the day-to-day management of FWS and the NWRS. AR002701, AFA§4 (Definition of DOI Senior Management Team). The Senior Management Team includes officials who have no official responsibility for the administration of the NWRS such as the Director of the Bureau of Indian Affairs. *Id.* The involvement of DOI Associate and Assistant Secretaries whose responsibilities do not include overseeing the management of FWS and the Director of the Bureau of Indian Affairs in making final determinations regarding the administration of a unit of the NWRS is contrary to the Refuge Act's explicit delegation of authority for administration of the NWRS to FWS.

CSKT also argues that BGA did not impeach CSKT's credentials to operate NBRC programs and implies that the failure somehow supports CSKT's litigation position. CSKT Opp at 17-19. The issue in this case is: Does the Refuge Act empower DOI and/or FWS to approve

the AFA, which sets up a joint management arrangement? If the Government did not have that authority, the AFA is void. Whether CSKT is qualified or not is irrelevant.

C. The Court Should Grant BGA's Motion and Deny the Cross Motions

In summary, the essential issues in the dispute concerning the scope of DOI's authority under the Refuge Act are: 1) what does the statement the NWRS "shall be administered by the United States Fish and Wildlife Service" mean?; 2) is the 2008 AFA a delegation of some FWS' authority to administer the NBRC? and 3) does section 668dd of Title 16 or some other provision of the Refuge Act authorize DOI or FWS to delegate the authority to administer the NWRS to the CSKT? As to the first question, there is nothing in the statutory language or the legislative history to indicate Congress meant "administered" to have any meaning other than the common meaning. Webster's New World Dictionary of American English Third College Edition, defines "administer" as "to manage or direct (the affairs of a government, institution, etc.). . . ." Neither the Government nor CSKT offer a different view. However, the Government and CSKT argue that the 2008 AFA does not delegate or transfer authority to CSKT to manage or direct the operation of the NBRC. As the discussion *supra* and BGA's opening brief demonstrate, the AFA sets up a joint management arrangement. Failing in their attempts to show that the AFA does not delegate authority to CSKT to "administer" the NBRC, the Government and CSKT argue that the Refuge Act does not preclude DOI from entering into arrangements with other entities concerning the NWRS. There is nothing in the statutory language or the legislative history of the Refuge Act or the TSGA that authorizes DOI to enter into an arrangement with any entity-federal, state, local or private – whereby it transfers or delegates some or all of FWS' authority to manage the NWRS or any refuge within the NWRS to that entity. Therefore, the Court should grant BGA's motion with respect to Count I and deny the crossmotions.

**VI. Neither the Government Nor CSKT Have Shown
Why the Court Should Not Grant BGA'S Motion Regarding Compliance with NEPA**

The Government's arguments concerning its "compliance" with NEPA are meritless. First, neither NEPA nor the Council on Environmental Quality's NEPA regulations provide for the issuance of programmatic categorical exclusions. Here, the Government and CSKT imply that the 2004 categorical exclusion ("CE") for the first AFA applies to all future AFAs on the NBRC (presumably the AFA "program"), regardless of how different the terms of later AFAs might be. This cannot be done. While the nature of a *categorical* exclusion is to exclude *categories* of actions, such as routine maintenance, an agency must support a decision to invoke a categorical exclusion with respect to each action it undertakes, including a consideration of whether extraordinary circumstances exist. *Humane Soc'y of the United States v. Johanns*, 2007 U.S. Dist. LEXIS 27674 at *21-13 (D.D.C. 2007); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 15 (D.D.C. 2009). Defendants have not created or invoked a categorical exclusion for AFAs; rather they have invoked a categorical exclusion for routine maintenance and attempted to apply it to a different AFA on the NBRC without making the necessary examination as to how the particular AFA fits within the categorical exclusion. And the Government does not point to any authority to create such "programmatic" exclusions under NEPA. By using a "programmatic categorical exclusion" to "comply" with NEPA when approving the 2008 AFA, the Government exceeded its authority under NEPA.

Second, neither the Government nor CSKT has identified any document in the Record that contains any legal analysis to support the conclusion that the "programmatic categorical

exclusion” developed as part of the approval of the prior AFA applied to the current AFA.¹⁴ The document the Government relies upon only states the ultimate conclusion. It is indisputable that the 2005 AFA and the 2008 AFA are not identical. The role of CSKT in the management of NBRC and the activities it is authorized to perform are not the same in both agreements. In fact, the existing categorical exclusions relied upon for the two different AFAs are not even the same. As the Government explains, for the first AFA, three categorical exclusions were invoked, while for the second AFA, only the CE for routine recurrent maintenance and management activities was invoked. CrossMotion at 34. Therefore, relying only on an analysis of the 2005 AFA was arbitrary and capricious.

Third, as BGA demonstrated in its opening brief and its discussion of the Refuge Act and TSGA in this brief, the 2008 AFA does more than assign work tasks to CSKT. What it does is define a role for CSKT in the decisionmaking process related to operations at NBRC. Even if this role does not create a joint management arrangement, which BGA believes it does, it alters FWS’ relationship to NBRC. The Government attempts to find a safe harbor in the categorical exclusion for “operation, maintenance, and management of existing facilities” by stating the work is routine whether performed by FWS or CSKT. CrossMotion at 30. That approach allows it to rely on the exclusion but it totally ignores the fact that the 2008 AFA alters FWS’ relationship to NBRC. The categorical exclusion does not apply to the proposed action – the approval and implementation of the 2008 AFA because the 2008 AFA does more than replace

¹⁴ Both Defendants and CSKT claim that the “programmatic” categorical exclusion issued in 2004 “expressly contemplated additional AFAs in the future.” CrossMotion at 3; CSKT SJM at 29, *citing* AR 002105. What the CE documentation actually says is that “The FWS will negotiate with the CSKT in good faith to explore and implement opportunities for adding activities to subsequent AFAs.” It is quite a stretch to claim that this language means that the 2004 CE was intended to cover subsequent AFAs. In fact the reference to adding activities suggests that future AFAs will be different and thus require a new CE determination.

FWS workers with CSKT workers. The Government's reliance on that categorical exclusion was arbitrary and capricious.

Finally, the Government admits that it did not document that it had examined the twelve potential "extraordinary circumstances" contained in the Departmental procedures and determined that none are implicated. CrossMotion at 36. Its defense is: 1) it is not required to document such an assessment; and 2) BGA does not cite any Record evidence that shows that one of the "extraordinary circumstances" is implicated. CrossMotion at 36. As to the first point, BGA noted that there is no evidence that the Government undertook the analysis. The Government does not say it did do the analysis. The Government's decisions allegedly are based on the Administrative Record. Presumably, if there is no record of an analysis or evaluation, the analysis or evaluation did not occur. The presumption is rebuttable but the Government has not rebutted it with any evidence.

As to the second point, BGA's opening brief does cite to Record evidence. The Government response is to ignore that Record evidence. CrossMotion at 36. The Government's problem is that the evidence is its evaluation of CSKT's performance and FWS' statement that CSKT's performance under the prior AFA undermined its ability to comply its obligations with respect to NBRC. Its assessment of CSKT's performance and FWS' ability to comply with the law and FWS policies due to that performance demonstrate that extraordinary circumstances existed.

The Government next argues BGA is relying on speculation. Under the Government's view all statements about the future are "speculation." The facts are that FWS, after some review or investigation, determined that CSKT's performance under the 2005 AFA was deficient in some respects, that FWS concluded CSKT's performance made it difficult for FWS to comply

with its legal obligations and to follow FWS policy. As a consequence, of those conclusions it terminated CSKT's authority to operate under the 2005 AFA. The 2005 AFA was terminated in December 2006 and within two years the 2008 AFA was approved. Under the 2008 AFA CSKT is responsible for performing the same activities that FWS found it failed to perform in an exemplary manner.¹⁵ Given these facts, it is reasonable to assume that CSKT may experience similar problems under the 2008 AFA. An assumption is not speculation. Clearly, DOI and FWS made a similar assumption because the 2008 AFA provides for more training of CSKT staff and a reduced work scope in the first Annual Work Plan. AR002707, AFA § 7.E.4.a.¹⁶

CSKT makes one argument that does not track the Government's arguments. CSKT argues that the requested relief is not appropriate because it would disrupt the contractual relationship between CSKT and the Government and it "would have the effect of destabilizing the NBRC at a time when a productive federal-tribal partnership has finally been established" CSKT Opp at 45. The cases CSKT relies on are inapposite. This AFA is not a long-term contract. Nor has there been a long-term contractual relationship between the parties. Moreover, as noted previously, the prior AFA was terminated by the Government.

CSKT asserts that injunctive relief or rescission "would have the effect of destabilizing the NBRC" but it presents no evidence that this would be the case. Moreover, it is unlikely to be the case since FWS has a statutory obligation to manage NBRC and to ensure that the biological integrity, diversity and environmental health of the NWRS are maintained for the

¹⁵ CSKT argues in both of its briefs that FWS is wrong. The Government does not agree.

¹⁶ As noted above in the Refuge Act discussion, no first Annual Work Plan was created at all. When FWS was in charge of creating AWP's under the first AFA, they were in fact created. AR 001437-001554 (2005 AWP); AR 000701-000801 (2006 AWP). The fact that when CSKT assumed joint responsibility for creating the AWP, no plan was created supports the conclusion that reduced and inadequate performance under the 2008 AFA is not speculation.

benefit of current and future generations of Americans. 16 U.S.C. § 668dd(a)(4). CSKT is not providing a service that FWS is not capable of performing.

NEPA, although a procedural statute, requires federal agencies to consider the likely effects of their proposed actions. Where, as here, the federal agency has a statutory obligation to preserve and conserve wildlife and habitat, the “contract” significantly alters the relationship of the agency to the natural resources and the agency did not even evaluate the effect of the change on the environment, including the wildlife, rescission or an injunction is an appropriate remedy. The status quo ante is the most favorable state for NBRC wildlife. Any harm to CSKT potentially is temporary. A properly constructed agreement that is subjected to a proper NEPA review would allow CSKT to have a role at NBRC. The same can not be said about the wildlife. At least one bison has already died due to inadequate fencing. AR002611, AR000935-36 SUPPL.

Neither the Government nor CSKT has provided any grounds for denying BGA’s motion or for granting their respective crossmotions.

VII. The Court Should Grant BGA’s Motion Regarding Compliance with ESA

A. Defendants’ Reliance On The “No Effect” Determination For The 2005 AFA Is Without Merit

Defendants assert that “[i]n 2004, FWS analyzed whether execution of the AFA would have any effect on listed species and their critical habitat at the NBRC.” CrossMotion at 37. This statement is misleading because it fails to acknowledge that, in 2004, FWS only analyzed whether the *2005 AFA* would have any effect on listed species; it did not consider whether the *2008 AFA* would have any effect on listed species. AR002099-2106. This omitted fact is

important because (1) the terms of the 2008 AFA differed from the 2005 AFA¹⁷ and (2) the factual context in which the second AFA was being executed differed from context of the first agreement. In particular, the second AFA was being executed after FWS decided to terminate the first AFA because it concluded performance deficiencies on the part of CSKT had occurred that justified termination. *See* BGA SJM at 13-14. Independently, either of these factors is legally sufficient to render the analysis done in connection with the approval of the 2005 AFA irrelevant to determining DOI's Section 7 obligations in connection with the approval of the 2008 AFA. In light of these differences in provisions and factual context, the execution of the 2008 AFA was a different proposed action than the 2005 AFA that required its own consultation.

Moreover, there is no "categorical exclusion" under the ESA that would allow FWS to exempt categories of agency action from ESA compliance; each action must be analyzed for its effects on listed species or their critical habitat. *See* 50 C.F.R. §§ 402.02, 402.03, 402.14(a). Nor do the Defendants cite any legal authority for the proposition that the ESA contains such an exclusion or that it authorizes DOI to create one. Thus, even if the no-effect determination was appropriate for the 2005 AFA (which is questionable but not at issue in this case), the terms and factual context of the 2008 AFA differed from the prior AFA and the second agreement required its own Section 7 analysis. Because FWS failed to undertake that independent consideration for the 2008 AFA, it violated its ESA Section 7 obligations.

¹⁷ For example, the 2008 AFA created (1) the position of CSKT Deputy Refuge Manager, a co-equal position with FWS's Deputy Refuge Manager and (2) a Refuge Leadership Team, comprised of the Refuge Manager, the FWS Deputy Refuge Manager, the CSKT Deputy Refuge Manager and the CSKT Lead Biologist. The Refuge Leadership Team writes the Annual Work Plan and "set[s] work priorities." AFA § 7.D. Under the prior AFA, CSKT did not have the same role in the development of the plans describing the work to be performed by CSKT. AR002705-6 (AFA §§ 7.C, 7.D). The 2005 AFA did not include these provisions. In addition, the requirement in the 2005 AFA for CSKT to obtain clearance from the Refuge Manager to proceed with an activity is absent from the 2008 AFA. AR002645.

B. ESA Compliance Cannot Be Deferred To Specific Future Projects

Continuing to rely on the 2004 no-effect determination, Defendants assert that the AFA is “essentially an employment contract” under which the terms and conditions were established for FWS to fund and CSKT to perform certain categories of work. CrossMotion at 37. However, the AFA does more than that. It gives CSKT, a non-federal entity, independent authority over certain aspects of the day-to-day management of NBRC. *See, e.g.*, AFA § 7.C.3.a (“The CSKT Deputy Refuge Manager will: . . . Supervise all CSKT Employees and direct the day-to-day work of employees and Volunteers in the Biological, Maintenance, and Fire Programs and those Activities of the Visitor Services Program that are the responsibility of the CSKT”); *see also id.* § 7.E.1 (“The Parties understand that [the] AFA represents a significant change in operation and maintenance of the NBRC”); *id.* § 2.A (the AFA “provides the CSKT with a substantive role in the day-to-day management of programs”). AR002699.

Even viewed as “essentially an employment contract,” the approval of the 2008 AFA had an effect on listed species. Once the AFA is approved the staffing decisions are implemented. The Refuge Manager, FWS Deputy Refuge Manager and law enforcement personnel remain under direct FWS supervision. AR002704-5 (AFA §§ 7.B, 7.C.3.b). The other job slots are filled with CSKT members, employees or contractors and FWS employees operating under an Intergovernmental Personnel Act agreement. All are under the direct supervision of the CSKT Deputy Refuge Manager. AR002705, AR002701 (AFA § 7.C.3.a and § 4 (Definition of “CSKT Employee”)). Most of the workers supervised by the CSKT are not FWS employees with an IPA agreement. There is a new team on the field and it does not have as much expertise as the former

team.¹⁸ And, the level of service provided under the initial Annual Work Plan will not be at the usual level.¹⁹ All of these actions occurred once the AFA was approved. All of these actions may affect a listed species or its habitat.

Once there is a switch from FWS employees and sole FWS management to managing listed species and critical habitat with CSKT employees and/or contractors and a joint management system, there is no way in advance to ensure the same level of effort or expertise, the same dedication to implementing the FWS's plan for listed species or their habitat, or timely performance. CSKT acts (or doesn't act) and there is an effect in the field then FWS through negotiation of Annual Work Plans, etc., or even termination of certain responsibilities addresses the problem. CSKT's actions and lack of action may affect listed species or their habitat. That was demonstrated under the prior AFA. Accordingly, FWS had an obligation to consult prior to approval of the AFA.

Furthermore, because the agency action is more than the mere employment contract, Defendants' reliance on subsequent project-specific Section 7 consultation to satisfy its ESA obligations is inappropriate for two reasons. First, because the decision to transfer authority to the CSKT to undertake certain refuge management activities is already a *fait accompli* at the later project-specific stage, consultation at that later stage will not consider the implications of the execution and/or implementation of AFA on listed species. FWS's consultation obligations

¹⁸ The 2008 AFA mandates "significant requirements for on-the-job training" in the Annual Work Plans and that the scope of the initial Annual Work Plan be limited to those tasks necessary to provide for the biological integrity of the NBRC, to ensure maintenance of critical infrastructure and equipment, and to provide "basic visitor services." AFA § 7.E.4.a. There is a significant difference between the level of effort required to maintain an existing population or habitat and the level of effort required to conserve a species or habitat.

¹⁹ *Id.*

on the proposed agency action—approved execution of the AFA—must be satisfied before that action is taken. *See* 50 C.F.R. §§ 402.02, 402.03, 402.14(a) (Section 7 consultation applies to any discretionary “agency action” that “may affect” listed species; “agency action” is defined broadly to include “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”.)

If FWS does not consider the effect that transfer of management authority to the CSKT may have on listed species and their habitat prior to execution of the AFA, at no point in the future will this decision, as a whole, be subject to consultation. This conclusion is evidenced by Defendants’ exhibit regarding consultation on a proposed bridge replacement project.

CrossMotion Exh. A. There is no indication that this project-specific consultation considered the impact of the AFA’s transfer of refuge management authority to the CSKT, or, for that matter, “any shortcomings on the part of CSKT” in implementing the particular project, as Defendants assured it would. CrossMotion at 40.

Second, the AFA authorizes CSKT to undertake certain day-to-day management activities that FWS has not treated as “projects” for ESA purposes. The AFA requires the preparation of an Annual Work Plan that will identify “the work and projects” to be performed at the Refuge for each fiscal year. AR002701, 002706 (AFA §§ 4, 7.E). It provides that “the AWP will describe the *routine, ongoing and project-specific work* to be accomplished in the following fiscal year . . . and will assign responsibilities for accomplishing work to individuals and teams of CSKT and Service employees.” AR002708 (AFA § 7.E.4.b). (emphasis added). Thus, the AFA contemplates that some “routine, ongoing” “work” that is separate from a specific “project” will be carried out by the CSKT. When the CSKT takes over implementation of routine,

ongoing work, it does not appear that there is a specific “project” for FWS to consult upon, nor is there any evidence in the Record of Section 7 consultation on the Plan itself.

This inference that future consultation will be undertaken only for discrete proposed projects, but not day-to-day refuge management activities implemented by non-FWS personnel, is supported by the dearth of evidence in the Record showing Section 7 consultation at the Refuge. Aside from the Defendants’ exhibit showing ESA consultation for a discrete bridge replacement project in 2009, the Administrative Record contains less than a handful of Section 7 consultation documents, all of which pre-date either AFA by decades. *See* AR000009ESA-12ESA (three 1978 Section 7 evaluation forms); 000004ESA (1982 Intra-Service Consultation Request). Thus, there is no evidence that FWS will evaluate the effects of CSKT’s daily implementation of refuge activities on listed species in future consultations.

This lack of future consultation on the proposed action, i.e., execution of the AFA, and certain day-to-day refuge activities undertaken by CSKT distinguishes this case from the principal case Defendants rely upon, *Center for Biological Diversity v. Department of Interior*, 563 F.3d 446 (D.C. Cir. 2009) (“*CBD*”). In *CBD*, the court considered whether ESA consultation was required at the first stage of a four-stage offshore oil and gas leasing process. *Id.* at 483. At that first stage, prospective lease purchasers acquired no right to explore, produce, or develop any of the areas listed in the leasing program. *Id.* at 473. Based on this fact, the Department of Interior did not engage in consultation, noting that it would comply with Section 7 at later stages of the leasing process. *Id.* at 482. The court held the petitioners’ ESA claim was not ripe because the welfare of animals was not implicated until later stages of the leasing program, which would be subject to Section 7 consultation. *Id.* at 483.

By contrast, the AFA is not the first step in a multi-stage process; it is a stand-alone agreement that gives CSKT rights upon execution. Moreover, unlike in *CBD*, where the proposed action—oil and gas development—would undergo Section 7 consultation at some point in the process, in this case, as shown above, numerous routine, ongoing actions implemented by CSKT under the AFA will not be subject to future Section 7 consultation, nor will FWS ever consider the effects of the overall decision to transfer certain refuge-management authority to CSKT on listed species or their habitat.

Thus, the execution of the AFA is more analogous to the U.S. Forest Service’s issuance of Land and Resource Management Plans (“LRMPs”), which are subject to Section 7’s consultation requirement prior to issuance. *See Forest Guardians v. Forsgren*, 478 F.3d 1149, 1154 (10th Cir. 2007) (‘approving, amending, or revising a LRMP constitutes ‘action’ under § 7(a)(2) of the ESA’); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994) (quotation omitted). Like the AFA, an LRMP is a “framework for making later project decisions rather than . . . a collection of project decisions.” *Forest Guardians*, 478 F.3d at 1153-54. Once that framework is approved, the Forest Service implements the plan by approving or disapproving specific projects. *Id.* at 1154. Despite the fact that the issuance of the LRMP does not authorize any particular project, Section 7 consultation is nonetheless required at that stage, *id.*, and cannot be deferred to later project stages. Likewise, consultation is required regarding the AFA at the execution stage and cannot be deferred until future projects thereunder.²⁰

²⁰ Relying on the court’s holding in *CBD*, Defendants assert that BGA’s ESA claim could also be dismissed as unripe. As discussed above, the AFA is distinguishable from the multi-stage leasing program at issue in *CBD*, i.e., unlike *CBD*, where the proposed action of oil and gas development would be subject to consultation at some point, later project-specific consultation will not address the proposed action of AFA execution. Thus, the failure to consult at the AFA execution stage is ripe for decision now.

C. CSKT's ESA Arguments Must Also Be Rejected

Like the Defendants, CSKT relies on the certification of no effect in the programmatic categorical exclusion for the 2005 AFA and the prospect of future Section 7 consultation on specific projects at the Refuge to satisfy FWS's ESA obligations. CSKT SJM at 57-58; CSKT Opp at 45-46. As demonstrated above, this reliance finds no support in the law and must be rejected.

CSKT also argues that assertions regarding CSKT's poor performance under the 2005 AFA have been discredited and thus cannot form the basis of a consultation requirement. CSKT SJM at 58; CSKT Opp at 46. CSKT's argument misses the mark for two reasons.

First, even if there had been no allegations that CSKT had mismanaged the Refuge under the 2005 AFA, the fact that the terms of the 2008 AFA differed from the 2005 AFA is sufficient to require consultation anew because the proposed "agency action" was different. Second, whether the allegations were ultimately proven to be true or untrue is not the relevant fact. The relevant fact is that, despite CSKT's protestations to the contrary, FWS concluded that CSKT's performance deficiencies were significant enough to terminate the 2005 AFA. AR002429-39. It is this conclusion that CSKT's performance under the 2005 AFA "prevented the Service from meeting its responsibilities at the NBRC"—that FWS had to take into consideration when determining the effects of the 2008 AFA on listed species and their habitat. Thus, FWS's failure to undergo Section 7 consultation on the execution of the 2008 AFA was a violation of the ESA.

VIII. DOI Exceeded Its Authority When It Approved § 10.D of the AFA

BGA asserts in its Complaint that the approval of the 2008 AFA was not in accordance with law because Section 10.D violates the Freedom of Information Act (“FOIA”). Despite the arguments of the United States and CSKT, this Court has jurisdiction to adjudicate the claim. BGA and Mr. Reffalt, an individual plaintiff, have standing to bring their claim, which is ripe. For the reasons set forth in its opening brief and this memorandum, the Court should grant BGA’s motion and deny the crossmotions.

A. Section 10.D violates FOIA

Section 10.D purports to exempt two categories of documents from disclosure under FOIA. First, Section 10.D states that, except for previously obtained copies of “Tribal records” that DOI demonstrates are clearly required to be maintained as part of its recordkeeping system, “records of the CSKT” shall not be considered “federal records” for purposes of FOIA. AR002712. This sentence addresses “Tribal records.” BGA agrees that to the extent that sentence addresses records created or generated by CSKT in connection with activities not associated with CSKT’s duties under the 2008 AFA, it is consistent with FOIA. For reasons set forth below, any record created or generated by CSKT in connection with its duties or obligations under the 2008 AFA is not a “Tribal record” and is subject to FOIA.

The second category of records addressed by Section 10.D are “records maintained solely by CSKT.” AR002712. According to Section 10.D and the CSKT, those records are not subject to FOIA. *Id.* As FOIA and the case law makes clear, because a record is maintained by a non-federal entity does not render that record beyond the reach of FOIA. “Agency records” are subject to FOIA. Thus, the question is: Are some or all of the records “maintained solely by

CSKT” agency records? Because of the relationship between CSKT and the Government under the AFA, the answer is yes.

Section 10.A, FWS directs CSKT to collect, maintain and provide to FWS “all records and other information specified [by the] AFA or the [Annual Work Plan] which [FWS] needs in order to comply with requirements imposed by law or [FWS] policy [concerning] any Activity [under the AFA] . . . and claims based on property damage, injury or death,” including records “related to construction, finance, environmental compliance and IPA employees’ performance.” AR002711. Accordingly, pursuant to the 2008 AFA, CSKT is responsible for collecting and maintaining the records related to all aspects of the operation of the NBRC. Clearly, FWS has tasked CSKT with maintaining the document management system for the operations performed at NBRC except perhaps law enforcement. All records FWS “needs in order to comply” with legal requirements and policy directives must be collected and maintained by CSKT.

AR002711. After collection, CSKT has a contractual obligation to provide records to FWS upon request.

FOIA Section 552(f)(2)(A) defines “record” as any information that would be an agency record subject to FOIA when maintained by an agency, and any information included in the above description which is maintained pursuant to Federal contract by a non-federal entity for purposes of record management. 5 U.S.C. § 552(f)(2)(A) and (B). The AFA is a contract and Section 10 is quite clear that CSKT has an obligation to manage the specified records. CSKT’s assertion that the statutory definition is limited only to those contracts where the sole purpose of the contract is record management is without merit. The statutory language is clear and is not limited in the manner suggested by CSKT. Reliance on legislative history is unnecessary since the statute is not ambiguous. If Congress wanted to limit the scope of the definition to those

situations where the sole purpose of the contract is record management, it could have done so. It did not.

Given the joint management structure under the AFA, both FWS and CSKT create records relating to the operations at the NBRC. Section 10.A unambiguously requires CSKT to collect and maintain the records created by each party to the AFA. There are three categories of records that discuss the NBRC, NBRC operations, CSKT's performance under the AFA and FWS' oversight of CSKT's performance under the AFA. They are documents created by CSKT, documents created by the Government and documents created jointly by CSKT and the Government. A record created by the Government relating to the NBRC in connection with the management of or operations at the NBRC is an agency record and is subject to disclosure under FOIA unless it is exempt. The fact that FWS and DOI have decided to delegate the record collection and management function to CSKT does not transform an agency record maintained by CSKT into a "Tribal record" or something other than an "agency record" for purposes of FOIA. Unlike the records in *Forsham v. Harris*, 445 U.S. 169 (1980), which were created by a non-federal entity in connection with a project where the Government's' only role was to provide funding through a grant, here the Government jointly manages the NBRC with CSKT and has directed CSKT to collect and maintain those records FWS "needs in order to comply with [the law] and Service policy" AR002711. The Government may not possess a given record at any particular time because of CSKT's obligation to maintain the record management system but it controls the records. It has specified what records must be collected and CSKT is contractually obligated to provide to FWS any record it requests.

Similarly, records created by CSKT²¹ as it performs its duties under the AFA are “agency records” and not “Tribal records” for purposes of FOIA. The AFA specifies several types of documents that CSKT must create solely or jointly with FWS. For example, the Annual Work Plan, the Refuge Annual Performance Plan and the NBRC Baseline Data are developed jointly. AR002706-08, AFA § 7.E These documents are used to delineate the tasks the CSKT must perform. AR002704-08, AFA § 7. By contrast, CSKT generates the “Activity records,” which describe what activity was performed by CSKT. AR002711, AFA § 10.B. The contents of an Activity record is set forth in Section 10.B of the AFA and each such record must provide the level of detail “adequate for Service purposes.” *Id.* All of these records, whether created jointly or solely by CSKT, are created in the normal course of the management of the NBRC, which, all parties agree is one of FWS’ statutory missions. The fact that FWS has elected to enter into a joint management arrangement with the CSKT does not alter the character of the records. The arrangement between the federal agency and the non-federal entity is analogous to the arrangement addressed by the D.C. Circuit in *Burka v. U.S. Department of Health and Human Services*, 87 F.3d 508 (D.C. Cir. 1996). The records created by CSKT and the records created jointly by CSKT and the Government in connection with the implementation of the 2008 AFA, the management of the NBRC, and NBRC operations are “agency records.”

CSKT takes the position that FOIA does not apply to records maintained solely by a Tribe while conceding that once a record is provided to FWS under the AFA it is subject to FOIA. CSKT Opp at 47. What CSKT has avoided addressing is whether certain records created solely by CSKT or jointly by FWS and CSKT are “agency records” at creation and remain so

²¹ BGA agrees that any records created by CSKT discussing NBRC that CSKT does not have an obligation to create pursuant to the AFA or which DOI has not directed it to create or whose creation is not necessary in order to meet its obligations under the AFA is not an “agency record.”

despite the fact that they are stored or maintained solely by CSKT as required by the AFA. Given the language of FOIA, the FOIA case law and the arrangement set up under the AFA, those records are “agency records.”

The United States takes a slightly different approach than CSKT by observing that the AFA creates a process by which it can obtain records from CSKT “to respond to FOIA requests . . . and to comply . . . with FOIA” CrossMotion at 45. The Government argues that BGA fails to state a claim because it can request records from CSKT when it gets a FOIA request. Implicit in this position is that at least some of the records maintained by CSKT pursuant to the AFA are “agency records.” CrossMotion at 45. The United States also observes that “records that are solely CSKT records” are not subject to FOIA.²² CrossMotion at 46. The United States, unlike CSKT, also appears to concede that records created pursuant to the requirements of the AFA by CSKT or jointly are not CSKT records but rather are agency records and subject to FOIA. CrossMotion at 45-6. Thus there is uncertainty as to what the United States’ legal position is. What is clear is that the language in Section 10.D of the AFA purports to render records that are within the scope of FOIA “non-FOIAble.” Accordingly, Section 10.D is inconsistent with FOIA and the Government’s approval of the AFA was not in accordance with law.

B. The ISDEAA Does Not Create an Exception to the Requirements of FOIA.

The parties’ reliance on the Indian Self-Determination and Education Assistance Act (“ISDEAA”) is misplaced. DOI’s authority to enter into Annual Funding Agreements of the type at issue here is set forth in Chapter 14, Subchapter II, Part D of Title 25 of the U.S. Code. Part D does not discuss disclosure of records created pursuant to Annual Funding Agreements.

²² Relying on the language in Section 10.D, CSKT’s position is that any record solely maintained by CSKT is not subject to FOIA. CSKT SJM at 59.

However, it does allow a Tribe to incorporate into its agreement provisions applicable to Self-determination Contracts authorized by Part A. 25 U.S.C. §458cc(l). As CSKT notes, it elected to incorporate the provision relating to disclosure of records into the 2008 AFA. CSKT SJM at 59. 25 U.S.C. § 450l sets forth the provisions that must be included in Self-determination Contracts.²³ Paragraph b (7) of the model Self-determination Contract states:

“(A) IN GENERAL. – Except for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the recordkeeping system of the Department of the Interior or the Department of Health and Human Services (or both), records of the Contractor shall not be considered Federal records for purposes of chapter 5 of title 5, United States Code.”

The provision in Section 450l does not, as CSKT argues, say records maintained solely by a Tribe are exempt from disclosure under FOIA. The provision says “records of the Contractor” are not federal records and, thus, are subject to FOIA except as noted. The ISDEAA provision merely recites the rule of law articulated by the courts and FOIA – only agency records are subject to FOIA. Who, as between a federal agency and a non-federal entity, possesses the record or maintains the record management system is not dispositive of whether the record is an agency record. See, *e.g. Burka v. U.S. Department of Health and Human Services*, 87 F.3d 508, 515 (D.C. Cir. 1996). Simply put, the second sentence in Section 10.D of the AFA is inconsistent with FOIA and ISDEAA.

CSKT also cites to 25 C.F.R. § 1000.392(c) in support of its argument that “records maintained solely by Tribes/Consortia” are not subject to FOIA. CSKT SJM at 59. The ISDEAA addresses Tribal records and, as stated above, declares a subset of Tribal records subject to FOIA. It does not create an exemption from FOIA for any record created in

²³ The 2008 AFA is not a “self-determination contract.” See 25 U.S.C. § 450(j) for the definition of “self-determination contract.”

connection with the implementation of Annual Funding Agreements. Nor does it authorize DOI to create any such exemptions through regulations or the terms of an agreement. Congress' silence is deafening on these issues given the existence of FOIA. The second sentence of Section 10.D is overbroad given FOIA and CSKT's record management obligation. DOI exceeded its authority when it approved Section 10.D.

In summary, Congress has specified the categories of records that are subject to FOIA. It has not delegated to DOI any authority to withhold any records otherwise subject to FOIA or to exempt them from disclosure. Therefore, DOI's approval of the AFA is not in accordance with law.

IX. Conclusion

For the reasons set forth herein and in BGA's opening memorandum of law, the Court should grant BGA's Motion for Summary Judgment and deny the motions filed by the Government and CSKT.