



Public Employees for Environmental Responsibility

962 Wayne Avenue, Suite 610 • Silver Spring, MD 20910

Phone: (202) 265-PEER • **Fax:** (202) 265-4192

Email: info@peer.org • **Web:** <http://www.peer.org>

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Secretary Ryan Zinke
U.S. Department of Interior
1849 C Street, NW
Mail Stop 7328
Washington, DC 20240

Dear Secretary Zinke:

I write on behalf of Public Employees for Environmental Responsibility (PEER) to convey that we were very pleased to learn of your decision to abandon the legislative transfer proposal and your commitment to maintain the Bison Range as a National Wildlife Refuge that is part of the National Wildlife Refuge System. PEER applauds this decision and your more general commitment not to sell or transfer public lands.

As you may know, PEER is also a Plaintiff in the lawsuit, *Reneau v. U.S. Fish and Wildlife Service*, Case No. 1:16-cv-00966-TSC, now pending in the U.S. District Court for the District of Columbia. The suit challenges the Fish and Wildlife Service's (FWS or Service) failure to produce an Environmental Impact Statement (EIS) for its proposal to transfer the National Bison Range out of the National Wildlife Refuge System (NWRS) to the Confederated Salish and Kootenai Tribes (CSKT). It also challenges the Service's failure to produce a Comprehensive Conservation Plan (CCP) for the Bison Range that was required by statute to be completed by 2012. In response to our suit, the U.S. Fish & Wildlife Service (FWS) has finally begun the CCP process for National Bison Range.

PEER has been involved in issues surrounding the Bison Range since 2003. It is because of this long history we are worried that past mistakes may be repeated in an effort to give management authority for the Bison Range to the CSKT. In particular, we are concerned about the statement the Tribes issued stating that you informed them that

“the Interior Department, through the U.S. Fish & Wildlife Service, is shifting its focus to exploring Tribal management of the National Bison Range.”

Unfortunately, the lengthy history of failed efforts toward that end has resulted in putting the Bison Range in a prolonged limbo in which it has suffered severe neglect. The obstacles that doomed past efforts at Tribal management remain the same. We would hate to see a return to past stalemates instead of a move forward to re-establish the Bison Range as the Crown Jewel of the Refuge System.

First and most basically, Tribal management of the Bison Range would be a clear violation of the Refuge Act, which provides that all National Wildlife Refuges “shall be administered by the Secretary through the United States Fish and Wildlife Service.” 16 U.S.C. §668dd(a)(1). Even another Interior agency cannot solely or jointly manage a National Wildlife Refuge, much less a non-federal entity such as an Indian Tribe. *Trustees for Alaska v. Watt*, 524 F. Supp. 1303, 1309, 1310 (D. Alaska 1981), *aff’d* 690 F.2d 1279 (9th Cir. 1982).

While the Indian Self-Determination Education & Assistance Act (ISDEAA), as amended by the Tribal Self Governance Act, 25 U.S.C. § 5301 *et. seq.*, provides for annual funding agreements (AFAs) with Tribes to perform certain services and functions at DOI facilities, the scope of AFAs is limited by the Refuge Act provision that requires management of National Wildlife Refuges by the FWS. The ISDEAA also contains a prohibition on contracting out functions that are inherently Federal. 25 U.S.C. § 458cc(k).

While a properly delimited AFA or cooperative agreement that does not involve shared management and does not contract out inherently federal functions is theoretically possible, actually fashioning such an agreement that is workable and acceptable to both the DOI and the CSKT has proven impossible, despite many years of effort toward that end.

In fact, it was the failure of these attempts that led the FWS to abandon this plan and instead propose the transfer. In announcing the transfer proposal on February 5, 2016, Noreen Walsh, the Mountain-Prairie Regional FWS Director, stated,

Many of you know that we have been working with the CSKT for about 20 years on the idea of a partnership at the National Bison Range that would be outlined in an Annual Funding Agreement which would allow them to manage and implement some of the activities on the refuge. This process has required much time and effort on the part of many, and despite valiant efforts all around, we have not yet achieved the type of partnership with the CSKT that we desired.

The reasons for this failure involve many practical and legal obstacles to the type of arrangement sought by the CSKT, which are illustrated by the history of such efforts to date. I want to ensure that you are aware of this history before deciding to invest yet more time and effort in another AFA or other agreement.

Efforts to implement an AFA with the CSKT began in 2003. After more than a year of negotiations, a draft AFA was published for public comment. Even though this proposed AFA was more limited than later proposals, it was opposed by more than 80 Refuge managers as unworkable. Their letter stated,

“No Refuge Manager, no matter how skilled, could successfully implement this agreement as it is written.”

The FWS nevertheless finalized the AFA in December 2005. However, after it went into operation, FWS found that the CSKT failed to adequately perform many of its functions under the AFA, and that FWS employees were suffering a hostile work environment. As a result, FWS cancelled the agreement in December 2006.

Yet, shortly afterwards, DOI determined to begin negotiations for a new AFA. Negotiating this second AFA took a year and a half and required a third party facilitator. The resulting product was legally vulnerable on several fronts. Most of the plaintiffs in the current PEER suit and others brought two lawsuits challenging the AFA as violating five different federal laws. The plaintiffs claimed that the AFA violated the Refuge Act because it instituted co-management of the Refuge with the CSKT in contravention of the requirement that only FWS manage Refuges. It also violated the Tribal Self-Governance Act because it contracted inherently federal functions to the CSKT. The AFA violated that National Environmental Policy Act (NEPA) because no environmental analysis under that statute was performed prior to entering the AFA.

That AFA also violated the Intergovernmental Personnel Act (IPA), because it provided for agreements under that Act for current FWS employees to work for the CSKT that did not meet the requirements of the Act. The AFA failed to provide that the federal employee would return to his or her former position at the conclusion of the IPA agreement, or to provide the protections for federal employees required by the IPA.

Finally, the AFA violated the Freedom of Information Act (FOIA) because it purported to exempt from FOIA’s requirements records solely maintained by the CSKT, meaning that records concerning the management of the Bison Range and the expenditure of federal funds by the CSKT would not be available to the public as required by FOIA.

On September 28, 2010, Judge Kollar-Kotelly of the U.S. District Court for the District of Columbia set aside the second AFA for failure to comply with NEPA. *Reed v. Salazar*, 744 F. Supp. 2d 98 (D.D.C. 2010). Because the AFA was invalidated under NEPA, the court did not reach the other four bases for annulling the AFA. However, any future AFA would be vulnerable to similar challenges.

After the second AFA was cancelled, the DOI and the CSKT again struggled to agree upon another AFA that could satisfy the aims of both parties and avoid the legal and practical pitfalls of the prior two AFAs. It took two years, until 2012, to prepare another draft AFA, and another two years, until 2014, to prepare a draft environmental assessment for the AFA that was presented for public comment. Many commenters asserted that the new AFA had not overcome the legal and practical deficiencies of the previous AFAs. The FWS and CSKT then returned to negotiations and apparently reached an impasse and abandoned the effort. In early 2016, Cynthia Martinez, the Chief of the NWRS declared that “[t]he process of negotiating and implementing Annual Funding Agreements has not been effective and has resulted in uncertainty for our employees.”

Again, it should be stressed that FWS proposed transferring the Bison Range to the CSKT because of the prolonged inability to fashion a new AFA.

Given this history, the first priority for the Bison Range should be to fill empty positions with qualified staff and begin in earnest the process of creating the long overdue Comprehensive Conservation Plan. Bison Range remains one of the only of the NWRS's more than 560 refuges without this basic charter for resource management.

Apart from the problematic approach of ceding management, there are many ways that the Tribe can participate on the Bison Range in the short run. However, the CCP blueprint for this refuge's operation and staffing should be completed before another AFA is even considered, so that the AFA can be designed to fit within the overall plan for management of the Refuge.

If at some point the Department does consider another AFA, we strongly urge that it be appropriately designed and limited to stay within the bounds of the law and to insure that it will contribute to rather than detract from effective management of the Bison Range. Entering another legally vulnerable AFA would only continue the instability and disruption that has characterized the management of the Bison Range for over a decade now.

Thank you for your consideration of these issues, which are crucial to returning the National Bison Range to full functioning as a National Wildlife Refuge and to its status as the Crown Jewel of the Refuge System.

Sincerely,

Jeff Ruch
Executive Director