

**United States District Court
for the District of Columbia**

BLUE GOOSE ALLIANCE,)
10 Circle S Road)
Edgewood, New Mexico 87015)
and)
DON REDFEARN)
907 Parkview Drive)
Tallahassee, FL 32311-1245)
and)
EVELYN REDFEARN)
907 Parkview Drive)
Tallahassee, FL 32311-1245)
and)
WILLIAM C. REFFALT)
1050 Matador Dr. SE)
Albuquerque, NM 87123-4223)
and)
CHRISTINE ENRIGHT-REFFALT)
1050 Matador Dr. SE)
Albuquerque, NM 87123-4223)
Plaintiffs,)
v.)
KEN SALAZAR,)
in his official capacity as)
Secretary of the Interior)
Department of the Interior)
1849 C Street, N.W.)
Washington, D.C. 20240,)
and)
ROWAN GOULD,)
in his official capacity as)
Acting Director of the)
U.S. Fish and Wildlife Service)
1849 C Street, N.W.)
Washington, D.C. 20240,)
Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs bring this action for declaratory and injunctive relief to require Defendants, the Secretary of the United States Department of the Interior (“Secretary”) and the Director of the United States Fish and Wildlife Service (“Director”) to: a) terminate implementation of and operations under the *Fiscal Years 2009-2011 Funding Agreement Between the United States Department of the Interior, Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation* (“2008 AFA”) for operation and management of the National Bison Range Complex (“NBRC”), a unit of the National Wildlife Refuge System located in Moiese, Montana; and b) retrieve any unspent funds already made available to the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (“CSKT”) under the 2008 AFA.

2. This action concerns issues similar to the issues raised in *Nathaniel P. Reed, et al., v. Salazar*, Civil Action No. 08-2117 (CKK) filed in this Court on or about December 12, 2008.

3. Plaintiffs bring this action to challenge the Defendants’ decision to approve and implement the 2008 AFA. The 2008 AFA violates the National Wildlife Refuge System Administration Act of 1966, as amended (“Refuge Act”), 16 U.S.C. §§ 668dd-668ee, the Indian Self-Determination and Education Assistance Act (“ISDEAA”), 25 U.S.C. §§ 450-450-n, as amended by the Tribal Self-Governance Act, 25 U.S.C. §§ 458aa-hh, and the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

4. Plaintiffs also challenge the Defendants’ decision to approve and implement the 2008 AFA because the Defendants failed to comply with the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347, and the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, in connection with their approval of the 2008 AFA.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. §§ 2201-2202, 28 U.S.C. § 1361, and the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201, 2202. The United States has waived sovereign immunity with respect to the claims set forth herein in 5 U.S.C. § 702 and 16 U.S.C. § 1536.

6. This Court may award costs to Plaintiffs pursuant to 28 U.S.C. § 2412(a) and may award attorneys' fees and expenses to Plaintiffs pursuant to 28 U.S.C. § 2412(d).

7. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) and 5 U.S.C. § 703.

PARTIES

8. Plaintiff Blue Goose Alliance (“Blue Goose”) is a non-profit organization headquartered in Edgewood, New Mexico. It is a national organization whose members reside throughout the United States. As stated in the bylaws, “[t]he purpose of the organization is to educate the American public to the opportunities afforded by the National Wildlife Refuge System and to alert the public to the organizational and physical needs of the System. The Alliance is dedicated to (1) elevating the stature of the national wildlife refuges and the Refuge System, (2) strengthening the integrity of the Refuge System, and (3) promoting the establishment of the National Wildlife Refuge Service as a separate agency within the U.S. Department of the Interior, thereby better enabling the System to conserve wildlife and wildlands and to offer the public educational and recreational opportunities which are compatible with the primary purposes of the refuges and the System.” Blue Goose promotes, by means of public education, outreach, and reasoned advocacy, coordinated and integrated management of the Refuge System in order to ensure the biological integrity, diversity, and environmental health of wildlife, plants, and habitats within the Refuge System. The Refuge System is America’s only

federal land conservation system devoted primarily to the conservation of native fish, wildlife, plants and their respective habitats. Refuges are found in all states and territories of the United States. Blue Goose, through its members, visits the various refuges, including the NBRC, engages in dialogue with field employees of the U.S. Fish and Wildlife Service (“FWS” or “Service”) responsible on a day-to-day basis for operating and managing the Refuge System about problems and issues related to specific refuges, and provides information by means of written comments and recommendations to FWS staff at the local, regional and headquarters level concerning the planning and management of the Refuge System as a whole and concerning specific refuges, including the NBRC. Through its “Issues Coordinator,” Blue Goose establishes contacts on issues selected by Blue Goose as matters of concern. The Issues Coordinator also sends official comments and recommendations to the Refuge managers, administrators, and other non-governmental organizations to leverage Blue Goose’s influence.

9. On June 1, 2007, Blue Goose sent a letter to Representative Nick J. Rahall II, Chairman of the House of Representatives Committee for Natural Resources, calling for a congressional hearing and an investigation by the General Accountability Office into the U.S. Department of the Interior’s decision to enter into an annual funding agreement in 2005 with the CSKT concerning the management of the NBRC. In connection with that funding agreement, Blue Goose also submitted comments in 2004 to the FWS voicing opposition to the then proposed annual funding agreement. Also in December 2007 and on March 17, 2008, Blue Goose submitted comments opposing the approval of the then-proposed 2008 AFA to the Assistant Secretary for Fish, Wildlife and Parks for the U.S. Department of the Interior (“DOI”), who was leading efforts to negotiate a new annual funding agreement.

10. Blue Goose's members include former FWS employees who have served at various refuges, including the NBRC, and other individuals who have been and are active volunteers at refuges across the country, including members of refuge "Friends Groups" who actively assist management at specific refuges. Many are active wildlife watchers and photographers who have an interest in studying, observing and preserving in their natural habitat the various animals and plants found at the refuges within the Refuge System.

11. The interest of Blue Goose members in having the Refuge System placed in an agency whose sole mission is the administration of the Refuge System and similar assets, and the interest of the members of the Blue Goose in having the NBRC managed as part of an integrated system in order to ensure preservation throughout the Refuge System of the flora and fauna found at the NBRC, including in particular the bison and all ESA-protected species, have been and will continue to be harmed by the implementation of the 2008 AFA. These interests are harmed because the 2008 AFA permits the CSKT to manage various activities at the NBRC in a manner inconsistent with the management of the Refuge System as a whole and in a manner that adversely affects the conservation of the fauna and flora within the NBRC and the preservation of their respective habitats.

12. Plaintiff Don Redfearn began his career with the Service in 1950 at the Bitter Lake National Wildlife Refuge in New Mexico. Subsequently, he was transferred to the Bear River Migratory Bird Refuge in Utah. From March 1958 to April 1960, he worked as the Assistant Refuge Manager at the Monte Vista National Wildlife Refuge in Colorado, and from April 1960 to July 1961, he worked as the Assistant Refuge Manager at the Wichita Mountains Wildlife Refuge in Oklahoma. From July 1961 to January 1963, he was the Refuge Manager at the Ouray National Wildlife Refuge in Utah. From January 1963 to February 1966, Mr. Redfearn worked

in the FWS Regional Office in Albuquerque, New Mexico, where he served as the Regional Refuge Master Planner and then as the Assistant Regional Refuge Supervisor. From February 1966 to June 1977, Mr. Redfearn was the Refuge Manager at the National Elk Refuge. From June 1977 until his retirement in October 1982, he served in Anchorage, Alaska, as the Regional Supervisor of all of the National Wildlife Refuges in Alaska. During his career, Mr. Redfearn managed and/or supervised 31 National Wildlife Refuges and prepared or worked on master plans for seven National Wildlife Refuges.

13. Mr. Redfearn, in his personal capacity, has visited more than 100 National Wildlife Refuges and has served as a resident volunteer on four major National Wildlife Refuges: Togiak National Wildlife Refuge in Alaska, the Arctic National Wildlife Refuge in Alaska, the Midway Atoll National Wildlife Refuge, and the Bosque del Apache National Wildlife Refuge in New Mexico. He has visited the National Bison Range Complex several times beginning in 1967 and most recently in May 2008, for the occasion that marked the centennial of the founding of the refuge. He intends to return to the NBRC in the near future.

14. Mr. Redfearn is a founding member of Blue Goose and has served as its President since 2006. In his personal capacity, he wrote letters to the Secretary in 2004 opposing negotiations for the first annual funding agreement with the CSKT related to the management of the NBRC, which was executed in 2005. The Service cancelled negotiations for renewing that agreement in December 2006. During the negotiations for a new agreement, he wrote numerous letters, on behalf of Blue Goose, to the Secretary, the Director, and members of Congress opposing any annual funding agreement with the CSKT for the NBRC. He also met with the Assistant Secretary and the Director to express Blue Goose's opposition to the agreement that became the 2008 AFA.

15. Mr. Redfearn wholeheartedly supports the mission of Blue Goose. Notwithstanding his retirement from the Service, he remains a vigorous advocate for the conservation of wildlife and its habitat, and believes that the Refuge System must be managed as a system, rather than as a loosely affiliated group of refuges, in order to preserve habitat and conserve the flora and fauna that use that habitat. Implementation of the 2008 AFA will harm Mr. Redfearn's personal interest in the conservation of wildlife and wildlife habitat, including the bison and other species at the NBRC. He is concerned that the implementation of the 2008 AFA will result in the same poor management as the previous annual funding agreement, which included the CSKT's failure to comply with the Service's bison management standards, failure to meet the Service's wildlife monitoring reporting standards and protocols, and failure to complete biological study plans and submission of inadequate and unsupported biological reports. Mr. Redfearn believes such poor management significantly impairs the functioning of the NBRC. In addition, implementation of the 2008 AFA harms Mr. Redfearn's interest in the management of the Refuge System as an integrated wildlife management system, rather than a conglomeration of discrete units. The implementation of the 2008 AFA will remove the NBRC from the coordinated management of the Refuge System generally and the coordinated management of the Service bison herds.

16. Plaintiff William Reffalt began his career with the Service in 1960, working at five National Wildlife Refuges from 1960 to 1969. He then served in the FWS Albuquerque Regional Office as a fish and wildlife biologist and as Regional Refuge Biologist. In 1973, he was transferred to the FWS Refuge Division in Washington, D.C., where he worked on, among other things, issues related to refuges, parks, wilderness areas, and wild and scenic rivers in Alaska. Subsequently, Mr. Reffalt became a Special Assistant to the Director of the Service and the principal Service officer on the Departmental task force addressing issues relating to

designation of additional acreage within Alaska Conservation System Units. In that capacity, Mr. Reffalt supervised a staff responsible at the Washington level for implementing FWS responsibilities to assist transfer of lands, including refuge lands, to Alaska Natives under the 1971 Alaska Native Claims Settlement Act. In addition, Mr. Reffalt's office supported the Department's efforts to study federal lands in Alaska and make recommendations for additions to the National Wildlife Refuge System, the Park System, the Wild and Scenic River System, and the Wilderness System in Alaska. His duties included development of proposals, supervising the completion of 28 environmental impact statements describing the proposals and likely impacts from designations, and briefing decision makers in the DOI, the Office of Management and Budget, the Council on Environmental Quality, and the White House. He also presented information briefings for the authorizing Congressional Committees and testified many times on the official recommendations from 1974-1979. Mr. Reffalt assisted in the planning for and accompanied numerous Congressional visits to Alaska and overflights of proposed areas along with visits to major cities and Native Villages across Alaska. In 1980, he was appointed Chief of Refuge Management, and in 1982 was appointed Chief of Wildlife Management. In 1984, Mr. Reffalt accepted a position as the Director of National Wildlife Refuge Programs with The Wilderness Society. While at The Wilderness Society, he worked on all aspects of the Refuge System, from management policies and annual appropriations to land acquisition and new refuge establishment, and helped influence numerous pieces of legislation concerning the Refuge System.

17. Mr. Reffalt retired in 1999. Since his retirement, Mr. Reffalt has been involved in Blue Goose activities. Mr. Reffalt is one of the Blue Goose founding members and currently serves as Vice President and on the Board of Directors. Mr. Reffalt has visited numerous

refuges. Since 2006, Mr. Reffalt has visited over 50 refuges in the western United States and about 24 others in the South and Southeast. He revisits refuges to observe the wildlife in different seasons, habitat conditions, and operations of the refuge in question. He has visited the NBRC three times since 2002 to gather historical information, photograph the panoply of animals within the NBRC, and, as part of the work of Blue Goose, to defend the NBRC from the destructive agreement between the DOI and the CSKT regarding management of the NBRC. During the recent centennial celebration at the NBRC, he volunteered for two weeks and assisted with operations and management activities including bird surveys, operation of the Visitor's Center, and writing a new refuge leaflet on the history of the NBRC. He intends to return to the NBRC in the near future.

18. As evidenced by his lengthy career related to Refuge System issues, and his post-retirement activities, Mr. Reffalt has a deep and longstanding interest in the conservation of wildlife and wildlife habitat, including the bison and other species at the NBRC. He also has a special interest in the conservation of the American bison. In his personal capacity, he has conducted studies and research focused on several species found at the NBRC. Implementation of the 2008 AFA harms Mr. Reffalt's personal interest in the conservation of wildlife and wildlife habitat, including the bison and other species at the NBRC. He is concerned that the implementation of the 2008 AFA will result in the same poor management as the previous annual funding agreement, including the CSKT's failure to comply with the Service's bison management standards, failure to meet the Service's wildlife monitoring reporting standards and protocols, failure to complete biological study plans, and submission of inadequate and unsupported biological reports.

19. Based on his many years of working on wildlife conservation issues, Mr. Reffalt believes that in order to assure the preservation of the species and their habitat that the Refuge System was set up to protect, it must be managed as an integrated system. In addition, Mr. Reffalt believes the Service's bison herds, which are found at several refuges, need to be managed in a coordinated and integrated manner. Mr. Reffalt is concerned that the 2008 AFA significantly impairs the ability of the Service to manage the bison in that manner. The 2008 AFA harms Mr. Reffalt's personal interest in the management of the Refuge System as an integrated wildlife management system by removing the NBRC from the coordinated management of the Refuge System under the control of a single authority. The 2008 AFA is contrary to Mr. Reffalt's interests in having the NBRC managed in conjunction with other refuges where bison and the other NBRC-resident species are found.

20. Mr. Reffalt has submitted Freedom of Information Act requests to the DOI in order to obtain information about the implementation of the CSKT annual funding agreement that became effective in March 2005. His requests sought information about the costs of implementing that annual funding agreement and the investigation by the Service of the grievances filed by Service employees relating to the CSKT's actions at NBRC. Mr. Reffalt often relies on the responses to Freedom of Information Act requests to obtain information about the management of, and operations at, the NBRC. Mr. Reffalt's interest in obtaining information regarding operations at the NBRC is impaired by the provision in the 2008 AFA that declares that documents created by the CSKT relating to its activities under the 2008 AFA are not subject to the Freedom of Information Act.

21. Plaintiff Christine Enright-Reffalt, who is known professionally as "Christine Enright," will be referred to hereinafter as "Ms. Enright" or "Enright." Ms. Enright began her

career with the Service in 1971 at the Aransas National Wildlife Refuge in Texas where she developed a new public use program for the 90,000-acre migratory bird refuge and worked on a major planning document. She was transferred in 1973 to the Wichita Mountains Wildlife Refuge in Oklahoma, where she assisted in the development of an innovative upgrade of the public use program for the 57,000-acre refuge established for the restoration of the American bison. From 1974 to 1980, she was Refuge Manager in the FWS Division of Refuges in Washington, D.C., assigned to the Alaska Native Claims Act Office in support of the efforts of the DOI and the Service to implement the Alaska Native Claims Settlement Act and, ultimately, to develop and legislatively support proposals for new national wildlife refuges, national parks, wild and scenic rivers, wilderness, and other conservation areas in Alaska. From 1980 to 1988, Ms. Enright served as Special Project Staff for the Assistant Director for Refuges and Wildlife, working directly for the Assistant Director in support of the Service's Divisions of Realty and Migratory Birds. In that position, she first completed the work necessary to finish the Alaska responsibilities, including completion of maps and legal descriptions for all refuge areas established in the Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 231 ("ANILCA") for the Congress, the DOI, and the Service. In addition, for the Service, she compiled the legislative history for the Act and its implementation responsibilities. She also developed a land acquisition priority system for the Service as requested by the Congress and she developed a National Wildlife Management Atlas to assist acquisition and management of refuge system units. And in connection with her Migratory Bird responsibilities, she prepared a draft environmental impact statement detailing a Service proposal for, and likely impacts from, requiring migratory bird hunters to use a non-toxic alternative instead of continuing the use of toxic lead shot. In 1988, she became a General Biologist responsible for

Section 7 consultation with the Division of Endangered Species, a position she held until her retirement in 1999.

22. During retirement, Ms. Enright became involved in the founding of Blue Goose and has actively supported its work since its incorporation in 2000. She has attended most of Blue Goose's annual meetings and currently serves on its Board of Directors. She has assisted in writing numerous position papers and comments on behalf of Blue Goose on a variety of proposals and issues affecting the Refuge System. Ms. Enright has visited more than 50 national wildlife refuges in the western United States since retiring, including visits to the NBRC in 2002 and 2008. In 2002, she assisted in the gathering of historical information on the other refuges in the area. During a second visit in 2008 for the NBRC's Centennial Celebration, she volunteered at the Refuge Visitor's Center. She intends to return to the NBRC in the near future.

23. Ms. Enright shares Mr. Reffalt's and Mr. Redfearn's personal interest in the conservation of wildlife and wildlife habitat, including the bison and other species at the NBRC, as evidenced by her lengthy career related to Refuge System issues and her involvement with bison conservation - an interest that is threatened by the 2008 AFA. Ms. Enright is concerned that the implementation of the current AFA will result in the same poor management as the previous AFA, including the CSKT's failure to comply with the Service's bison management standards, failure to meet the Service's wildlife monitoring reporting standards and protocols, and failure to complete biological study plans and submission of inadequate and unsupported biological reports. In addition, Ms. Enright has a personal interest in the management of the Refuge System as an integrated wildlife management system, which is adversely affected by removing the NBRC from the coordinated management of the Refuge System as a whole. The 2008 AFA is contrary to, and thus harms Ms. Enright's interest in maintaining the purpose of the

Refuge System, i.e., to manage each refuge, including the NBRC, in conjunction with other refuges in order to conserve the wildlife and wildlife habitat found within the Refuge System.

24. Plaintiff Evelyn Redfearn has had an interest in, and involvement with, the Refuge System for 59 years. For 14 years, her primary residence was on national wildlife refuges: two years on the Monte Vista National Wildlife Refuge in Colorado, one year on the Wichita Mountains National Wildlife Refuge in Oklahoma, which has a resident herd of bison, and 11 years on the National Elk Refuge in Wyoming, which has a wintering herd of bison. Ms. Redfearn also has volunteered at a number of National Wildlife Refuges. In 1979, she spent two weeks in the wilderness of the Arctic National Wildlife Refuge in Alaska serving as temporary field assistant to a graduate student conducting a study of dall sheep. For three months in 1991, she served as a resident volunteer at the Arctic National Wildlife Refuge manning the Visitor Center. In 1996 and 1997, Ms. Redfearn spent four months as resident volunteer at Bosque del Apache National Wildlife Refuge in New Mexico, with a temporary assignment to the Cabeza Prieta National Wildlife Refuge in Arizona. In 1997, she was a resident volunteer for three months at the Midway Atoll National Wildlife Refuge on Midway Atoll, an insular possession of the United States.

25. Ms. Redfearn has visited refuges in every region and in almost every state. Beginning in 1967, she visited the NBRC on several occasions. Her most recent visit was in May 2008, when she attended the Centennial Observance held at the refuge. She intends to return to the NBRC in the near future. She is a founding member of Blue Goose, serving as the organization's first Secretary, and is currently on the Board of Directors. On behalf of Blue Goose, and as a private citizen, she has consistently worked to prevent the 2008 AFA from becoming effective.

26. Ms. Redfearn's efforts related to the Refuge System reflect her personal interest in conservation of wildlife and wildlife habitat within the National Wildlife Refuges, an interest that is threatened by the 2008 AFA. She is concerned that the implementation of the 2008 AFA will lead to the same results as the previous AFA, including the CSKT's failure to comply with the Service's bison management standards, failure to meet the Service's wildlife monitoring reporting standards and protocols, failure to complete biological study plans, and submission of inadequate and unsupported biological reports. Ms. Redfearn's membership in Blue Goose reflects her interest in the management of the Refuge System as an integrated whole under the control of a single entity, which is harmed by the 2008 AFA and the transfer of management of the NBRC to an entity outside the Service.

27. Defendant Ken Salazar, who is being sued in his official capacity, is the Secretary of the U.S. Department of the Interior and, thus, is the official ultimately responsible for the approval of the 2008 AFA and for the Department's compliance with federal law.

28. Defendant Rowan Gould, who also is being sued in his official capacity, is the Acting Director of the U.S. Fish and Wildlife Service. His predecessor was a signatory to the 2008 AFA. The National Wildlife Refuge System Administration Act, as amended, empowers the FWS to manage the National Wildlife Refuge System.

FACTS

The National Bison Range Complex

29. The NBRC includes the 1) National Bison Range; 2) the Ninepipe National Wildlife Refuge; 3) the Pablo National Wildlife Refuge; and 4) the Northwest Montana Wetland Management District in Lake County, Montana. The NBRC is comprised of approximately 32,865 acres and is located within the boundaries of the State of Montana.

30. Prior to the 1880s, the number of bison in the United States exceeded 10 million animals. The National Bison Range, which currently contains approximately 18,799 acres, was established in 1908 and is one of the oldest wildlife refuges in the nation. It was the nation's first wildlife conservation area established at the direction of Congress and acquired completely with funds appropriated by Congress. Using bison purchased and donated to the federal government, the federal government has protected and fostered the once nearly extinct American bison for 100 years. The National Bison Range is home to 350 to 500 bison. The National Bison Range is one of four national wildlife refuges in the Refuge System devoted primarily to the bison. The National Bison Range's work continues to be vital to the future of the bison as a healthy native species that is genetically pure or with a very low hybridization. Its extensive acreage of native prairie, forests, wetlands and streams also provide habitat for elk, deer, pronghorn antelope, bighorn sheep, black bear, coyote, ground squirrels and other mammals. The National Bison Range also supports over 200 species of birds, including eagles, hawks, meadowlarks, bluebirds, ducks, and geese. Facilities at the National Bison Range include a Visitor Center, walking trails, auto tour roads, and a picnic area.

31. The Ninepipe National Wildlife Refuge was established on June 25, 1921, by Executive Order No. 3503 to function as a refuge and breeding ground for migratory and native birds. The refuge, which currently comprises approximately 4,027 acres, supports migratory waterfowl, including Canada geese and great blue herons, and other bird species, as well as mammals and sport fish. Grizzly bears also have been known to forage on the refuge.

32. The Pablo National Wildlife Refuge was established by Executive Order No. 3504 on June 25, 1921, to function as a refuge and breeding ground for migratory and native birds. The refuge, which currently comprises approximately 2,473 acres, supports migratory waterfowl,

such as mallards, and other bird species, including bald eagles, as well as mammals and sport fish. The main feature of the refuge is a reservoir that contains about 1,850 acre-feet of water at full pool level.

33. The Northwest Montana Wetland Management District in Lake County and Flathead County contains thirteen Waterfowl Production Areas (comprised of Waterfowl Production Areas in Lake County totaling approximately 7,564 acres and Waterfowl Production Areas in Flathead County totaling approximately 5,218 acres), and a Conservation Easement Program that includes 6,300 acres. The Waterfowl Production Areas are not contiguous. Waterfowl Production Areas preserve wetlands and grasslands critical to waterfowl and other wildlife. These protected areas provide breeding and nesting habitat. The Waterfowl Production Areas are managed primarily to preserve habitat for migratory birds. These areas support many species of waterfowl, such as Canada geese, mallards and American widgeon, other bird species, such as savannah sparrows, meadowlarks, hawks, song sparrows and peregrine falcons, and small mammals, such as minks, muskrats and badgers. The Waterfowl Production Areas in Lake County are managed by National Bison Range personnel.

34. As noted in the *Wildland Fire Management Plan for National Bison Range Complex, Moiese, Montana*, dated October 31, 2001, the NBRC is home to a number of species listed under the ESA as threatened or endangered, including but not limited to, the grizzly bear, the gray wolf, the Canada lynx, and the bull trout. www.fws.gov/fire/fmp/region6/montana/. In addition, pursuant to the ESA, bull trout critical habitat has been designated within the NBRC.

35. The NBRC is home to a number of species listed as threatened or endangered species under the ESA, including, but not limited to, the grizzly bear, the gray wolf, the Canada lynx,

and the bull trout. In addition, pursuant to the ESA, bull trout critical habitat has been designated within the NBRC.

36. Grizzly bears have been observed at the Ninepipe National Wildlife Refuge, the National Bison Range, and in the Lake County Waterfowl Production Areas, which are part of the NBRC. Wolves also have been observed on occasion at the National Bison Range, the Lake County Waterfowl Production Areas, and the Ninepipe National Wildlife Refuge. Bull trout are in the Jocko River on the National Bison Range, and in Flathead Lake near the Flathead Waterfowl Protection Area. *Id.* at 15. The threatened Canada lynx also may be found on the NBRC.

37. Genetic testing of individual animals within many of the federally-managed bison herds demonstrates that many, if not most, of the federally-managed herds exhibit evidence of domestic cow introgression. The Service has identified the evidence of domestic cow introgression as a serious issue. A department level working group – the Bison Conservation and Management Working Group – has been established to address this issue and other issues related to the conservation of the bison. The Service is taking steps to address this issue by managing herds found in several refuges, *including the herd within the NBRC*, as a single population. The DOI is considering whether the National Park Service should manage the bison herds under its jurisdiction in a similar manner. In order to sustain a viable population of bison under federal management, herds must be managed so as to ensure long-term heterozygosity. The Service has documented the genetic profiles for all of its herds, including the prevalence and site of introgressed loci, allelic diversity, and frequency of private alleles. Managing individual herds in a coordinated manner in order to ensure genetic heterozygosity, and thus species viability, is an element or component of the management of the Refuge System, including the NBRC.

38. The National Bison Range herd is a very healthy herd containing unique alleles not found in other herds managed by the federal Government. Therefore, the National Bison Range herd is vital to the Service's coordinated bison management program. The Service has decided to manage the National Bison Range herd and at least three so-called satellite herds as a single population. The three other herds are located in Colorado, Iowa and North Dakota. Management of several herds as a single population requires a carefully planned and coordinated breeding program, consistent high quality DNA and disease testing, microchip tagging, and unified recordkeeping on each animal throughout its life. Management of the National Bison Range herd by experienced FWS employees is critical to the long term success of the coordinated bison management program, and is essential for the long-term viability of the America bison.

The Prior AFA

39. On March 15, 2005, a prior annual funding agreement ("2005 AFA") between the Service and the CSKT became effective. The 2005 AFA expired on December 6, 2006, and was not extended.

40. On September 19, 2006, seven FWS employees at the NBRC filed an informal grievance with the FWS Deputy Regional Director, alleging that a hostile work environment had existed at the NBRC since the commencement of the 2005 AFA.

41. In response to the grievance, the FWS conducted an investigation. In a December 6, 2006 letter to the FWS Director, the FWS Regional Director, Jerry Mitch King, recommended, based on his concerns about the treatment of FWS employees and the visiting public, and performance deficiencies on the part of CSKT, that the 2005 AFA be terminated. Mr. King also opined that because tribal laws differed from federal laws and regulations and the CSKT did not operate under the same policies and procedures as the FWS, "it will be almost impossible for

management to be in compliance with our legal mandates and directives with respect to the management of the NBR; and even more impossible for the Service to impose Federal policies and procedures on the CSKT.”

42. By letter dated December 11, 2006, from the FWS Regional Director to the CSKT Tribal Chairman, the 2005 AFA was cancelled by the FWS for inadequate performance, including, but not limited to, failure to comply with FWS bison management standards; failure to meet FWS wildlife monitoring reporting standards and protocols; failure to complete biological study plans and submission of inadequate and unsupported biological reports; failure to timely and properly maintain vehicles, equipment and property; and for creation of a work environment characterized by harassing, offensive, intimidating and oppressive behavior on the part of employees of the CSKT. The FWS also found that the CSKT had created unsafe conditions for employees and the public and failed to maintain buildings in compliance with safety and health standards. The termination letter also stated that the CSKT’s performance had prevented the FWS from meeting its responsibilities at the NBRC under the National Wildlife Refuge System Administration Act and other applicable laws and regulations.

43. On or about December 29, 2006, the DOI announced its intention to enter into a new AFA with the CSKT for the NBRC. Negotiations culminated in the agreement challenged here.

The 2008 AFA

44. On June 19, 2008, representatives of the DOI and the FWS signed the 2008 AFA with the CSKT. The 2008 AFA, which covers fiscal years 2009-2011, became effective no later than January 1, 2009, and expires on September 30, 2011. Both the 2005 AFA and the 2008 AFA involve the management of operations at the NBRC, a unit of the Refuge System.

45. The CSKT is comprised of the Bitterroot Salish, the Pend d'Oreille, and the Kootenai Tribes. Members of the CSKT reside within the Flathead Reservation, which is located in northwest Montana. The CSKT are governed by a Tribal Council.

46. The 2008 AFA provides funding for the CSKT to manage certain programs, and perform certain services, functions and activities at the NBRC that, prior to the 2005 AFA and the 2008 AFA, were being managed and performed by FWS employees. Base funding for the AFA is to be provided annually. AFA Sec. 13.A., E.2. Under the terms of the 2008 AFA, at the beginning of the fiscal year the Service pays the CSKT the requisite funds to carry out the activities and functions assigned to the CSKT. AFA Sec. 13.E.2., Attachment B. The Service may transfer additional funds to the CSKT as warranted. AFA Sec. 13.E.2.b. The AFA provides that in the event of retrocession by the CSKT or reassumption by the Service of any activity covered by the AFA, the CSKT is to return to the Service any funds the CSKT has not expended on such activity or activities. AFA Sec. 17.A., B., C.

47. The 2008 AFA provides that the CSKT will perform "Activities" at the NBRC in five areas: 1) management, 2) biological program (including habitat management), 3) fire program, 4) maintenance program, and 5) visitor services program (phased in over two years). AFA Sec. 6.A. "Activity" is defined by the 2008 AFA as "a program, service, function, activity or portion thereof." AFA Sec. 4.

48. The 2008 AFA provides that activities not explicitly covered by the agreement are retained by the federal Government, but may be included in subsequent AFAs. AFA Sec. 6.C. The 2008 AFA expressly assigns only the Law Enforcement Program to the FWS. AFA Sec. 7.C.3.b.i.

49. Under the terms of the 2008 AFA, the only positions to be retained by the FWS are the Refuge Manager position and a Deputy Refuge Manager position. The 2008 AFA calls for the CSKT to designate a Deputy Refuge Manager, a Lead Biologist, and an Administrative Support Assistant. AFA Sec. 6.A.1; Sec. 7.C.1.

50. Under the 2008 AFA, the Refuge Manager retains the responsibility and authority for directing and controlling the operations at the NBRC, subject to the dispute resolution procedures set forth in Section 19 of the 2008 AFA. AFA Sec. 7.B. In addition, the following decisions that are expressly reserved in Section 7.B. of the agreement to the Refuge Manager also are subject to the dispute resolution provisions set forth in the agreement: setting work priorities; approval of uses of the NBRC by third parties; signature authority for Appropriate Use Determinations, Compatibility Determinations, and Special Use Permits; expenditure of federal funds *not* transferred to the CSKT; supervision of FWS personnel performing activities retained by the FWS; establishment and modification of certain regulations for public use; final field level approval of environmental compliance documents and refuge management plans; final field level approval of emergency operations documents, Wildland Fire Situation Analysis and Wildland Fire Cost Share Agreements; and final field-level approval of implementation of any actions concerning security issues. AFA Sec. 7.B.1-10.

51. Under the terms of the 2008 AFA, the Service Deputy Refuge Manager supervises and conducts the Law Enforcement Program, supervises any subordinate Service employees not assigned to the CSKT, and performs specific duties negotiated with the Refuge Leadership Team. AFA Sec. 7.C.3.b. The Service Deputy Refuge Manager also is a senior staff advisor to the Refuge Manager. AFA Sec. 7.C.1.

52. Subject to the final authority of the Refuge Manager, which in turn is subject to the dispute resolution provisions in Section 19, the CSKT “will manage the Activities performed by the CSKT.” AFA Sec. 7.A. The CSKT Deputy Refuge Manager is a “senior staff advisor to the Refuge Manager” and is to “provide substantive input to management decision-making at NBRC.” AFA Sec. 7.C.1.

53. The CSKT Deputy Refuge Manager alternates with the Service Deputy Refuge Manager in serving as Acting Refuge Manager in the absence or unavailability of the Refuge Manager. AFA Sec. 7.C.2. The Acting Refuge Manager is authorized to exercise all authorities assigned to the Refuge Manager, except those specifically reserved to the Refuge Manager in Section 7.B. of the 2008 AFA. AFA Sec. 7.C.2.

54. The CSKT Deputy Refuge Manager is to direct the day-to-day work of employees and volunteers in the programs assigned to the CSKT under the 2008 AFA, including federal employees assigned to the CSKT under the Intergovernmental Personnel Act. AFA Sec. 7.C.3.a. The 2008 AFA provides that, in the absence of the CSKT Deputy Refuge Manager, a CSKT-designated official will provide day-to-day direction to employees and volunteers assigned to activities under the direction of the CSKT. AFA Sec. 7.C.2.

55. The CSKT may redesign the activities assigned to it and may reallocate funding between activities with the prior written approval of, and subject to, any conditions imposed by the Refuge Manager. AFA Sec. 9.B. The decision of the Refuge Manager not to approve a request by the CSKT to redesign activities or reallocate funding with regard to the activities assigned to it is subject to the dispute resolution and appeal procedures provided in Section 19 of the 2008 AFA.

56. The Refuge Leadership Team, which is comprised of the Refuge Manager, the Service Deputy Refuge Manager, the CSKT Deputy Refuge Manager and the CSKT Lead Biologist, determines the allocation of most of the duties between the CSKT Deputy Refuge Manager and the Service Deputy Refuge Manager, which in turn are set forth in the Annual Work Plan. The Refuge Leadership Team also writes the Annual Work Plan for each fiscal year, conducts short-term planning, and, subject to the dispute resolution process in Section 19, resolves concerns raised by the FWS or the CSKT. AFA Sec. 7. D.2 and 3.

57. The Refuge Management Leadership Team and the CSKT Tribal Council, per the 2008 AFA, must meet at least quarterly to discuss the performance of the Service and the CSKT under the 2008 AFA. AFA Sec. 7.C.3; Sec. 7.D.5.

58. The 2008 AFA describes the arrangement between the CSKT and the Defendants as a “management partnership.” AFA Sec. 7 C.1. The 2008 AFA states that the CSKT and the DOI “will collaborate in the management of the NBRC through the Refuge Leadership Team.” AFA Sec. 7.D.

59. Compliance with federal environmental laws and requirements is to be jointly shared by the FWS and the CSKT. The Refuge Leadership Team is to identify activities that will require documentation and processes under NEPA, the National Historic Preservation Act, and other cultural resource laws and regulations. The parties are directed to work together to implement the required processes under those authorities. AFA Sec. 9.C.

60. If the Refuge Leadership Team cannot reach consensus on any matter under its jurisdiction, the decision of the Refuge Manager will prevail, subject to the right of the CSKT Deputy Refuge Manager to invoke the dispute resolution procedures in Section 19 of the 2008 AFA. AFA Sec. 7.D.6.

61. The Annual Work Plan for each fiscal year is to be “jointly . . . develop[ed]” by the FWS and the CSKT through the work of the Refuge Leadership Team. The Annual Work Plan is to include *all* activities on the Refuge (including those to be performed by CSKT and those to be retained by the FWS), describe the work to be accomplished in the following fiscal year, establish priorities, project completion dates and quality requirements for work, and assign responsibilities between CSKT employees and FWS employees for accomplishing work. AFA Sec. 7.E.

62. The AFA represents “significant change in operation and maintenance of the NBRC.” AFA Sec. 7.E.1. New CSKT employees will be assigned to the NBRC at the time the AFA is implemented. AFA Sec. 7.E.1. The initial Annual Work Plan will be “limited in scope,” and “will include only the basic, fundamental Activities necessary to provide for biological integrity of the NBRC, ensure maintenance of critical infrastructure and equipment, and provide basic visitor services.” AFA Sec. 7.E.4.a. The 2008 AFA observes that significant staff training and orientation, and development of work protocols will be required at the beginning of the arrangement between the Service and the CSKT. AFA Sec. 7.E.4.a.

63. The dispute resolution process set forth in Section 19 of the 2008 AFA includes four levels of review. First, disputes are to be considered by the Refuge Leadership Team. AFA Sec. 19.A.1 and 2. If the Refuge Leadership Team cannot reach consensus, the Refuge Manager is the decision-maker. If the decision of the Refuge Manager is unacceptable to the CSKT, the CSKT Deputy Refuge Manager may elevate the dispute to the second level. At that level, the Refuge Supervisor and the head of the CSKT Natural Resources Department attempt to resolve the dispute. AFA Sec. 19.A.3. If they are unable to reach consensus, the Refuge Supervisor’s decision will prevail, but the head of the CSKT Natural Resources Department may elevate the

dispute to the third level. AFA Sec. 19.A.3. At that level, the Tribal Council and the FWS Regional Director attempt to resolve the dispute. At this level, mediation may be invoked by either party. If consensus cannot be reached, either without mediation or after mediation, the FWS Regional Director is the decision-maker. If the Tribal Council does not agree with the FWS Regional Director, it may elevate the dispute to the fourth level, which is an appeal to the DOI Senior Management Team. The DOI Senior Management Team is comprised of the Deputy Secretary, the Associate Deputy Secretary, the Assistant Secretary for Fish, Wildlife and Parks, the Assistant Secretary for Indian Affairs, the Director of the U.S. Fish and Wildlife Service, the Director of the Bureau of Indian Affairs, and the Associate Solicitor for General Law. AFA Sec. 4; AFA Sec. 19.A.4. The decision of the DOI Senior Management Team may be appealed to the Interior Board of Contract Appeals.

64. Without going through any of the levels of review within the DOI, or after they are completed, the CSKT may appeal disputes under the 2008 AFA to the Interior Board of Contract Appeals and then to court. AFA Sec. 19.B, referencing 25 C.F.R. Part 1000, Subpart R and 25 U.S.C. § 450m-1.

65. The CSKT's performance under the AFA is to be jointly evaluated by the CSKT and the FWS. The CSKT has the right to jointly draft and approve its own evaluation. If there are disagreements about the CSKT's performance, the assessment report is to include the views of both parties. AFA Sec. 11.A.2.

66. The Annual Narrative Report for each fiscal year to be submitted to the FWS Refuge Supervisor is to be prepared by the Refuge Leadership Team. AFA Sec. 11.B. Any other report or evaluation concerning the AFA, as well as periodic status reports to be submitted to FWS's

Regional Office, must also be produced jointly and include both Parties' positions. AFA Sec. 11.C. and D.

67. The 2008 AFA provides that any comments about the CSKT's performance by any third party be promptly provided in writing to the CSKT Deputy Refuge Manager in accordance with disclosure policies under the Freedom of Information Act and the Privacy Act. The Service is prohibited from taking any action regarding the CSKT's performance on the basis of any such comment if it did not comply with this requirement. AFA Sec. 11.A.3.a.

68. Section 10 of the 2008 AFA exempts records of the CSKT related to its activities on the NBRC from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, "except for previously provided copies of Tribal records that the Secretary demonstrates are clearly required to be maintained as part of the record-keeping system of the Department of the Interior"

APPLICABLE LAW

National Wildlife Refuge System Administration Act

69. The National Wildlife Refuge System Administration Act ("Refuge Act"), 16 U.S.C. §§ 668dd-668ee, was originally enacted in 1966. The 1966 enactment consolidated various federal authorities for managing areas devoted to fish and wildlife preservation that were administered by the DOI. The Refuge Act was amended in 1976 by Public Law No. 94-223, 90 Stat. 199, after Congress expressed concern that the Service, which was jointly administering four game ranges with the DOI's Bureau of Land Management, would, by Secretarial Order, lose joint administrative authority over three of the ranges. The administration of the three ranges would be transferred solely to the Bureau of Land Management. The 1976 amendments, *inter alia*, prohibited the transfer or other disposition of land within the Refuge System without Congressional authorization, and declared that all lands within the Refuge System were to be

administered by the DOI only through the Service. According to the House Report accompanying the bill, the purpose of the prohibition is to preclude joint administration of the Refuge System or portions thereof by the FWS and any other agencies, and to preclude transfer of administration of individual refuges to other agencies. H. Rept. No. 94-335 (1975). In 1997, Congress amended the Refuge Act again when it passed the National Wildlife System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 252, which is considered the organic act for the Refuge System. In the House Report accompanying the legislation, Congress stated that “National Wildlife Refuges are often important components of the ecosystems in which they are located . . . [n]onetheless, they cannot fulfill the mission set forth in this Section unless they are consistently directed and managed as a national system.” H. Rep. No. 105-106, at 8. The 1997 enactment, *inter alia*, articulated guiding principles for management of the Refuge System; mandated a long-term comprehensive conservation plan for each refuge or related complex of refuges; clarified the process for determining the compatibility of uses at refuges; and authorized the Secretary to enter into cooperative agreements with State fish and wildlife agencies for the management of programs on refuges, subject to the standards established by, and the overall management oversight of, the Director of the Service. Pub. L. No. 105-57, 111 Stat. 1252.

70. The mission of the Refuge System is “to administer a national network of lands and waters for the conservation, management, and, where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.” 16 U.S.C. § 668dd(a)(2).

**Indian Self-Determination and Education Assistance Act
and Tribal Self-Governance Act of 1994**

71. In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 458aa-hh. The Indian Self-Determination and Education Assistance Act, as

originally enacted, was intended to assure “maximum Indian participation in the direction of educational as well as other Federal services to Indian communities” 25 U.S.C. § 459a(a), by permitting an “orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.” 25 U.S.C. § 450a(b). It provided for contracts or cooperative agreements with recognized Indian tribes to perform programs, functions, services or activities that had been administered by the Federal Government for the benefit of Indians. 25 U.S.C. § 450f(a)(l).

72. In 1994, Congress amended the Indian Self-Determination and Education Assistance Act when it passed the Tribal Self-Governance Act of 1994. Pub. L. No. 103-413, 108 Stat. 4250. Among other things, the Tribal Self-Governance Act authorized the Secretary to enter into annual funding agreements (so called AFAs) with certain tribes with respect to programs, services, functions and activities administered by DOI agencies other than the Bureau of Indian Affairs. The Tribal Self-Governance Act authorized the Secretary to enter into such agreements to transfer the control and management of specific programs, services, functions or activities that are of special geographic, historical, or cultural significance to the participating tribe. 25 U.S.C. § 458cc(c).

73. The Tribal Self-Governance Act expressly prohibits the Secretary from entering into an agreement “with respect to functions that are inherently Federal or where the statute establishing the existing program does not authorize the type of participation sought by the tribe” 25 U.S.C. § 458cc(k).

National Environmental Policy Act

74. NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1. The statute requires federal agencies to identify and consider the environmental impacts

of proposed federal actions, and obligates federal agencies to consider alternatives, as well as measures that could avoid or reduce adverse impacts, *before* taking action to assist or approve a proposed action or project that may significantly affect the environment.

75. For any proposed major federal action that may significantly affect the quality of the human environment, NEPA requires “a detailed statement” that fully analyzes “the environmental impact of the proposed action” and its alternatives. 42 U.S.C. § 4332 (2)(C); 40 C.F.R. § 1502.14. This mandate is intended to inject environmental considerations into the federal agency’s decision-making process, to inform the public and to ensure all that the agency took a “hard look” at environmental concerns *prior* to making a decision to proceed. The environmental impact statement (“EIS”) serves as a means of assessing environmental impact, rather than justifying decisions already made. 40 C.F.R. § 1502.2(g).

76. An EIS must contain a statement of the “underlying purpose and need to which the agency is responding in proposing the alternatives” to be studied in the EIS. 40 C.F.R. § 1502.13.

77. The alternatives analysis “is the heart of the environmental impact statement,” and NEPA requires federal agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives,” including “the alternative of no action,” and “[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.” 40 C.F.R. § 1502.14. A properly conducted alternatives evaluation is linked to the evaluation of environmental consequences and therefore is inherently flawed by any failure to adequately consider the environmental consequences of a proposed action. An agency must use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the environment.

78. As part of its duty to present a full and fair discussion of significant environmental impacts, an agency must include consideration not only of those impacts that may be directly attributable to the proposed action, but also indirect and cumulative impacts as well. 40 C.F.R. § 1502.16; *see also* 40 C.F.R. §§ 1508.7, 1508.8, 1508.27. Indirect impacts are those caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Cumulative impacts are the impacts on the environment which result from the incremental impact of a project when added to other past, present and reasonably foreseeable future action, regardless of what agency (either federal or non-federal) or person undertakes such other actions.

79. The NEPA process requires the agency to determine whether the action is one that normally requires an EIS. 40 C.F.R. § 1501.4(a)(1). An agency action that does not normally require either an Environmental Assessment (“EA”) or an EIS is subject to a categorical exclusion. 40 C.F.R. § 1501.4(a)(2). “Categorical exclusion” is defined as “a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations.” 40 C.F.R. § 1508.4. If an agency chooses not to prepare an EIS and does not invoke a categorical exclusion, the agency is required to prepare an EA to determine whether an EIS is necessary. 40 C.F.R. § 1501.4(b). If the agency concludes, based on the EA, that an EIS is not required, it must prepare a finding of no significant impact (“FONSI”) which explains the agency’s reasons for its decision. 40 C.F.R. § 1501.4(e).

The Endangered Species Act

80. The ESA was enacted in 1973 to “provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species.” 16 U.S.C. § 1531(a)(1), (b).

81. The ESA requires the Secretary to take a number of steps to identify and protect threatened and endangered species. The Secretary has, in turn, delegated responsibility for administering the ESA to the Service. 50 C.F.R. § 402.01(b).

82. Section 4 of the ESA, 16 U.S.C. § 1533, requires the Service to list species of wildlife or plants endangered or threatened with extinction. The regulations governing such listings, and the list of species themselves, are found at 50 C.F.R. Part 17.

83. The Service has listed several species found at the NBRC as endangered species or threatened species, including the grizzly bear and the bull trout.

84. Section 4 of the ESA requires the Service to “concurrently” designate “critical habitat” for the listed species when it lists a species as either threatened or endangered. 16 U.S.C. § 1533(b)(6)(C). The ESA defines “critical habitat” as areas that are either: (1) occupied by the species and have physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection, or (2) not currently occupied by the species but “essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A)(I).

85. Section 7 of the ESA imposes conservation and consultation obligations on federal agencies with respect to listed species. 16 U.S.C. § 1536(a).

86. Under Section 7(a)(2) of the ESA, a federal agency must “insure,” through “consultation,” that a contemplated agency action “is not likely to jeopardize the continued

existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2).

87. A Biological Assessment “evaluates the potential effects of the action” on listed species and critical habitat, and determines “whether such species or habitat are likely to be adversely affected by the action.” 50 C.F.R. § 402.12.

88. If the action agency determines that the contemplated agency action “may effect listed species or critical habitat,” the agency must enter into “formal consultation” with the Service, unless, based on informal consultation or a Biological Assessment performed by the action agency, the Service determines that the proposed action will not adversely affect any listed species or critical habitat. 50 C.F.R. § 402.14. Formal consultation requires the Service to issue a Biological Opinion “detailing how the agency action affects the species or its critical habitat.” 16 U.S.C. § 1536(b)(3)(A).

89. If the contemplated agency action is likely to jeopardize the continued existence of a listed species, or destroy or adversely modify critical habitat, the Service must issue a Biological Opinion that sets forth reasonable and prudent alternatives to be undertaken in order to avoid such results. 50 C.F.R. § 402.14(h)(3).

90. If the Service determines that the contemplated agency action is not likely to jeopardize the continued existence of a listed species and is not likely to destroy or adversely modify critical habitat, the Service will issue a “no jeopardy” Biological Opinion. A no jeopardy Biological Opinion is to be accompanied by an incidental take statement, in which the Service specifies the amount of incidental taking of the species that is permitted, and sets forth “reasonable and prudent measures” for minimizing such taking. 50 C.F.R. § 402.14(i).

91. In formulating the Biological Opinion and identifying any reasonable and prudent alternatives to the contemplated agency action, the Service is required to use “the best scientific and commercial data available.” 50 C.F.R. § 402.14(g)(8).

92. The Service has issued its Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act (March 1998) which sets forth, *inter alia*, the intra-Service process for compliance with Section 7 of the ESA.

93. When the Service is the action agency, as is the case with respect to the 2008 AFA approval and implementation, the Project Leader is responsible for determining if listed species and/or critical habitat is present in the action area. If, as is the case with respect to the NBRC, listed species are present, the Project Leader must determine if the proposed action is likely to adversely affect the listed species.

94. If the action may adversely affect a listed species or critical habitat, the Project Leader must request formal consultation or a formal conference with the appropriate Ecological Services Office. At the conclusion of the consultation or conference, the appropriate Ecological Services Office issues a Biological Opinion or Conference Report which, upon approval, ends the consultation process.

The Administrative Procedure Act 5

95. The Administrative Procedure Act (“APA”), U.S.C. §§ 553-559, 701-706, provides for judicial review of agency actions, such as those at issue here. A reviewing court shall hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

CLAIMS FOR RELIEF

COUNT I VIOLATION OF THE NATIONAL WILDLIFE REFUGE SYSTEM ADMINISTRATION ACT

96. The Plaintiffs repeat and reallege Paragraphs 1 - 95.

97. The National Wildlife Refuge System Administration Act, as amended, declares that the Refuge System shall be administered by the Secretary through the Service.

98. The 2008 AFA transfers management of certain programs at the NBRC to the CSKT during the term of the 2008 AFA. The 2008 AFA transfers responsibility for managing the biological program, including habitat management, the fire program, and the maintenance program to the CSKT. This transfer results in joint management of the NBRC, in violation of the National Wildlife Refuge System Administration Act.

99. By virtue of Section 10 of the 2008 AFA, records created by CSKT related to its activities on the NBRC are deemed non-federal agency records and, thus, are expressly exempted from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. If the Service was managing the NBRC, all records relating to the operations at the NBRC, whether created by CSKT or the Service, would be federal agency records for purposes of FOIA. This provision relating to non-disclosure of CSKT records is further evidence that the 2008 AFA transfers management of the NBRC to the CSKT. Thus, the 2008 AFA violates the National Wildlife Refuge System Administration Act.

100. All decisions of the Refuge Manager and all decisions of the Refuge Leadership Team are subject to challenge by the CSKT through the dispute resolution process set forth in Section 19 of the 2008 AFA. Thus, at a minimum, decision-making authority regarding the operation and management of the NBRC is shared with the CSKT – a violation of the National Wildlife Refuge System Administration Act.

101. Under the 2008 AFA, all decisions of the Refuge Manager and all decisions of the Refuge Leadership Team may be challenged and resolved by senior DOI officials or, ultimately, in federal court. Thus, the NBRC is not managed or administered solely by the Service, as required by the National Wildlife Refuge System Administration Act.

102. The 2008 AFA empowers the CSKT to administer and manage the NBRC, and thus, violates the National Wildlife Refuge System Administration Act's prohibition on the administration of the Refuge System or its components by entities other than the Service. Therefore, the respective decisions of the Secretary and the Director to approve and enter into the 2008 AFA are not in accordance with law.

COUNT II
VIOLATION OF THE TRIBAL SELF GOVERNANCE ACT

103. Plaintiffs repeat and reallege Paragraphs 1 - 102.

104. The Tribal Self-Governance Act prohibits the Secretary from entering into agreements to transfer management, administration or control of programs, services, functions and activities to tribes if the function is inherently federal.

105. As stated by Congress, the mission of the Refuge System is to conserve native fish and wildlife for the benefit of current and future generations of Americans. Congress also has declared that each refuge shall be managed to fulfill the mission of the Refuge System, as well as the specific purpose for which that refuge was established. 16 U.S.C. § 668dd(a)(3).

106. To that end, Congress directs the Secretary to plan and direct the continued growth of the Refuge System in a manner that is best designed to accomplish the mission of the Refuge System. 16 U.S.C. § 668dd(a)(4).

107. Managing the Refuge System or any part of it is an inherently federal function.

108. All decisions by the Refuge Manager and the Refuge Leadership Team relating to activities that the 2008 AFA authorizes the CSKT to perform are subject to the dispute resolution provisions in Section 19 of the 2008 AFA.

109. Per Section 7A of the 2008 AFA, the CSKT manages the biological program and the fire program at the NBRC.

110. Pursuant to the 2008 AFA, the CSKT has been assigned functions that are inherently federal. Therefore, the 2008 AFA violates the Tribal Self Governance Act.

**COUNT III
VIOLATION OF THE TRIBAL SELF GOVERNANCE ACT**

111. The Plaintiffs repeat and reallege Paragraphs 1 - 110.

112. Disputes between the CSKT and the Service regarding the day-to-day management of the flora and fauna at the NBRC, including, without limitation, management of the bison and management of listed species, are subject to the dispute resolution provisions of the 2008 AFA.

113. By virtue of the dispute resolution process in the 2008 AFA, the NBRC is jointly administered by the CSKT and the Service.

114. The 2008 AFA transfers to the CSKT functions that are reserved to the Secretary and the Service by Congress in the National Wildlife Refuge System Administration Act, as amended. The Tribal Self-Governance Act precludes the Secretary from entering into an agreement with a tribe that purports to transfer to that tribe a function or activity that another federal law precludes the tribe from undertaking. The approval of 2008 AFA is an impermissible act by the Secretary and the Service and, therefore, is not in accordance with law.

**COUNT IV
VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT**

115. Plaintiffs repeat and reallege Paragraphs 1 - 114.

116. Congress did not exempt the decisions approving, or the implementation of, annual funding agreements entered into pursuant to the Tribal Self-Governance Act from the National Environmental Policy Act when it enacted the National Wildlife Refuge System Administration Act, as amended, or the Tribal Self-Governance Act.

117. The decision of the DOI to enter into the 2008 AFA is a final agency action.

118. The approval of the 2008 AFA is, for purposes of NEPA, a major federal action. The implementation of the 2008 AFA is, for purposes of NEPA, a major federal action.

119. The approval of the 2008 AFA significantly affects the quality of the human environment within the Refuge System generally and the NBRC in particular. The implementation of the 2008 AFA significantly affects the quality of the human environment within the Refuge System generally and the NBRC in particular.

120. Neither the DOI nor the Service has identified any categorical exclusion under NEPA that applies to the decision to approve or sign the 2008 AFA.

121. Neither the DOI nor the Service has identified any categorical exclusion under NEPA that applies to the implementation of the 2008 AFA.

122. No NEPA categorical exclusion promulgated or issued by the DOI or the Service applies to the decision to approve or to sign the 2008 AFA.

123. No NEPA categorical exclusion promulgated or issued by the DOI or the Service applies to the implementation of the 2008 AFA.

124. Neither the Service, the CSKT, nor any other entity or person performed an environmental assessment or an environmental impact statement to assess the effect of the approval and/or implementation of the 2008 AFA on the species found at the NBRC.

125. Neither the Service, the CSKT nor any other entity or person performed an environmental assessment or an environmental impact statement to assess the effect of the approval and/or implementation of the 2008 AFA on the environment, and in particular on the NBRC.

126. Neither the Service, the CSKT, nor any other entity or person conducted an environmental assessment or an environmental impact statement to assess the effect of the transfer of responsibility to run the biological program to the CSKT on the Service's coordinated management of the bison herds under its jurisdiction prior to the execution of the 2008 AFA.

127. Neither the Service, the CSKT, nor any other entity or person conducted an environmental assessment or an environmental impact statement to assess the effect of having an inexperienced CSKT staff responsible for running the biological program, the fire program or the maintenance program on the wildlife and the habitat within the NBRC.

128. Neither the Service, the CSKT, nor any other entity or person conducted an environmental assessment or an environmental impact statement to assess the effect of the implementation of a "limited" Annual Work Plan on the wildlife and their habitat within the NBRC.

129. Given the performance of the CSKT under the 2005 AFA, it was arbitrary and capricious for neither the Secretary nor the Service to undertake an environmental assessment or an environmental impact statement to assess the effect of the implementation of the 2008 AFA on: a) the ability of the Service to fulfill its statutory duties under the National Wildlife Refuge System Administration Act; b) the conservation of species found at the NBRC; and c) the Service's coordinated management of bison herds.

COUNT V
VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

130. The Plaintiffs repeat and reallege Paragraphs 1 - 129.

131. The failure of the Secretary and the Service to undertake, directly or indirectly, an environmental assessment or an environmental impact statement prior to the implementation of the 2008 AFA is a violation of NEPA and, thus, is “not in accordance with the law.”

COUNT VI
VIOLATION OF THE ENDANGERED SPECIES ACT

132. Plaintiffs repeat and reallege Paragraphs 1 - 131.

133. The FWS is the agency within the DOI that has been delegated the responsibility for implementing the ESA.

134. Pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540(g), by letter dated January 5, 2009, Plaintiffs gave written notice to the FWS of its failure to perform certain nondiscretionary duties under Section 7 of the ESA. 16 U.S.C. § 1536.

135. Section 7 of the ESA imposes an obligation on federal agencies, including the Service, to “utilize their authorities in furtherance of the purpose of this chapter by carrying out programs for the conservation of listed species.” 16 U.S.C. § 1536. The ESA defines “conserve” to mean the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which activities such as research, census, habitat acquisition and maintenance, propagation, live trapping and transplantation are no longer necessary.

136. Unless otherwise exempt, Section 7 also requires each federal agency, including the Service, in consultation with the Secretary, to ensure that any action authorized or funded by such agency is not likely to jeopardize the continued existence of any endangered species or

threatened species, or to result in the destruction or adverse modification of critical habitat for such species.

137. An action is likely to jeopardize the continued existence of a species if it reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the world by reducing the reproduction, numbers, or distribution of that species. An action destroys or adversely modifies critical habitat if it produces a direct or indirect alteration that appreciably diminishes the value of the critical habitat for the survival and recovery of a listed species. 50 CFR § 402.02

138. Upon information and belief, the Service has made no attempt to determine if the approval and/or implementation of the 2008 AFA would likely jeopardize the continued existence of any listed species, or result in the destruction or adverse modification of the critical habitat located within the NBRC.

139. The 2008 AFA sets forth the responsibilities of the parties and the terms and conditions under which the Service will fund, and the CSKT will perform, programs, services, functions, and activities or portions thereof at the NBRC. The approval of the 2008 AFA is an “action” for purposes of the ESA and the regulations promulgated thereunder. The implementation of the 2008 AFA is an “action” for purposes of the ESA and the regulations promulgated thereunder.

140. Upon information and belief, neither the Service, the CSKT, nor any other entity or person undertook a biological assessment to evaluate the potential effects of the approval of the 2008 AFA on listed species found at the NBRC and/or to determine if any such species is likely to be adversely affected by the approval of the 2008 AFA. Upon information and belief, neither the Service, the CSKT, nor any other entity or person undertook a biological assessment

to evaluate the potential effects of the implementation of the 2008 AFA on listed species found at the NBRC, and/or to determine if any such species is likely to be adversely affected by the implementation of the 2008 AFA.

141. Upon information and belief, none of the federal signatories to the 2008 AFA participated in Section 7 consultation with respect to the listed species or any critical habitat located within the NBRC in connection with the decision-making process that resulted in the approval of the 2008 AFA by the federal Government.

142. Upon information and belief, the Service did not engage in the informal consultation process set forth in the regulations promulgated under the ESA and the Service's own guidance with respect to the approval and/or implementation of the 2008 AFA and the effect on the listed species and/or critical habitat found at the NBRC.

143. Upon information and belief, the Service did not engage in formal consultation under the ESA with respect to the approval and/or implementation of the 2008 AFA and the effect of the approval and/or implementation of the 2008 AFA on the listed species at the NBRC and/or the critical habitat located within the NBRC.

144. The failure of the Defendants to determine if the approval and/or implementation of the 2008 AFA would likely adversely affect one or more of the listed species found at the NBRC, or any critical habitat located within the NBRC, is a violation of the ESA. Thus, the approval of the 2008 AFA was not in accordance with law.

145. The failure of the Service to determine if the approval and/or implementation of the 2008 AFA would likely jeopardize the continued existence of any listed species, or result in the destruction or adverse modification of critical habitat, is a violation of the ESA. Thus, the approval of the 2008 AFA was not done in accordance with law.

COUNT VII
VIOLATION OF THE ENDANGERED SPECIES ACT

146. Plaintiffs repeat and reallege Paragraphs 1 - 145.

147. Given the performance of the CSKT under the 2005 AFA, it was arbitrary and capricious for the Secretary and the Service not to determine if the approval and/or implementation of the 2008 AFA would likely jeopardize the continued existence of any listed species, or result in the destruction or adverse modification of critical habitat, is a violation of the ESA.

COUNT VIII
VIOLATION OF THE FREEDOM OF INFORMATION ACT

148. Plaintiffs repeat and reallege Paragraphs 1 - 147.

149. The CSKT performs functions and activities at the NBRC pursuant to the 2008 AFA that previously were performed by the Service. The CSKT performs functions and activities at the NBRC pursuant to the 2008 AFA that, but for the 2008 AFA, would be performed by the Service. Notwithstanding the 2008 AFA, the NBRC remains a component of the Refuge System. Therefore, the CSKT is a contractor of the Service for purposes of Section 552(f)(2)(B) of the Freedom of Information Act.

150. The Service, as a constituent agency of the DOI, has an obligation to make information concerning its operations and activities available to the public pursuant to the Freedom of Information Act. Per the National Wildlife Refuge System Administration Act, the Service is responsible for administering and managing the Refuge System, including the NBRC. Information, that is not otherwise exempt from disclosure pursuant to the Freedom of Information Act, relating to the management of the Refuge System and its constituent elements must be available for disclosure to the public pursuant to the Freedom of Information Act.

151. Section 10.D of the 2008 AFA exempts records created by the CSKT in connection with its performance of activities under the AFA from the Freedom of Information Act, 5 U.S.C. § 552, with the limited exception of “previously provided copies of Tribal records that the Secretary demonstrates are clearly required to be maintained as part of the record keeping system of the Department of Interior.”

152. Section 10.D of the 2008 Act violates the Freedom of Information Act. Therefore, the approval of the 2008 AFA by the Defendants is not in accordance with law.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court enter a judgment in favor of Plaintiffs and against Defendants as follows:

1. A declaration that the 2008 AFA permits the CSKT to jointly administer and manage the NBRC.
2. A declaration that the 2008 AFA authorizes the CSKT to undertake activities and functions that are inherently federal.
3. A declaration that the Defendants’ approval of the 2008 AFA violates the National Wildlife Refuge System Administration Act and the Tribal Self-Governance Act.
4. A declaration that the Defendants’ approval of the 2008 AFA was arbitrary, capricious, and otherwise not in accordance with law.
5. A declaration that the approval of the 2008 AFA is a major federal action that may significantly affect the environment, and thus, the Defendants violated NEPA when they failed to undertake an environmental assessment or an environmental impact statement prior to approving the 2008 AFA.

6. A declaration that the Defendants violated Section 7 of the ESA when they failed to determine, prior to the approval of the 2008 AFA, if the approval and/or implementation of the 2008 AFA would likely jeopardize the continued existence of any listed species or result in the destruction or adverse modification of the critical habitat found within the NBRC.

7. A declaration that Section 10.D of the 2008 AFA violates the Freedom of Information Act.

8. An order vacating, setting aside and rescinding the Defendants' approval of the 2008 AFA.

9. An order enjoining the Defendants from implementing the 2008 AFA and from transferring any additional funds to the CSKT pursuant to the 2008 AFA.

10. An order enjoining the Defendants from approving any annual funding agreement with the CSKT relating to the NBRC until the Defendants comply with the ESA and NEPA.

11. An order that the Plaintiffs recover their costs, including reasonable attorneys' fees, incurred in connection with the above-captioned action, as provided for under the Endangered Species Act, 16 U.S.C. §1540(g)(4), and the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and other applicable law; and

12. Such other and further relief as the Court may deem just and proper and in the public interest.

April ____, 2009

Respectfully submitted,

Sheila D. Jones (DC Bar # 955260)
John Bryson (DC Bar # 235846)
Emily C. Schilling (DC Bar # 490483)
Holland & Hart LLP
975 F Street, NW, Suite 900
Washington, DC 20004
(202) 393-6500
Attorneys for Plaintiffs