

National Bison Range (NBR): Establishment and some basics

Located in NW Montana's Mission Valley within the boundaries of the Flathead Indian Reservation.

- 18,800 acres
- High boundary fence encloses the wild plains bison

NBR established on May 23, 1908 by President Theodore Roosevelt as directed Congress.

- "...for a permanent national bison range for the herd of bison to be presented by the American Bison Society."
- Act of Mar. 4, 1909 enlarged NBR area increased funds
- First time Congress appropriated funds to buy entire wildlife conservation area
- Two additional purposes were added later
 - "...refuge and breeding grounds for birds" (E.O. 3596, 12/22/1921)
 - "...to provide adequate pasture for the display of bison in their natural habitat at a location readily available to the public." (P.L. 85-622, Jan. 7, 1958)

In 1908, Univ. MT professor Morton Elrod was commissioned by the American Bison Society (ABS) to search for a suitable location for a proposed bison range.

- Success of Pablo-Allard herd on the Flathead Reservation (see below) intrigued Elrod.
- Some Tribal members were guarded about the potential refuge, but many of the leaders wanted bison maintained on the reservation.
 - Tribal member Duncan McDonald told Elrod in 1908: "*Every Indian will be glad if the Government can and will save them, and keep them where they can be seen.*"
 - Final refuge boundary was found to contain one native allotment and portions of eight others (almost 1,000 ac.).
 - Some of those lands were purchased by government, and owners were offered other lands, some with greater acreage.
 - Other 17,800 refuge acres were considered non-irrigable, too steep for farming but good grazing.

ABS purchased 34 bison from Alicia Conrad (Kalispell, MT) in 1909.

- Total cost: \$10,560 raised in 1908 from citizens of 29 states for NBR bison herd.
- Conrad's had purchased 36 bison from Charles Allard's widow in 1901.
 - Charles was born in Oregon, part Cree and part French Canadian; he married a member of the Salish Tribe; grazed bison on reservation with partner Pablo.
 - Michel Pablo, born to a Piegan Blackfeet mother, had married a Salish woman.
- Six additional bison were donated through ABS auspices forming a 40-member herd.
- In 1906 Pablo sold remaining herd (708 bison) to Canada for \$177,000 leaving only the new NBR conservation herd protected within the reservation.

The Flathead Indian Reservation

The Flathead Indian Reservation is home to the Confederated Salish and Kootenai Tribes (CSKT).

- Reservation population: >28,000 with 5,100 CSKT members
- Tribal government employs ~1,200 people
- CSKT expends \$30 million through its payroll into the local communities

Allotment Era (begun by Dawes Act in 1887)

- Intended to stimulate assimilation of Indians, provide individual household ownership of land and subsistence farming, citizenship, increase independence.
- Opened unallotted lands to settlement by non-Indians under public land laws; could have affected 75 million acres nationwide.
- 1904 Allotment Act accelerated the allotment process, directed unallotted lands in the Flathead Reservation to be opened for non-Indian settlement.
 - Reservation surveyed and parcels allotted to Tribal members
 - 80 acres for farm allotment; 160 acres for ranch allotment
 - President Taft, by Executive Order in 1909, opened the unallotted lands
- In 1910, unallotted reservation lands were purchased with appropriations by Congress, using appraisal formula in the 1904 Act.
 - 404,047 acres of reservation lands were patented to non-Indians, and 81,125 ac. were reserved for state school lands, roads, canals, etc., and the NBR
 - 485,172 acres (37%) total were removed from reservation status for which the Tribes were paid \$1,343,331.
 - Over time many tribal members sold their allotted lands, often due to financial hardships.
- In 1971, the U.S. Court of Claims ordered the United States to pay restitution to CSKT and Tribal members for lands “taken” from the reservation, including the NBR and other reserved lands. A new appraisal date of Jan. 1, 1912 raised land values considerably.
 - More than \$21,900,000 was paid circa 1972, including funds in lieu of interest.
 - A 1972 Statute (P.L. 92-253, 3/17/1972) directed that 85% of payments, after attorney fees, were to go directly to tribal members, and that money was not to be subject to Federal or State income tax.
- CSKT currently maintains an active acquisition program and now owns over 60% of the original 1.3 million reservation acres.

National Bison Range Today

Home to a diversity of wildlife species, including: 300-450 plains bison (including calf crop), elk, bighorn sheep, pronghorn, black bears, wolves, coyotes, badgers, mule and white-tailed deer, mountain lions.

- The National Bison Range Complex includes:
 - Lost Trail National Wildlife Refuge (NWR); Ninepipe NWR; Pablo NWR
 - 14 Waterfowl Production Areas; many private lands conservation easements
 - About 32,865 acres in total

Over 200 species of birds including Lewis's woodpecker, tundra swans, golden eagle, northern goshawk, bullock's oriole, mountain bluebird, western tanager, vesper sparrows.

Covers one of the largest remaining tracts of Intermountain Grasslands

- Grasslands and prairies are among the rarest habitats in the U.S. due to threats from agriculture, development, invasive species.
- Up to 75% of the refuge is covered in prairie grasses including Idaho fescue, rough fescue, and bluebunch wheatgrass.
 - Native wildflowers blanket the refuge in the spring including: Arrowleaf balsamroot, prairie smoke, blanket flower, pearly everlasting, harebell, shooting star, and the Montana state flower: the bitterroot.
- The refuge must constantly battle threats from invasive species that overtake native grasses and wildflowers; requires a well-planned and carefully executed program.

NBR is 10th most visited National Wildlife Refuge in the Nation (*2013 Banking on Nature report*)

- Among 563 NWRs nationwide, including Alaska, Puerto Rico, and territorial areas
- Features Spectacular Mission Mountains setting and wildlife viewing opportunities, including the very popular 19-mile auto tour route.
 - 200,000+ visitors annually; 83% are from other states and countries
- Visitors contribute \$12.5 million to the local economies
- Every \$1 spent to operate NBR generates almost \$14 in local economies
- Creates 169 jobs in the state of Montana

Refuge staff routinely works with CSKT to achieve NBR and reservation-wide management programs:

- All NBR fire management operations are conducted by CSKT fire staff
- CSKT staff routinely assist with habitat restoration programs
- Joint reservation-wide initiative monitors and helps control invasive species
- Cooperative tundra swan reintroduction and protection program
- Pheasants Forever partnership helps restore native grasslands
- A joint-grant (\$1 million) to improve habitats on treaty right landscapes, like NBR.

Prior to the first AFA negotiations (2003-04) NBR had 17 employees to manage the complex. Following two failed AFAs only 7 personnel remain. Since 2010, 5 permanent NBR staff have left the refuge citing the uncertainty and tensions arising from ongoing AFA negotiations. The Project Leader has not been permitted to fill any vacant positions while awaiting an AFA decision, even though the approved staffing for the Complex shows funding for 12 permanent positions.

NBRC is obviously critically understaffed and lacks adequate funding to permit flexibility in completing necessary activities and upkeep. Vacancies include Deputy Project Leader (2 yrs.); Supervisory Lead Biologist (2 ½ yrs.) Supervisory Visitor Services Manager (2 ½ yrs.); Range Conservationist (3 yrs.). Currently lacks staff to recruit, train, and supervise seasonal or volunteer people. Staff morale must be at critically low levels from uncertainty, and inability to perform necessary duties on time and safely.

Tribal Self-Governance Act (TSGA), Oct. 25, 1994

Title IV amends 1975 Indian Self Determination and Education Assistance Act (P.L. 93-638, 1/4/75)

- Objective: To give self-governing Tribes the opportunity to exercise their inherent self-governing powers through greater control over tribal affairs and enhanced tribal governmental responsibilities.
- Introduced the concept of Annual Funding Agreements (AFA) with Bureau of Indian Affairs (BIA) and non-BIA bureaus of Department of the Interior (DOI).
- Only federally recognized self-governing Tribes may request an AFA.
- Two types of non-BIA Annual Funding Agreements:
 - Section 403(b)(2) non-BIA programs or activities that are otherwise available to Indian tribes or Indians.
 - Title I – eligible programs, functions, services, and activities that the Secretary provides for the benefit of Indians because of their status as Indian (25CFR 1000.420)
 - Section 403(c) non-BIA activities administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.
 - National Park Service, U.S. Fish and Wildlife Service, Bureau of Reclamation, Bureau of Land Management, U.S. Geological Survey, Office of Natural Resources Revenue
- Section 403(c) AFAs are discretionary agreements
 - Congressman Richardson, sponsor of the TSGA, in responding to concerns over proposed TSGA legislation (1994 Congressional Record 140, No. 115):
 - *“If the tribe over-reaches and requests to negotiate for programs or functions which have no relevance to Indian Affairs, the Secretary can simply say no.”*
- 2016 Revised Fish and Wildlife Service (FWS) Native American Policy states:
 - The Service [FWS] is *“committed to...considering discretionary Self-Governance requests for annual and multi-year funding agreements where resources are available and the agreements meet the mutual benefits of tribes and the Service.”*
- CFR Regulations
 - 403(c) non-BIA bureaus may include any terms necessary to meet program mandates. (25CFR 1000.143)
 - These are not available under 403(b)(2) and BIA funding agreements.
- A Tribe may not negotiate an AFA for 403(c) activities without having a BIA funding agreement in place. (25CFR 1000.31)
 - Tribes may not have a stand-alone AFA with a 403(c) program.
 - This demonstrates that programs established for the benefit of the general public, as a whole, (such as the NBR) are not mandatory for a tribe to achieve Self-Governance under the law.

- The 1998 BIA Federal Register Notice releasing AFA regulations stated the intent of non-BIA 403(c) agreements: “...where the program instead involves programs administered for the Nation as a whole, where it is not a matter of a tribe governing itself

TSGA (continued)

and its members, then different standards apply under the law and in the regulatory proposals that the federal team has made.”

“However, tribal participation in a non-BIA program which is not administered for the benefit of Indians does not necessarily raise issues of either self-determination or self-governance. Such programs instead entail a cooperative spirit of working together with the local communities in the administration of programs designed for the benefit of the Nation as a whole.”

- The Secretary publishes an annual federal register notice listing activities available for negotiations for 403(c) AFAs.
 - 63 National Park units and 31 National Wildlife Refuges (including all 16 Alaska NWRs), and 3 National Fish Hatcheries are currently on that list.
 - Refuge listing includes activities and services, not programs or functions
 - The list is subject to change, including additions of areas
- **Disclaimer language added to the TGSA by Senator McCain** at the request of the Association of Fish and Wildlife Agencies (Cong. Record Vol.140, 10/7/1994):
 - The AFWA raised concerns about “*the potential impact of self-governance legislation on the existing jurisdiction and authority of the Tribal, State, and Federal governments over natural resources, including fish and wildlife.*”
 - Section 403(k) was added: “Nothing in this Section is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize...any 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...”

Note: The 1966 National Wildlife Refuge Administration Act, as amended by the 1976 “Game Range Act” and most recently by the 1997 Refuge Improvement Act, established and provides guidance, purposes, standards, and limitations on administration of the Refuge System. The Game Range Act requires the Secretary to administer the Refuge System through the Director of the FWS.

- Case law defines administer as “manage, direct, control.”
- Joint management of refuges is prohibited.
- Refuge programs may not be delegated to other entities.
- Refuges may not be removed from NWRS except by legislation.
- Refuge lands can only be removed by Migratory Bird Conservation Commission using strict guidelines.
- Cooperative agreements are permitted and offer means for multiple party benefits.

CSKT AFA Proposal

In 2011, CSKT requested negotiations for a third AFA.

- Proposed to manage all refuge programs including biological, visitor services, and maintenance.
- The FWS would retain only three positions: 2 in management; 1 law enforcement. Current refuge staff have over 80 years of NBR experience; 3 are tribal members.
- CSKT would recruit and supervise up to 13 permanent and seasonal staff.
 - Including 4 supervisory positions: lead biologist; visitor services manager; maintenance program leader, and an on-site staff manager.
 - Five existing refuge staff would be required to sign Intergovernmental Personnel Act agreements (IPA) assigning them to work for CSKT. If staff declined, they would be involuntarily reassigned to other stations as available.
- In 2011, the FWS initiated an Environmental Assessment (EA) to evaluate the expected impacts from this proposal, and other alternatives.
 - The EA was sent out for public review and comment in August 2014.
 - Over 100 comments were received, the majority opposed the CSKT draft proposal.
 - The EA has not been finalized or released.

In September 2015, the FWS lead negotiator offered CSKT a revised AFA proposal:

- Five additional CSKT positions, funded by FWS, would be added to the current CSKT proposal
 - Historically, all NBR-CSKT staff have been new recruits, some with no affiliation to CSKT.
- The IPA requirement for 5 NBR staff was removed.
 - The modification was designed to protect and retain experienced FWS-NBR employees.
 - This would enable enhanced, necessary training of new CSKT staff.
 - This would enable NBR capability to resume activities or functions if necessary.

CSKT rejected the revised proposal and asked for a pause in negotiations until February 2016.

- In November 2015, the CSKT council attended a Tribal Nations Conference at the White House.
- CSKT met with DOI Secretary Jewell and expressed dissatisfaction with AFA negotiations.

A New Proposal Appears

In early February 2016, FWS Director Dan Ashe proposes to support legislation to remove the NBR from the National Wildlife Refuge System, and place it “in trust” for the benefit of the CSKT.

- Regional Director Noreen Walsh (Denver) and Refuge Chief Cynthia Martinez (Wash. D.C.) issue statements explaining the reasoning behind the new proposal and decision (see attached).
- Noreen Walsh, with assistants Will Meeks, and Mike Blenden travel to NBR to meet with staff to explain the new proposal.

The FWS apparently will not request any compensation or exchange of lands.

- NBR lands could be valued at between \$19,000,000 - \$25,000,000.
 - The last land acquired for NBRC (340 ac. in 2006) cost \$477,000 or \$1,400/acre.
- Values for the wildlife have not been discussed, many of the large mammal populations were founded by donations to the Federal Government from private organizations, city or state governments, and from Canada.
- Structures and improvements to the NBR would be worth many millions.
 - Includes a Visitor Center, bison corral system, bunkhouse, 3 refuge houses, storage facilities, fuel depot, maintenance shop, barn, and special fencing.
 - FWS just completed construction of a \$650,000 maintenance facility.

The FWS proposal apparently intends that the original NBR purposes would be retained—although a legal mechanism for accomplishing that does not exist. It is uncertain just who would be delegated responsibility for assuring fulfillment of such a mandate.

Tribal Trust lands are held by the BIA in trust for the tribes. It is the tribes that determine just how the lands and resources are to be managed for the benefit of the tribes and their members.

The original intent of the NBR—as a permanent refuge for the conservation of the American bison for the benefit of all Americans in perpetuity, plus the numerous additional commitments and objectives associated with that directive from Congress in 1908, will be permanently lost.

As the proposal currently is outlined, the remaining three National Wildlife Refuges, fourteen Waterfowl Production Areas, and oversight of the ~6,500 acres of conservation easements will remain within the NWRS but there is no indication just where they will be administered from. Two of the NWRs are located on CSKT lands under provisions of a perpetual easement. CSKT will surely want to take control of those areas. The Lost Trail NWR, although outside the Flathead Reservation is also a known traditional use area for the Pend d’Orielle tribe, a Salish tribe. Again, uncertainty exists about its future.

Nothing has been said, to date, about fulfilling the requirement for an Environmental Impact Statement with full public participation for legislation to remove a unit of the NWRS. That responsibility rests with FWS, as the proposal originated with its Director, Regional Director, and Chief of the NWRS.

Conclusion: This proposal and any legislation offered to carry it forward will obviously be very controversial, and in this election year will be uncertain of passage. Legal action seems likely. Meanwhile, the NBR Staff suffers; the natural resources suffer, and will require long periods to recover in some instances (control of invasive spp., adequate rotation of bison between internal pastures to prevent overgrazing/damage to habitat; loss of key outreach programs; loss of important trend data sets, etc.). Removal of NBR from the NWRS would be an unacceptable loss of a National Trust commitment to all Americans in perpetuity as originally intended. Further, any AFA must recognize limits in NWRS law.