



November 26, 2007

Representative Nick J. Rahall, Chairman
House Natural Resources Committee
1324 Longworth Building
Washington, D.C. 20515

Dear Chairman Rahall:

On behalf of the National Wildlife Refuge Association (NWRA) and its membership comprised of former and current U.S. Fish and Wildlife employees, over 140 Affiliate refuge "Friends" groups and concerned citizens, I am writing to express comments about H.R. 3994, which would amend Title IV of the Indian Self-Determination and Education Assistance Act. NWRA supports Indian Self Governance and supports tribal involvement at national wildlife refuges. However, we believe that several provisions of the bill undermine important checks and balances related to implementing Tribal Annual Funding Agreements on national wildlife refuges.

The NWRA believes that the Department of the Interior should enter into Annual Funding Agreements (AFA) on national wildlife refuges only when such agreements contribute to the mission and purposes of the refuge and the National Wildlife Refuge System, are cost effective, and include provisions allowing for complete transparency and accountability. Further, such agreements should not include refuge staff positions that are "inherently federal," such as the refuge manger.

To this end, please find attached NWRA's recommended guidelines concerning implementation of AFAs on national wildlife refuges and how specific provisions of the legislation comport with these principles. As your committee considers amendments to this proposed legislation, we urge its members to take these principles in consideration when addressing provisions governing Annual Funding Agreements.

Thank you for your consideration of our views, and we appreciate your continued support of the National Wildlife Refuge System.

Sincerely,

A handwritten signature in black ink, appearing to read "Evan M. Hirsche". The signature is stylized and fluid.

Evan M. Hirsche
President

National Wildlife Refuge Association Guiding Principles

In evaluating the appropriateness of proposed AFAs involving a unit of the NWRS, the NWRA will be guided by the following principles (*text in italics explains how HR 3994 fails or meets our guidelines*):

1. The proposed agreement must not include programs, services, functions, or activities which the NWRA believes are “inherently federal” in nature, defined as those that would abrogate or in any way diminish the authority of the FWS to manage a refuge or the Refuge System. The fundamental authority for management of refuges must be retained by the FWS. It is essential that our public lands be managed for the public and this can only be insured through management by the federal government.

H.R. 3994: PASS

During the hearing on November 8th, Chairman Rahall stated that AFAs contracted under HR 3994 would not allow tribes to have any “inherently federal” responsibilities. Section 411(1) states that “Nothing in this title expands or alters any statutory authority of the Secretary so as to authorize the Secretary to enter into any agreement...with respect to an inherent Federal function.” In the bill, the term “inherent Federal function” means “a Federal function that cannot legally be delegated to an Indian tribe.” According to the National Wildlife Refuge System Administration Act of 1966, the Secretary of the Interior, through the U.S. Fish and Wildlife Service, shall administer the Refuge System; therefore an Indian tribe cannot legally have management authority.

2. The proposed agreement must maintain or enhance management of the refuge for the conservation purposes for which it was established, and in accordance with the requirements of the National Wildlife Refuge System Administration Act of 1966, National Wildlife Refuge System Improvement Act of 1997, and other laws governing the Refuge System. Implicit in this principle is the requirement that the federally recognized Tribal partners must have the resources, experience and training to successfully perform the tasks agreed upon.

H.R. 3994: FAIL

Section 407(c)(4)(A)(ii) discusses what would occur if the Secretary and a tribe cannot agree on a Funding Agreement. If the agreement is rejected because the tribe does not have the resources, experience or training to successfully perform the tasks agreed upon, HR 3994 states that the Secretary “shall provide technical assistance to overcome the objections stated in the notification.” NWRA suggests this clause be removed or re-written to place the responsibility of providing resources, expertise and training on the tribe.

3. Tribes performing tasks under the proposed agreement must be bound by the environmental laws, regulations and policies of and related to the FWS.

H.R. 3994: FAIL

Section 410(b) provides the opportunity for an Indian tribe to request a waiver of “specific text in regulation.” As written, under the bill tribes could request waivers for the National Environmental Policy Act, the Endangered Species Act, etc... If for some reason the Secretary does not issue a decision, the waiver is approved. Further, the only grounds to deny a waiver is that, “the waiver is prohibited by Federal law.” NWRA recommends that this provision be removed. A tribe involved in an AFA on a National Wildlife Refuge must adhere to the same laws as the U.S. Fish and Wildlife Service. In addition, Section 406 (g)(1) provides a waiver of the Freedom of Information Act (FOIA). While tribes would have to keep records, they would only be required to give the Secretary access to such records

after a 30-day notice. NWRA suggests this provision be removed or changed to ensure tribes comply with the Freedom of Information Act; tribal AFAs must be subject to the same level of transparency as a federal contractor.

4. Administrative and management decisions must be made by a FWS official that reports to the Director of the FWS. Only the FWS has the unique expertise and the statutory mandate to manage the National Wildlife Refuge System.

H.R. 3994: PASS

HR 3994 states that tribes cannot conduct “inherently federal” responsibilities. According to the National Wildlife Refuge System Administration Act of 1966, the Secretary of the Interior, through the U.S. Fish and Wildlife Service, shall administer the Refuge System; therefore an Indian tribe cannot legally have management authority.

5. The proposed AFA must be demonstrably cost-effective and a value added to administration of the refuge and Refuge System. Because AFAs preclude a competitive bidding process for contractual activities on refuges, the public must be assured the agreements are cost-effective and do not constitute an added burden to refuge operational funding.

H.R. 3994: FAIL

Section 405(b)(2) states the Secretary “shall” enter into funding agreements with tribes that are determined by the tribe, not the federal agency, including agreements at national wildlife refuges. Under this provision, the Secretary would have no negotiating rights with respect to what is authorized or what is indeed appropriate. The Secretary would not be able to make the determination that the AFA is a cost-effective, value-added agreement. NWRA suggests this be re-written to state the Secretary “may” enter into funding agreements with other agencies and that the Secretary be given negotiating power with the tribe in determining what is appropriate to be in the AFA.

Section 406(d) allows that “An Indian tribe may redesign or consolidate programs or reallocate funds for programs in any manner that the Indian tribe deems to be in the best interest of the Indian community being served...” Funding for an AFA is for a specific agreement; tribes should not be allowed to use federal AFA funds for other purposes. NWRA suggests this provision be removed.

Section 409(l) states that after a tribe has entered into an AFA, if they feel the funding is insufficient, the tribe can simply stop until additional funding is provided. It would be up to the tribe to determine if the total amount provided for a specific activity was sufficient; not the Secretary. Further, the Secretary could not terminate the agreement unless the Secretary can show “irreparable harm.” NWRA suggests this provision be re-written to give negotiating power to the Secretary.

6. The proposed agreement must have clear and enforceable provisions to ensure performance and accountability. Action under the agreement should be reviewed annually by the refuge manager and a report regarding performance made available to the public.

H.R. 3994: FAIL

Section 405(b)(2) first mandates that the Secretary “shall” enter into AFAs with non-Bureau of Indian Affairs (BIA) agencies, including the Fish and Wildlife Service (FWS) through the Department of the Interior, then takes any negotiating power from the Secretary and gives it all to the tribe. Without the Secretary actively participating in the negotiations, there is no mechanism for ensuring the AFA will have clear and enforceable provisions regarding performance and accountability. NWRA suggests this be re-written to state the Secretary “may” enter into funding agreements with other agencies and that

the Secretary be given negotiating power with the tribe in determining what is appropriate to be in the AFA.

Section 406 (g)(1) provides a waiver of the Freedom of Information Act (FOIA). To ensure accountability, the performance report on the AFA must be made public. NWRA suggests this provision be removed or changed to ensure tribes comply with the Freedom of Information Act.

7. The availability of funds for proposed AFAs or the extension of existing AFAs must be considered within the context of overall budget priorities of the refuge and Refuge System. AFAs should be evaluated on an annual basis and only be renewed if the services and programs remain a priority.

H.R. 3994: FAIL

Section 405(b)(2) states that the Secretary, through the FWS, “shall” enter into an AFA based solely on the wishes of a tribe and Section 405(e)(3) states that a funding agreement may exceed one year – “at the discretion of the Indian tribe.” No consideration of the overall budget priorities of the refuge and of the System need to be taken into account. Further, Section 405(c) states, “The Secretary shall not revise, amend, or require additional terms in a new or subsequent funding agreement without the consent of the Indian tribe.” NWRA suggests this be re-written to give negotiating power to the Secretary entering into agreements and revising subsequent agreements, thereby allowing the Secretary to consider an agreement in the overall context of budget priorities of the NWRS.

8. The AFA process must provide an adequate opportunity for public review and comment on proposed AFAs. This should include a minimum 90-day public comment period and participatory public hearings in appropriate locations.

H.R. 3994: FAIL

There are no provisions in HR 3994 for public review of proposed AFAs. NWRA suggests a 90-day public comment period be incorporated into Section 405 as well as giving the Secretary negotiating power.

9. A public comment period must take place when any proposal is made to substantively modify or expand an existing AFA.

H.R. 3994: FAIL

There are no provisions in HR 3994 to provide a public comment period for a proposed change to an existing AFA. NWRA suggests a public comment period be incorporated to Section 405(c) when changes are proposed to existing AFAs.