D. Fred Matt
Tribal Council Chairman
Confederated Salish & Kootenai Tribes

Testimony
before the Senate Committee on Indian Affairs
United States Senate

Hearing on S. 1715
"Department of the Interior Tribal Self-Governance Act of 2003"

May 12, 2004
Washington, D.C.

Greetings Chairman Campbell, Vice-Chairman Inouye and Committee members. My name is Fred Matt and I serve as the Chairman of the Tribal Council of the Confederated Salish & Kootenai Tribes ("CSKT" or "Tribes"). Thank you for the opportunity to provide my views to your Committee.

I am pleased to testify before this Committee on behalf of the Tribes on S. 1715, which would amend Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA) with respect to the Interior Department's Tribal Self-Governance program. the issue. We intend to later submit a comprehensive position paper with respect to the various provisions contained in the bill.

CSKT's Self-Governance Background

The Confederated Salish and Kootenai Tribes have been very active in the area of Self-Governance and are one of the original ten Self-Governance Tribes. We have found the system of Self-Governance contracting, through compacts and annual funding agreements (AFA's), to be extremely effective in: 1) increasing the efficiency and integrity of federal services to Tribes and Tribal members; 2) increasing Tribal autonomy and self-sufficiency; 3) strengthening the government-to-government relationship between the United States and Tribal governments; and 4) developing the Tribal economy.[1] All of these are among the principal objectives of the Indian Self-Determination and Tribal Self-Governance Acts. As Congress stated as its policy rationale for ISDEAA:

> [T]he United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.
>
> 25 USC § 450a(b)

CSKT has fully embraced the Self-Governance system and now contracts or compacts every eligible Interior Department Indian program on our reservation, as well as programs of the Indian Health Service and other functions of the U.S. Health & Human Services Department. Not only have we taken over administration of these programs, but we have achieved results which we believe strongly vindicate Congress' establishment of the program. Our record of

[1] Our administration of federal programs under ISDEAA and the Tribal Self-Governance Act has resulted in increased employment opportunities for our Tribal members (as well as non-Tribal members) that were not previously available. Today, CSKT is the largest employer in northwest Montana. We employ over one thousand (1,000) people in a variety of capacities, from lawyers, doctors and dentists to engineers, scientists and teachers.

However, for true context, it is important to remember that the Indian unemployment rate on our Reservation is 41%, compared to the overall Lake County unemployment rate of 7.5%. Obviously, we still have a long way to go in building our Tribal economy. To this end, the Tribal Self-Governance Act is a vital tool for us.

success also confirms the wisdom and vision of the late Michael ("Mickey") T. Pablo, former CSKT Tribal Chairman, who strongly advocated for Tribal Self-Governance legislation and policies. Our record in administering federal programs would continue to make Mickey proud.

For example, one of the Bureau of Indian Affairs (BIA) programs we assumed in 1989 was the Safety of Dams (SOD) program. A principal objective of this program is to eliminate or ameliorate structural and/or safety concerns at 17 locations on the Flathead Reservation as identified by the Department of Interior National Dams - Technical Priority Rating listing. Our SOD Program provides investigations, designs and SOD modifications to resolve the concerns of the dams on the list. The Tribes' SOD Program has been extremely successful and, under our administration, Reservation dams have been modified at a cost significantly lower than originally estimated by the Bureau of Reclamation. For example, the Black Lake Dam was completed in November 1992 at a savings of approximately $1.3 million. The Pablo Dam Modification Project was completed in February 1994 at a savings of nearly $140,000. The first phase of the McDonald Dam SOD program has been a "model" program which has been used by other tribes.

Our Forestry Program is another example of our Self-Governance efforts. In FY '96, we compacted all federal Forestry activities after a year-long Tribal study of the assumption of those programs. We also administer fire pre-suppression and suppression activities through other agreements.

In fiscal years '97 and '98 respectively, CSKT compacted for administration of both the Individual Indian Monies (IIM) program and the Northwest Regional Office title plant functions for the Flathead Reservation. Few tribes operate these programs. The fact that CSKT does so is a testament to our strong commitment to exercise our full authority under the Tribal Self-Governance Act.

In addition to the above examples, CSKT compacts for the panoply of other BIA programs, including: law enforcement; Tribal courts; education programs, etc. Our Tribal government infrastructure and staff is well-equipped to administer these programs and we are very experienced in federal contracting requirements. Our Natural Resources Department alone has well over 100 employees, including biologists, botanists, hydrologists, wildlife technicians, etc. The U.S. Fish & Wildlife Service (FWS) has a high degree of confidence in our Natural Resources staff since it not only awards grants to our Natural Resources Department, but the FWS-administered National Bison Range Complex also contracts with Tribal government staff for various project work.

The logical next step for us is a Self-Governance contract for operations at the National Bison Range Complex (NBRC). Title IV of ISDEAA, as amended, authorizes tribes to contract non-BIA programs within the Interior Department. The Act contains a special provision authorizing contracting when the program, services, functions or activities are of "special geographic, historical, or cultural significance" to a Self-Governance Tribe (25 USC § 458cc(c)).

CSKT Efforts Concerning National Bison Range Complex

As this Committee is aware, the Confederated Salish & Kootenai Tribes are currently in negotiations with the U.S. Fish & Wildlife Service (FWS) for an Annual Funding Agreement covering various activities at the NBRC. It has been ten years since we first initiated this effort and it has been an expensive, frustrating and resource-intensive effort to say the least. We continue our efforts because the National Bison Range Complex (which includes the ancillary Ninepipe/Pablo Refuges) occupies a unique place within our Reservation, our history and our culture.

The National Bison Range is wholly located within our Reservation (as are the Ninepipe/Pablo Refuges) on land reserved in the Hellgate Treaty of 1855. The Treaty was breached by the Act of May 23, 1908 when Congress removed, without Tribal consent, nearly 18,500 acres in the heart of our Reservation and created the National Bison Range. Although the Tribes received a minimal payment of $1.56 cents an acre and then another settlement through the Indian Claims Court, CSKT bitterly opposed opening the Reservation and we defended our Treaty rights. Most importantly, we never consented to sell the land. The bison that were initially brought onto the newly-created National Bison Range were descended from a herd originally raised by Tribal members Charles Allard and Michel Pablo.

In addition to this history, a study commissioned by the FWS confirmed a number of cultural sites that are located within the NBRC. There is no question that CSKT has strong cultural, historic and geographic connections to the National Bison Range Complex. In addition to those connections, the Tribes are the landowner of the Ninepipe and Pablo Refuges, since those refuges are federal easements on lands which remain held in trust for the Tribes.

Due to these circumstances, CSKT feels very strongly that we should be participating in the operation of the NBRC and we believe Congress has, through the Tribal Self-Governance Act, provided us the avenue for such participation.

Our latest effort to negotiate with FWS on the NBRC began early in 2003 and got off to a rocky start during our first negotiation meeting. Due to difficulties CSKT had had in earlier years while attempting to enter into an agreement for the NBRC, we requested in 2003 that our new negotiations include Interior decisionmakers from the Central (D.C.) Office in addition to regional FWS officials. However, Interior wanted the Denver Regional FWS office to handle the negotiations, so we have been meeting with FWS Regional staff almost monthly since last summer. Despite great resistance from FWS on a number of fronts, CSKT has stayed the course and, while the process has involved much compromise, we believe we have made real progress towards drafting an AFA which would be mutually acceptable to the FWS and CSKT. During our last meeting in March, we narrowed down the list of unresolved issues to several items.

We believe that several of these outstanding issues should now be resolved as a result of the U.S. Fish & Wildlife Service's recent agreement with the Council of Athabascan Tribal Governments (CATG) for the Yukon Flats National Wildlife Refuge, signed on April 30, 2004. Some of CSKT's proposed AFA provisions are identical to what is contained in the Yukon Flats AFA. Now that FWS has signed the Yukon Flats AFA, CSKT expects to be accorded equal treatment with respect to some of the boilerplate provisions found in these agreements.

One of our primary concerns at this point is the moving target we have been facing re: finalizing negotiations. Our experience with FWS finds the agency continually identifying or creating new issues which delay a final agreement. For example, at one point in January of this year, we thought we had narrowed down our outstanding issues to a very short list. Then FWS unilaterally rewrote the draft AFA in February so that it included some unacceptable new issues, further delaying our progress.

Despite our concerns, we are hopeful that we can finalize an AFA with FWS in the very near future so we can realize our goal of assisting with the operations of the National Bison Range Complex. We appreciate the support of our friends in Congress who share our vision and goals.

The voices of opposition to Tribal Self-Governance contracting at the National Bison Range Complex or the Yukon Flats National Wildlife Refuge generally fall into one of two categories: 1) opposition based in racism; and 2) opposition based in ignorance, although there is obviously overlap between the two categories. Contracting opposition has been almost exclusively from people who neither understand the government-to-government relationships between the United States and Indian Tribes, nor take the time to fully understand the federal laws and policies which authorize and encourage this type of contracting. Unfortunately, there are also many opponents whose opposition simply stems from racial and cultural prejudices. We have local opponents who have opposed every undertaking in which the Tribes have engaged. In each instance, their reasoning does not withstand scrutiny. With respect to our effort to contract operations at the NBRC, we had one local resident quoted in a September 2, 2003 Washington Post article as saying that we wanted to put a casino on the Bison Range!

We are confident that the federal decisionmakers in Washington will see the opposition's arguments for what they are. We believe that most people agree with the New York Times when it said in a September 3, 2003 editorial (*copy attached*) that "The National Bison Range is an unusual case. It offers a rare convergence of public and tribal interests. If the Salish and Kootenai can reach an agreement with the Fish and Wildlife Service, something will not have been taken from the public. Something will have been added to it."

Comments on S. 1715

The Confederated Salish & Kootenai Tribes strongly support enactment of S. 1715, the "Department of the Interior Tribal Self-Governance Act of 2003". This legislation is the result of many months of effort on the part of numerous Tribes and Tribal representatives. We believe

that this legislation would increase the efficacy of the Act and decrease the ability of Interior agencies to circumvent the Act's intentions. Pending our submission of a more complete position paper for the hearing record, following are comments on selected provisions of S. 1715 as it currently reads:

S. 1715's inclusion, in § 401(9), of a definition for "inherent federal function", while still subject to conflicting interpretations, is a solid step in the right direction for eliminating considerable confusion as to what is deemed to be an inherent federal function. During our negotiations, FWS had initially taken the position that supervisors of the NBRC visitor center and maintenance staff were inherently federal functions and could not be contracted.

We support the explicit identification, in § 405(b)(1)(A), of Office of Special Trustee (OST) activities as mandatory for inclusion in an AFA (at a Tribe's option) reflects organizational changes within the Interior Department since the legislation was originally enacted and makes clear that the programs are still available for Tribal compacting despite any reorganization.

CSKT supports § 405(b)(3), which retains the existing authority for Self-Governance contracting of non-BIA programs which are of special geographical, historical or cultural significance to an Indian Tribe. As indicated above, CSKT is utilizing this authority to pursue an AFA with the U.S. Fish & Wildlife Service covering activities at the National Bison Range Complex. We would strongly oppose any effort to water down this existing authority.

The bill's standards for rejection of final offers, found in § 407(c)(4), would help constrain Interior officials from basing a rejection of a Tribe's final offer on subjective or invalid reasons. Along the same lines, the bill's provisions establishing a clear and convincing burden of proof on the Secretary (§§ 407(d) and 418) would be beneficial, as would § 407(e) which would codify a requirement to negotiate in good faith and maximize implementation of the Self-Governance policies, and § 407(i) which would codify a rule of statutory and contract construction that any ambiguity is to be resolved in favor of the Indian Tribe(s).

Another positive addition is the bill's provision directing that any savings realized by the Tribe shall be applied to that contracting Tribe in order to provide additional services to program beneficiaries (§ 407(f)). CSKT has faced problems with FWS in trying to include a similar provision in an AFA for the NBRC, so it would be helpful to have the Tribal Self-Governance Act more clearly require Tribal retention of such savings.

With respect to S. 1715's provision on contract support costs (indirect costs), it is important that § 409(c) of the bill would retain the existing statutory language mandating funding to tribes for such costs. Obviously, the real problem has been getting the federal government to fund tribes at a level which would meet the requirement of paying full contract support costs. To this end, we appreciate that Chairman Campbell has introduced S. 2172, the Tribal Contract Support Cost Technical Amendments of 2004, and we are grateful for the Chairman's attention to this crucial issue. We continue to be mystified how every other government contractor except for Indian

Tribes - including defense and university contractors, whose indirect cost rates often exceed 100% - always have their indirect cost rates honored and paid, while Tribal governments almost never receive the indirect costs which they are due. The Indian Self-Determination and Education Assistance Act was not intended to be a money-losing proposition for tribes. Presently, the reality of tribes having to absorb indirect costs associated with contracting federal programs serves as a significant disincentive for tribes to contract such programs as intended by Congress. Depending on how S. 2172 and S. 1715 progress through the legislative process, it may be useful to consider incorporating provisions or objectives of S. 2172 into S. 1715, as appropriate. We also recognize that the pending decision before the U.S. Supreme Court in *Cherokee Nation v. Thompson* will impact this issue.

CSKT supports the provision in § 409(j) for retention of interest or income earned on any funds paid under a compact or AFA. This is a good issue for the legislation to more explicitly clarify since we have been told by FWS that we would have to return to it any interest over $250 earned from funds paid under an AFA. Similarly, we support S. 1715's provision in § 409(k) specifically allowing carryover of funds into a succeeding fiscal year. FWS has told us it can not allow us to carry over funds because it would be illegal.

The language in § 412(2) states that programs are not eligible for inclusion in a compact or AFA if the statute establishing such program "does not authorize the type of participation sought by the Indian Tribe (without regard to whether 1 or more Indian tribes are identified in the authorizing statute)". The Committee and Tribes may want to look further at this language since it can be confusing. At a minimum, we should probably reinsert into this provision the existing statutory text in 25 USC 458cc(k) which clarifies that the program-authorizing statutes need not identify Indian Tribes in order for a requested program to be included in a compact or AFA.

Section 413(b)(1) of the bill, allowing tribes to apply any provision of Title I or Title V to their AFA, is very important. However, FWS interprets this provision as only applying to BIA programs. The Committee should clarify this by amending the provision to read "At the option of a participating Indian tribe, any or all of the provisions of title I or title V shall be incorporated in any Interior compact or funding agreement." [*emphasis added*]

Under § 415(c)(1)(B)(ii), the Interior Secretary would be required to annually provide Congress with a list of Tribal requests for AFA's with non-BIA agencies for programs of special geographic, historical or cultural significance (per § 405(b)(3) of the bill), and state the grounds for any denial by the Secretary of such requests. This, like the above-referenced provisions in §§ 407(c)(4), 407(d), 407(e), 407(i), and 418, would assist in holding the Interior Department accountable for its responses to Tribal requests for compacts or AFA's under the Tribal Self-Governance Act.

One problem which has arisen over the course of our NBRC negotiations is an agency belief that the various mandatory requirements of the Tribal Self-Governance Act, such as mandatory application of Title I provisions at a Tribe's option (as provided by 25 USC § 458cc(l)) do not

supersede or otherwise bind the Interior Department's discretion to enter into an AFA as established by 25 USC § 458cc(c) [§ 405(b)(3) o f S. 1715]. S. 1715 could address this issue through language explicitly stating that all of the mandatory requirements of the Tribal Self-Governance Act also apply to any compact or AFA entered into under the provisions of § 405(b)(3).

Conclusion

Mr. Chairman, thank you for the opportunity to speak to this Committee on behalf of the Confederated Salish & Kootenai Tribes. We appreciate your, and the Committee's, interest in strengthening the Tribal Self-Governance Act and amending the Act to respond to the contemporary needs of Indian Tribes.