

Date: April 15, 2020  
From: The Kogan Law Group, P.C.  
To: Save the National Bison Range, LLC  
Re: **Memorandum of Law: Legality of Congressional Transfer of National Bison Range Wildlife Refuge to CSKT**

**I. Introduction:**

On December 11, 2019, U.S. Senators Steven David Daines and Democratic Senator Raymond Jon Tester of Montana, as cosponsors, introduced into the Senate Committee on Indian Affairs the deceptively innocuous “Montana Water Rights Protection Act” ([S.3019](#)).

Many legitimate objections already have been raised about the majority of S.3019’s provisions which, if enacted, would adopt as federal law the \$1 billion [Montana-Confederated Salish and Kootenai Tribes \(“CSKT”\) State Water Compact](#). Section 3(3) of S.3019 identifies the CSKT Water Compact as [MCA 85-20-1901 \(2017\)](#), including any state amendments consistent with S.3019 that may subsequently be made thereto. A great many Montanans have expressed concern that the CSKT Water Compact would transfer the State-defined water rights of Montana’s nontribal citizens and residents to the CSKT tribal trust account without such individuals’ constructive input or informed consent.

S.3019 is far less transparent about the water rights transferred to the CSKT and/or retained by the Federal and State governments than was Senator Tester’s unsuccessful 2016 proposed legislation entitled the “Salish and Kootenai Water Rights Settlement Act of 2016” ([S.3013](#)). For example, Sections 11(a) and 11(b)(5) of expired S.3013 expressly stated that “[t]he instream flow water rights of the Tribes in or adjacent to the land described in subsection (b), as described in the Compact, are confirmed,” including “the [land of] the National Bison Range Complex...” Section 13(c)(1) of S.3019, meanwhile, states that “all land comprising the National Bison Range (including all natural resources, interests, *and appurtenances of that land*) shall be held in trust by the United States for the benefit of the Tribes.” (emphasis added). Since this language has been used by other federal agencies to describe reserved water rights tied to a federal reservation of land for a specific purpose,<sup>1</sup> it can reasonably be assumed that, if S.3019 is enacted into federal law, the federal reserved water rights held by the U.S. Fish and Wildlife

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<sup>1</sup> See U.S. Interior Department Bureau of Land Management, *Water Rights Manual No. 7250*, Rel. No. 7-110 (Sept. 30, 2013) (Supersedes Rel. No. 7-86), Sec. 1.5.B.7, at p. 1-10, [https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter\\_blmmanual7250.pdf](https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmmanual7250.pdf) (“The BLM will need to officially relinquish any federally-reserved water rights that may exist within the revocation area, *as water rights are appurtenant to the land* and will go to the new owner pursuant to general appurtenance clauses in conveyance documents; however, a non-federal entity cannot acquire a federally-reserved water right.”) (emphasis added). See also Reclamation Act of 1902, 32 Stat. 388, [§ 8, 32 Stat. 390](#), chapter 1093 (June 17, 1902), codified [43 U.S.C. § 372](#) (“The right to the use of water acquired under the provisions of this Act shall be *appurtenant to the land irrigated*, and beneficial use shall be the basis, the measure, and the limit of the right.”) (emphasis added).

Service (“USFWS”), [as illustrated](#) and described in the USFWS-National Bison Range Montana Compact ([MCA 85-20-1601](#)), including both [consumptive and non-consumptive uses](#), will be transferred to the CSKT incident to the USFWS’ transfer to the Tribes of the National Bison Range lands and associated wildlife and natural resources.<sup>2</sup>

Section 13 of S.3019 is entitled “National Bison Range Restoration.” If this section is enacted as federal law as [drafted by the CSKT](#) and later [revised and edited](#) by the USFWS, it would direct the USFWS to betray the legal and fiduciary federal trust obligations/duties that both Congress and the Interior Department, by virtue of the Service, have long owed to the American public-at-large to steward and conserve the National Bison Range and its wildlife and habitat(s), a unit of National Wildlife Refuge System, for current and future generations of ALL Americans, not just Native American tribal members.

## **II. The National Bison Range Is A Prime Unit Of The National Wildlife Refuge System:**

“The National Wildlife Refuge System is the conservation jewel in America’s system of public lands. For 100 years, refuges have provided small, yet critical portions of the habit necessary to meet the public’s long-standing interest in ensuring the survival of the Nation’s fish, wildlife, and plant resources for the benefit of present and future generations.”<sup>3</sup> “National wildlife refuges are the only federal lands to be managed primarily for the benefit of wildlife.”<sup>4</sup>

The National Bison Range (“NBR”) is one of the oldest units of the National Wildlife Refuge System. Former President Theodore Roosevelt signed into law the [Act of May 23, 1908](#), authorizing the federal government to use taxpayer funds for the first time to purchase suitable unallotted land from within the Flathead Indian Reservation (not to exceed 12,800 acres) for the conservation of bison. The [Act of March 4, 1909](#), subsequently authorized the appropriation of additional taxpayer funds for such purpose, expanding the size of the National Bison Range up to, but not exceeding 20,000 acres. On December 22, 1921, former President Warren G. Harding issued [Executive Order 3596](#), directing that the lands of the National Bison Range was to be further reserved and used “as refuges and breeding grounds for birds.” Approximately 20 years later, former President Franklin D. Roosevelt issued [Presidential Proclamation 2416](#) which converted areas “reserved and set aside from time to time as refuges and breeding grounds for native birds, migratory waterfowl, wild animals and other forms of wildlife [...into] Federal wildlife refuges.”

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<sup>2</sup> Black’s Law Dictionary defines the term “appurtenant with respect to land. “A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or [water-course](#)...”, citing Civil Code Cal. § 662. See also [State of Alaska v. Babbitt](#), 72 F.3d 698, 703 (9th Cir. 1995), quoting *United States v. New Mexico*, 438 U.S. 696, 700 (1978) (holding that “[u]nder the reserved water rights doctrine, when the United States withdraws its lands from the public domain and reserves them for a federal purpose, the United States implicitly reserves appurtenant waters then unappropriated to the extent needed to accomplish the purpose of the reservation. [...] It follows that courts must conclude that ‘without the water the purposes of the reservation would be entirely defeated.’”).

<sup>3</sup> See U.S. Fish & Wildlife Service, Annual Report of Lands Under Control of the U.S. Fish & Wildlife Service, *as of September 30, 2004*, at Message from the Director, <https://digitalmedia.fws.gov/digital/collection/document/id/264>. See also Id. (“The National Wildlife Refuge System provides habitat for more than 700 species of birds, 220 species of mammals, 250 reptile and amphibian species, more than 1,000 fish and countless species of invertebrates and plants.”).

<sup>4</sup> See U.S. General Accounting Office Report to Congressional Requesters, *National Wildlife Refuges: Continuing Problems With Incompatible Uses Call for Bold Action* (GAO/RCED-89-196) (Sept. 1989), at 2, <https://www.gao.gov/assets/150/148073.pdf>.

In its enactment of the [Fish and Wildlife Act of 1956](#), the U.S. Congress recognized “the inherent right of every citizen and resident of the United States” to recreationally enjoy use of the nation’s natural resources, including fish and wildlife refuge resources. Thereafter, on September 28, 1962, the U.S. Congress passed and the President signed into law the Refuge Recreation Act of 1962, “[t]o assure continued fish and wildlife benefits from the national fish and wildlife conservation areas” ([P.L. 87-714](#)). This enactment, which is codified at [16 U.S.C. § 460k](#), however, subjugated Americans’ recreational use of national fish and wildlife resources (deemed a secondary use) to their paramount conservation use, by requiring the Interior Secretary to first determine “that such recreational use *will not interfere with* the primary purpose for which the [conservation] areas were established.” (emphasis added).

Several years later, the U.S. Congress consolidated the Federal government’s natural land and wildlife resource holdings protected as national wildlife refuges into a system when it enacted into federal law, on October 15, 1966, the National Wildlife Refuge System Administration Act of 1966 ([P.L. 89-669](#)), which is codified at [16 U.S.C. § 668d](#). Section 4(d)(1) of the 1966 Act imposed a uniform use management rule that reinforced the 1962 Act’s non-interference standard. Section 4(d)(1) imposed a “compatibility” standard that authorized the issuance of federal permits “*for any purpose*, including but not limited to hunting, fishing, public recreation and accommodations, and access,” only if the Interior Secretary first determined that any such “uses are *compatible with* the major purposes for which such areas were established.” (emphasis added) (i.e., to conserve, protect, and propagate selected species of native fish and wildlife). Significantly, the “for any use” language in this important federal statute is broad enough to prohibit both recreational *and* tribal subsistence hunting and fishing in national wildlife refuge system areas, including the National Bison Range, if determined to be incompatible with the refuge’s primary purpose of fish and wildlife conservation.

The 1966 Act was thereafter amended, expanded and enhanced as the National Wildlife Refuge System Improvement Act of 1997 ([P.L. 105-57](#)), on October 9, 1997, which was re-codified as [16 U.S.C. § 668ddnote](#). Significantly, Section 4 of the 1997 Act added new Section 4(a)(2) to the 1966 Act to clarify the primary mission and paramount use of the National Wildlife System: “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*.” (emphasis added). Section 5 of the 1997 Act similarly added new Section 4(a)(4)(B) to the 1966 Act to state that, “[i]n administering the System, the Secretary [of the Interior] shall – [...] ensure that the biological integrity, diversity, and environmental health of the System are maintained *for the benefit of present and future generations of Americans*.” (emphasis added). [House of Representatives Report 105-106](#), accompanying the 1997 Act, reaffirms on pages 4 and 8 these key points as a matter of policy: “H.R. 1420 [...] sets forth the policy and procedures through which the System and individual refuges are to be managed in order to *fulfill that mission for the long-term benefit of the American people*.” (emphasis added).

Section 5 of the 1997 Act also added new Sections 3(A)-3(C) to the 1966 Act. New Section 3(A) states that “each refuge shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established.” New Section 3(B) states that “compatible wildlife-dependent recreation is a legitimate and appropriate *general public use* of the System, directly related to the mission of the System...” (emphasis added). New Section 3(C) states that “compatible wildlife-dependent recreational uses are the *priority general public uses* of the System and shall receive priority

consideration in refuge planning and management.” (emphasis added).<sup>5</sup> Section 5 of the 1997 Act also added new Section 4(D) to the 1966 Act. New Section 4(D) states that, “to ensure that the mission of the System [...] and the purposes of each refuge are carried out, except that *if a conflict exists between the purposes of a refuge and the mission of the System, the conflict shall be resolved in a manner that first protects the purposes of the refuge*, and to the extent practicable, that also achieves the mission of the System.”(emphasis added).

### **III. The Federal Government Obligation To Protect, Preserve/Conserve The Natural Resource Assets Of The National Bison Range Of The National Wildlife Refuge System Is A Public Trust Legal And Fiduciary Trust Obligations Owed To ALL Americans:**

Since, at least, [1999](#), the USFWS has referred to and recognized its obligation to responsibly steward the components of the National Wildlife Refuge System, including the National Bison Range. “[R]efuges focus on wildlife, and most often, those species *held in trust for all Americans*.” (p. xii, emphasis added). “The sheer number of species *for which refuges have trust responsibilities* creates a challenge for managers faced with what often seems like wildlife management triage.” (p. 17 emphasis added). “Finally, *some refuges have trust responsibilities for large mammals* or other species that are normally not identified as trust species for the Service. Examples include [...] *bison at the National Bison Range*.” (p. 19, emphasis added). Even the [National Research Council of the National Academy of Sciences](#) (NRC-NAS), in its 1995 review of the USFWS’ “Biomonitoring of Environmental Status and Trends Program” [at footnote 7](#), long ago recognized that “[t]he FWS *trust resources* include more than 91 million acres of lands managed by FWS (which are primarily national wildlife refuges)...The lands are referred to as ‘trust lands’ and the species as ‘trust species.’” (p. 12, emphasis added).

The USFWS’ use of the phrases “trust resources” and “trust responsibilities” is not accidental, and they should NOT be overlooked or be taken lightly either by your Senate Offices or the United States Senate at-large. These phrases have intentional legal meaning and significance following from [Presidential Executive Order 12996](#) issued by former President Clinton in 1996. Sections 3(a) and (e) of E.O. 12996 expressly identify, in its directives to the Secretary of the Interior, the “*trustee and stewardship*

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<sup>5</sup> Section 3 of the 1997 Improvement Act added definitional terms to Section 5(a) of the 1966 Act (16 U.S.C. § 668ee), consistent with Section 3 of [Presidential Executive Order 12996](#). Section 3 of that E.O. recognized the concept of “compatible wildlife-dependent recreational uses involving hunting, fishing, wildlife observation and photography, and environmental education and interpretation as priority public uses of the Refuge System.” New Section 5(1) of the 1966 Act defined “compatible use” as a “wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.” (emphasis added). New Section 5(2) defined “wildlife-dependent recreation” and “wildlife-dependent recreational use” as “a refuge involving hunting, fishing, wildlife observation and photography, or environmental education and interpretation.” Section 5(3) defined “sound professional judgment” as “a finding, determination, or decision that is consistent with principles of sound fish and wildlife management and administration, available science and resources, and adherence to the requirements of this Act and other applicable laws.” Section 5(10) defined “purposes of the refuge” and “purposes of each refuge” as “the purposes specified in or derived from the law, proclamation, executive order, agreement, public land order, donation document, or administrative memorandum establishing, authorizing, or expanding a refuge, refuge unit, or refuge subunit.” Section 5(11) defined “refuge” as “a designated area of land, water, or an interest in land and water within the System, but does not include Coordination Areas.” (emphasis added). The USFWS issued regulations implementing these provisions in 2000. See U.S. Department of the Interior, Final Rule – Final Compatibility Regulations Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 65 Fed. Reg. 62458,

*responsibilities for the Refuge System*” that the Interior Secretary, and by extension, the federal government holds vis-à-vis the American people. (emphasis added). And, such phrases have most recently been employed in annual [USFWS budget proposals](#). These phrases refer to the agency as “the only agency in the Federal government” “with *principal trust responsibility* to protect and conserve migratory birds, threatened and endangered species, certain marine mammals and inter-jurisdictional fisheries” (p. EX-1, emphasis added), identified as “*trust resources*.” (p. EX-2, emphasis added). They also refer to “[t]he Service’s National Wildlife Refuge System [as] embod[ying...] our Nation’s commitment to conserving fish and wildlife for *all Americans and future generations*” (p. EX-10, emphasis added), and the Service’s need “to maintain efforts to oversee its *legal mandate and trust responsibility* to maintain healthy migratory bird populations *for the benefit of the American public*.” (p. EX-18, emphasis added).

Just like any other trustee, the USFWS, as the trustee for National Wildlife Refuge System’s National Bison Range, holds legal title to such trust resources or property, for which it owes “[fiduciary duties](#)” to the American people who are the beneficiaries holding equitable title to such resources/property. And, like any other trustee, the USFWS is liable to the beneficiaries for breach of its fiduciary duties. These include a duty of loyalty, a duty of prudence, and subsidiary duties. Pursuant to the duty of loyalty, a fiduciary must administer the trust solely in the interest of the beneficiaries, and not in its own interests. Pursuant to the duty of prudence, a fiduciary’s management of trust resources/property must meet an objective standard of care. A fiduciary also must fulfill subsidiary duties, including the duty of impartiality, which prohibits a fiduciary from showing any favoritism between classes of beneficiaries. In addition, a fiduciary owes a duty not to commingle trust property/resources with its personal property, as well as, a duty to inform and account to the beneficiaries on the status of the trust property/resources.

The idea that the federal government serves as the fiduciary to protect and preserve/conservate National Wildlife Refuge System and its individual units, including the National Bison Range (specifically, its fish, bison and other wildlife and their habitats), arose from the public trust doctrine of Roman civil law. Pursuant to that historic doctrine, the government held specific natural resources (e.g., water) in common trust for the benefit of all people, including future generations. The natural resources are the trust *res*, and the government serves as the trust *fiduciary* legally and ethically bound to protect and preserve the trust *res* for the benefit of its beneficiaries, ALL Americans. The public trust doctrine was later expanded under English common law, and then, again, in the United States by state law and judicial interpretations of state laws.<sup>6</sup>

According to, at least, one constitutional law scholar from the University of Montana, the Founders of the United States Constitution had, in part, based their idea of a broader “[public trust](#)” as an essential feature of limited government, on the benevolent rule of Roman Emperor Marcus Ulpius Trajanus. (pp. 1110-1111); (See p. 203 et seq., *infra*). Pursuant to that notion, [the government serves as the fiduciary of We the People](#), and thus as a public trust, the purposes of which “are said to be those set forth in the Declaration of Independence (the protection of natural human rights) and in the Preamble to the United

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<sup>6</sup> Some state statutes, at the time of statehood, (as verified by the [New Jersey Supreme Court](#) and the [U.S. Supreme Court](#) with respect to New Jersey [on two occasions](#), [Illinois](#), etc.), recognized the state as holding in public trust the lands submerged beneath navigable waterways. Other state statutes more recently (e.g., the [U.S. Supreme Court](#) with respect to [Connecticut](#)), (the Sixth Circuit Court of Appeals with respect to [Michigan](#)), (the Supreme Court of [California](#)), and ([Montana MCA 75-1-103\(2\)\(a\)](#)) recognized that the state holds some or all natural resources in public trust for the benefit of current and future generations of citizens.

States Constitution and various state constitutions.” (p. 192); (p. 1084). As the result, “public officials are legally bound to (appropriately adopted) standards borrowed from the law regulating private fiduciaries.” These duties include “the duty to follow instructions,” “the duty of reasonable care,” “the duty of loyalty,” “the duty of impartiality,” and “the duty to account.” (pp. 1083, 1088, 1138). The “public trust” “was part of a *fiduciary ideal of government service* that was omnipresent [...] when the Constitution was drafted, debated, and ratified.” (p. 1083, 1086-1087, emphasis added). Public officials, therefore, *are* “the people’s servants, agents, guardians or *trustees*,” consistent with “*fiduciary principles*.” (p. 1084, emphasis added). It is arguably this broader public trust that incorporates the public trust obligations the USFWS and Interior Department proclaim as owed to the American public to protect and preserve/conservate the natural trust resources of the National Wildlife Refuge System and its individual units, including the National Bison Range.

The U.S. Supreme Court has articulated another source of the public trust in its controversial nineteenth century decision in *Dred Scott v. Sandford*. It arguably supports the conclusion that the U.S. Constitution’s Article IV Property Clause vests the Federal Government with the duty and responsibility, as agent and *trustee* of the American people, to properly manage the territories that it had long ago acquired for their common and equal benefit, before they were disposed of for the purpose of forming new States, as well as more newly acquired federal property. “Article IV federal property encompasses property not conveyed to the states but reserved by the United States at the time of statehood as well as property purchased or otherwise acquired by the United States for a specific purpose,” including the 20,000 acres the Federal government had acquired from within the Flathead Indian Reservation during 1908 and 1909, specifically to establish the National Bison Range as one of the nation’s first wildlife refuges.

During the early twentieth century, the U.S. Supreme Court recognized that Article IV, Section 3 of the U.S. Constitution vested the U.S. Congress with the “power to dispose and make all needful rules and regulations respecting the territory or the property belonging to the United States.” In evaluating the full scope of that constitutional provision, the Supreme Court, in *Light v. United States*, quoting its earlier nineteenth century decision in *United States v. Trinidad Coal Co.*, held that, “[a]ll public lands of the nation are *held in trust for the people of the whole country*.” (emphasis added). According to the Court, in *Light*, “it is not for the courts to say how that *trust* shall be administered. That is for Congress to determine. [...] [I]n the exercise of the same *trust* it may disestablish a reserve, and devote the property to some other national and public purpose.” (emphasis added). And, during the latter twentieth century, the U.S. Supreme Court, in *Kleppe v. New Mexico*, quoting various of its prior cases, ruled that “[t]he power over the public land thus entrusted to Congress is without limitations.” According to the Court, citing its prior decision in *United States v. San Francisco*, which, in turn, cited *Light v. United States*, the Article IV, Section 3 Property Clause “permit[s] ‘an exercise of the complete power which Congress has over particular public property entrusted to it.’” Consequently, in the Court’s view, “the ‘complete power’ that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there,” since both are Federal property.

**IV. Section 13 Of The Daines/Tester Bill (S.3019), If Enacted Into Federal Law, Would Cause Congress and the Interior Department To Breach The Federal Government’s Fiduciary Trust Obligations Owed To The People Of The Whole Country – i.e., To The American People At-Large:**

[Section 13\(a\)\(1\)\(O\)](#) of the Daines/Tester bill (S. 3019) states that “exceptional circumstances” warrant Congress’ transfer/restoration of the National Bison Range to the CSKT. However, the bill blatantly ignores Congress’ declared statutory mission and purpose of the National Wildlife Refuge System, which is to benefit ALL Americans. The statutory mission and purpose of the National Wildlife Refuge System that Congress declared does not distinguish between who among the American people are entitled to receive the benefit of federal stewardship and conservation because of any special cultural, spiritual, ethnic, religious or political identity. The interests of Native American tribal members are not to be accorded any more favorable treatment than those of nontribal Americans, and the transfer of the National Bison Range serves no worthy national or public purpose or benefit. If the National Bison Range is transferred in accordance with the Daines/Tester bill (S.3019), it will be abundantly clear that the U.S. Congress will have violated various of the fiduciary duties the Federal Government owes to ALL Americans. For example, Congress will breach its *fiduciary duty of impartiality* by showing favoritism and preference toward one class of beneficiaries – federally recognized tribes – the CSKT – at the exclusion of all other classes of beneficiaries consisting of the American public at—large.

Sections 13(a)(1)(J)-(M) of the Daines/Tester bill endeavor to persuade the members of Congress that the CSKT would be good stewards of the National Bison Range because they: (i) “have played a substantive roles as conservation leaders, often in partnership with the National Bison Range;” (ii) “have demonstrated a long-term commitment to responsible management of the land and resources surrounding the National Bison Range;” (iii) “desire to carry out the purposes for which the National Bison Range was established;” (iv) “have extensive experience in wildlife and natural resources management...” (other than with respect to the National Bison Range); (v) “have an extensive history of successful partnerships with Federal agencies” concerning “threatened and endangered species management,” “migratory waterfowl management,” and “wetland habitat management;” and (vi) “have entered into prior management-related” [tribal self-determination program \(P.L. 93-638\)](#) “agreements relating to the National Bison Range.” However, the facts on the ground speak otherwise.

*First*, tribal management of the land and resources surrounding the National Bison Range (i.e., (i)-(ii) and (iv) above) is not the same as the actual management *of* the National Bison Range and its diverse wildlife species derived from a multitude of originating sources located within and beyond Montana (i.e., a national selection). Given the unique features of the range and its wildlife, Congress had designated the protection, conservation, sheltering, and propagation of National Bison Range wildlife species as a special public charge imposing upon the Federal government a manifold perpetual public trust obligation owed to the American public at-large. (See Blue Goose Alliance Draft NBR CCP/EIS Comments ([May 14, 2019](#))).

*Second*, the Tribes’ “*desire*” to carry out the purposes for which the National Bison Range was established (i.e., (iii) above) is not the same thing as *actually fulfilling* those purposes. For example, the Tribes’ promise contained in Section 13(a)(2)(C) “to continue public access and educational opportunities” is not legally enforceable against the Tribes. According to the [Legal Memorandum](#) issued by the Obama administration’s former Interior Department Solicitor, federally recognized tribes such as the CSKT “are immune from suit absent an express waiver or congressional abrogation.” The CSKT also “are not subject to the United States Constitution absent congressional action to the contrary” because the “tribes pre-dated the United States and were not parties to the Constitutional Convention.” (p. 13). In addition, the penultimate subsection (D) of Section 13(a)(2) states rather clearly that the purpose of the

National Bison Range transfer is to ensure that the “land, bison, and other natural resources as the land is restored to Federal [Indian] trust ownership *for the benefit of the Tribes.*” Therefore, if the National Bison Range were transferred to the Tribes as the Daines/Tester bill (S.3019) contemplates, the Tribes will, by definition, violate the USFWS’ former fiduciary duty of loyalty owed to the American public because the CSKT would no longer administer the public trust resources solely in the interest of the trusts’ Americans at-large beneficiaries, but would rather administer it in its *own* interests.

*Third*, while the CSKT may have had some successful lesser partnerships with Federal agencies, including the USFWS, such as a grant-funded restoration of grassland habitats on the refuge incident to the removal of invasive Douglas Fir trees, and the development of a standby fire management program which the CSKT had been responsible for employing as an initial attack on any fire experienced on USFWS lands within Flathead Indian Reservation boundaries, these lesser partnerships were not pursued under any “638” Advanced Funding Agreement. (See Skip Palmer Draft NBR CCP/EIS Comments (2019)). And, although members of the CSKT, in the 1870’s may have established a bison herd on the reservation as Section 13(a)(1)(F) of the bill asserts, that herd likely did not exist when Congress established the National Bison Range during 1908-1909, for the purpose of saving the American Bison. As the result, the USFWS, during the 1970’s, was compelled to donate no fewer than 30 bison, technical assistance, and fence building services to the CSKT to assist the Tribes in establishing their own herd. (See Blue Goose Alliance Ltr. to U.S. Senator Daines ([Dec. 20, 2019](#))).

*Fourth*, contrary to Sections 13(a)(1)(J)-(M)’s overstatement, the CSKT’s past partnerships with the USFWS in managing the National Bison Range pursuant to “638 contracts” have proven to be extremely unsuccessful. The CSKT had previously entered into a Fiscal Year 2005-2006 Advance Funding Agreement (“2005 AFA”) (i.e., ‘638 self-determination contract’) with the USFWS during fiscal year 2005 to manage the National Bison Range. The USFWS, however, had terminated that contract in December 2006 because of alleged mismanagement. As the nonprofit group Public Employees for Environmental Responsibility (“PEER”) had copiously documented in its [May 15, 2012](#) scoping comments (at 2), the USFWS “cancellation letter [had] described [w]ide-ranging performance failures, including, but not limited to unacceptable and unusable biological data collection and reporting, non-compliance with prescribed bison management and husbandry protocols, and negligence with vehicle equipment maintenance and facilities.”<sup>7</sup> In addition, the contract had been cancelled because of the

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<sup>7</sup> See [Reed v. Salazar](#), 744 F. Supp 2d 98, 105-106 (D.D.C. 2010) (“On March 1, 2006, FWS’s Project Leader for the NBRC, Steven Kallin, compiled a report on the CSKT’s implementation of the AFA in 2005. [...] FWS found that in 2005, under the previous AFA, only 41% of the activities performed by the CSKT under the AFA were rated as successful. [...] In the Biology Program, 9 out of 26 required activities were rated as unsuccessful, with 6 more rated as ‘needs improvement.’ [...] FWS found that some activities were not initiated in a timely manner and some were not performed by qualified personnel. [...] In the Fire Program, FWS found that only one of three required prescribed burns was completed, due in part to poor planning. [...] In the Maintenance Program, FWS found that ‘[s]everal of the highest priority Activities, such as those that influence public health and long-term maintenance of vehicles and heavy equipment, were not completed at a satisfactory level.’ [...] On April 27, 2006, the Project Leader issued a memorandum complaining about the CSKT’s failure to maintain fences, indicating that ‘lack of fence maintenance has compromised our ability to manage both the bison herd and habitat according to planned management strategies, and will complicate any future attempts to evaluate the results of our habitat management efforts.’ [...] On December 5, 2006, the Project Leader made a formal request to have FWS reassume bison feeding activities from the CSKT, citing underfeeding.”).

“reported mistreatment of FWS employees by the CSKT.” (Ibid.).<sup>8</sup> These multiple failures reflected that the Tribes, as agents of the USFWS under the 2005 AFA, had breached the public trust by failing to satisfy both the USFWS’ fiduciary duty to follow instructions and the USFWS’ fiduciary duty to employ a reasonable standard of care.<sup>9</sup>

*Fifth*, despite this setback, the CSKT Tribal Council, once again pursued efforts to secure a new AFA ‘638 contract’ with DOI-FWS for Fiscal Years 2009-2011, which was signed on June 19, 2008.<sup>10</sup> This 2008 AFA, which became effective January 1, 2009, “provide[d] for the CSKT to be more involved in the management of the NBRC than under the 2005 AFA,” “recognize[d] and formalize[d] the partnership between the Service and the CSKT in operating and maintaining all programs of the NBRC,” and “provide[d] that the parties w[ould] collaborate in the management of the NBRC through the ‘Refuge Leadership Team,’ comprised of two FWS officials and two CSKT officials, subject to the final authority of the FWS Refuge Manager.”<sup>11</sup> The 2008 AFA also “provide[d] that FWS may reassume responsibility for any activities for which the CSKT are responsible in the event that the FWS Director f[ound], and notifie[d] the CSKT in writing, that the performance of the CSKT [was] causing imminent jeopardy to natural resources or public health and safety.”<sup>12</sup> Because the CSKT would have been given relatively greater responsibilities under the 2008 AFA despite the evidentiary record showing the Tribes’ poor stewardship of the National Bison Range under the 2005 AFA, a group of former USFWS refuge officials filed a lawsuit *inter alia* pursuant to the U.S. Administrative Procedure Act (“APA”) and the National

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<sup>8</sup> *Reed v. Salazar*, 744 F. Supp 2d at 106 (“On September 19, 2006, seven FWS employees filed an informal grievance with the FWS Regional Director alleging that a hostile work environment had existed at the NBRC since the AFA commenced in 2005. [...] Following an investigation, the FWS Regional Director concluded that ‘a chronic and pervasive workplace problem of considerable magnitude existed at the NBR.’ [...] On December 6, the Regional Director requested the termination of the CSKT’s authority to continue operating under the 2005 AFA and an end to negotiations toward an AFA for Fiscal Year 2007. [...] The recommendation was based on the CSKT’s failure to maintain a safe and fair working environment as well as poor performance by the CSKT. [...] The Regional Director noted that ‘the CSKT performance under the AFA was not at an acceptable level for their first year and has not made significant improvement in spite of significant input and assistance from the Service.’”).

<sup>9</sup> *Reed v. Salazar*, 744 F. Supp 2d at 106-107 (“On December 11, 2006, FWS formally notified the CSKT that it was withdrawing the CSKT’s authority to extend performance under the 2005 AFA and terminating negotiations for a Fiscal Year 2007 AFA. [...] The reasons given for the termination included the CSKT’s failure to comply with bison management standards, failure to meet FWS wildlife monitoring and reporting standards, failure to complete biological study plans, and failure to timely and properly maintain vehicles, equipment, and property. [...] The termination memorandum also cited the unacceptable workplace environment at the NBRC and unsafe conditions for employees and the public. [...] In his report on the CSKT’s performance in calendar year 2006, the NBRC Project Leader found that several of the highest priority activities in the Maintenance Program were not completed at a satisfactory level, including those that influence wildlife health and safety, habitat management and the long-term maintenance of vehicles, equipment and infrastructure, interior fence maintenance, and bison husbandry. [...] He also found that the CSKT had failed to maintain electric fences at proper voltage, allowing bison to escape from a grazing unit and resulting in the death of one bison cow who was attacked by other bison while entangled in the fence. [...] He found that the CSKT had significantly underfed surplus bison that were being confined pending transfer to other NWRS units in October-December 2006. [...] According to the Project Leader, the CSKT’s underfeeding of bison ‘clearly justified the need for the FWS to cancel the CSKT’s bison feeding responsibility, and feed these bison using FWS staff, in order to properly prepare these bison for the stress of their pending relocation.’”).

<sup>10</sup> *Reed v. Salazar*, 744 F. Supp 2d at 107.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

Environmental Policy Act (“NEPA”)<sup>13</sup> in federal district court to prevent the 2008 AFA from continuing in place. The U.S. District Court for the District of Columbia ruled that the USFWS’ failure to perform a full NEPA Environmental Impact Statement (“EIS”) addressing the application of the categorical exclusion to 2008 AFA which the agency had invoked notwithstanding *the substantial evidence in the record of the CSKT’s past performance problems*, constituted an arbitrary and capricious action that rendered the 2008 AFA in violation of NEPA. See *Reed v. Salazar*, 744 F.Supp.2d 98, 117-118 (D.D.C. 2010). As the result, the federal district court set aside the 2008 AFA, effectively restoring stewardship of the National Bison Range exclusively to the USFWS. 744 F.Supp.2d at 120.

*Sixth*, on November 10, 2011, the CSKT requested negotiations with the USFWS for yet another 5-year annual funding agreement allowing them to manage programs on the National Bison Range Complex.<sup>14</sup> PEER responded on [May 15, 2012](#),<sup>15</sup> to the USFWS’ subsequent posting on the National Bison Range Wildlife Refuge website of its intention to prepare a NEPA-based environmental assessment given the CSKT’s expressed desire to enter into yet another AFA with the USFWS for FY 2013-2016. In its scoping comments, PEER had argued that the proposed AFA “should be the subject of a full Environmental Impact Assessment (EIA) which explores how the AFA could have significant environmental and public safety impacts, and that it did not warrant a finding of no significant impact (FONSI) given the Tribes’ prior National Bison Range AFA history.”<sup>16</sup>

By September 2014, PEER had written to the Planning Division of the National Bison Range Complex arguing that the draft of the new [FY 2013-2016 AFA](#) still being negotiated between the USFWS and the CSKT had suffered the same infirmities but for minor changes that had inflicted both the 2008 (FY 2009-2011) and 2005 AFAs. As the PEER public comments revealed, the USFWS had not even prepared any written evaluation of the CSKT’s performance under the 2008 AFA at the time federal district court had set it aside.<sup>17</sup> In particular, PEER argued that “[t]he purpose of the agreement [was] not to improve operations of this unit of the National Wildlife Refuge System or to benefit wildlife which relies upon the refuge. No specific wildlife objective is mentioned in the agreement.”<sup>18</sup> PEER also argued

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<sup>13</sup> The complaint in that legal action also had alleged violations of the National Wildlife Refuge System Administration Act, the Indian Self-Determination and Education Assistance Act, the Freedom of Information Act, and the Intergovernmental Personnel Act. See Public Employees for Environmental Responsibility, *Comments on Environmental Assessment for the Proposed Annual Funding Agreement with the Confederated Salish and Kootenai Tribes; National Bison Range Complex, Moiese, MT FWS-R6-R-2014-N092* (Sept. 17, 2014), Sec. II.A at 5, [https://www.peer.org/wp-content/uploads/attachments/9\\_17\\_14\\_PEER\\_NBR\\_DEA\\_comments.pdf](https://www.peer.org/wp-content/uploads/attachments/9_17_14_PEER_NBR_DEA_comments.pdf).

<sup>14</sup> See U.S. Fish and Wildlife Service, *Draft Environmental Assessment for a Draft Annual Funding Agreement, National Bison Range Complex, Montana* (Aug. 2014), at 5, [https://www.fws.gov/bisonrange/AFA-2014/draft\\_nbr\\_ea\\_afa.pdf](https://www.fws.gov/bisonrange/AFA-2014/draft_nbr_ea_afa.pdf).

<sup>15</sup> See Public Employees for Environmental Responsibility, *Scoping Comments on the Environmental Assessment For The 2013-2016 Funding Agreement For The National Bison Range Complex Between the U.S. Department of Interior and the Confederated Salish and Kootenai Tribes* (May 15, 2012), [https://www.peer.org/wp-content/uploads/attachments/5\\_15\\_12\\_PEER\\_comments\\_AFA\\_2013-16.pdf](https://www.peer.org/wp-content/uploads/attachments/5_15_12_PEER_comments_AFA_2013-16.pdf).

<sup>16</sup> *Id.*, at 1-2.

<sup>17</sup> See Public Employees for Environmental Responsibility, *Comments on Environmental Assessment for the Proposed Annual Funding Agreement with the Confederated Salish and Kootenai Tribes; National Bison Range Complex, Moiese, MT FWS-R6-R-2014-N092* (Sept. 17, 2014), *supra* at 2; n. 1, at 3.

<sup>18</sup> *Id.*, at 3.

that the [USFWS 2014 Draft Environmental Assessment](#)<sup>19</sup> performed pursuant to NEPA to assess the effects of that AFA on wildlife and the environment, where the agency already had chosen the AFA as the proposed agency action – “Alternative B”<sup>20</sup> – also had revealed *a primary tribal rather than wildlife protection purpose*. “The purpose for this action – an AFA – is to fulfill our desire enter into an expanded partnership under the authority of the Tribal Self-Governance Act of 1994...An AFA is needed to carry out the Tribe’s desire for tribal involvement in activities on the National Bison Range Complex...”<sup>21</sup> According to PEER, although Section 2.A of the AFA “allude[d] generally to ‘an on-the-ground partnership...to accomplish common goals and objectives to benefit wildlife, habitat and people,’” the AFA failed to spell out these benefits more specifically.<sup>22</sup> Section 2.C of the AFA, for example, identifies that the only benefits the USFWS derives from the agreement is the general benefit of working (partnering, coordinating, cooperating) with others in administering the National Wildlife Refuge System. One such putative benefit is the supposed fulfillment of the National Bison Range Complex’s “responsibilities to protect the cultural resources of the NBRC through close collaboration with the Native people in whose homeland the NBRC is located.”<sup>23</sup>

The September 17, 2014 PEER comment letter, furthermore, emphasized that the federal district court, in *Reed v. Salazar*, had ruled that “potential environmental impacts must be considered *even if they are not entirely certain*” (emphasis added) (*See* 744 F.Supp.2d at 118, citing NEPA (40 C.F.R. § 1508), 40 CFR at § 1508.3). 40 CFR at § 1508.3 defines the term “affecting” which “means will or *may* have an effect on” the environment. (emphasis added). PEER had taken particular issue with the draft EA’s conclusion that “[t]he effects of any of the alternatives [to the no-action alternative] on actual wildlife populations, including threatened and endangered species, [were] unknown.”<sup>24</sup> It argued that since the draft EA had effectively “ignore[d] the negative [environmental] effects experienced under two prior AFAs,” it was “inherently insufficient to comply with FWS’s obligations under NEPA to analyze potential environmental effects.”<sup>25</sup> PEER argued, furthermore, that “the current draft [FY 2013-2016] AFA poses additional environmental effects and risks, because it aims to incorporate the management of the NRBC

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<sup>19</sup> See U.S. Fish and Wildlife Service, *Draft Environmental Assessment for a Draft Annual Funding Agreement, National Bison Range Complex, Montana* (Aug. 2014), at 6. (“Alternative A” was a “No Action” – i.e., continued USFWS management of the National Bison Range Complex. “Alternative B” was the “Draft Annual Funding Agreement (Proposed Action).” “Alternative C” was the “Annual Funding Agreement for Fire and Visitor Programs.” “Alternative D” was the “Annual Funding Agreement Same as Alternative C Plus Addition of More Confederated Salish and Kootenai Tribes Staff in All Programs.” “Alternative E” was the “Annual Funding Agreement Same as Alternative D Plus District Programs with Combined U.S. Fish and Wildlife Service and Confederated Salish and Kootenai Tribes Staff in All Programs.”).

<sup>20</sup> See United States Department of the Interior Fish and Wildlife Service Mountain-Prairie Region, *Notice of Environmental Assessment Analyzing Proposed Action For An Annual Funding Agreement With Confederated Salish and Kootenai Tribes* (Aug. 5, 2014), [https://www.fws.gov/bisonrange/AFA-2014/NBR\\_NWR\\_Draft\\_AFA\\_EA\\_Dear\\_Reader\\_Ltr.pdf](https://www.fws.gov/bisonrange/AFA-2014/NBR_NWR_Draft_AFA_EA_Dear_Reader_Ltr.pdf).

<sup>21</sup> See Public Employees for Environmental Responsibility, *Comments on Environmental Assessment for the Proposed Annual Funding Agreement with the Confederated Salish and Kootenai Tribes; National Bison Range Complex, Moiese, MT FWS-R6-R-2014-N092* (Sept. 17, 2014), *supra* at 3-4.

<sup>22</sup> *Id.*, at 4; FY 2013-2016 AFA at Sec. 2.A.

<sup>23</sup> FY 2013-2016 AFA at Sec. 2.C.

<sup>24</sup> See Public Employees for Environmental Responsibility, *Comments on Environmental Assessment for the Proposed Annual Funding Agreement with the Confederated Salish and Kootenai Tribes; National Bison Range Complex, Moiese, MT FWS-R6-R-2014-N092* (Sept. 17, 2014), *supra* at 7, quoting U.S. Fish and Wildlife Service, *Draft Environmental Assessment for a Draft Annual Funding Agreement, National Bison Range Complex, Montana* (Aug. 2014), Sec. 7.3, at 96.

<sup>25</sup> See Public Employees for Environmental Responsibility, *Comments on Environmental Assessment for the Proposed Annual Funding Agreement with the Confederated Salish and Kootenai Tribes; National Bison Range Complex, Moiese, MT FWS-R6-R-2014-N092* (Sept. 17, 2014), *supra* at 7.

into the overall management of Tribal lands.”<sup>26</sup> PEER referred to this as “ an unprecedented action for a National Wildlife Refuge, which in accordance with the NWRSSA, is to be “managed to fulfill the mission of the System, as well as for the specific purposes for which that refuge was established” (citing 16 U.S.C. § 668dd(3)(A)).<sup>27</sup> Moreover, PEER argued that, since the USFWS had listed 18 other National Wildlife Refuge System units in 8 states and over 60 National Park Service units in 19 states as eligible for similar tribal agreements,<sup>28</sup> the proposed USFWS-CSKT FY 2013-2016 AFA, given its uncertain effects on wildlife and the environment and the historic CSKT mismanagement of the National Bison Range, “[was] likely to be a precedent for similar agreements on other Wildlife Refuges, as well as, National Parks and other public land managed by the Department of Interior.”<sup>29</sup> Finally, PEER had objected to Section 11.D of the proposed AFA excusing the CSKT from compliance with the Freedom of Information Act (“FOIA”).<sup>30</sup> Because of the “potentially significant environmental effects on the proposed action,” PEER insisted that an EIS under NEPA was required.<sup>31</sup> Had this proposed FY 2013-2016 AFA been executed, the CSKT’s implementation of it would likely have breached USFWS’ fiduciary duty to employ a reasonable standard of care, and the USFWS’ fiduciary duty to account.

*Seventh*, on February 8, 2016, PEER issued a press release, asserting that because the USFWS and the CSKT had come to an impasse in executing another AFA that would facilitate an agency-tribal partnership providing for the CSKT to manage and operate the National Bison Range, the USFWS had announced it was “[looking to support legislation transferring](#) Montana’s National Bison Range [...] to a local Indian tribe.” On May 23, 2016, [PEER issued another press release](#) stating that it had filed another lawsuit against the USFWS, because the agency had proclaimed, during February 2016, that “it was pursuing legislation to transfer Montana’s National Bison Range, often called the Crown Jewel of the National Wildlife Refuge System, to the Confederated Salish and Kootenai Tribes (CSKT).” [PEER’s federal complaint](#) was filed [on behalf of former USFWS officials](#) (Compl. At paras. 8-17) in the U.S. District Court for the District of Columbia. It averred that “[t]he FWS set meetings with [former] Congressman Ryan Zinke, Senator Steve Daines, and Senator Jon Tester concerning the NBR proposal for the week of February 6, 2016,” and that former USFWS representative “Cynthia Matrinez met with

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<sup>26</sup> *Id.*, at 8.

<sup>27</sup> *Id.*

<sup>28</sup> See U.S. Department of the Interior Office of the Secretary, *Notice - List of Programs Eligible for Inclusion in Fiscal Year 2012 Funding Agreements To Be Negotiated With Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs*, 76 Fed. Reg. 57068, 57069, 57072 (Sept. 15, 2011), at Sections I, III.E.8 <https://www.govinfo.gov/content/pkg/FR-2011-09-15/pdf/2011-23683.pdf>.

<sup>29</sup> See Public Employees for Environmental Responsibility, *Comments on Environmental Assessment for the Proposed Annual Funding Agreement with the Confederated Salish and Kootenai Tribes; National Bison Range Complex, Moiese, MT FWS-R6-R-2014-N092* (Sept. 17, 2014), *supra* at 9.

<sup>30</sup> *Id.*, at 10 citing proposed FY 2013-2016 AFA Section 11.D (“D. *Inapplicability of the Freedom of Information Act (FOIA) 5 U.S.C. § 552 and the Privacy Act (5 U.S.C. § 552a)*. As authorized by 25 U.S.C. §§ 4501(b), 4501(c)(1)(b)(7)(A), 458cc(1), and 25 C.F.R. § 1000.392, 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, records of the CSKT shall not be considered Federal records for the purpose of the FOIA. The FOIA does not apply to records maintained solely by CSKT. As authorized by 25 C.F.R. § 1000.393, CSKT records shall not be considered Federal records for the purposes of the Privacy Act.”) (emphasis added).

<sup>31</sup> See Public Employees for Environmental Responsibility, *Comments on Environmental Assessment for the Proposed Annual Funding Agreement with the Confederated Salish and Kootenai Tribes; National Bison Range Complex, Moiese, MT FWS-R6-R-2014-N092* (Sept. 17, 2014), *supra* at 13. PEER’s 2014 public comments had expanded the criticisms PEER had previously conveyed in its May 2012 scoping comments.

[former] Congressman Zinke and with Senators Daines and Tester on February 18.” (Compl., at para. 44). The PEER Complaint also asserted that, “[a] February 18, 2016 email from [former USFWS Director,] Dan Ashe stated that he met with former Department of Interior Solicitor Hilary Tompkins about drafting legislation.” In addition, the PEER complaint alleged that the Ashe email stated “that he hoped to have a good draft by the end of the next week as he anticipated that the Montana Delegation of Zinke, Daines, and Tester might ask for assistance in drafting legislation.” (Compl., at para. 45.)

The PEER Complaint sought both declaratory and equitable relief. For example, it sought for the court to declare that “[t]he preparation of draft legislation and the meeting with Montana Congressional delegates constitute[d] a recommendation on a proposal for legislation under 42 U.S.C. § 4332(C) [NEPA], and that USFWS’ failure to prepare an environmental impact statement (“EIS”) violated NEPA and White House Council on Environmental Quality (“CEQ”) regulations. (Compl. at para. 50). Furthermore, the PEER complaint had sought for the court to enjoin and set aside the agency’s proposed transfer of the National Bison Range via legislation without having prepared the NEPA-required EIS. (Compl. at para. 51). The PEER complaint, moreover, had sought for the court to declare that the USFWS violated both the National Wildlife Refuge System Improvement Act of 1997 and the U.S. Administrative Procedure Act (“APA”) because it had failed to prepare a comprehensive conservation plan (“CCP”) within 15 years of that statute’s enactment as had been required. (Compl. at paras. 53-54).

On September 21, 2016, the [USFWS filed its answer](#) to the PEER complaint. In the answer’s first paragraph, the agency “den[ie]d that [it] h[ad] announced a legislative proposal to transfer the National Bison Range (‘NBR’) out of the National Wildlife Refuge System (‘NWRS’).” (Ans. At para. 1). In addition, the USFWS Answer denied the allegations contained in para. 44 of the PEER Complaint, and asserted that former “Congressman Zinke’s office requested that FWS brief them on the history of the NBR,” with former USFWS representative Martinez responding to that request, and had “met with staff from Senator Daines’ and Senator Tester’s offices,” in response to similar requests those offices had made. (Ans., at para. 44). The USFWS Answer denied the allegations contained in PEER Complaint para. 45, to the extent “inconsistent with the plain language, meaning or context of the emails [...that former] FWS Director Dan Ashe [had sent] on February 18, 2016 related to the NBR.” (Ans. at para. 45). On September 26, 2016, PEER issued a press release entitled, “[U.S. Fish and Wildlife Service Disavows Bison Range Transfer Proposal](#).” The PEER press release contained a byline asserting that the USFWS Answer’s denials of PEER’s allegations constituted a “retreat” and an “[a]ttempted [d]efense” of the agency’s “[i]llegal [p]romulgation of [its] refuge [g]ive-[a]way [p]lan.”

On March 10, 2017, PEER filed with the federal district court its [motion for summary judgment](#), along with a supporting memorandum of law describing in considerable detail the [documents PEER had received](#) in response to its prior Freedom of Information Act (“FOIA”) request dispatched to the USFWS which served as the basis of its Complaint allegations. The agency records so produced revealed the USFWS proposal to transfer the Bison Range to the CSKT, subsequent USFWS drafts of the transfer legislation, and USFWS revisions of CSKT drafts of such legislation. (Memo of Law at pp. 19-25, notes 14-16).<sup>32</sup> The apparent reason behind the agency’s failure to prepare a CCP for the National Bison Range

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<sup>32</sup> Our client, Save the National Bison Range, LLC is in possession of all such agency records and more.

which the National Wildlife Refuge Improvement Act of 1997 had required the agency to do within the prescribed 15-year deadline (i.e., by 2012) was the agency’s inability to conclude another AFA with the CSKT. (Memo of Law at pp. 25-27). Finally, on January 18, 2017, the USFWS published in the Federal Register a Notice of Intent to Prepare a CCP for the National Bison Range, signaling its commencement of work on a CCP which would evaluate the “Alternative B (Preferred Management Option) of a Congressional transfer of lands comprising of the NBR unit of the National Wildlife Refuge System to the CSKT of the Flathead Reservation, to be held in trust for the benefit of the CSKT.” ([82 Fed. Reg. at 5597-5598](#)). In Section VI.A-B of its memorandum of law, PEER set forth its argument why the USFWS’ failure to prepare a CCP and EIS violated, respectively, both NEPA and the Refuge Act.

On May 18, 2017, the USFWS filed in the Federal Register a replacement Notice of Intent to Prepare a CCP for the National Bison Range ([82 Fed. Reg. 22843](#)). Notably, this revised CCP notice stated that the USFWS “intend[ed] to move in a different direction than that indicated by the earlier [January 18, 2017] notice.” In other words, USFWS would “not proceed with evaluating a preferred alternative of legislative transfer of the NBR.” (*Id.*). The notice went on to set forth a more detailed rationale for the change in policy: “Specifically, due to the variety of information and perspectives received during the comment period and a change in policy direction,<sup>33</sup> we will not proceed with evaluating a preferred alternative of legislative transfer of the NBR.” (*Id.*) This revised notice mentioned nothing about the agency records PEER had obtained from its prior FOIA request that revealed former and legacy senior USFWS officials had worked with members of Congress in drafting transfer legislation for the CSKT which the Tribes had lobbied one or more of Montana’s congressional representatives to incorporate into a larger bill they might originate.

On January 29, 2018, PEER issued a press release announcing that it had reached an agreement with the USFWS [to settle its 2016 lawsuit against the USFWS](#). The press release stated that the objective of the lawsuit had always been “to block the transfer of the transfer of Montana’s National Bison Range to a local tribe” – i.e., the CSKT – and to “reintegrate[e] the Bison Range as a fully functioning part of the National Wildlife Refuge System.” As the [settlement agreement](#) indicates, the USFWS had agreed to prepare a CCP for the National Bison Range pursuant to the Refuge Act and USFWS Compatibility Policy ([603 FW2](#)) and an Environmental Impact Statement on the CCP pursuant to NEPA. Completed drafts of the CCP and EIS were due “by July 31, 2022, and a completed final CCP and final NEPA EIS were due by January 31, 2023. (Settle Agmt. at para. 4). What the PEER press release did not say was that the lawsuit had been intended block the *USFWS’* transfer of the NBR, not Congress’ transfer of the NBR.

During September 2019, thirty-three months ahead of the settlement agreement deadline, the USFWS released its [final EIS on the CCP](#) – i.e., of the potential effects on the National Bison Range environment and wildlife of the no-action and two proposed action alternatives contained within the soon-to-be released final CCP of the National Bison Range. The final NBR EIS identified Lake and Sanders Counties, Montana as two of the five cooperating agencies on the EIS planning team, along with the CSKT, the Interior Department Bureau of Indian Affairs and the Montana Fish, Wildlife and Parks (Final EIS, at 3). The final EIS also identified the representatives from Lake and Sanders Counties, Montana as

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<sup>33</sup> See David Reese, *Interior Halts Transfer of Bison Range to Tribes*, Courthouse News Service (April 13, 2017), <https://www.courthousenews.com/interior-halts-transfer-bison-range-tribes/>.

individual members of the “core planning team” set forth in Appendix A.<sup>34</sup> Chapter 4 of the Final EIS “describes the potential environmental consequences of implementing the No Action Alternative and the two NBR CCP management alternatives.” (Final EIS, at 54). The Final EIS states, in other words, that “the Federal Action that USFWS is proposing is to implement the NBR CCP. The CCP is a long-term planning document that reflects the Service’s commitment to conserve, protect, and enhance natural resources on the NBR.” (Final EIS at 54). The Final EIS next states that, “[s]ince the CCP is considered a planning document, objectives and strategies for each alternative [...] described in this EIS are analyzed programmatically...” The Final EIS states, thereafter, that the core planning team had evaluated the implementation of the CCP Alternatives’ direct effects (“caused by the action and occurs at the same time and place”), indirect effects (“caused by the action, is later in time or farther removed in distance, but is still reasonably foreseeable”), and cumulative effects (“the incremental effect of the action when added to other past, present, and reasonably foreseeable actions.”). (Final EIS, Sec. 4.1, at 54). Appendix D of the Final EIS sets forth the USFWS’ compatibility determinations regarding each CCP alternative.

On December 5, 2019, the USFWS released its [Final CCP of the National Bison Range](#), approximately three years ahead of the settlement agreement deadline. The Final CCP states that the USFWS had “developed a CCP and EIS for NBR *separate and apart from* the CCP and Environmental Assessment for the other units of the National Bison Range Complex.” (emphasis added). The putative rationale behind this curious move was that “the Service determined that the complexity of the issues related to the management of the NBR warranted the more detailed and rigorous analysis that is required by an EIS.” (Final CCP, at 1).<sup>35</sup> This rationale, at least, appears consistent with the May 18, 2017 revised USFWS notice of intent to prepare a CCP and NEPA EIS for the National Bison Range (82 Fed. Reg. 22843) discussed above, which was filed on the same day but separately from the USFWS Notice of Intent to Prepare a CCP and the less rigorous NEPA Environmental Assessment (“EA”) for Pablo, Lost Trail, and Ninepipe National Wildlife Refuges, and the Northwest Montana Wetland Management Districts ([82 Fed. Reg. 22844](#)). It does not appear out of the question that the separate notices of intent filed during May 2017 indicated that senior USFWS officials had still anticipated or foreseen a future Congressional transfer of National Bison Range lands and nature resources.

Final CCP Section 1.6, at a basic level, appears to corroborate this rationale by referencing the May 18, 2017 revised notice of intent to prepare a CCP for the National Bison Range. This section of the Final CCP reiterates the revised notice’s explicit mention of a change in policy direction that did not include “a Congressional transfer of lands comprising the NBR to the CSKT of the Flathead Reservation,

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<sup>34</sup> “Appendix A – List of Preparers” identifies as preparers of both the Final EIS and Final CCP the following nine individuals representing the five cooperating agencies on the “core planning team:” (1) Neil Anderson of the Montana Fish, Wildlife and Parks, Region 1; (2) Dale Becker of the CSKT Natural Resources Department; (3) Robert Compton of the Bureau of Indian Affairs Land Management; (4) Wally Congdon, Lake County Attorney; (5) Gale Decker, Lake County, Commissioner; (6) Pat Jamieson, Lake and Sanders Counties Subject Matter Expert; (7) David Redhorse, Bureau of Indian Affairs Natural Resources Division; (8) Dave Stipe, Lake County Commissioner; (9) Brian Upton, CSKT Attorney. (Final EIS, App. A, Table A-1. Planning Team, at A1-A2).

<sup>35</sup> See Final CCP at 1 (“At the start of this planning process, the refuge was part of the National Bison Range Complex (Complex), which also managed the Ninepipe, Pablo, and Lost Trail National Wildlife Refuges (NWRs) as well as the Flathead and Lake County Wetland Management Districts (WMDs) (Fig. 1.1). In 2019, the National Bison Range Complex was merged with the Benton Lake National Wildlife Refuge Complex and Lee Metcalf National Wildlife Refuge to form the Western Montana Complex (WMTC).”).

to be held in trust by the Secretary of the Interior for the benefit of the CSKT.” This section of the Final CCP thus states that such a transfer “is not evaluated in this document.” (Sec. 1.6, at 11). In addition, it states that since “[t]he CSKT has not requested an annual funding agreement, neither the EIS nor the CCP had expressly considered that alternative. Clearly, however, neither the Final EIS nor the Final CCP explained *why* the CSKT had not requested from the USFWS an annual funding agreement. Was this attributable to CSKT oversight or lobbying fatigue? Or, did the CSKT and USFWS know something about the future of the National Bison Range about which most members of the American public at-large remained unaware?

On December 11, 2019, barely six days following the agency’s issuance of its Final CCP on the National Bison Range, U.S. Senators Daines and Tester introduced into the Senate Committee on Indian Affairs as cosponsors the Montana Water Rights Protection Act (S. 3019). On December 18, 2019, the USFWS published in the Federal Register its [Record of Decision](#).

Clearly, information the USFWS had publicly released in [response to a number of FOIA requests](#) confirms that senior Interior and USFWS officials and the members of Montana’s congressional delegation, had each previously participated directly or indirectly in the elaborate machinations of the USFWS and the CSKT, from 2015 through January 18, 2017, [to develop draft legislation](#) to facilitate the ultimate transfer of the National Bison Range Wildlife Refuge to the CSKT *without* the constructive public input. Given this reality, how could department and agency officials legitimately now justify, on uncertainty grounds, their failure to evaluate (i.e., their discounting) as a possible “alternative” in the Final CCP and EIS the more than remote possibility that either Daines or Tester would ultimately propose a new version of the CSKT Water Compact that incorporates the CSKT draft National Bison Range transfer legislation? How could they consider the CSKT’s use of that refuge as other than an incompatible non-wildlife-dependent use requiring a studied evaluation of the potential environmental and public safety effects of such a transfer? It is incredulous that senior USFWS officials responsible for the development of the Final CCP and EIS had been unaware of the possibility that such legislation could eventually be proposed by Montana’s congressional delegation.<sup>36</sup>

## V. Conclusion:

If Congress transfers the National Bison Range to the CSKT without constructive public input from around the Nation, Congress, the Interior Secretary and, by extension, the USFWS, will be guilty of betraying the Federal government’s legal and fiduciary trust obligations/duties owed to ALL Americans. Those obligations/duties require the Federal government to preserve, conserve and properly steward the lands, wildlife and habitats of the National Bison Range, a unit of the National Wildlife Refuge System, in perpetuity for the benefit of current and future generations of ALL Americans, not just Native American tribal members. These obligations/duties include the fiduciary duties of loyalty, prudence, reasonable care, and impartiality, as well as, the duty to inform and account, otherwise collectively known as the “public trust.”

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<sup>36</sup> See [Wilderness Soc. V. Babbitt](#), 5 F.3d 383, 388-389 (9th Cir. 1993) (noting that, because the USFWS had been aware, since December 1989, that its grazing practices were damaging the Refuge, its failure to formulate a grazing plan compatible with purposes of the Refuge was not substantially justified.).

Regulations the USFWS had issued in 2000 to implement the compatibility provisions of the 1997 Act expressly state that such rules apply only “to use of Federally-owned *and managed* national wildlife refuges”<sup>37</sup> (emphasis added). This means that, while they likely apply to national wildlife refuges that are tribally co-managed with the USFWS pursuant to an AFA, they likely do *not* apply to wildlife refuges legal title to which remains with the Federal government, but management of and equitable title to which resides with federally recognized tribes.

The administrative record surrounding the CSKT’s stewardship of the National Bison Range is replete with numerous recurring instances of CSKT mismanagement of its lands and wildlife. Consequently, the Tribes cannot be expected to undertake traditional and customary hunting, fishing and land stewardship practices in any more of a responsible manner than they had previously performed those tasks when the USFWS provided them with the contractual opportunity to cooperatively manage that wildlife refuge. The historical record, in other words, strongly militates *against* a finding that Congress’ acting pursuant to Section 13 of S.3019, in exercise of its authority under the United States Constitution’s Art. IV Property Clause, to direct the Interior Secretary and USFWS Regional Director to transfer equitable title to the National Bison Range to the CSKT, would qualify as a compatible non-wildlife-dependent use of that national wildlife refuge’s natural trust resources, consistent with the primary purposes for which the National Bison Range had been originally established: (1) “being a permanent range for the care and maintenance of a herd of bison and other mammals” (*See* 35 Stat. 267, 35 Stat. 1051), *supra*; and (2) “a bird refuge” (*See* E.O. 3596, Dec. 22, 1921), *supra*.

The introduction of S.3019, including Section 13 thereof, into the United States Senate Committee on Indian Affairs within one week of the USFWS’ release of the final CCP and EIS, raises other important legal questions. One such question is whether the USFWS intentionally breached the January 2018 contractual settlement agreement it reached with PEER, by failing to provide a complete final CCP and EIS that evaluated as an alternative the possible introduction of proposed legislation by members of the Montana congressional delegation (toward and about which former and current senior Interior and USFWS officials had long been working and been aware), and the potential effects the enactment of that legislation into Federal law could have on the National Bison Range environment, wildlife and public safety.

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<sup>37</sup> *See* U.S. Department of Interior, *Final Rule – Final Compatibility Regulations Pursuant to the National Wildlife Refuge System Improvement Act of 1977*, 65 Fed. Reg. 62458, 62479 (Oct. 18, 2000), <https://www.govinfo.gov/content/pkg/FR-2000-10-18/pdf/00-26389.pdf>. *Cf.* U.S. Department of the Interior, Office of the Secretary, *Notice – List of Programs Eligible for Inclusion in Funding Agreements Negotiated With Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs and Fiscal Year 2020 Programmatic Targets*, 85 Fed. Reg. 12326, 12330 (March 2, 2020), at Sec. “E – Eligible Fish and Wildlife Service Programs,” “8. National Wildlife Refuge Operations and Maintenance,” <https://www.govinfo.gov/content/pkg/FR-2020-03-02/pdf/2020-04249.pdf> (listing the Nation; al Bison Range, Montana as a refuge and/or hatchery located within close proximity to a self-governance tribe).