



Public Employees for Environmental Responsibility

962 Wayne Avenue, Suite 610 • Silver Spring, MD 20910

Phone: (202) 265-PEER • Fax: (202) 265-4192

Email: info@peer.org • Web: <http://www.peer.org>

June 28, 2016

Senator Jon Tester
311 Hart Senate Office Building
Washington DC 20510

Senator Steve Daines
320 Hart Senate Office Building
Washington DC 20510

Representative Ryan Zinke
113 Cannon House Office Building
Washington, DC 20515

RE: Plan to Cede the National Bison Range

Dear Senators Tester and Daines and Representative Zinke:

As you are undoubtedly aware, the U.S. Fish & Wildlife Service (FWS) has announced its sponsorship of legislation to turn the National Bison Range over to the Confederated Salish and Kootenai Tribes (CSKT). Separately, the CSKT has posted its own version of draft legislation to authorize it to take possession of the National Bison Range.¹

We are writing you today on behalf of Public Employees for Environmental Responsibility (PEER) concerning this CSKT draft to make sure you are aware of the numerous gaps, uncertainties and pitfalls it contains.

Initially, you should be aware of the sweeping nature of the CSKT draft which would repeal or transcend a number of current legal safeguards. Notably, the CSKT draft would –

- Repeal the statute authorizing and declaring the mission of the National Bison Range and further declare that any provisions of this law are “expressly superseded”²;

¹ Posted at <http://bisonrangeworkinggroup.org/wp-content/uploads/2016/06/CSKT-Draft-NBR-Bill-6-6-16.pdf>

² See §4 (j) of the CSKT draft; all further section references are to this draft.

- Make its terms not subject to any other statutory restraint³; and
- Bar any “claims” against the Tribes “concerning the...post-transfer management of the lands and other property transferred” under its provisions.⁴

Most significantly, the draft stipulates that these lands would be administered solely “for the benefit of the Tribes.”⁵

Consequently, there will be virtually no recourse if a “smooth transition”⁶ does not occur or the draft’s language about the land, wildlife or public visitation is ignored or contravened. Similarly, every ambiguity, uncertainty and conflict would be resolved in the favor of the CSKT and to the potential detriment of the American people and the ecological well-being of the lands, wildlife and other resources of the National Bison Range.

With that in mind, we highlight three major uncertainties hovering over this draft which relate to the most basic elements of this proposed transaction:

1. Refuge Mission

There is nothing in the CSKT draft that ensures that the National Bison Range will continue to function as a wildlife refuge. While the draft makes a reference to the CSKT’s “ecological stewardship with respect to the subject lands, bison, and other resources”⁷, it contains other more explicit provisions which seem to say that how the land will be used is up to the sole discretion of the CSKT. For example, the draft states that –

- The lands will be used for unspecified “non-conflicting purposes of the Tribes”⁸ with the Tribes being the sole arbiter whether any non-refuge use presents a conflict;
- The lands may be “enhanced”⁹ by the Tribes, again with no explanation or elaboration of the term; and
- The Tribes aspire to restore traditional uses which include “hunting, fishing, gathering, cultural” but also extend to “many other purposes”¹⁰, again with explanation or suggestion of any limits.

In short, if the CSKT draft is adopted, the Tribes would be free to convert the National Bison Range from a refuge to any other use desired.

³ “Notwithstanding any other provision of law...” (§4(a))

⁴ §4(k)

⁵ §3(b)(4)

⁶ §3(b)(4)

⁷ §3(b)(1)

⁸§3(a)(18)

⁹ §3(b)(2)

¹⁰ §3(a)(5)

2. Public Access and Visitation

The National Bison Range is the 10th most visited refuge in the entire National Wildlife Refuge System. It attracts more than 200,000 visitors each year, the vast majority (83%) come from out-of-state or abroad and pumps an estimated \$12.5 million into the local economy, creating a substantial number of local jobs.¹¹

While the CSKT draft declares that one of its purposes is “to continue public visitation opportunities”¹² it nowhere requires public access. In another section, the draft tasks the Secretary of Interior to “provide the Tribes with funding sufficient” for liability insurance but only “as long as public visitation is required by federal law for the lands transferred by this Act”.¹³ It is not at all clear that that precondition exists.

Elsewhere, the draft declares:

“The lands transferred under this Act shall be managed exclusively by the Tribes...provided that the Tribes shall provide public visitation and education opportunities.”¹⁴

But the draft is silent on how this proviso would be enforced, or of what these “opportunities” would consist. Nor does there appear to be any mechanism to undo the land transfer in the event that the CSKT reneges on these or any other commitments.

The absence of a mechanism to ensure public access strongly suggests that visitation will be at the sufferance of the CSKT.

The draft references the Mission Mountains Tribal Wilderness as an example of CSKT resource management.¹⁵ A portion of this tribal enclave is closed to public access for most of the summer months to minimize human-grizzly contacts, thus underling the ability of CSKT to foreclose public access for reasons both valid or not.

3. Fate of the Bison Herd

The FWS has a plan to manage “meta-populations” (groups of spatially separated populations of the same species) of bison on multiple refuges, with the herd at each refuge being a component of the meta-population which must be managed in concert with the herds at other refuges. The bison herd at the National Bison Range represents one of the four primary genetic lineages of extant conservation herds. The Bison Range animals contain a higher diversity of genetic alleles than any other Department of Interior herd and have unique alleles not found in other Department herds.

Because of the unique genetic diversity of the NBR herd, bison from that herd have been

¹¹ U.S. Fish & Wildlife Service, Division of Economics “Banking on Nature: The Economic Benefits to Local Communities of National Wildlife Refuge Visitation” October 2013.

¹² §3(b)(3)

¹³ §4(g)

¹⁴ §4(d)

¹⁵ §3(a)(12)

relocated to other Refuges at various times to establish new herds or to improve the genetic diversity of existing herds. The Bison Range holds 25.2% of the FWS bison meta-population and comprises 17.5% of current FWS land area devoted to bison management. The Bison Range herd, and the Refuge's management of that herd, is vital to the future of the bison as a healthy native species that is genetically pure or with very low hybridization.

With respect to these bison, the CSKT draft states that –

“The United States hereby relinquishes to the Tribes all interest the United States may have in the bison on the lands transferred under this Act.”¹⁶

Other than that, the draft gives no clue about the fate of the Bison Range's unique bison herd, or whether these animals will continue to play their current role in the future of the bison – now the nation's official mammal – as a healthy native species.

Since the U.S. would have no further legal interest in these bison, under the approach taken in this draft, the CSKT would be free to sell or relocate however many animals it sees fit.

These basic uncertainties are compounded by some pitfalls buried within the provisions of the CSKT draft. First is the continuing financial obligations the CSKT draft would impose upon U.S. taxpayers after the transfer takes place.

As an initial matter, the federal government would be transferring the entire refuge, its buildings (including a new \$650,000 maintenance facility) and prized bison herd totaling nearly \$100 million in value to the CSKT without any compensation in return. In addition, the CSKT would take title to all “improvements and appurtenances” on the Bison Range.¹⁷

On top of that, the CSKT draft would require the federal government to provide the CSKT with “funds, personal property, and equipment or other resources” needed to enable the Tribes to operate Bison Range for the first two years after the transfer.¹⁸ Nothing could be lent but must be given to the CSKT as the U.S. would not “retain ownership or control of any of the” assets provided. Furthermore, these additional federal payments would be obligated “notwithstanding any other provision of law”.¹⁹

Although, the U.S. would have given away all interests in the lands, the CSKT draft would have the U.S. government making payments to Lake and Sanders Counties for “the first five full fiscal years” to compensate for the loss to local tax rolls as if they were still under federal ownership.²⁰

Finally in this regard, taxpayers would have to pay the CSKT for “liability insurance covering tort actions filed by members of the public.”²¹ This requirement has no time limit, suggesting

¹⁶ §4(c)

¹⁷ §4(b)

¹⁸ §4(e)

¹⁹ Ibid

²⁰ §4(f)

²¹ §4(g)

that these payments would have to continue into perpetuity.

At the same time, the National Wildlife Refuge System is suffering through tighter budgets, rising costs and growing challenges. Presumably, all of these payments to the CSKT and others under this plan would come at the expense of other refuges.

The second large pitfall created by the CSKT draft is language that casts a legal cloud over the title of land privately held within the boundaries of the Flathead Indian Reservation. The CSKT draft defines the Reservation as “all land within the exterior boundaries...notwithstanding the issuance of any patent, and including rights-of-way running through the Reservation.”²² If enacted, this language suggests that the U.S. Congress is placing a permanent “easement” or some undefined property interest on or under all of the lands that were removed pursuant to the 1904 Allotment Act on behalf of the CSKT. As such, the Tribes would be given some form of legal claim on all 4,834 parcels (comprising more than 485,000 acres) that were removed and made available for homesteading under the public land laws.

This troublesome provision appears to have no relation to the stated purposes of the CSKT draft.

Another disturbing and gratuitous provision of the draft would suspend the application of the National Environmental Policy Act (NEPA) to any actions by the Department of Interior after the transfer of the National Bison Range to the CSKT.²³ While the CSKT’s antipathy toward NEPA may be understandable, there is no reason why the salutary provisions of NEPA, such as public notice and comment, consideration of environmental consequences and alternatives, should not apply to federal actions with respect to the Bison Range and the CSKT.

In addition, application of NEPA may provide a needed, if limited, safeguard against some of the potential abuses described above.

A final questionable provision of this draft would disallow all claims against the United States or its agencies under the Administrative Procedure Act and other laws for pre- and post-transfer management of the lands and property that are to be transferred to the Tribes.²⁴ This provision would have a potentially far-reaching impact unrelated to the purported purpose of the legislation, in precluding a wide range of legal actions concerning the management of the lands and property of the Bison Range while it was managed by the FWS. The provision is made even more questionable by including two sections of the U.S. Code, 5 U.S.C. §§ 707 and 708, which do not exist.

Apart from this draft, as you may know, PEER is currently suing the FWS for its own failure to comply with the legislative NEPA requirements of that statute before submitting its proposal to you to transfer the Bison Range to the CSKT. Should we prevail in this litigation, FWS may be induced to finally do what it should have already done – conduct a careful analysis of the environmental consequences of, and reasonable alternative to, this proposed ceding of a major national wildlife refuge.

²² §2(b)

²³ §4(e)

²⁴ §4(k)

Undoubtedly, the Congress, as well the American people, would benefit from being able to review that environmental analysis and comment on it before a final decision is made on submitting legislation. Regardless of the equities of CSKT attachment to the National Bison Range, the American people, not just the residents of Montana, have an interest in this refuge which deserves consideration, as well.

In closing, we would urge you to ask the FWS to finally begin to address its overdue NEPA obligations in this matter. Through that process, required by Congress, the consequences of various actions and alternatives can be weighed, debated and assessed.

Should you have any questions about the foregoing or desire information on any aspect of it, please do not hesitate to contact us at (202) 265-PEER.

Sincerely,

Jeff Ruch
Executive Director

Paula Dinerstein
Senior Counsel