

March 20, 2020

Ms. Cathy Willis
Acting FOIA Officer
United States Department of Interior
United States Fish and Wildlife Service (FWS)
5275 Leesburg Pike
MS:IRTM
Falls Church, VA 22041

Re: Freedom of Information Act Request

Dear Ms. Willis:

This Freedom of Information Act request seeks production of:

- All public records including, but not limited to, all communications of any kind, type or form, such as written, digital, electronic (email), facsimile, audio, audio-visual, and internet (including via Skype, LinkedIn, Twitter, Facebook, Instagram, YouTube, WhatsApp, Messenger, WeChat, Tumblr, QQ, and other approved social media services used by the agency), that have been sent, dispatched and otherwise transmitted from, and/or exchanged by, any one or more the offices of the U.S. Department of Interior (“DOI”), U.S. Fish and Wildlife Service (“FWS”), by its officials, employees and/or representatives, from January 1, 2015 through March 19, 2020:
 - Regarding congressional legislation, including, but not limited to, S.3019 (the “Montana Water Rights Protection Act”),¹ to facilitate the potential conveyance (transfer) to the Confederated Salish and Kootenai Tribes (“CSKT”), a federally

¹ See S. 3019, *Montana Water Rights Protection Act*, 116th Cong. 1st Sess. (Dec. 11, 2019), at Sec. 13 – “National Bison Range Restoration,” <https://www.congress.gov/bill/116th-congress/senate-bill/3019/text> and <https://www.congress.gov/116/bills/s3019/BILLS-116s3019is.pdf> (facilitating via Secs. 13(a)(1)(P), 13(b)(2)(B), (D); 13(c)(1)-(3); 13(d)(1)-(2); 13(e); 13(f)(1)-(2), the conveyance (transfer) of the United States Government’s legal title in the lands, bison, fish, wildlife, other natural resources, and federal buildings and personal property of (located in and on) the National Bison Range, one of the oldest units of the National Wildlife Refuge System, to the CSKT, with equitable title in such assets to be held by the U.S. Secretary of the Interior in trust for the CSKT).

recognized tribe² of the Flathead Indian Reservation located in northwestern Montana, by the FWS Director, the U.S. Secretary of the Interior, and/or by the United States Congress, of the lands, bison, wildlife, and natural resources of the National Bison Range,³ and the federal and state water rights appurtenant, assigned, or allocated thereto, or otherwise appropriated thereby, to be held in trust by the U.S. Secretary of the Interior acting as the federal trustee, for the benefit of only the CSKT, even though the National Bison Range is one of the oldest units of the National Wildlife Refuge System,⁴ the mission of which is “to preserve a national network of lands and waters for the conservation and management of fish, wildlife, and plant resources of the United States *for the benefit of present and future generations*” (emphasis added), which lands

² See U.S. Department of the Interior, Bureau of Indian Affairs, *Notice – Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 84 Fed. Reg. 1200, 1201 (Feb. 1, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-02-01/pdf/2019-00897.pdf>.

³ See Act of May 23, 1908, ch. 192, 35 Stat. 267, codified at 16 U.S.C. §671, <https://www.loc.gov/law/help/statutes-at-large/60th-congress/session-1/c60s1ch192.pdf> (enacted by Congress and signed into law by President Theodore Roosevelt, authorizing taxpayer funds for the first time to purchase suitable land for the conservation of bison) and <https://uscode.house.gov/view.xhtml?req=May++23%2C++1908%2C++ch.++192%2C++35++Stat.++267&f=treesort&fq=tr ue&num=1&hl=true&edition=prelim&granuleId=USC-prelim-title16-section671> (authorizing the President reserve and except 12,800 acres, only, for the purposes of the section); Act of March 4, 1909, ch. 301, 35 Stat. 1051, <https://uscode.house.gov/statviewer.htm?volume=35&page=1051> (directing the President to reserve and except a sufficient area to enlarge the range to not to exceed 20,000 acres).

⁴ See P.L. 89-669, 80 Stat. 927-929, at Secs. 4-5 (Oct. 15, 1966), <https://www.govinfo.gov/content/pkg/STATUTE-80/pdf/STATUTE-80-Pg926.pdf#page=1> (establishing the National Wildlife Refuge System), codified at 16 U.S.C. § 668d, <https://www.govinfo.gov/content/pkg/USCODE-2010-title16/pdf/USCODE-2010-title16-chap5A-subchapIII-sec668dd.pdf>. See also U.S. House of Representatives, Report 105-106, accompanying H.R. 1420 - the National Wildlife Refuge System Improvement Act of 1997, 105th Cong. 1st Sess. (May 21, 1997), at 1-2, 4, <https://www.congress.gov/105/crpt/hrpt106/CRPT-105hrpt106.pdf> (“The National Wildlife Refuge System is the only system of Federal lands acquired and managed for the conservation of fish, wild-life, plants, and their habitat. The System has evolved into the world’s most comprehensive system of lands devoted to wildlife conservation and management. [...] Today, the System, administered by the United States Fish and Wildlife Service (USFWS), has grown to 509 refuges in all 50 States, and waterfowl production areas in 10 States, totaling nearly 93 million acres. [...] H.R. 1420 establishes that the conservation of fish, wildlife, plants and their habitats is the mission of the National Wildlife Refuge System and 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*. H.R. 1420 requires that public use of a refuge may be allowed only where the use is compatible with the mission of the System and purpose of the individual refuge, and sets forth a standard by which the Secretary shall determine whether such uses are compatible. It establishes as the policy of the United States that wildlife-dependent recreation, when it is compatible, is a legitimate and appropriate public use of the Refuge System, through which the American public can develop an appreciation for fish and wildlife. It establishes compatible wildlife-dependent recreational uses as the priority general public uses of the Refuge System. Finally, it also requires the Secretary to prepare a comprehensive conservation plan for each refuge and specifies the topics to be addressed and procedures for the adoption of such plans.”)

and waters the Secretary of the Interior⁵ holds in trust and stewards on behalf of *all Americans*, which DOI-FWS communications have, from January 1, 2015 through March 19, 2020, been sent, dispatched, exchanged or otherwise transmitted:

- To or with the offices, professional and nonprofessional staff members, representatives and other liaisons of United States Senator Steven David Daines of Montana, wherever such offices and persons may be located within the State of Montana and/or Washington, D.C., including directly to United States Senator Steven David Daines, himself;

and/or

- To or with the offices, professional and nonprofessional staff members, representatives and other liaisons of United States Senator Raymond Jon Tester of Montana, wherever such offices and persons may be located within the State of Montana and/or Washington, D.C., including directly to United States Senator Raymond Jon Tester, himself;

and/or

- To or with the offices, professional and nonprofessional staff members, representatives and other liaisons of United States Congressman Gregory Richard Gianforte of Montana, wherever such offices and persons may be located within the State of Montana and/or Washington, D.C., including directly to United States Congressman Gregory Richard Gianforte, himself;

and/or

- To or with the offices, professional and nonprofessional staff members, representatives and other liaisons of former United States Congressman Ryan Keith Zinke of Montana, wherever such offices and persons may have been located within the State of Montana and/or Washington, D.C., including directly to former United States Congressman Ryan Keith Zinke, himself;

and/or

- To or with the offices of the United States Senate Committee on Energy and Natural Resources and its professional and nonprofessional staff, employees,

⁵ See Presidential Documents, *Executive Order 12996 – Management and General Public Use of the National Wildlife Refuge System*, 61 Fed. Reg. 13647 (March 28, 1996), at Sec. 1, <https://www.govinfo.gov/content/pkg/FR-1996-03-28/pdf/96-7774.pdf>. See also Michael Smith and Inez Connor, *President Issues Landmark Executive Order On the National Wildlife Refuge System*, U.S. Fish and Wildlife Service News Release (March 28, 1996), <https://www.fws.gov/mountain-prairie/pressrel/96-23.html>.

- representatives and liaisons and to the Committee Chairman and Ranking Member and their respective professional and nonprofessional staff, employees, representatives and liaisons, and to any one or more of the Republican Committee (including U.S. Senator Steven David Daines) and Democratic Committee members and their respective professional and nonprofessional staff, employees, representatives and liaisons;⁶

and/or

- To or with the offices of the United States Senate Subcommittee on Energy, including to the Subcommittee Chairman and Ranking Member and their respective professional and nonprofessional staff, employees, representatives and liaisons, and to any one or more of the Republican Subcommittee members (including U.S. Senator Steven David Daines), Democratic Subcommittee members, and Ex Officio Subcommittee members, each of their respective professional and nonprofessional staff, employees, representatives and liaisons;⁷

and/or

- To or with the offices of the United States Senate Subcommittee on National Parks, including to the Subcommittee Chairman (U.S. Senator Steven David Daines) and Ranking Member and their respective professional and nonprofessional staff, employees, representatives and liaisons, and to any one or more of the Republican Subcommittee members, Democratic Subcommittee members, and Ex-Officio Subcommittee members and their respective professional and nonprofessional staff, employees, representatives and liaisons;⁸

and/or

- To or with the offices of the United States Senate Subcommittee on Public Lands, Forests and Mining, including to the Subcommittee Chairman and Ranking Member and their respective professional and

⁶ See United States Senate, *U.S. Senate Committee on Energy & Natural Resources*, <https://www.energy.senate.gov/public/index.cfm/members>.

⁷ See United States Senate, *U.S. Senate Committee on Energy & Natural Resources, Subcommittee on Energy*, <https://www.energy.senate.gov/public/index.cfm/subcommittees?p=Energy>.

⁸ See United States Senate, *U.S. Senate Committee on Energy & Natural Resources Subcommittee on National Parks*, <https://www.energy.senate.gov/public/index.cfm/subcommittees?p=national-parks>.

nonprofessional staff, employees, representatives and liaisons, and to any one or more of the Republican Subcommittee members (including U.S. Senator Steven David Daines), Democratic Subcommittee members, and Ex-Officio Subcommittee members and their respective professional and nonprofessional staff, employees, representatives and liaisons;⁹

and/or

- To or with the offices of the United States Senate Subcommittee on Water and Power, including to the Subcommittee Chairman and Ranking Member and their respective professional and nonprofessional staff, employees, representatives and liaisons, and to any one or more of the Republican Subcommittee members, Democratic Subcommittee members, and Ex-Officio Subcommittee members and their respective professional and nonprofessional staff, employees, representatives and liaisons;¹⁰

and/or

- To or with the offices of the United States Senate Committee on Environment and Public Works, including to the Committee Chairman and Ranking Member and their respective professional and nonprofessional staff, employees, representatives and liaisons, and to any one or more of the Majority Committee and Minority Committee members and their respective professional and nonprofessional staff, employees, representatives and liaisons;¹¹

and/or

- To or with the offices of the United States Senate Subcommittee on Fisheries, Water and Wildlife, including to any one or more of the

⁹ See United States Senate, *U.S. Senate Committee on Energy & Natural Resources Subcommittee on Public Lands, Forests, and Mining*, <https://www.energy.senate.gov/public/index.cfm/subcommittees?p=public-lands-and-forests>.

¹⁰ See United States Senate, *U.S. Senate Committee on Energy & Natural Resources Subcommittee on Water and Power*, <https://www.energy.senate.gov/public/index.cfm/subcommittees?p=water-and-power>.

¹¹ See United States Senate, *U.S. Senate Committee on Environment and Public Works*, <https://www.epw.senate.gov/public/index.cfm/members>.

Republican Subcommittee members and Democratic Subcommittee members and their respective professional and nonprofessional staff, employees, representatives and liaisons;¹²

and/or

- To or with the offices of the United States Senate Committee on Indian Affairs, including to the Committee Chairman and Ranking Member and their respective professional and nonprofessional staff, employees, representatives and liaisons, and to any one or more of the Republican Committee members (including U.S. Senator Steven David Daines) and Democratic Committee members (including U.S. Senator Raymond Jon Tester) and their respective professional and nonprofessional staff, employees, representatives and liaisons.

If there are any fees for searching or duplicating the records the production and delivery of which have been herein requested, please let us know the \$ amount thereof.

If you deny all or any part of this FOIA request, please cite each specific exemption upon which you based your denial of this request and/or refusal to produce and release the specific information sought, and notify us of appeal procedures under the applicable FOIA law and regulations.

For purposes of this FOIA request, it shall be presumed, unless the agency clearly establishes otherwise, that the records of documented agency communications we have requested were created or obtained by the agency and are sufficiently within the agency's control (i.e., these materials have come into the agency's possession in the legitimate conduct of its official duties, and Congress has not manifested a clear assertion of intent to exclusively control the documents).¹³

¹² See United States Senate, *U.S. Senate Committee on Environment and Public Works, Subcommittee on Fisheries, Water, and Wildlife*, <https://www.epw.senate.gov/public/index.cfm/fisheries-water-and-wildlife>.

¹³ See *United We Stand America, Inc. v. IRS*, 359 F. 3d 595, 598-605 (D.C. Cir. 2004), https://scholar.google.com/scholar_case?case=18360315655283575754&hl=en&as_sdt=6&as_vis=1&oi=scholar (wherein the U.S. Court of Appeals for the District of Columbia Circuit, in applying the D.C. Circuit's four-factor test in the congressional context to determine whether an agency exercises sufficient control over requested documents to render them agency records). See also *Id.*, at 603, citing and quoting *Paisley v. CIA*, 712 F.2d 686, 696 (D.C. Cir. 1983). ("Under these circumstances, *absent 'clear' [...] expression of congressional intent to control the entire response, neither the IRS's own expectations nor its handling of the document can turn the entire agency-created record into a congressional document. Otherwise, documents that agencies create in response to congressional requests could become congressional documents even if Congress expressed no intent to keep them secret, for it can be said of most such materials that they would not have been created but for the congressional request, that the agency relies on them for no other purpose, and that they are kept in separate files, i.e., in the agency's office of congressional affairs. Such a result would 'exempt from FOIA's purview a broad array of materials otherwise clearly categorizable as agency records, thereby undermining the spirit of broad disclosure that animates the Act.'*") (emphasis added).

We look forward to receiving your final response determination within the prescribed 20 working day statutory period.

If you have any questions regarding the handling of this request, please do not hesitate to contact us at: Office – (212) 644-9240; Cellular – (917) 565-1521.

Thank you, in advance, for your expeditious handling of this FOIA request.

Sincerely,

Lawrence A. Kogan

Lawrence A. Kogan
Managing Principal

Cc: Save the National Bison Range, LLC, MT
U.S. Department of Interior, Office of the Secretary
U.S. Department of Interior, Office of the Solicitor
U.S. Department of Interior, Bureau of Indian Affairs