

March 30, 2020

Ms. Leah Fairman
Acting FOIA Officer
MS-7328, MIB
U.S. Department of the Interior
Office of the Secretary (OS)
1849 C Street, NW
Washington, D.C. 20240
osfoia@ios.doi.gov

Re: Freedom of Information Act Request

Dear Ms. Fairman:

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”), Office of the Secretary (“OS”), by its officials, employees and/or representatives, from January 1, 2015 through March 19, 2020:
 - Regarding congressional legislation, including, the prior “National Bison Range Restoration Act,”¹ which the U.S. Fish and Wildlife Service (“FWS”) had previously stated it would support,² and is now incorporated in Section 13 of S.3019 (the

¹ See Confederated Salish and Kootenai Tribes, *Bison Range Restoration Excerpts of S. 3019*, <https://bisonrange.org/wp-content/uploads/2020/01/S.3019-NBR-excerpt.pdf>. See also Confederated and Salish and Kootenai Tribes, *Section-by-Section Summary of Bison Range Restoration Legislation*, <https://bisonrange.org/wp-content/uploads/2020/01/Section-by-Section-Summary-of-Bison-Range-Restoration-Provisions.pdf>.

² See Vince Devlin, *Tribes Draft Proposed Legislation for Transfer of National Bison Range*, Missoulian (June 10, 2016), https://missoulian.com/news/state-and-regional/tribes-draft-proposed-legislation-for-transfer-of-national-bison-range/article_d6b3e294-f4b6-5240-ad23-17cbe0464784.html; Vince Devlin, *New Direction for Bison Range? FWS Proposal Catches Many Off Guard*, Missoulian (Feb. 13, 2016), https://missoulian.com/news/local/new-direction-for-bison-range-fws-proposal-catches-many-off/article_069afc12-92fa-5ce4-8b80-6b5e64b7044c.html.

“Montana Water Rights Protection Act”³),⁴ to facilitate the potential conveyance (transfer) to the Confederated Salish and Kootenai Tribes (“CSKT”), a federally recognized tribe⁵ 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,⁶ and the federal and state water rights appurtenant, assigned, or allocated thereto by agreement,⁷ 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

³ 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).

⁴ See Confederated Salish and Kootenai Tribes, *Bison Range Restoration Legislation*, <https://bisonrange.org/about/> (“...In 2016, FWS asked whether CSKT would support restoring the Bison Range to federal trust ownership for the Tribes. The Tribes developed draft legislation and embarked on extensive public outreach, garnering support from conservation groups, Indian tribes, and the public. This Bison Range restoration legislation has now been incorporated into the Montana Water Rights Protection Act (S. 3019), a bipartisan bill introduced in December 2019 by Montana Senators Steve Daines (R) and Jon Tester (D).” (emphasis added)); <https://bisonrange.org/legislation/> (“In 2016, the Confederated Salish and Kootenai Tribes drafted the National Bison Range Restoration Act. That legislation has now been incorporated as Section 13 of S.3019, the “Montana Water Rights Protection Act,” as introduced on December 11, 2019.”) (emphasis added). See also Confederated Salish and Kootenai Tribes, *Responses of CSKT to Public Comments on the Tribes’ Draft “National Bison Range Transfer and Restoration Act of 2016”* (July 2016), <https://bisonrange.org/wp-content/uploads/2019/10/Public-Comment-Responses-July-2016.pdf>. See also Confederated Salish and Kootenai Tribes, *Video of CSKT – Sponsored Public Meeting on Draft Bison Range Restoration Act* (July 12, 2016), <https://player.vimeo.com/video/174672863>.

⁵ 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>.

⁶ 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).

⁷ See U.S. Fish and Wildlife Service-Montana National Bison Range Compact, Montana Code Annotated 2019, Title 85, Chapter 20, Part 16, MCL 85-20-160, https://leg.mt.gov/bills/mca/title_0850/chapter_0200/part_0160/section_0010/0850-0200-0160-0010.html. See also The Montana Department of Natural Resources & Conservation, *National Bison Range Compact*, 85-20-1601 MCA, <http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/national-bison-range-compact>.



Lawrence A. Kogan, Esq. NY, NJ, DC

Of Counsel:

James Wagner, Esq. MA

Fred B. Wilcon, Esq. MA

is one of the oldest units of the National Wildlife Refuge System,⁸ 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 and waters the Secretary of the Interior⁹ 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 and otherwise transmitted:

- To or with the professional and nonprofessional staff members, representatives, and other liaisons of the Montana State executive agencies and their divisions, including, but not limited to, the Montana Department of Environmental Quality, Montana Fish, Wildlife & Parks, Montana Department of Natural Resources & Conservation (including its Trust Lands Management Division), and the Montana Department of Livestock;

and/or

- To or with the executive agencies and offices, the professional and nonprofessional staff members, representatives, and other liaisons of the

⁸ 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.”)

⁹ 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>.

Office of the Governor of Montana,¹⁰ including its many offices (especially the Office of Indian Affairs),¹¹ and directly to or with Montana Governor Stephen Clark Bullock, himself;¹²

and/or

- To or with the executive agencies and offices, the professional and nonprofessional staff members, representatives, and other liaisons of the Office of the Lieutenant Governor of Montana, including directly to or with Lieutenant Governor Mike Cooney, himself;¹³

and/or

- To or with the executive agencies and offices, the professional and nonprofessional staff members, representatives, and other liaisons of the Office of the Former Lieutenant Governor of Montana, including directly to or with Former Lieutenant Governor of Montana, Angela McLean, herself;¹⁴

and/or

- To or with the offices and departments, professional and nonprofessional staff members, representatives and other liaisons of the Government of Lake County, Montana,¹⁵ including, but not limited, to the Lake County Montana Board of Commissioners, individually or collectively,¹⁶ and the Office of the Lake County Civil Attorney and/or Civil Deputy Attorney, Walter (“Wally”)

¹⁰ See State of Montana, *Office of the Governor, Official Site of Governor Steve Bullock*, <https://governor.mt.gov/>.

¹¹ See State of Montana, *Office of the Governor – Offices*, <http://governor.mt.gov/Offices> and <https://directory.mt.gov/govt/state-dir/agency/gov>.

¹² See State of Montana, *Office of the Governor – About Governor Steve Bullock*, <http://governor.mt.gov/About/Governor>.

¹³ See State of Montana, *Office of the Governor – About Lieutenant Governor Mike Cooney*, <http://governor.mt.gov/About/Lieutenant-Governor>.

¹⁴ See Holly Michels, *Emails: Last May, Bullock Staffers Confirmed to McLean She Was On Her Way Out*, Independent Record (May 6, 2016), https://helenair.com/news/politics/state/emails-last-may-bullock-staffers-confirmed-to-mclean-she-was/article_6cdb6f4-5cb2-55e5-802b-f7f04a9641d7.html; Matt Volz, *Angela McLean Stepping Down as Montana’s Lieutenant Governor*, Associated Press (Nov. 30, 2015), https://helenair.com/news/local/updated-angela-mclean-stepping-down-as-montana-s-lieutenant-governor/article_5f917166-391b-5170-bf8f-3eb98446d45e.html

¹⁵ See Lake County Montana, *Lake County Directory*, <https://www.lakemt.gov/>.

¹⁶ See Lake County Montana, *Meet the Commissioners*, <https://www.lakemt.gov/main/commissioner.html>.

Congdon and Legal Assistants;¹⁷

and/or

- To or with the offices and departments,¹⁸ professional and nonprofessional staff members, representatives and other liaisons of the Government of Sanders County Government, including, but not limited to, the Sanders County Montana Board of Commissioners, individually or collectively,¹⁹ and the Office of the Sanders County Attorney, including its Attorney and Legal Assistants,²⁰

and/or

- To or with the offices, professional and nonprofessional staff members, representatives and other liaisons of the Office of the Attorney General,²¹ Department of Justice, of the State of Montana, including directly to or with

¹⁷ See, e.g., Patrick Reilly, *Lake, Sanders Commissioners Balk at Water Compact Provisions*, Missoulian (Dec. 28, 2019), https://missoulian.com/news/local/lake-sanders-commissioners-balk-at-cskt-water-compact-provisions/article_af7390ce-06ab-5055-b42d-601a854ea811.html (re Lake County Attorney Wally Congdon interviewed); U.S. Fish and Wildlife Service, *Final Comprehensive Conservation Plan and Environmental Impact Statement – National Bison Range Montana* (Sept. 2019), at A1, https://www.fws.gov/uploadedFiles/USFWSNBRCCPFINAL_508compliant_Sept2019updated.pdf (re Lake County Attorney Wally Congdon on Planning Team); *Confederated Salish and Kootenai Tribes v. Lake County Montana*, Civil Action No. 9:19-cv-00090-DLC, “Lake County’s Brief in Support of Application for Preliminary Injunction” (June 17, 2019), at 1, <https://turtletalk.files.wordpress.com/2019/11/20-county-counter-motion-for-pi.pdf> (re Lake County Attorney Wally Congdon representing Lake County); Lake County Montana, Lake County Board of Health Membership Revised (Jan. 2018), <https://www.lakemt.gov/environmental/pdf/2018%20Jan%20BOH%20Membership%20list.pdf> (re Lake County Attorney Wally Congdon membership); Lake County Montana, *Lake County Montana 2018 Growth Policy* (Aug. 21, 2018), at Acknowledgements, <https://www.lakemt.gov/planning/pdf/2018%20Growth%20Policy.pdf> (re Civil Deputy County Attorney on Lake County Staff); Caleb M. Soptelean, *Freeway Shootout Affects Local Attorney, Cattle Rancher*, Valley Journal (May 24, 2017), <http://www.valleyjournal.net/Article/17686/Freeway-Shootout-affects-local-attorney-cattle-rancher> (re Lake County Deputy Civil Attorney Wally Congdon interviewed); David Reese, *MT County Fights for Lost Revenue from Tribes’ Dam*, Courthouse News Service (Feb. 13, 2017) <https://www.courthousenews.com/mt-county-fights-for-lost-revenue-from-tribes-dam/> (re Deputy County Attorney Wally Congdon interviewed); Office of the Lake County Attorney, *Memorandum Re Insurance Cost Repayment from Accidents* (Feb. 9, 2016), <https://www.lakemt.gov/prfd/MMinutes/2016/CrashFeeLegalOpinionMarch%202016.pdf> (authored by Lake County Attorney Wally Congdon).

¹⁸ See Sanders County Montana, *Departments*, <https://co.sanders.mt.us/departments/>.

¹⁹ See Sanders County Montana, *Board of Commissioners*, <https://co.sanders.mt.us/departments/commissioners-office/>.

²⁰ See Sanders County Montana, *County Attorney*, <https://co.sanders.mt.us/departments/county-attorney/>.

²¹ See State of Montana, *Attorney General’s Office*, <https://dojmt.gov/agooffice/>; State of Montana Department of Justice, *Office of the Attorney General – Staff, Bureaus, Offices and Divisions*, <https://directory.mt.gov/govt/state-dir/agency/justice>.

Attorney General Timothy Fox, himself,²² and/or Former Chief Deputy Attorney General Alan Joscelyn, himself;²³

and/or

- To or with the offices, professional and nonprofessional staff members, representatives and other liaisons of the Tribal Council²⁴ of the Confederated Salish Kootenai Tribes (“CSKT”) of the Flathead Reservation located in northwestern Montana, including but not limited to, directly to or with any one or more of the CSKT Tribal Council’s current or former members, including current Chairwoman, Shelly Fyant, current Vice-Chairwoman, Anita Matt, Former Chairman Ronald Trahan, Former Vice-Chairman Leonard Gray,²⁵ Former Chairman Vernon Finley, and Former Vice-Chairman Leonard Twoteeth.²⁶

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 if the \$ amount thereof exceeds \$1,000.

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 exchanged with the CSKT Tribal Council and/or with any one or more of its current or former members, that we have requested, are not entitled to protection under Exemption 5 of the FOIA on the grounds they concern or otherwise bear on issues relevant to the federal government’s special “trust relationship” with a federally recognized Native

²² See State of Montana, Montana Department of Justice, *Attorney General Tim Fox*, <https://dojmt.gov/our-attorney-general/>.

²³ See Sandfire Black Butte Copper Mine Project, *Project Partners – Alan L. Joscelyn*, https://blackbuttecopper.com/project_partners/alan-l-joscelyn-2/ (re former role as Chief Deputy Attorney General for Attorney General Tim Fox); Sandfire Resources America, Inc., Corporate Directors, *Alan L. Joscelyn, Director*, <http://www.sandfireamerica.com/corporate/directors> (re former role as Chief Deputy Attorney General for Attorney General Tim Fox).

²⁴ See Confederated Salish and Kootenai Tribes, Government, *Tribal Council*, <http://www.csktribes.org/government/tribal-council>.

²⁵ See Confederated Salish and Kootenai Tribes, *Tribal Council Meeting Minutes* (April 26, 2018), <http://www.csktribes.org/component/rsfiles/download-file/files?path=Tribal+Council%2FMinutes%2F2018%2FApril%2F042618+Minutes.pdf>.

²⁶ See Confederated Salish and Kootenai Tribes, *2016-2017 Annual Report*, at 5, <http://www.csktribes.org/component/rsfiles/download-file/files?path=CSKT+Annual+Reports%2F2017-AnnualReport+PROOF-AlphaGs.pdf>

American organization.²⁷ The United States Supreme Court has expressly refused to read an “Indian Trust” exemption into the FOIA statute.²⁸

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 Solicitor
U.S. Department of Interior, Bureau of Indian Affairs
U.S. Department of Interior, U.S. Fish and Wildlife Service
U.S. Department of Interior, Office of the Special Trustee

²⁷ See *U.S. Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12-14 (2001), <https://casetext.com/case/dept-of-the-interior-v-klamath-water-users-prot-assn> (unanimously holding *first*, that, since seven of the records exchanged between the Department of the Interior and several Indian Tribes located in the Klamath River Basin dealing with agency decisions on water allocation did not qualify as ‘inter-agency or intra-agency memorandums or letters’ falling within the attorney work-product and deliberative process privileges under Exemption 5, they were required to be disclosed; and holding *second*, that Exemption 5 did not apply to such communications since the Tribes necessarily communicate with the Bureau with their own interests in mind, acting as self-advocates at the expense of others seeking benefits inadequate to satisfy everyone.).

²⁸ See *U.S. Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. at 15-16.