

Responses of the Confederated Salish and Kootenai Tribes to Public Comments on the Tribes' Draft "National Bison Range Transfer and Restoration Act of 2016"

The Confederated Salish and Kootenai Tribes have collected over 150 comments on the Tribes' draft "National Bison Range Transfer and Restoration Act of 2016". These comments were solicited through the Bison Range Working Group website, which was established by the Tribes to notify the public of the draft legislation and to collect public comments, as well as through a public meeting held in Pablo, Montana on July 12, 2016. The comment period opened on June 10, 2016, was extended beyond its original closing date of June 24th, and closed on July 15, 2016.

The total number of comments received during that period was 153. Several individuals submitted more than one comment; the number of unique individuals/organizations that submitted comments is 145. Of those, approximately 76 commenters supported the Tribes' draft legislation, approximately 55 commenters opposed it, and 14 commenters presented questions or concerns without supporting or opposing the proposed legislation.

All of these comments have been posted on the Bison Range Working Group website (www.bisonrangeworkinggroup.org). To respect commenters' privacy, their email addresses, physical addresses (other than city/state), and phone numbers have been redacted from the comments prior to posting.

Below are a number of comments, concerns and questions that were raised in the public comments, along with responses from the Tribes. In the responses, the Confederated Salish and Kootenai Tribes are referred to as "Tribes", the draft National Bison Range Transfer and Restoration Act of 2016 is referred to as the "Act", the National Bison Range is referred to as "Bison Range", the Flathead Indian Reservation is referred to as "Reservation", and the U.S. Fish & Wildlife Service is referred to as "FWS" or the "Service".

1) Precedent

Comment: Some commenters expressed concern that passage of the Act would set a precedent for conveyance of other federal lands or facilities. One commenter asserted that "[g]iving ownership of the NBR to the CSK Tribe would by definition set a precedent of giving a federal wildlife refuge to a non-governmental entity." Other commenters pointed out that the Bison Range "is a completely unique situation and should not in any way be construed as a precedent regarding other federal properties."

Response: The Act directly addresses the issue of precedent. As a matter of law, Section 4(i) of the Act would prohibit the interpretation of the Act as a precedent. This section reads as follows:

The provisions of this Act are uniquely suited to address the distinct circumstances, facts, history, and relationships involved with the subject bison, lands and Tribes. These provisions are not intended, and shall not be interpreted, as precedent for any other situation regarding federal properties or facilities.

As a practical matter, the facts surrounding the history of the National Bison Range do not lend themselves to creating a precedent for other situations. Unlike most federal properties, the Range is located in the center of an Indian Reservation that was reserved by Treaty, on lands which the Tribes never consented to convey. Underscoring this uniqueness is the fact that the lands were the subject of a federal judicial decision holding that the lands had been unconstitutionally taken within the meaning of the Fifth Amendment of the U.S. Constitution (*see Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. United States*, 437 F.2d 458, 485 (1971)). The history of how Tribal members had initially brought the ancestors of the Range’s bison herd to the Flathead Indian Reservation makes the Bison Range situation even more unique and unlike that of any other federal property or facility. Further distinguishing this situation are the Tribes’ two prior Tribal Self-Governance agreements, under which they had assisted with National Bison Range operations in 2005-06 and 2008-2010.

While one commenter expressed concern that the Act would create a precedent for “giving” a federal wildlife refuge to a “non-governmental entity”, the Confederated Salish and Kootenai Tribes are a federally-recognized tribal government and so the Act could create no precedent for a transfer to a non-governmental entity.

2) **Access**

Comment: Several commenters asked about public access. One commenter asked whether the Tribes might impede access through “exorbitant entry fees”. Another commenter asked whether fishing access would continue. At least one individual asked whether a person would be required to have a Tribal recreation permit in order to access the Bison Range.

Response: The Tribes have always agreed that public access must be required under the draft legislation, and this has been a key factor in FWS’ support for the Bison Range restoration concept. Continued public access would be required by Section 4(d) of the Act. Fishing access would also continue under the Tribes’ management. As a practical matter, the Tribes already provide public access to most Tribal lands on the Flathead Indian Reservation, so continued access at the National Bison Range would be consistent with the Tribes’ current and past practices. This existing public access to Tribal lands includes fishing access. Public access at the Bison Range would continue to be guided by conservation and public safety considerations.

Maintaining reasonable entry fees would support the Tribes’ interests in public education and visitor experiences at the Bison Range, whereas exorbitant fees would undermine those priorities.

The Bison Range would continue to be subject to its own fee structure. Access would therefore not depend on whether a person had a Tribal recreation permit.

3) **Additional access points**

Comment: Some commenters inquired about additional access points to the National Bison Range, and several individuals suggested an entrance off Highway 93 and/or at the top of Ravalli Hill.

Response: The Tribes do not currently have plans for new points of access to the National Bison Range. However, the Tribes may consider such access points if there was reason to believe that they would improve the visitor experience while still protecting the Range’s natural resources.

The Tribes have developed, and currently maintain, the existing Ravalli Hill scenic turnout interpretive area on Highway 93, on Tribally-owned land adjacent to the Bison Range. The public generally considers, and uses, this site as a public access Bison Range viewing area. The U.S. Fish & Wildlife Service considers the public access viewing from this site when it estimates annual overall public uses and visitation of the National Bison Range. Use of this Tribally-owned and managed site will not change in the future, but may be considered for expanded visitor experiences and interpretation.

4) Interpretive opportunity

Comment: Some commenters said that the proposed Bison Range restoration would allow for improved interpretive opportunities through greater incorporation of the Tribes’ cultural and historical ties to the land, bison, and other natural resources found at the Range.

Response: The Tribes agree that the proposed Bison Range restoration would greatly expand the Tribes’ ability to incorporate aspects of Tribal historical and cultural connections to the Range’s land, bison and other natural resources. Based upon comments, as well as past feedback from the public, the Tribes believe that many people would welcome such interpretive additions.

5) Funding

Comment: Several commenters asked how the Tribes would fund operation of the Bison Range, and a couple of commenters questioned whether the Tribes may charge higher admittance fees.

Response: Under the Act, after the two-year transition period provided for in Section 4(e) of the Act (and addressed in item #7 of these responses), the Tribes would fund annual operations of the Bison Range – the federal government would no longer fund them. The Tribal Council is committed to funding the Bison Range at a degree that will maintain or exceed its current level of operation. Some portions of Bison Range operations may be able to be performed or addressed through existing staff in the Tribes’ Natural Resources, Lands, or Maintenance departments. The Tribes would likely assess the current bookstore concession at the Bison Range visitor center to evaluate for expanded opportunities related to visitor needs and expectations, which could also assist with meeting annual funding needs.

Maintaining or increasing the current level of visitation would be one part of the budget planning process, and would dovetail with planning for public education opportunities, which are a priority for the Tribes. As stated above, maintaining reasonable entry fees would be essential to supporting the Tribes’ interests in public education and visitor experiences at the Bison Range, whereas exorbitant fees would undermine those priorities.

6) **Past compensation**

Comment: Several commenters alleged that the Tribes had been paid twice for the land upon which the National Bison Range was established, and one commenter claimed that the Tribes were paid over \$22,200,000 for the land. Some commenters asked whether the Tribes would repay the United States for the National Bison Range lands and improvements.

Response: Some of these comments appear to confuse amounts identified in the federal Court of Claims’ 1971 decision *Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. United States*, 437 F.2d 458 (1971). In that decision, the court held that the Tribes had not consented to the federal taking of numerous lands within the Flathead Indian Reservation, among them the National Bison Range. The court further held that the United States, in its eminent domain acquisition of the land for the National Bison Range, had not paid the Tribes fair market value for the land, thereby violating the Fifth Amendment of the U.S. Constitution. The decision concerned many properties within the Flathead Indian Reservation; the National Bison Range was just one part of those lands.

The court used 1912 fair market value prices to determine what the United States should have paid the Tribes when it had taken the land for the Bison Range, as well as other Reservation lands. While the decision awarded the Tribes \$6,066,668.78, plus interest, for all of the lands which were the subject of the court case, only a small portion of that amount was for the National Bison Range (less than \$250,000). Some commenters are apparently referring to this court-ordered payment of fair market value as being a “second payment” to the Tribes when, in fact, it simply required the United States to remedy the fact that it had never paid the Tribes the constitutionally-required “just compensation” for the taking of the land.

While the draft Act does not specifically provide for repayment of these funds, it does provide the federal government with savings that would exceed such a repayment amount within one or two years of Tribal operation of the Range – and far exceed such an amount over the course of several years, let alone decades. Since the federal government would no longer be expending its annual level of \$700,000-\$1,000,000 on Bison Range management, it would save that amount each year through Tribal funding of the Bison Range - while still benefitting from the same conservation management and public access requirements in the Act.

It is important to remember that, when the United States took the land for the National Bison Range, the Tribes also suffered injuries, including access prohibitions and restrictions, which have never been compensated by the United States.

7) **Transition period**

Comment: One commenter expressed a belief that the Tribes could fund Bison Range operations on their own during the transition period, and would not need funding from the Interior Department. Another commenter stated that the draft legislation could be revised to increase the level of transition period funding.

Response: Both the Tribes and the U.S. Fish & Wildlife Service agree that it would be in the best interest of the natural resources involved for the two governments to cooperate in transitioning from federal to tribal management of the Bison Range. Section 4(e) of the Act provides for a transition period of two (2) years, during which the Interior Secretary would be directed to cooperate in, and assist with, the transition from federal to Tribal management. Such cooperation could take the form of: funding; transfer of equipment or personal property; assignment of staff via Intergovernmental Personnel Act agreements; or other assistance. This part of the legislation reflects the fact that both parties are equally interested in caring for the natural resources at issue. A smooth transition at the Range is in the public interest.

8) **Genetics**

Comment: Several commenters mentioned the genetic values of the National Bison Range’s bison herd, and expressed concern that such values continue to be safeguarded.

Response: The professionals at the Tribes’ Natural Resources Department fully appreciate and value the genetic characteristics and values of the bison herd at the National Bison Range. From a broader perspective, those genetic characteristics are a scientific representation of the uniqueness of this particular herd and its cultural and historic value to the Tribes. The Tribes would continue to manage this bison herd with this genetic value in mind.

9) **Weed control/management**

Comment: Several commenters mentioned the importance of weed control and management.

Response: The Tribes recognize the importance of controlling and managing invasive/noxious weeds. The Tribes currently devote a great deal of resources to weed control on the Reservation, having spent over \$545,000 during the period of fiscal years 2012-2016. Under the National Bison Range’s existing management plan, which the Tribes helped develop, weed management projects are identified as high priority. Under Tribal management of the Bison Range, the Tribes would continue this prioritization.

10) **Restoration of land to Indian Tribes**

Comment: Several commenters expressed blanket opposition to the concept of restoring land to Indian tribes. Comments included such statements as:

- “Given the logic being used here, all non Indians [*sic*] should be moving out of the country and returning all lands back to the Native Americans.”
- “Dangerous precedent to begin ‘giving back’ land to tribes”
- “we cannot undo the past”

Response: The Tribes believe that the Act should be evaluated on the merits of its own unique facts and history. While some individuals may oppose any sort of land transfer to a tribal government, or to Indians in general, such opposition does not have support in the law nor does it make for sound policy development.

11) Sentiments towards Indians and Indian tribes

Comment: A number of commenters expressed animosity towards Indians or tribes generally, without reference to the draft Act. Examples include:

- “leave the Bison Range in Federal hands the Indians lazy bastards will just screw it up” [*sic*]
- “I, like so many taxpaying residents of Montana, am getting tired of the tribes demanding things to which you are not entitled.” [*sic*]
- “I think it’s time that reservations be abolished [*sic*], tribal members fully assimilated into American society as a whole, including paying their fair share of taxes.”
- “Tell the minority people who live in this country to get off their ass, get an education or trade and make a living like the rest of us have done or are doing! . . . The sacrifices that have been made by white people for 240 years are what has made this country great.” [*sic*]
- Native Americans “exhibit no motivation to lift themselves out of poverty or ignorance.”
- “. . . DON’T give the Indians control of any and all wildlife species on OUR land.” and
- “Indian tribes and their members are just unable and unwilling to properly protect a species like the bison.”

Response: Comments that derive from racist beliefs or bigotry are outside the scope of these responses, but obviously have little value in any objective evaluation of the Tribes’ draft legislation.

Some of these comments reflect a mistaken belief that Indian people do not pay taxes. While members of federally-recognized tribes are not subject to some taxes, such as state income taxes if the tribal member both resides and works within his/her own Indian reservation, tribal members are subject to many state and federal taxes, including federal income tax.

12) Changing the name of the National Bison Range

Comment: Several commenters addressed the potential for the name of the National Bison Range to be changed, as provided in Section 4(d) of the draft legislation. Two commenters suggested new names for the facility, such as “Big Medicine Range”, or naming it after the Pend d’Oreille man who first brought the bison to the Flathead Indian Reservation from east of the Continental Divide. One commenter indicated he would not want to see the name changed.

Response: While no official discussion on this issue has taken place yet, the Tribes see value, as some commenters suggested, in possibly renaming the National Bison Range to reflect historical or cultural aspects of the Range. The draft legislation does not require renaming of the National Bison Range, but would recognize the Tribes’ ability to do so.

13) Senior Passes/Golden Age Passports

Comment: Several commenters asked whether Senior Passes or Golden Age Passports would still be honored by the Tribes if the National Bison Range were restored to federal trust ownership for the Tribes.

Response: Senior Passes and Golden Age Passports are lifetime passes issued by the federal government for entry into various federal facilities such as National Parks and National Wildlife Refuges (see <http://store.usgs.gov/pass/senior.html>). The Tribal Council has not yet considered whether it would continue to honor such passes. However, providing low-cost services or programs for elders is common within the Tribal government.

14) National Environmental Policy Act (NEPA)

Comment: A couple of commenters made references to the National Environmental Policy Act (NEPA), including assertions of its application to this comment period.

Response: The public comments solicited and received by the Confederated Salish and Kootenai Tribes are not subject to the provisions of NEPA which, by its own terms, applies to major federal (not tribal) actions.

15) Hunting

Comment: One commenter asked whether hunting would be allowed on the Bison Range.

Response: Although hunting is allowed on some National Wildlife Refuges, public hunting is not currently allowed on the National Bison Range, although there are periodic “management hunts” used for population control of certain animals. The Tribes do not envision changes to this.

16) Ninepipe and Pablo Refuges

Comment: One commenter asked who would manage the Ninepipe and Pablo National Wildlife Refuges.

Response: The Ninepipe and Pablo Refuges are both located on land held in trust by the federal government for the Confederated Salish and Kootenai Tribes, and are both currently administered by FWS as part of the National Bison Range Complex. The Act would not affect management of either the Ninepipe or Pablo Refuges. FWS would continue to manage both, although they would likely be administered out of another refuge, such as Lost Trail or Benton Lake Refuges. Changing administrative headquarters for a refuge is not a new concept. The Lost Trail National Wildlife Refuge has been removed and added to the National Bison Range Complex in the past.

The Ninepipe and Pablo Refuges were both originally established as refuges after years of Tribal requests for the federal government to designate them as bird conservation areas. In 1921, the federal government finally agreed and President Warren Harding issued Executive Orders designating both Ninepipe and Pablo as refuges. In 1948,

Congress approved the purchase by the federal government from the Tribes of perpetual easements for use of Ninepipe and Pablo for refuge purposes.

17) Cooperative opportunities

Comment: One commenter saw opportunity in the draft legislation for Tribal cooperation with state & federal programs such as Montana Conservation Corps (MCC).

Response: The Tribes appreciate this suggestion and note that nothing in the draft legislation would preclude or hinder such cooperation. The Tribes have a long and extensive history of cooperating with other governments and entities in the pursuit of conservation management, including at the National Bison Range.

18) Shared management track record

Comment: One commenter asserted that past shared management at the National Bison Range had “failed”.

Response: The last Tribal Self-Governance agreement at the National Bison Range was very successful. Both the Tribes and the U.S. Fish & Wildlife Service were pleased with the constructive relationship that they jointly built at the Bison Range under their 2008-2010 partnership. However, unlike past Tribal Self-Governance agreements, under the Act the Tribes would be the sole manager of the Range – there would not be shared management between Tribal and federal governments. This would not, however, preclude continued cooperation between the two governments.

19) Tribal preference in hiring

Comment: One commenter expressed concern about the Tribes’ “preferential hiring practices”.

Response: Under Tribal law, the Tribes have adopted hiring preferences for Tribal members and other members of federally-recognized Indian tribes. This is consistent with federal law. However, the Tribes also hire many non-Indian and non-Tribal member employees. Under the Tribes’ last partnership agreement at the National Bison Range, the Tribes hired and employed some non-Indian staff, including the manager of the Tribes’ Bison Range staff.

20) Separate bison herd

Comment: One commenter suggested that the Tribes start a bison herd of their own, on Tribal land, while leaving the National Bison Range a National Wildlife Refuge.

Response: Starting its own herd elsewhere on the Reservation would not reunite the Tribes with either the land that had been taken from its Reservation or the bison herd which Tribal members had helped make possible. Nor would this approach of separate herds address the issue of how the Tribes could partner with the U.S. Fish & Wildlife Service at the National Bison Range. This partnership question has consumed a great deal of Tribal and federal resources over the last 22 years, since the passage of the Tribal

Self-Governance Act. The Act would resolve that question by restoring the Bison Range to federal trust ownership for the Tribes.

21) Revising financial assistance to Counties

Comment: One commenter suggested that the Tribes’ draft legislation could either lengthen the time period for phasing out the Refuge Revenue Sharing payments to Sanders and Lake Counties, or increase the amount of such payments to those Counties.

Response: The Tribes appreciate this suggestion, and share the concern of easing any transition in the Counties’ budgets. The Tribes have considered alternatives to the provisions in Section 4(f) of the draft Act, and have discussed alternatives with both Sanders and Lake Counties. Those discussions may result in changes to this part of the draft legislation.

22) U.S. Fish & Wildlife Service motives

Comment: One commenter questioned the motives of the U.S. Fish & Wildlife Service in supporting the proposed Bison Range restoration, and asserted disbelief that the FWS support arose from either concern for tribal self-governance or conserving limited federal resources.

Response: The Tribes cannot speculate as to the reasoning behind FWS support for the Tribes’ proposed legislation. However, FWS Director Dan Ashe has stated in correspondence that

[t]he plain fact is, the Salish-Kootenai are very capable managers. They can manage [the National Bison Range] and this herd. They very much want to do this. The land will be held in trust, by the BIA, on behalf of the CSKT, for the original purposes, so it will be protected, in perpetuity.

. . . There is only one reason that I am supporting this: It is the right thing to do! And sometimes, doing the right thing is scary. But as Martin Luther King taught us, “It is never the wrong time to do the right thing.”

Director Ashe’s statement above finds support in the recently-revised FWS Native American Policy, which talks about furthering “the United States’ and the Department of the Interior’s trust responsibility to federally recognized tribes to protect, conserve, and use tribal reserved, treaty guaranteed, or statutorily identified resources.”

23) Bison Range Working Group

Comment: One commenter asked which parties constituted the Bison Range Working Group.

Response: The Working Group currently consists informally of the comments submitted on the Working Group website established by the Tribes. The Tribes have met with conservation group representatives to discuss our draft legislation, and the Tribes expect to continue this discussion now that public comments have been received and posted.

The Tribes have also met with the Lake and Sanders County Commissions, and expect to continue that dialogue as well. Depending on future discussions/participation, the Working Group may become a more formalized body.

24) **Herd Capacity**

Comment: Some commenters asked about bison population management and culled bison.

Response: Surplus wildlife and removal of bison or other wildlife are addressed in the National Bison Range’s existing management plan. Bison would continue to be culled as necessary to maintain the genetic diversity of the herd and the carrying capacity of the range. The Tribes would manage the culled bison via auction, similar to the current program. The Tribes are always open to suggestions and idea regarding disposition of culled bison and may consider other options in the future.