



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

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June 4, 2019

Submitted via email only to: cgplanrevision@fs.fed.us

Custer Gallatin National Forest
Attn: Forest Plan Revision Team
P.O. Box 130
10 East Babcock
Bozeman, MT 59771

**Re: *Nez Perce Tribe's Comments on the Draft Environmental Impact Statement
and Draft Revised Forest Plan for the Custer Gallatin National Forest***

Dear Forest Plan Revision Team:

On behalf of the Nez Perce Tribe (Tribe), thank you for the opportunity to comment on the Draft Environmental Impact Statement (DEIS) and Draft Revised Forest Plan (Plan) for the Custer Gallatin National Forest (Forest).

According to the Plan, its purpose is to have an integrated set of plan direction to provide for social, economic, and ecological sustainability and multiple uses of the Custer Gallatin National Forest lands and resources. Using the 2012 Planning Rule, the Plan sets the overall context for informed decision making by evaluating and integrating social, economic, and ecological considerations relevant to management of the forest.

The Tribe reserved, and the United States secured to the Tribe, in its 1855 Treaty, "the right to fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed lands."¹

The lands and waters of the Custer Gallatin National Forest (Forest) are part of the Tribe's vast aboriginal territory, over which the Tribe has treaty-reserved rights. As fiduciary, the United States and all its agencies, including the Forest, owe a trust duty to the Tribe to protect all of its treaty-

¹ Treaty with the Nez Percés, June 11, 1855, 12 Stat. 957.

reserved resources.² This trust relationship has been described as “one of the primary cornerstones of Indian law”³ and has been compared to the relationship existing under the common law of trusts, with the United States as trustee, the tribes as beneficiaries, and the property and natural resources managed by the United States as the trust corpus.⁴

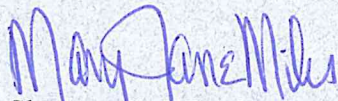
This duty includes the protection of the habitats on which the Tribe’s treaty-reserved resources rest because the right to take fish and other resources reserved by the Tribe presumes the continued existence of the biological conditions necessary to support the treaty-reserved resources.⁵

The Tribe is also a co-manager of its treaty-reserved resources. Due to the Tribe’s enormous stake in ensuring that its members may continue to access and exercise treaty rights within the Tribe’s aboriginal territory for future generations, the Tribe devotes substantial time, resources, and effort into restoring fish, wildlife, and their habitat on National Forest Service lands. These improvements not only benefit the Tribe but also members of the general public who reside near or travel to National Forests.

After review of the DEIS and Plan, the Tribe supports Alternative D because it emphasizes natural process themes, includes robust objectives for restoration, provides key linkage areas for wildlife habitat connectivity, and is the most proactive alternative for bison and bighorn sheep, and overall ecological integrity of ecosystems managed by the Forest.

Thank you again for the opportunity to provide comments. The Tribe’s technical comments that follow this letter reflect the policy views and technical concerns of the Tribe. The Tribe reserves the right to provide additional comments in conjunction with the June 11, 2019 government-to-government consultation in Lapwai. You are welcome to contact Mike Lopez, Nez Perce Tribe Staff Attorney, at (208) 843-7355 or mlopez@nezperce.org, with any questions or concerns.

Sincerely,



FOR Shannon F. Wheeler
Chairman

² See *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987); *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

³ Felix Cohen, *Handbook of Federal Indian Law* 221 (1982).

⁴ See, e.g., *Mitchell*, 463 U.S. at 225.

⁵ See *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985), cert. denied, *Sunnyside Valley Irrigation District v. United States*, 474 U.S. 1032 (1985).

NEZ PERCE TRIBE'S COMMENTS ON THE
DRAFT ENVIRONMENTAL IMPACT STATEMENT AND DRAFT REVISED FOREST
PLAN FOR THE CUSTER GALLATIN NATIONAL FOREST

I. GENERAL COMMENTS

a. The Need to Adopt Enforceable Standards Over Guidelines

As the Forest is aware, standards are generally understood as legally enforceable, binding and mandatory requirements with which the Forest Service must comply through NFMA planning regulations or individual forest plans. 16 U.S.C. § 1604(i). Courts have consistently viewed standards as "mandatory requirements." In contrast, guidelines are merely "discretionary." *See e.g. Miller v. United States*, 163 F.3d 591,594 (9th Cir. 1998).

While the 2012 Planning Rule states that compliance with both standards and guidelines is mandatory (Federal Register/ Vol. 77, No. 68 / Monday, April 9, 2012 / Rules and Regulations Pg. 21172), understanding how the Planning Rule defines and interprets "guidelines" in the context of forest management is important. Guidelines "allow[] for either strict adherence to the terms of the guideline, or deviation from the specific terms of the guideline, so long as the purpose for which the guideline was included in the plan is met." *Id.* at 21206. The Tribe is concerned that this characterization of guidelines, even if enforceable, vests substantial discretion in Forest managers to unilaterally determine the circumstances under which the agency may "deviate" from a guideline while meeting the guideline's purpose. Courts tend to defer to the agency in how to best achieve and implement standards. The Tribe believes courts may likely approach "mandatory" guidelines similarly, affording the agency substantial deference and flexibility in defending its views on when, why and how a guideline meets its intended purpose when applied to a multitude of site-specific projects. This broad agency discretion to control when guideline deviations are warranted gives rise to vagueness, ambiguity, uncertainty and political and legal unaccountability which ultimately undermine NFMA's overarching goal to "insure" the protection of various resources. 16 U.S.C. § 1604. The Tribe requests that the Forest Service establish more standards and discourage adopting guidelines because standards (1) safeguard consistency and political accountability; and (2) improve efficiency by eliminating the need for Forest staff to negotiate project-specific rules and regulations on each individual project. If the Forest Service wants to maintain or increase flexibility, then the agency can provide specific exemptions to the standard that are articulated at the forest plan level. Moreover, the 2012 Planning Rule provides a solid adaptive management framework in which the Forest Service can change standards based on changed conditions. The biennial evaluation and report of monitoring information is such a process

Any changes in standards or guidelines in the Plan should be placed in an appendix table for reference. Each change should be shown, rationale provided, and its location in the document. Such a table would provide a helpful summary of management changes from old to new and help readers find these changes in the new document.

b. Forest Service's Responsibilities to the Tribe

The Tribe is pleased that the Forest has included Section 2.4.3 “Areas of Tribal Importance (American Indian Rights and Interests)” in the Plan. This section correctly acknowledges the sovereign status of Indian tribes, as well as the unique rights, interests, and governing process requiring coordination and consultation in order to ensure the Forest Service meets its trust responsibilities to the tribes. The Tribe also appreciates the Forest’s definition of trust responsibility as “the U.S. Government’s permanent legal obligation to exercise statutory and other legal authorities to protect tribal lands, assets, resources, and treaty rights.”

In the second sentence of the second paragraph, please make the following changes: “Among the treaty rights reserved by **certain** Tribes are the rights to fish at all usual and accustomed fishing places, as well as to hunt, gather, **pasture animals on open and unclaimed lands** in a manner that would allow them to maintain their traditional way of life.”

To safeguard the Forest Service's ongoing responsibilities to the Nez Perce Tribe and other federally-recognized Indian tribes, the Tribe requests that the agency amend Standard 02 in the Plan to read "**Any project, new developments or** land management activity shall avoid, minimize, or mitigate potential conflict with forest resources **used in the exercise of treaty reserved rights** and for traditional cultural practices.”

In addition, the Tribe requests that the Forest include the following additional standard regarding consultation on agency projects that may affect Tribal rights and interests: “The Forest shall ensure the opportunity for timely and meaningful consultation on any agency project, new development, or land management activity that may affect the rights and interests of Indian tribes.”

c. At-Risk Plant Species

The Tribe supports the additional goals, objectives, and standards in the Plan for at-risk plant species, and Objective FW-OBJ-PRISK under Alternative D – “Progress towards conservation of an at-risk plant species is made by completing at least three projects per decade with design features that restore habitat or populations of such species.”

d. Species of Conservation Concern (SCC)

Considering the Forest’s diverse ecology, geographic span, and habitat for a number of regionally at-risk species, the Tribe is concerned that bighorn sheep and bison are not designated SCC in the Plan. The Tribe acknowledges that all revised plan alternatives include plan components for bighorn sheep and bison, however, the Forest has an opportunity to set precedent for these species by designating them as SCC. There is substantial concern regarding the long-term persistence of these species in the planning area.

e. Bighorn Sheep

Lands managed by the Forest Service provide habitat essential to the persistence of native bighorn sheep in the American West. However, the scientific evidence shows that the presence of domestic sheep on and adjacent to bighorn sheep habitat impairs ecological conditions required by bighorn sheep on Forest Service lands. The Tribe's vision for bighorn sheep is for full population restoration across all suitable historic range (Figure 1). Fragmentation of habitat and presence of domestic sheep and goats do not lend to long-term persistence of bighorn sheep on the Forest.

The Tribe supports Alternative D that does not allow permitted use of domestic sheep or goats (grazing or outfitting), public use of recreational pack goats, and agency use of domestic sheep or goats for weed control. The Forest can set a high standard for bighorn sheep recovery and conservation on National Forest Lands by selecting Alternative D.

The Tribe recommends that the Forest actively pursue and complete projects designed to maintain or improve habitat for bighorn sheep (e.g. Objective FW-OBJ-WL-02 under Alternative D).

The Tribe recommends revising Goal FW-GO-WLBHS-01 to read (changes in bold): “**The Forest Service engages** with Tribal governments, State wildlife management and livestock health agencies, livestock permittees or producers, targeted weed sheep or goat operators, and pack goat users to develop livestock management protocols and habitat management strategies to minimize risk of disease transmission between domestic livestock and native bighorn sheep.”

Furthermore, how does Goal FW-GO-WLBHS-01 apply under Alternative D?

f. Bison

Forest lands provide irreplaceable habitat for Tribal treaty-reserved resources including pronghorn antelope, elk, mule and white-tailed deer, bighorn sheep, and bison. Although all these species are important to Tribal members, wild bison are central to Tribal members' culture. For centuries, the Tribe depended on bison as a source of food, clothing, and shelter in order to survive on the open plains.

Bison are the only wild North American ungulate that has not been recovered across significant portions of their historic range (Figure 2).⁶ Unlike species such as bighorn sheep and pronghorn, bison have received little to no tolerance on private or public lands outside of national parks, tribal lands, and refuges. This has prevented them from being recognized as the wild and free-ranging species they are and has limited conservation efforts.⁷

Improved habitat on Forest lands would enable increased population numbers while reducing ecological impacts to the Yellowstone National Park (YNP) landscape, to which the bison have been recently limited. Increased use of the Forest by bison may also provide some relief to other native wildlife species, such as elk, that share and compete for limited habitat in YNP.

⁶ Lott 2002; Freese et al. 2007; Bailey 2013.

⁷ Lott 2002; Plumb and Sucec 2006; Bailey 2013.

The Tribe supports Alternative D because it is the most proactive for bison with a desired condition for a year-round, self-sustaining population on the Forest, robust objectives for habitat improvement projects, preference for bison management over livestock management within the bison management zones, and no exceptions for management actions specifically designed to control bison movement.

g. Monitoring Plan

Tribe asks that the Forest identify and describe the list of focal species and add effectiveness of projects related to big game security to the Monitoring Plan. In addition, the Tribe advises that the Forest include a monitoring component to prevent disease transmission from domestic sheep or goats to bighorn sheep populations.

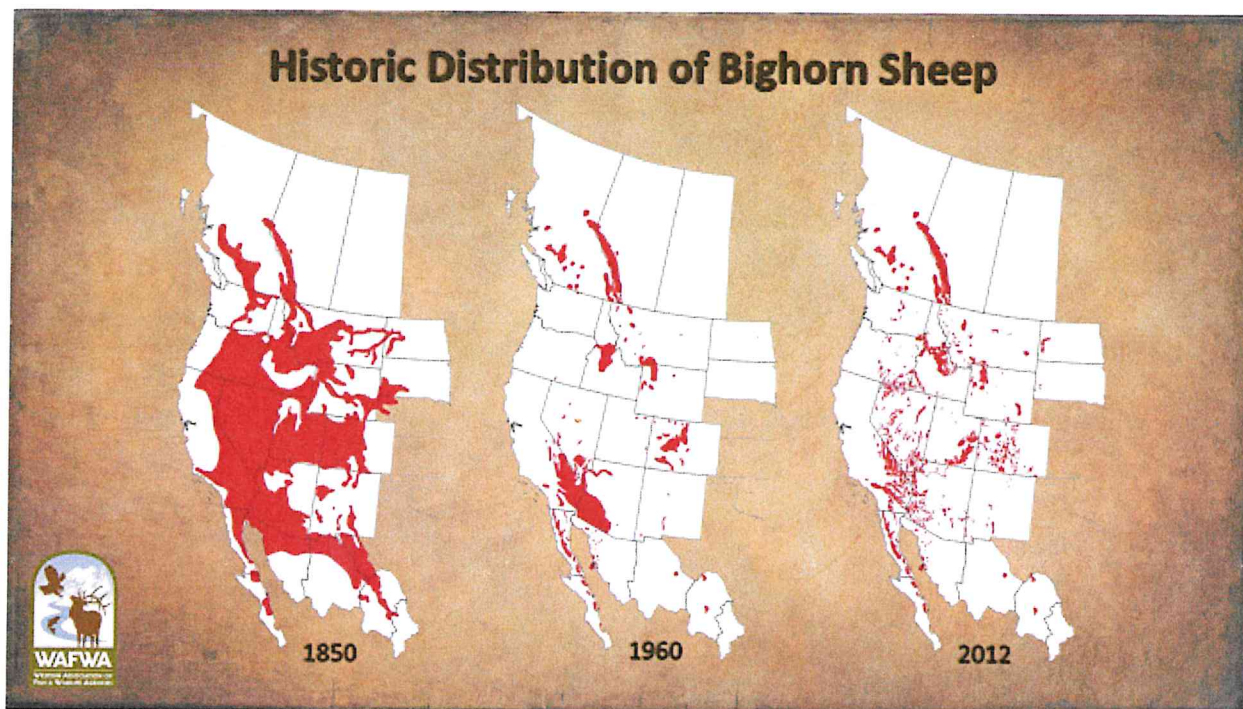


Figure 1. Distribution of bighorn sheep over time in the American West. Conservation funding is the result of recovery success, however, fragmented populations and presence of domestic sheep and goats do not lead to long-term persistence or full recovery. (Wild Sheep Foundation and WAFWA; https://www.wafwa.org/committees_groups/wild_sheep_working_group/maps/)

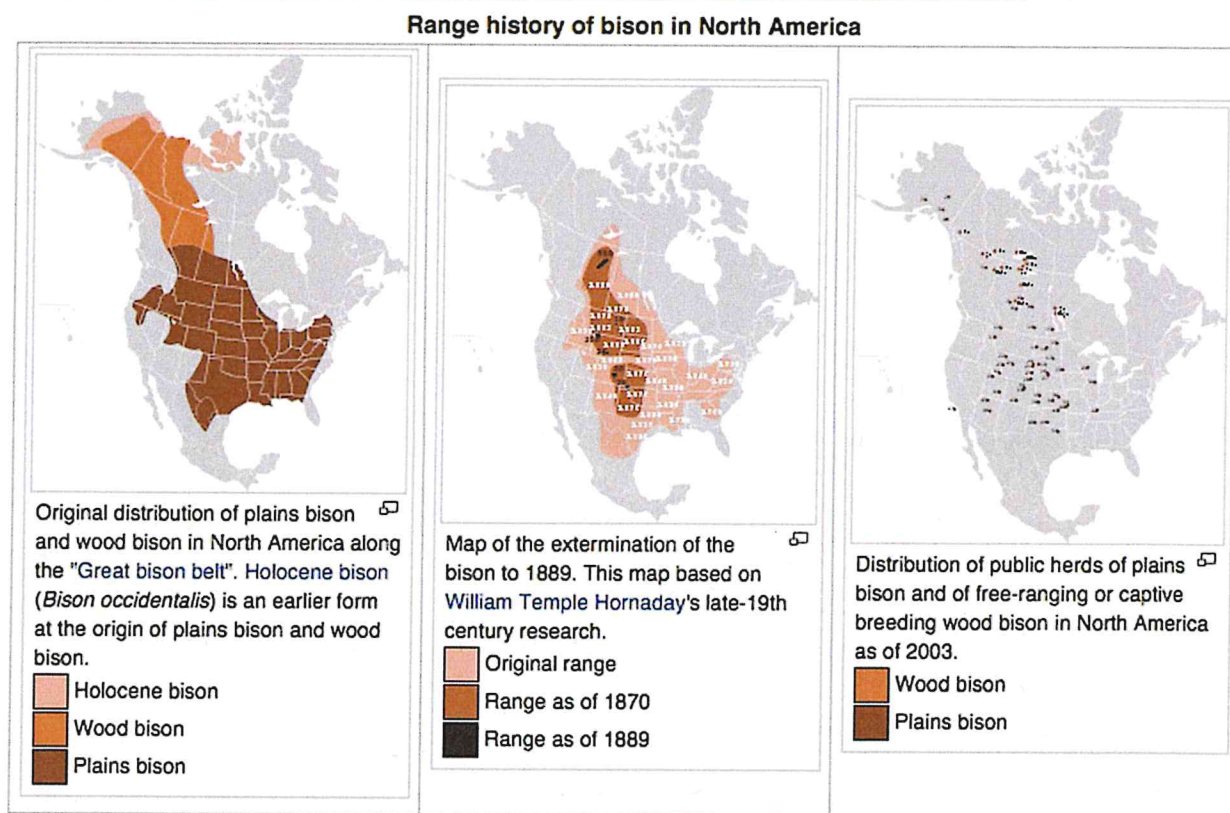


Figure 2. Distribution of bison over time in North America. (Feldhamer et al. 2003)

References

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- Freese, C.H., Aune, K.E., Boyd, D.P., et al. 2007. Second chance for the plains bison. *Biological Conservation* 136: 175-184.
- Lott, D.F. 2002. American bison. A natural history. University of California Press, Berkeley, California.
- Plumb, G.E., Sucec, R. 2006. A bison conservation history in the US National Parks. *Journal of the West* 45: 22.