



Montana Natural Resource Coalition

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March 4th, 2024

U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS: PRB (JAO/3W)
Falls Church, VA 22041– 3803
Attn: FWS–HQ–NWRS– 2022–0106

RE: National Wildlife Refuge System; Biological Integrity, Diversity, and Environmental Health (BIDEH) 50 CFR Part 29 and 601 FW 3

Assistant Secretary Shannon Estenoz,

The Montana Natural Resource Coalition (MtNRC) is a network of eighteen (18) counties who have county governmental jurisdiction over 53,814 square miles in the State of Montana. MtNRC's mission is to inform federal agency rulemaking pertaining to land use, natural resource planning, and advocating on behalf of our membership. Current MtNRC members include Beaverhead, Blaine, Fergus, Garfield, Liberty, Madison, McCone, Musselshell, Pondera, Petroleum, Phillips, Powder River, Prairie, Richland, Roosevelt, Sweet Grass, Valley, and Wibaux Counties.

MtNRC has already submitted comments to United States Fish and Wildlife Service (USFWS) on two other processes regarding refuge management. Some of the procedural issues and other concerns we identified relate to the current proposal, therefore we are including those comments as part of this submittal. One thing we noted was the failure to consult with and coordinate USFWS policy and management development and decisions with local governments and adjacent property owners. As for this current proposed BIDEH regulation and policy changes our potentially affected member counties were not provided with any advance notice.

The USFWS has decided to lump a policy revision to their manual (601 FW 3) and inserting new BIDEH regulations into the code of federal regulations (CFR) in a single process. Though these items correlate they should be separate processes in order to provide utility to the commenting public. The USFWS has not adequately demonstrated at the unit level that climate change and anthropogenic stressors are indeed transforming the ecological function of habitats on individual refuge systems.

- The Climate-Policy Agenda (CPA) is deficient in that it fails to comply with the Data Quality Act standards for scientific information, and inappropriately relies upon top-down executive directives and international guidance while significantly diminishing intergovernmental coordination with political sub-divisions of the United States.
- The CPA agenda has resulted in a fragmented public record, and diminished the role, power, and authority of State and local governments by removing parity they have in land-use planning.
- USFWS proposed policies fail to consider interagency land use planning conflicts and impacts to private property and local governments by imposing the expansion of refuge boundaries and prioritizing pre-human conditions and ecosystem corridors.¹
- The proposed Rule does not contain peer reviewed scientific information, data, articles, and/or other substantive, high integrity, reproducible scientific information that would allow MtNRC county governments to understand the need, purpose, and foreseeable impacts of the proposed Rule.
- The administrative record for the proposed Rule does not contain examples of climate change or invasive species that would allow MtNRC members to conclude why the BIDEH regulations are necessary.
- The BIDEH as proposed prioritizes management that would further pressure compatible uses on individual refuges which have long established compatible and historic use.²
- The proposed BIDEH Rule in conjunction with the Missouri Headwaters Conservation Area and the land planning policy changes constitute a group of concerted efforts³ by USFWS which poses unassessed impacts on the state and counties which contain or border the refuge systems.

Background

On September 15th of 2023 the United States Fish and Wildlife Service (USFWS) issued a proposed rule on the Federal Register to update planning policies, 602 FW 1–4,⁴ for the National Wildlife Refuge System (Refuge System). The purpose of these policy updates is stated to modernize the Refuge System's management by incorporating landscape conservation plans and consideration of climate change and other anthropogenic forces in refuge management. Neither landscape conservation planning, nor climate change and other anthropogenic forces are mentioned within the National Wildlife Refuge System Improvement Act.⁵

We identified in our comment on this proposed rule,

“ . . . that it is clear that USFWS and their partners desire to apply landscape scale ecoregional planning which could reach far outside of wildlife refuge boundaries. The fact that the proposed policy would allow Service partners to develop landscape plans which delineate ecoregional units

¹ Federal Register / Vol. 89, No. 23 / Friday, February 2, 2024 / Proposed Rules – “*Historical conditions* means composition, structure, and function of ecosystems that **existed prior to ecological degradation caused by anthropogenic change**, based on best available scientific and historical information.” (all bold, emphasis ours)

² “This proposed language would untether current and future management actions from sustaining historical conditions that may no longer be possible on many refuges,” the FWS said.

³ CFR 1508.1(q)(3) “**Major Federal actions** tend to fall within one of the following categories: (iii) Adoption of programs, such as a **group of concerted actions to implement a specific policy or plan**; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or **executive directive**.” (emphasis ours)

⁴ [Federal Register :: National Wildlife Refuge System Planning Policies \(602 FW 1-4\) for the U.S. Fish and Wildlife Service](#)

⁵ *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022) “. . . We presume that ‘Congress intends to make major policy decisions itself, not leave those decisions to agencies.’ *United States Telecom Assn. v. FCC*, 855 F. 3d 381, 419 (CA DC 2017); “. . . it is unlikely that Congress will make an ‘[e]xtraordinary gran[t] of regulatory authority’ through ‘vague language’ in ‘a long-extant statute.’” Ante, at 18–20 (quoting *Utility Air*, 573 U. S., at 324).”

outside of refuge boundaries in order to inform refuge planning is concerning to adjacent property owners and local governments with special expertise and jurisdiction by law.”

On September 20th of 2023 the USFWS published the proposed Missouri Headwaters Conservation Area, which as proposed, would authorize the Service to facilitate the acquisition of up to 250,000 acres of conservation easements within the 5.7-million-acre boundary. USFWS failed to **published this on the Federal Register** but instead published notice on its website starting a public scoping period on the 20th of September. Initially the scoping period was slated to end on the 26th of October. After another letter being issued by the Montana Attorney General’s office the window was extended to the 27th of November.

After reviewing a response to a FOIA request on this item it is evident that USFWS and partners violated the Administrative Procedures Act and failed to disclose maps and other information. This information confirmed that the conservation area is indeed a Land Protection Plan (LPP, see attachment I) making it a part of the refuge system and therefore presumably subject to the refuge system BIDEH and land planning policies and regulations that USFWS is promulgating.

Now USFWS is proposing the BIDEH policy into the Code of Federal Regulations in parallel with BIDEH policy revision at 601 FW 3. This notice was published on the federal register on February 2nd, 2024, with a 30-day comment period. The Federal Register states that,

“The Service did not anticipate the extent of climate change impacts on refuge species and habitats or the need to clarify in regulations our interpretation of and authority to implement the BIDEH mandate.”

This statement is made and asserted without cited references or empirical data that shows climate change is transforming species composition and ecological function of habitats.⁶ To the contrary the CMR game refuge in Montana is stable and has remained largely unchanged in ecological composition and presence of wildlife. One significant negative impact on the refuge is the USFWS has been retiring Grazing permits recognized in Animal Unit Months (AUMs) off the range in spite of the long established historical compatible use under the Taylor Grazing Act and reserved grazing districts which predate the establishment of the CMR.⁷

USFWS proposed policy and regulations conflict with individual refuge priorities

The USFWS asserts that climate change has had an unanticipated impact on the refuge system. This assertion needs to be rationally verified and documented at the unit level with full consultation with counties and adjacent land holders. The proposed regulations prioritize focusing on pre-human conditions within the refuge system (which includes conservation buffers) and inappropriately leave discretion to unit managers to alter wildlife and biodiversity targets.

FWS said,

⁶ “[I]n order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method,” “any and all scientific testimony or evidence admitted [must be] ...reliable,” “tested,” and “supported by appropriate validation.” *Daubert v. Merrell Pharmaceutical, Inc.*, 509 U.S. 579 (1993) (emphasis added). As to peer review, the Supreme Court similarly explained that peer review can be helpful but “does not necessarily correlate with reliability” because “in some instances well-grounded but innovative theories will not have been published.” *Daubert*, supra, p. 593.

⁷ On December 11, 1936, President Roosevelt signed Executive Order 7509, establishing the Fort Peck Game Range (FPGR). FPGR, the precursor to the Charles M. Russel Wildlife Refuge (CMR), specifically provided that lands previously withdrawn or reserved “will be affected hereby only insofar as may be consistent with the uses and purposes for which such prior withdrawal or reservation was made.”; This Executive withdrawal performed under the authority of the Picket Act of 1910 was done “subject to all valid existing rights” and were “reserved and set apart for the conservation and development of natural wildlife resources and for the **protection and improvement of public grazing lands and natural forage resources.**”

"This proposed language would untether current and future management actions from sustaining historical conditions that may no longer be possible on many refuges,"

The organic act for the National Wildlife Refuge System requires that each individual refuge is managed to fulfill the specific purpose for which the refuge was established,

*"With respect to the Refuge System, it is the policy of the United States that – (A) each refuge shall be managed to fulfill the mission of the System, as well as the **specific purposes for which that refuge was established**...." [NWRS Improvement Act, Section 5(a)(3)]*

When there is a conflict between system goals and individual refuge purposes, the statute provides deference to the individual priority scheme.

*"...ensure that the mission of the System described in paragraph (2) and the purposes of each refuge are carried out, except that if a conflict exists between the purposes of a refuge and the mission of the System, **the conflict shall be resolved in a manner that first protects the purposes of the refuge**, and, to the extent practicable, that also achieves the mission of the System; (NWRS Improvement Act Section 5 (a)(4)(D))*

The proposed regulations define historical conditions,

*"Historical conditions means composition, structure, and function of ecosystems **that existed prior to ecological degradation caused by anthropogenic change**, based on best available scientific and historical information."*

The UFWFS then under the heading of diversity states,

*"We evaluate diversity by referencing **historical conditions**, recognizing that climate change and other **anthropogenic change** are influencing refuge ecosystems."*

So USFWS is directing unit managers to focus their evaluations for "diversity" based on conditions prior to anthropogenic (human) influence. The regulations also correspond to the USFWS policy proposals last year for landscape planning goals (see attachment I). Here is how they address *Conserve and Connect Habitat* in the FR,

*"(2) Conserve and connect habitat. We allow for and defer to natural processes on habitats within the Refuge System and promote conservation, restoration, and connectivity to meet refuge habitat objectives and **landscape planning goals** (the earlier policy changes USFWS issued last year redirect their landscape planning goals). We will avoid and minimize habitat fragmentation to sustain biological integrity and diversity. **When natural processes cannot meet habitat objectives or facilitate adaptation to anthropogenic change, we will use science-based management techniques or acquire lands** when necessary to meet statutory requirements, fulfill refuge purposes, and ensure biological integrity, diversity, and environmental health."*

Therefore, if natural processes do not produce the results of management level biodiversity and connectivity objectives the service will acquire lands to accomplish what for all intents and purposes are arbitrary administrative goals. The proposed regulations then explicitly prohibit agricultural practices unless they are deemed necessary (by whom?) to fulfill refuge purposes which under the proposed regulations will likely be heavily mitigated,

*"(6) **Agricultural uses.** We prohibit the use of agricultural practices unless they are determined necessary to meet statutory requirements, fulfill refuge purposes, and ensure biological integrity, diversity, and environmental health, and where we cannot achieve refuge management objectives through natural processes."*

These policies conflict with statutory requirements and long-established compatibility uses on certain refuges. USFWS has failed to address or assess these conflicting priorities and is imposing policy changes which will create more conflict and confusion over time.

*a. **Proposed policies pose conflicting and competing priorities for refuge managers (CMR case example)***

Executive order 7509 which established the CMR Game Range recognized the existing TGA reserved districts and required the domestic livestock grazing be administered under the TGA, the history of the range proves domestic livestock has always enjoyed a secondary use and by custom has long been a compatible use on the range. The proposed regulations run counter the organic act of the refuge system which explicitly states,

*"With respect to the Refuge System, it is the policy of the United States that – (A) each refuge shall be managed to fulfill the mission of the System, as well as the **specific purposes for which that refuge was established...**" [NWRIS Improvement Act, Section 5(a)(3)]*

The Act also points to specific documentation in order to determine the purposes of each refuge,

*"...purposes of a refuge and purposes of each refuge mean the purposes specified in or derived from the law, proclamation, **executive order**, agreement, public land order, donation document, or administrative memorandum establishing, authorizing, or expanding a refuge, refuge unit, or refuge subunit."* (Refuge Improvement Act, Section 5)

On December 11, 1936, President Roosevelt signed Executive Order 7509, establishing the Fort Peck Game Range (FPGR). FPGR, the precursor to the Charles M. Russel Wildlife Refuge (CMR), specifically provided **that lands previously withdrawn or reserved "will be affected hereby only insofar as may be consistent with the uses and purposes for which such prior withdrawal or reservation was made."**

This Executive withdrawal was performed under the authority of the Picket Act of 1910 and was "*subject to all valid existing rights*" and were "*reserved and set apart for the conservation and development of natural wildlife resources and for the **protection and improvement of public grazing lands and natural forage resources.***" This order also stated that "*the range or preserve, being within grazing districts duly established pursuant to the provisions of the TGA as amended by the 74th Congress, shall be under the exclusive jurisdiction of the Secretary of the Interior, so far as it relates to the public grazing lands and natural forage resources thereof.*"

April 13, 1942, the FPGR was expanded. Executive Order 9132 reserved an additional 7,474 acres of lands around the Fort Peck Dam and Reservoir for war department (US Army Corps of Engineers) use. The withdrawal **recognized that TGA Districts 1, 2 and 6 "will remain under the jurisdiction and administration of the Secretary of the Interior..." for protection of grazing lands...** Consistent with EO 7509, which recognized the duly established TGA grazing districts created by Departmental Orders of July 11, 1935, and October 6, 1935.

It is important to note that E.O. 9132s recognition of TGA districts 1, 2, and 6 was in reference to the entire game range not just the 7,474-acre legal description in the Order. If the Order were only referencing the

7,474-acre legal description regarding grazing districts it would not have included district 6 which is not within the legal description but overlays the southern portion of the game range to the west. TGA districts 1, 2, and 6 represent the three grazing districts duly established wherein the entirety of the Game Range overlays, the entirety of which E.O. 7509 applies.

Though the Congress shifted management of the refuge solely to USFWS and passed the the 1997 NWRSA to amend the 1966 act providing an organic act for the system, the Act itself in Sec. 5 (A) recognizes the “organic” specific purposes for which each individual refuge was established, and to manage each refuge for those specific purposes. E.O. 7509⁸ establishes the specific purposes for which the CMR was established and still applies to the refuge under the authority of the National Wildlife Refuge System Act.⁹

Conclusion

In this letter we mainly address problems with the 50 CFR Part 29 and did not have the time to address the policy revision at 601 FW 3. We hold that USFWS should not have lumped these processes into a single notice with only 30 days to comment. The proposed CFR and policy changes are not rationally justified from our review and should be withdrawn. The Code of Federal Regulations are supposed to direct agencies in a way to maintain compliance with statutory mandates and priorities, and then policy is developed for management level staff and personnel to assure compliance with the CFR and organic laws that govern the system. The USFWS in issuing novel CFR into the code while simultaneously revising their BIDEH policy in the same notice shows disregard for the commenting public and effected landowners and governments.

It is clear that USFWS and their partners desire to apply *landscape scale* ecoregional planning which could reach far outside of wildlife refuge boundaries. The fact that the proposed policy would allow Service partners to develop landscape plans which delineate ecoregional units outside of refuge boundaries in order to inform refuge planning is concerning to adjacent property owners and local governments with special expertise and jurisdiction by law.

The policy changes proposed appear to remove emphasis regarding the requirements for USFWS to obtain information and data relating to each planning area from private landowners concerning land management issues that may impact or relate to the planning unit. This is especially important in cases such as with the CMR game refuge or other refuges where cattle producers have a priority use of the refuge for domestic livestock grazing purposes under the Taylor Grazing Act and other authorities.¹⁰

The system-wide policy cannot be used in such a way to repurpose game refuges for priorities inconsistent with the original purposes. Long established uses on certain game refuges have established customs and

⁸ The 9th circuit in 1983 concluded: “The legislative history on this point is more indicative of confusion regarding the existing priority scheme than of an intent to change priorities. Many legislators seemed to think E.O. 7509 had established an absolute wildlife priority. Such confusion is not sufficient to revoke E.O. 7509. We thus hold that P.L. 94-223 did not revoke the priority scheme for access to the resources of the Range established by E.O. 7509.”

⁹ 43 USC 1701(f) Savings provisions “Nothing in this Act shall be deemed to repeal any existing law by implication.”; National Wildlife Refuge System Administration Act of 1966 16 USC § 668dd (h) “Regulations applicable to areas of the System that are in effect on the date of enactment of this Act shall continue in effect until modified or rescinded.”; “It is the law of our circuit that revocation or modification of an existing withdrawal should be express to be effective.” See *United States v. Consolidated Mines and Smelting Co., Ltd.*, 455 F.2d 432, 445-46 (9th Cir.1971); “Repeal of a statute or order by implication is not favored.” *Watt v. Alaska*, 451 U.S. 259, 267, 101 S.Ct. 1673, 1678, 68 L.Ed.2d 80 (1981)

¹⁰ MCA 76-16-102; 43 USC § 1901(a)(4), (5); 43 USC § 315b; 43 CFR § 4100.0-2; [The Repurposing of Federally-Reserved Taylor Grazing Districts For Wildlife Rewilding: A Statutory, Administrative and Legal Analysis](#). Stillwater Technical Solutions. April 22, 2020. J.R. Carlson et. al.

cultures by use and law. In many cases bona-fide occupants and settlers have maintained active use on the range since before the refuge was established.

These and other valid existing rights must be accounted for and protected in any policy which may impact or seek to change the priority scheme of the refuge. This should include advanced notification, consultation, and coordination with adjacent property owners and local and state governments regarding associated lands and waters.

Find also attached to this letter comments we submitted on the revision of 602 FW 1-4 and the Missouri River Headwaters Conservation Area which identify substantive concerns and failure to consult with and coordinate such processes with affected private land holders and local governments.

Regards,



Montana Natural Resource Coalition

Attachment I

MtNRC Substantive Comment

RE: National Wildlife Refuge System Planning Policies (602 FW 1–4) for the U.S. Fish and
Wildlife Service (Attn: Docket No. FWS–HQ–NWRs–2023–0024)

10-16-23



Montana Natural Resource Coalition

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October 16, 2023

Policy and Regulations Branch
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS: PRB (JAO/3W)
Falls Church, VA 22041-3803

RE: National Wildlife Refuge System Planning Policies (602 FW 1-4) for the U.S. Fish and Wildlife Service (Attn: Docket No. FWS-HQ-NWRS-2023-0024)

To whom it may concern,

The Montana Natural Resource Coalition (MtNRC) is a network of seventeen (17) counties who have county governmental jurisdiction over 48,934 square miles in the State of Montana. MtNRC's mission includes research, policy engagement of federal agencies in land use and natural resource planning, and advocacy at the agency and executive level on behalf of our membership. Current MtNRC members include Beaverhead, Blaine, Fergus, Garfield, Liberty, Madison, McCone, Musselshell, Pondera, Petroleum, Phillips, Powder River, Richland, Roosevelt, Sweet Grass, Toole, and Valley Counties.

Introductory Statements:

- Advanced notice and coordination with state and local governments and adjacent property owners must take place before a Land Protection Plan (LPP), Land Protection Strategy (LPS), and subsequent Comprehensive Conservation Plan (CCP) are developed, amended, or revised. (Sec. 2)

- USFWS Proposed Policy Objectives Inappropriately Target Private Lands for Acquisition.¹ (Sec. 3)
- Wildlife corridors and ecoregional planning, with associated buffer and acquisition zones, fail to balance the needs of the human environment and poses substantive statutory non-compliance issues. (Sec. 4)
- Indigenous knowledge falls short of Data Quality Act (DQA) and the Federal Land Policy Management Act (FLPMA) standards for interdisciplinary scientific information. (Sec. 5)
- National refuge system goals and plans are subordinate to individual refuge purposes.² The United States Fish and Wildlife Service (USFWS) must first make available all compatibility determinations and document the history of refuge establishment and management as well as original refuge purposes and authorizing authority.³ (Sec. 6)
 - Private special interest partners cannot be allowed to develop landscape plans which serve as source material for developing LPPs, LPSs, or CCPs.⁴

1. **Introduction:**

The institutionalization of climate change theory into executive branch policy is the mechanism currently imposing vast transformative impacts on the economy of the United States and political process which implicates the *major questions*⁵ doctrine. This is evidenced by dozens of rules and guidance being issued and promulgated within Department of Interior (DOI) and other federal departments pursuant to their climate action plans.

The United State Fish and Wildlife Service (USFWS) is proposing this policy change citing authority from the National Wildlife Refuge System Improvement Act

¹ Draft: 602 FW 1 Exhibit 1 Landscape Plan p. 1, **Acquisition Boundary** (also known as an Approved Acquisition Boundary). A defined area within which we are authorized to acquire all the acreage.; “The right to exclude is “a fundamental element of the property right.””; *Kaiser Aetna v. United States*, 444 U. S. 164, 179–180.; “**The right to exclude is ‘one of the most treasured’ rights of property ownership.**” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 435 (1982).; “According to Blackstone, the very idea of property entails ‘that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.’ 2 W. Blackstone, Commentaries on the Laws of England 2 (1766). In less exuberant terms, we have stated that **the right to exclude is ‘universally held to be a fundamental element of the property right,’** and is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” 594 U. S. *CEDAR POINT NURSERY v. HASSID* (2021) p. 7; Refuge Improvement Act Section 5 (a)(4)(E) (all bold emphasis ours)

² Refuge Improvement Act Section 5 (a)(4)(D) . . . ensure that the mission of the System described in paragraph (2) and the purposes of each refuge are carried out, except that if a conflict exists between the purposes of a refuge and the mission of the System, **the conflict shall be resolved in a manner that first protects the purposes of the refuge**, and, to the extent practicable, that also achieves the mission of the System. . . also see, NWRs Improvement Act, Section 5(a)(3); 601 FW 1, Section 1.15

³ Refuge Improvement Act Section 5 (c) . . .by express **provision of the law**, proclamation, **Executive order**, or **public land order establishing the area**, or amendment thereof. . .

⁴ Draft: 602 FW 1 Exhibit 1 Landscape Plan (p. 4): . . . A landscape plan **may be developed either by partners** or Service staff and **may be used as source material** for an LPP, LPS, or CCP. (Bold emphasis ours)

⁵ *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022)

(NWRS). The stated purpose of this policy revision is to incorporate landscape conservation planning and design, and the consideration of climate change and other anthropogenic forces in refuge management.⁶ Neither landscape conservation planning, nor climate change and other anthropogenic forces are mentioned within the NWRS.⁷ USFWS is directed to manage the refuges as a national network of lands and waters for the conservation, management, and where appropriate restore fish, wildlife, and plant resources and habitats.

With this current rule it is clear that USFWS and their partners desire to apply *landscape scale* ecoregional planning which could reach far outside of wildlife refuge boundaries. The fact that the proposed policy would allow Service partners to develop landscape plans which delineate ecoregional units outside of refuge boundaries in order to inform refuge planning is concerning to adjacent property owners and local governments with special expertise and jurisdiction by law.

The policy changes proposed appear to remove emphasis regarding the requirements for USFWS to obtain information and data relating to each planning area from private landowners concerning land management issues that may impact or relate to the planning unit. This is especially important in cases such as with the CMR game refuge or other refuges where cattle producers have a priority use of the refuge for domestic livestock grazing purposes under the Taylor Grazing Act and other authorities.⁸

The system-wide policy cannot be used in such a way to repurpose game refuges for priorities inconsistent with the original purposes. Long established uses on certain game refuges have established customs and cultures by use and law. In many cases bona-fide occupants and settlers have maintained active use on the range since before the refuge was established.

These and other valid existing rights must be accounted for and protected in any policy which may impact or seek to change the priority scheme of the refuge. This should include advanced notification, consultation, and coordination with adjacent property owners and local and state governments with jurisdiction by law regarding associated lands and waters.

⁶ The Federal Register Notice states: “*The purpose of the policy updates is to modernize the Refuge System’s refuge management by incorporating landscape conservation planning and design and consideration of climate change and other anthropogenic forces in refuge management.*”

⁷ “. . . We presume that “Congress intends to make major policy decisions itself, not leave those decisions to agencies.” *United States Telecom Assn. v. FCC*, 855 F. 3d 381, 419 (CA DC 2017); . . . it is unlikely that Congress will make an “[e]xtraordinary gran[t] of regulatory authority” through “vague language” in “a long-extant statute.” *Ante*, at 18–20 (quoting *Utility Air*, 573 U. S., at 324).

⁸ MCA 76-16-102; 43 USC § 1901(a)(4), (5); 43 USC § 315b; 43 CFR § 4100.0-2; [The Repurposing of Federally-Reserved Taylor Grazing Districts For Wildlife Rewilding: A Statutory, Administrative and Legal Analysis](#). Stillwater Technical Solutions. April 22, 2020. J.R. Carlson et. al; **Draft 602 FW 1 - 1.9** “*How does the Refuge System coordinate with the States and territories during refuge planning?*”

2. Coordination, Cooperation, and Notification of State and Local Governments and Private Landowners:

The coordination process was designed to ensure that proposed federal actions are responsive to local conditions, issues, needs, customs, cultures and economies. Where inconsistencies exist between proposed federal actions and existing local plans, laws, ordinances, and other policies, the federal agency is obligated to work with the coordinate government and attempt consistency with local plans and polices.

Counties have corporate powers and exercise constitutionally and legislatively-delegated state sovereignty over lands within their boundaries. Montana boards of County Commissioners serve as the Chief Executive authority of the County Government. Federal and state agencies are charged by law with administrative authority over lands within a Montana county, and all governmental entities are to act in the interest of the citizens as prescribed by their statutory authorities.⁹

Montana counties are acutely aware that federal and state managed lands can make up a substantial amount of area within the boundaries of an individual county. The customs, cultures, and economies of counties can directly be affected by changes in administrative or land use policy on federal and state lands. Most Montana Counties have officially adopted land use plans and policies that address land use management issues and provide a guide to assist federal and state land agencies in their development and implementation of land use plans and management actions.¹⁰

The Fergus County, Montana Land Use Policy states:

*“Therefore, in compliance with federal statues, federal and state agencies to the extent bound by federal law and regulation shall inform local governments of all pending actions affecting local communities and citizens and **coordinate with them in the planning and implementation of those actions.** The Fergus County Commission, when affected by such actions, shall be consulted and coordinated with in accordance with the constitutions and Laws of Montana and the United States.”¹¹*

In compliance with federal and state law, including the National Wildlife Refuge System Improvement Act (NWRS), National Environmental Policy Act (NEPA), the Federal Land Management and Policy Act (FLPMA), and the National Forest Management Act (NFMA), all federal and state agencies shall consider, to the maximum extent required by law, County Land Use plans and policies, and

⁹ Phillips County Resource Use Plan 2012 (Montana) (introduction) “State and federal agencies are charged by law with governing state and federal lands inside Phillips County’s political boundary in the best interest of all the citizens.”

¹⁰ 43 C.F.R. Section 1610.3-1(c)(1) “In providing guidance to BLM personnel, the BLM State Director shall assure such guidance is as “consistent as possible with existing officially adopted and approved resource related plans, policies or programs of other State agencies, Indian tribes and local governments that may be affected”

¹¹ Fergus County Land Use Policy 2011 (Montana)

coordinate with Montana boards of County Commissions for the purpose of planning and managing federal and state lands within the geographic boundaries of a county.

The NWRS Improvement Act specifically states at Sec. 5(a)(4)(E):

“ensure effective coordination, interaction, and cooperation with owners of land adjoining refuges and the fish and wildlife agency of the States in which the units of the System are located”

The Act further requires USFWS to consult with adjoining state, local and private landowners affected by comprehensive conservation planning which includes preliminary planning through LPPs, LPSs, or other landscape plans that inform the CCP process. Section 5(e)(3)(A) specifically states:

“In preparing each comprehensive conservation plan under this subsection, and any revision to such a plan, the Secretary, acting through the Director, shall, to the maximum extent practicable and consistent with this Act— (A) consult with adjoining Federal, State, local, and private landowners and affected State conservation agencies”¹²

The NWRS Improvement Act recognizes reserved state authority and jurisdiction relating to the management, control, and regulation of fish and wildlife under state law within the refuge system. NWRS Improvement Act Sec. 5(m):

“Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System.”

Valid existing water rights are unaffected under the NWRS Improvement Act. The Act does not reserve any water right to the United States for any purpose, nor does it affect any federal or state water quality or water quantity laws.

NWRS Improvement Act Sec. 5(n):

“Nothing in this Act shall— (A) create a reserved water right, express or implied, in the United States for any purpose; (B) affect any water right in existence on October 9, 1997; or (C) affect any Federal or State law in existence on October 9, 1997, regarding water quality or water quantity.”

a. USFWS Failed to Provide Adequate Notice and Involvement of Affected States and Counties in This Planning Effort

The USFWS ambition to incorporate landscape planning and design into its planning policies apparently led to the convening of five chartered national

¹² Also see, Refuge Improvement Act Section 5 (e)(4)(A) *“At a minimum, the Secretary shall require that publication of any final plan shall include a summary of the comments made by States, owners of adjacent or potentially affected land, local governments, and any other affected persons, and a statement of the disposition of concerns expressed in those comments.”*

service teams to update existing or develop new natural resource regulations, policies, and handbooks for the Refuge System. These chartered teams have been active for over a year.

The Federal Register states that,

“These draft policy updates were distributed for internal Service review throughout all Regions and programs within the agency in August of 2022. We provided an opportunity for State engagement through the Association of Fish and Wildlife Agencies in February 2023.”

It appears that these Chartered national service teams constitute an “*advisory committee*” as defined under the Federal Advisory Committee Act (FACA) at 5 U.S.C. Sec. 3(2) and therefore are subject to procedural requirements under the Act. Under Section 10 and Section 11 of FACA,¹³ within a reasonable timeframe of the submission of these comments, we request that all records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agendas, and other documents used to inform and develop these draft policies to be made available. We believe these Charters to be flawed by departing from the procedural statutes for “*advisory committees*,” **including notice in the Federal Register.**¹⁴

Up until the publication of the current FR notice for this proposed rulemaking our member Counties received no notice or information signifying this planning effort was underway. The Association of Fish and Wildlife Agencies is not sufficient to constitute government to government engagement with states and in particular County Governments that have a high likelihood of being affected by these policy changes.

This is becoming a common practice for USFWS regarding policies and initiatives within the state of Montana.¹⁵ The current proposed [Missouri River Headwaters conservation area](#) in southwestern Montana also falls short of adequate public notice and consultation with affected state governments.¹⁶ This conservation area directly relates to the current refuge planning policy changes because the Red Rock Lakes NWR and the associated Centennial Valley Easement Program is within the footprint of the [5.8 million acre conservation area](#).

¹³ 5 U.S.C. Sec. 10(b); Sec. 11(a)

¹⁴ 5 U.S.C. Sec. 9(a)(2); Sec. 10(a)(2) Our review has found no publication by agency heads on the federal register regarding the establishment of these “advisory committees” and the associated charter.

¹⁵ [Rep. Rosendale Requests an Open and Public Process as the Department of Interior Considers Reintroducing Bison in Montana | U.S. Representative Matt Rosendale \(house.gov\)](#); [LETTER-230321-Gov.-Gianforte-to-Sec.-Haaland-on-S.O.-3410.pdf \(mt.gov\)](#); [DOI - bison proposal FINAL 2021.11.09.pdf \(senate.gov\)](#)

¹⁶ [REP. ROSENDALE DEMANDS ANSWERS RELATING TO FISH AND WILDLIFE'S UNPRECEDENTED COVERT LAND GRAB | U.S. Representative Matt Rosendale \(house.gov\)](#); [AG Knudsen calls out USFWS for covert deal with ‘conservation oligarchs’ in Montana | Commentary | dillontribune.com](#);

There is a need to adequately assess the implications of such policy changes in conjunction with a group of concerted efforts¹⁷ within USFWS and DOI which may pose vast transformative impacts on the economy and policy of the State of Montana and its Counties. As a result, this current policy revision should be tabled pending the reception and assessment of relevant information to ensure compliance with FACA and all procedural requirements under relevant authorities.

3. USFWS Proposed Policy Objectives Inappropriately Target Private Lands for Acquisition:

The proposed landscape conservation planning applied to the refuge system inappropriately targets adjoining private lands for acquisition by seeking to establish acquisition boundaries. The proposed policy would allow for partners and/or service staff to develop a landscape plan (presumably outside of any public process) which then is used as source material for developing Land Protection Plans (LPPs), Land Protection Strategies (LPSs), and finally a Comprehensive Conservation Plan (CCPs).

The draft policy at **602 FW 1 – 1.5 – Overall Policy for Refuge Planning**, states at 1.5(B):

*“Refuge planning enhances conservation benefits **beyond the refuge boundaries**, by using **landscape planning and design** to inform refuge plans and management (see Exhibit 1 for a definition of “landscape planning and design”) and promotes connectivity across the landscape.”*

Exhibit 1 contains the glossary of terms for these policy changes. On pg. 4 Landscape Plan is defined as:

*“A document that includes the best available interdisciplinary scientific information on spatial and temporal conditions, vulnerabilities, risk, and opportunities for landscape-level conservation. A landscape plan **may be developed either by partners or Service staff and may be used as source material for an LPP, LPS, or CCP.**”*

This process will encourage public/private partnerships between USFWS and special interest partners which circumvents local governments, adjacent landowners, and the legislative process.

The Phillips County Land Resource Use Policy states:

*“Recognize that government agencies are relying on **Public/Private partnerships to gather information and to carry out the agendas of special***

¹⁷ CFR 1508.1(q)(3) **Major Federal actions** tend to fall within one of the following categories: (iii) Adoption of programs, such as a **group of concerted actions to implement a specific policy or plan**; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or **executive directive**. (emphasis ours)

interest groups bypassing the legislative process and the voice of the American people.”¹⁸

Any refuge planning or landscape plan which reaches outside refuge boundaries must provide advanced notice and coordination with state and local governments and adjacent property owners before a Landscape Plan, Land Protection Plan (LPP), Land Protection Strategy (LPS), and subsequent Comprehensive Conservation Plans (CCP) are developed, amended, or revised. Private special interest partners should not be allowed, without consultation and coordination with affected state and local governments, to develop landscape plans which serve as source material for developing LPPs, LPSs, or CCPs.¹⁹

Before an acquisition boundary is established around a refuge USFWS must first acquire written consent from landowners and local governments before including such lands within the boundary.²⁰ “*Every man is a proprietor in government, and considers it a necessary part of his interest, because it effects his property.*”²¹ He examines the cost and compares it with the advantages. The courts have consistently emphasized the private property owners *right to exclude* as one of the most essential sticks in the bundle of rights characterized as property:

“The right to exclude is “a fundamental element of the property right.””

Kaiser Aetna v. United States, 444 U. S. 164, 179–180.;

“**The right to exclude is ‘one of the most treasured’ rights of property ownership.**” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 435 (1982).

And that,

“According to Blackstone, the very idea of property entails ‘*that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.*’ 2 W. Blackstone, Commentaries on the Laws of England 2 (1766). In less exuberant terms, we have stated that **the right to exclude is ‘universally held to be a fundamental element of the property right,’** and is ‘*one of the most essential sticks in the bundle of rights that are commonly characterized as property.*”

- 594 U. S. *CEDAR POINT NURSERY v. HASSID* (2021)

¹⁸ Phillips County, Office of the Commissioners. (*Phillips County Land Resource Use Plan*) July 23, 2012, Constitutional Principles and Private Property, Objective 5a p.19

¹⁹ See definitions for Landscape Protection Plan and Landscape Protection Strategy at 602 FW 1 – Exhibit 1 p. 3 and 4

²⁰ Presidential Executive Order 13132, Federalism. 64 Fed. Reg. 43,255 (1999) - “*The national government should be deferential to the States when taking action that affects the policymaking discretion of States and should act only with the greatest caution where state or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.*”

²¹ Thomas Paine, *The Rights of Man* (1791)

a. Takings Implications

Presidential Executive Order 12630 requires federal agencies to analyze the economic effects or takings implications of their proposed policies, decisions, rules, and regulations on the private property, private property rights and investment backed expectations of individual citizens. The order directs administrative agencies to assess the potential takings of private property under the 5th and 14th amendments of the U.S. Constitution during their pre-decisional analyses.

“Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights.”²²

For the current proposal this means the agencies are to quantitatively assess the implications of establishing system-wide policy with the intent to institute landscape conservation planning which reaches outside refuge boundaries and seeks to implement landscape protection plans and strategies including acquisition of private lands.

4. Landscape Conservation Planning:

Wildlife corridors and their elements of all scales include moderate to severe land and water use restrictions. Various statutes mandate achieving a balance between the human and natural environments, most notably the National Environmental Policy Act and its CEQ NEPA implementation rule. The imposition of wildlife corridor systems and ecoregion planning renders compliance with that balancing mandate impossible within the boundaries of wildlife corridors and their surrounding buffer zones.

Wildlife corridors and habitat connectivity have been adopted by numerous federal departments and their agencies as part of the national climate change policy²³ without noticeable concern for the statutory noncompliance issues they raise, nor for the impacts to the human environment where the corridors are imposed. These exist at all scales from site-specific to the developing continental-scale "wildways" where human access and use come under varying degrees of administrative control.

Attempts have been made to establish these continental-scale mega corridors legislatively. Those attempts having failed, steps toward establishing the corridor system have been shifted to the executive branch. The institutionalization of climate change theory into executive branch policy is the mechanism currently imposing vast

²² EO-12630

²³ EO 13990, EO 14008; [Microsoft Word - 230318 Corridors connectivity guidance memo final draft \(formatted\) \(whitehouse.gov\)](#); [ESA 10J Historical Range White Paper \(boundarylinefoundation.org\)](#)

transformative impacts on the economy of the United States and political process.²⁴ This includes in part imposing landscape scale conservation goals and timetables which includes permanent conservation of 30% of lands and waters by 2030.²⁵

Much of this is predicated on a narrative driven by the environmental community that undeveloped land and wildlife are disappearing. This narrative is used to justify programs that expand government land ownership and the regulation of natural resources. Referencing government data from the Natural Resources and Conservation Services (NRCS)²⁶ and other agencies, Rob Gordons comprehensive report - [Lands and Habitat in the United States: A Reality Check](#) – challenges this narrative stating:

“Contrary to the familiar, agenda-driven narrative, development or conversion of natural landscapes to agricultural and urban use in the United States is not rapidly growing, nor are all U.S. species generally becoming ever more endangered. Left unchallenged, misinformation regarding the environment provides undue support for those who wish to impose wrong-headed, economically harmful policies upon an already enormous government estate, to enlarge it even further, and to impose economically destructive and burdensome regimes on those private lands that escape. Americans should be generally optimistic about the state of our lands and wildlife.”²⁷

The proposed rule defines *landscape scale* as:

“. . . landscape scale is often synonymous with ecoregions, watersheds, or similar units that we and our partners delineate during the planning process to assist in the development of a landscape plan.”

It is clear that USFWS and their partners desire to apply *landscape scale* ecoregional planning which could reach far outside of refuge boundaries. With the exception of the Service facilitating land exchanges of particular parcels which further the purpose of the refuge, the Service in this policy proposal is straying away from clearly delegated functions under the Refuge System Act. The fact that the proposed policy would allow Service partners to develop landscape plans which delineate ecoregional units outside of refuge boundaries in order to inform refuge planning is concerning to

²⁴ “[W]hen Congress wishes to ‘alter the fundamental details of a regulatory scheme,’ . . . we would expect it to speak with the requisite clarity to place that intent beyond dispute.” - *U.S. Forest Serv. v. Cow pasture River Pres. Ass’n* 140 S.Ct. 1837, 1848–49 (2020)

²⁵ *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) “Judge Friendly wrote that when an agency wants to state a principle ‘in numerical terms,’ terms that cannot be derived from a particular record, the agency is legislating and should act through rulemaking.”; **Executive Order 14008** seeks to designate federal lands for specified purposes linked to international timetables and targets expressed in numerical terms and values that cannot be derived from a particular statutory delegation. Thus, 30x30 and the sectoral decarbonization of the entire economy constitutes a legislative rule dictating specific numerical targets for use across every federal department affecting State and Local Governments and private parties.

²⁶ “Natural Resources Conservation Service data show a large decline in crop and pasture land, from 552 million acres in 1982 to 489 million acres in 2017.” [US Doesn’t Need to ‘Transform’ for Biodiversity or Biden ‘30 by 30’ Scheme \(dailysignal.com\)](#)

²⁷ Rob Gordon, [Lands and Habitat in the United States: A Reality Check - SPECIAL REPORT No. 256](#) | March 4, 2022
INSTITUTE FOR ECONOMIC FREEDOM, The Heritage Foundation.

adjacent property owners and local governments with special expertise and jurisdiction by law.

5. **Indigenous Knowledge**:²⁸

The proposed Refuge Policy Definition of “*Indigenous Knowledge*” is redundant, was rejected by Congress through a CRA Resolution in 2017 and degrades Federal standards of the Data Quality Act (DQA).

The proposed policy defines “*Indigenous Knowledge*” (IK) information as:

*“A body of observations, oral and written knowledge, practices, and beliefs developed by Indigenous Peoples and applied to phenomena across biological, physical, cultural, and spiritual systems. IK can develop over millennia, continues to evolve, and includes insights based on evidence acquired through direct relationships with the environment, long-term experiences, extensive observation, and lessons and skills passed from generation to generation.”*²⁹

On February 7, 2017, through H.J. Resolution 44, the 115th United States Congress rejected the substantively similar definition of “*Traditional Ecological Knowledge*” (TEK) in the Planning 2.0 Rule proposed by BLM.³⁰ Once a Rule has been rejected by Congress the Congressional Review Act prohibits issuance of a substantially similar or new rule that:

*“A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.”*³¹

The proposed definition of *Indigenous Knowledge (IK)* and the rejected definition of *Traditional Ecological Knowledge* in H.J. Resolution 44 are identical in scope and intent.

Furthermore, the Data Quality Act (DQA)^{32,33} requires information disseminated by Federal agencies to meet four standards: *Quality, Utility, Objectivity, and Integrity*. In promulgating the DQA, and with respect to the quality of information for Federal decision-making, Congress specifically requires:

²⁸ Draft 602 FW 1 – 1.8

²⁹ Draft USFWS Policy 602 FW 1 Exhibit 1 Glossary p. 3

³⁰ Federal Register Vol. 81, No.37. Thursday, February 25, 2016. Page 9689.

³¹ 5 U.S.C. § 801(b)(2).

³² Section 515(a) US Treasury and General Government Appropriations Act. Pub.L. 106-554.

³³ H.R. 5658; 66 FR 49718 September 28, 2001.

“The more important the information, the higher the quality standards to which it should be held, for example, in those situations involving influential scientific or statistical information.”³⁴

- i. *The “Objectivity” component of DQA requires information used for resource planning to identify all sources of information, and standards for models, data, financial information or information in statistical contexts are to be documented “so the public can assess for itself whether there may be some reason to question the objectivity of the sources.”*
- ii. *The “Reproducibility” component of DQA requires that information used for RMPs be “capable of being substantially reproduced subject to an acceptable degree of imprecision.”*
- iii. *The “Utility” component of DQA refers to the usefulness of the information for its intended users, including the public. In disseminating information under the “Usefulness” requirement, Federal agencies “need to consider the uses of the information not only from the perspective of the agency, but also from the perspective of the public.”*

The proposed *Indigenous Knowledge* of tribal “observations, oral knowledge, practices, and beliefs...” obtained through “interaction and experience with the environment....” and “social, cultural, and spiritual systems” is subjective and falls short of the FLPMA scientific standard which calls for BLM to: “use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.”³⁵ Bottom line, IK does not meet the federal “objectivity” and “reproducibility” standards of the Data Quality Act.

Because “*Indigenous Knowledge*” may not be subject to peer review, oral traditions are typically not published, and observations are not easily verifiable, the public could be disenfranchised through inclusion of *Indigenous Knowledge* as a presupposed scientific standard during Federal resource planning and processes. The proposed policy gives disproportionate attention to tribal governments and knowledge over and against state and local governments and associated customs and cultures of United States citizens who settled and appropriated these lands under Federal disposal laws.³⁶

6. Managing Wildlife Refuges for the Original Purposes for which the Refuge was Established:

³⁴ 66 FR 49718.

³⁵ 43 U.S.C. § 1712(c)(2). (Pub. L. 94–579, title II, § 202(c)(2), Oct. 21, 1976, 90 Stat. 2748.)

³⁶ J.R. Carlson et. al., *Survey of the History, Background, and Compliance of the Proposed BLM Landscape, Conservation and Health Rule with The Public Land Laws of the United States, Report to Public Record RIN 1004-AE92* – Boundary Line Foundation, June 2023 (FINDINGS OF FACT and CONCLUSIONS OF LAW, p. 24, 25)

The NWRS puts emphasis on the original purposes for which each individual refuge was established when determining how best to manage the refuge and the broader refuge system.

*“With respect to the Refuge System, it is the policy of the United States that – (A) each refuge shall be managed to fulfill the mission of the System, as well as the **specific purposes for which that refuge was established....**” [NWRS Improvement Act, Section 5(a)(3)]*

Where there is a conflict between the system mission and individual refuge purposes, individual refuge purposes have priority,

*“...ensure that the mission of the System described in paragraph (2) and the purposes of each refuge are carried out, except that if a conflict exists between the purposes of a refuge and the mission of the System, **the conflict shall be resolved in a manner that first protects the purposes of the refuge, and, to the extent practicable, that also achieves the mission of the System;** (NWRS Improvement Act Section 5 (a)(4)(D))*

The Act also points to specific documentation in order to determine the purposes of each refuge,

*“...purposes of a refuge and purposes of each refuge mean the purposes specified in or derived from the **law, proclamation, executive order, agreement, public land order, donation document, or administrative memorandum establishing, authorizing, or expanding a refuge, refuge unit, or refuge subunit.**” (Refuge Improvement Act, Section 5)*

Existing policy as well as the USFWS Handbook for identifying resources of concern and management priorities (2017)³⁷ also reassert these priorities,

“...however, we give priority to achieving a refuge’s purpose(s) when we identify conflicts with the Refuge System mission or goals.” (601 FW 1, Section 1.4)

And,

*“**When we acquire an addition to a refuge under an authority different from the authority used to establish the original refuge, the addition also takes on the purpose(s) of the original refuge, but the original refuge does not take on the purpose(s) of the addition unless Congress determines otherwise.**” (601 FW 1, Section 1.15)³⁸*

³⁷ USFWS, [Identifying Refuge Resources of Concern and Management Priorities: A Handbook](#), January 2017

³⁸ *United States v. Consolidated Mines and Smelting Co., Ltd.*, 455 F.2d 432, 445-46 (9th Cir.1971) “It is the law of our circuit that revocation or modification of an existing withdrawal should be express to be effective.”; See . . . *Watt v. Alaska*, 451 U.S. 259, 267, 101 S.Ct. 1673, 1678, 68 L.Ed.2d 80 (1981) “Repeal of a statute or order by implication is not favored.”

We have found in past analysis that the Comprehensive Conservation Planning process for the CMR game refuge has failed to adequately accomplish these priorities to identify original purposes for which the range was established and manage accordingly.³⁹ To the contrary the CMR game refuge under the current CCP is driving the range away from the original purposes and priority uses of the range while failing to identify TGA authorities which govern the domestic livestock grazing purposes on the range. This may very well be the case regarding other refuges which have TGA reserved districts that overlay the range.

This is the case despite the fact that the current policy on the Comprehensive Conservation Planning Process (602 FW 3), directs planning teams to:

*“Document the history of refuge establishment and management as well as refuge purposes and authorizing authority (for example; legislation [including wilderness designation, if applicable], executive orders, administrative memoranda). **These will become driving forces in the process of determining and subsequently be reflected in the refuge vision statement, goals, objectives, and strategies in the comprehensive conservation plan.**”* [602 FW 3.4 C(1)(b)]

In spite of this, the USFWS under the current CCP has been retiring a priority use of the CMR without the required CVGD determinations and other procedural requirements relating to changing the priority scheme of a refuge. This is the result of the Service failing to follow already established policy and statutory requirements cited above. The current proposed policy changes seem to reduce these priorities of management in favor of landscape scale planning which desire to reach far outside of refuge boundaries.

7. **Conclusion:**

The National Wildlife Refuge System planning policies must incorporate and clearly correspond with statutory obligations for USFWS to coordinate and consult with adjacent private landowners, local governments, and states wherein refuge planning is taking place. USFWS should not rely on partners to develop landscape plans outside of public process and consultation in order to inform and drive refuge planning. Any outside advisory to the USFWS which affects the direction of policy is subject to the Federal Advisory Committee Act and the requirements therein, including publication requirements on the federal register.

Because USFWS has been unresponsive to Montana Representatives relating to other interrelated initiatives in the State of Montana, it is important for questions to be

³⁹ [The Repurposing of Federally-Reserved Taylor Grazing Districts For Wildlife Rewilding: A Statutory, Administrative and Legal Analysis](#). Stillwater Technical Solutions. April 22, 2020. J.R. Carlson et. al

answered and requested information provided before USFWS proceeds in finalizing this rule.

We appreciate the opportunity to comment on this item and look forward to receiving further information and coordinating with USFWS on refuge system policy and management that affects our member counties.

Regards,

Montana Natural Resource Coalition

John Tolgson, President

Attachment II

RE: Proposed Establishment of the Missouri Headwaters Conservation Area Scoping for Draft
Land Protection Plan and Associated Acquisition Boundary

11-27-23



Montana Natural Resource Coalition

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November 27, 2023

U.S. Fish and Wildlife Service
922 Bootlegger Trail
Great Falls, MT 59404
Attn: Ben Gilles

RE: Proposed Establishment of the Missouri Headwaters Conservation Area Scoping for Draft Land Protection Plan and Associated Acquisition Boundary

To whom it may concern,

The Montana Natural Resource Coalition (MtNRC) is a network of eighteen (18) counties who have county governmental jurisdiction over 53,814 square miles in the State of Montana. MtNRC's mission is to inform federal agency rulemaking pertaining to land use, natural resource planning, and advocating on behalf of our membership. Current MtNRC members include Beaverhead, Blaine, Fergus, Garfield, Liberty, Madison, McCone, Musselshell, Pondera, Petroleum, Phillips, Powder River, Prairie, Richland, Roosevelt, Sweet Grass, Valley, and Wibaux Counties.

The primary purpose of local planning is to provide self-determination for counties. Injection of substantial amounts of federal dollars into local jurisdictions affecting land tenure, disposition, acquisition, and use must demonstrate that it originates from and supports local interest and is not in conflict with local development intent. Any loss of productive land affects the economic wellbeing of a county. Perpetual Conservation Easements (CEs) predetermine the future of the counties they affect by limiting flexibility in growth and economic development.

1. Montana Local Government Natural Resource Policies and Goals¹

The nature and intent of much of the natural resource policy at the county level in the state of Montana is to protect the customs and cultures of county citizens through protection of private property rights, the facilitation of a free market economy, and the establishment of a process to ensure self-determination by county residents. (*Fergus LUP p.1*)

Self-determination: (Merriam Websters)

- 1: free choice of one's own acts or states without external compulsion
- 2: determination by the people of a territorial unit of their own future political status

Conservation Easements (CEs) may constitute an intrusion into local land use and tax policy. By their very design and nature CEs impose in perpetuity deed restrictions on property permanently sequestering working lands, creating a complex split estate contractual relationship between landowners, land trusts, and/or the State or federal government. CEs often reduce the value and illegitimately encumber adjacent private properties.

State and federally funded CEs, and/or any acquisition of land, water, or an interest in land or water under the Land and Water Conservation Fund and other federal programs should maintain consistency with already established natural resource policies and goals enacted at the local government level. This subjects any Federal or State acquisitions of land or water or interests therein to the jurisdictional oversight of local governments² who have a vested interest in order:

- (a) That the County suffer no net loss in tax revenue.
- (b) That all private property interests are protected and enhanced.
- (c) That citizens of the County will suffer no adverse economic impacts.
- (d) That all government entities investigate and attempt to increase local economic development by increasing the amount of privately controlled land within the county.
- (e) That federal and state land agencies should not acquire any private lands or rights in private lands within a county without first ensuring compliance with the items listed above.³ (Phillips LUP p.19)

One of the biggest problems facing local governments today is the loss of tax base. In order for any community to provide needed schools, health care, police protection and other services, industry and commerce within the community must be encouraged and strengthened. (Valley LUP p.16)

¹ See. **Attachment I Sec. 2 p. 4,5 - Coordination, Cooperation, and Notification of State and Local Governments and Private Landowners**, MtNRC Oct. 16, 2023

² 43 C.F.R. Section 1610.3-1(c)(1) "In providing guidance to BLM personnel, the BLM State Director shall assure such guidance is as "consistent as possible with existing officially adopted and approved resource related plans, policies or programs of other State agencies, Indian tribes and local governments that may be affected"

³ Phillips County, Office of the Commissioners. (Phillips County Land Resource Use Plan) July 23, 2012 LAND TENURE, DISPOSITION, ACQUISITION, AND USE p. 19, 20; VALLEY COUNTY RESOURCE USE PLAN Sep 2013 p. 21, 22

Any land tenure adjustments for any government agency should provide for no net loss of private land, private property rights and interests including grazing allotments overlying federal land expectations, or loss of property tax revenue to the County. The design and development of all federal and state land dispositions and acquisitions, including land adjustments and exchanges, should be carried out to the benefit of the residents⁴ of the County. (p.19)

2. Background

On September 15th the United States Fish and Wildlife Service (USFWS) issued a proposed rule on the Federal Register to update planning policies, 602 FW 1–4,⁵ for the National Wildlife Refuge System (Refuge System). The purpose of these policy updates is to modernize the Refuge System's management by incorporating landscape conservation plans and consideration of climate change and other anthropogenic forces in refuge management. Neither landscape conservation planning, nor climate change and other anthropogenic forces are mentioned within the National Wildlife Refuge System Improvement Act.⁶

We identified in our [comment](#) on this current proposed rule,

“that it is clear that USFWS and their partners desire to apply landscape scale ecoregional planning which could reach far outside of wildlife refuge boundaries. The fact that the proposed policy would allow Service partners to develop landscape plans which delineate ecoregional units outside of refuge boundaries in order to inform refuge planning is concerning to adjacent property owners and local governments with special expertise and jurisdiction by law.”

Yet it appears that this is already taking place in the case of the Missouri Headwaters Conservation Area developed by USFWS and Non-Governmental Partners.

On [September 8th Representative Matt Rosendale issued a letter to USFWS](#) (Service) Director Martha Williams expressing significant concern that the Service along with Non-Governmental Environmental partners had been developing this planning effort to establish a 5.7 million acre “conservation area” spanning 5 counties in Southwestern Montana. The letter states,

“It has come to my attention that the US Fish and Wildlife Service, in consultation with the Theodore Roosevelt Conservation Partnership, Nature Conservancy and potentially others have taken unprecedented and covert steps to substantially limit public and private use of 5.8 million acres in Montana under the guise of “conservation.””

⁴ “. . . Probably the only general principle that can be laid down with respect to subsidies is that they can never be justified in terms of the interest of the immediate beneficiary, but only in terms of the general benefits which may be enjoyed by all citizens.” F A Hayek, 'The Constitution of Liberty' The Definitive Edition. (The University of Chicago Press, London 2011) chapter 17 *The Decline of Socialism and the Rise of the Welfare State* p. 381 (originally published 1960)

⁵ [Federal Register :: National Wildlife Refuge System Planning Policies \(602 FW 1-4\) for the U.S. Fish and Wildlife Service](#)

⁶ *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022) “. . . We presume that ‘Congress intends to make major policy decisions itself, not leave those decisions to agencies.’ *United States Telecom Assn. v. FCC*, 855 F. 3d 381, 419 (CA DC 2017); “. . . it is unlikely that Congress will make an ‘[e]xtraordinary gran[t] of regulatory authority’ through ‘vague language’ in ‘a long-extant statute.’” Ante, at 18–20 (quoting *Utility Air*, 573 U. S., at 324).”

Twelve days later, September 20th, the Service published the proposed Missouri Headwaters Conservation Area which as proposed would authorize the Service to facilitate the acquisition of up to 250,000 acres of conservation easements within the 5.7-million-acre boundary. With **no notice published on the Federal Register** the Service published notice on its website starting a public scoping period on the 20th of September. Initially the scoping period was slated to end on the 26th of October. After another letter being issued by the Montana Attorney General's office the window was extended to the 27th of November with three in-person meetings scheduled.

The [letter submitted by the Montana Department of Justice \(DOJ\) September 20th](#) identified serious concerns and lack of transparency relating to the Services proposed "conservation area."

"I write to voice serious concerns about the U.S. Fish and Wildlife Service's (USFWS) "Missouri Headwaters Conservation Area" (MHCA) proposal announced today that seeks to transform nearly 5.8 million acres (over 9000 square miles) into a national wildlife refuge via conservation easements on private land."

And,

"The Kafkaesque scheme of environmental laws and regulations provides a nearly insurmountable obstacle to the energy, mining, and agriculture industries. And this designation would be another tool wielded and abused by well-funded environmental groups to oppose all permits for responsible development on state and private land."

The DOJ further identified what appears to be clandestine actions by the Service, The Nature Conservancy, and Theodore Roosevelt Conservation group in violation of the Federal Advisory Committee Act.

*"USFWS's clandestine actions appear to be a blatant violation of the Federal Advisory Committee Act (FACA). Congress enacted FACA "with the objective of 'opening many advisory relationships to public scrutiny except in certain narrowly defined situations.'" Votevets Action Fund v. McDonough, 992 F.3d 1097, 1101 (D.C. Cir. 2021) (quoting Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 463 (1989))."*⁷

The DOJ conclusively stated,

"Montanans deserve better than covert deals between federal bureaucrats and conservation oligarchs. I will vehemently oppose any attempt to ram through this consequential project without full transparency and procedural accountability."

⁷ FACA defines "advisory committee" broadly as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof ... which is ... established or utilized by one or more agencies in the interest of obtaining advice or recommendations for ... one or more agencies or officers of the Federal Government ..." 5 U.S.C. app. 2 § 3(2). FACA, importantly, imposes strict procedural requirements. For example, advisory committees must publish notice of any meetings in the Federal Register, 5 U.S.C. App 2 § 10(a)(2); 41 C.F.R. § 102-3.150(a); meetings must be open to the public, 5 U.S.C. App. 2 § 10(a)(1); and committees must make their records and drafts publicly available. Id. § 10(b)-(c)

3. Corresponding USFWS Refuge System Planning Policy Revision

USFWS is currently rewriting their [Refuge Planning Policy](#) which prioritizes landscape scale conservation planning and climate change into the policy.⁸ Last year the USFWS chartered five national service teams tasked with updating existing or develop new natural resource regulations, policies, and handbooks for the National Refuge System. Up until the recent publication of the current Federal Register notice for this proposed rulemaking our member Counties received no notice or information signifying this planning effort was underway.⁹

For procedural purposes the proposed Missouri Headwaters Conservation Area (MHCA) is for all intents and purposes a *Land Protection Plan (LPP)*. This makes the National Refuge Planning Policy revision directly relevant. It is concerning to note that the USFWS on their fact sheet and web page for the MHCA scoping process does not use the word refuge, nor mention the fact that LPPs result from land acquisition planning, which is a preliminary step in the continuous, integrated refuge planning process. USFWS policy regarding Acquisition Planning describes an LPP as establishment documentation for a refuge.

602 FW 1 Refuge Planning Overview (Current Planning Policy) 1.7 C. (1) –

*“Refuge planning typically begins before the establishment of an area as a unit of the Refuge System. Land acquisition planning (usually resulting in a Land Protection Plan [LPP] and associated NEPA document) is a preliminary step in the continuous, integrated refuge planning process. This process eventually results in completion of a CCP and appropriate refuge step-down management plans. . . **Refuge establishment documentation (LPP and associated NEPA document)** should identify the approved refuge boundary, refuge purpose(s), goals, and general management direction. See 341 FW 2.”*

The proposed policy changes for the Refuge System would allow partners and USFWS staff to develop landscape plans which inform the agency in developing *Land Protection Plans* with an associated *Acquisition Boundary*. At the same time USFWS is scoping the MHCA *Land Protection Plan* they are proposing planning policy changes which defines *Land Protection Plan* as:

*“A plan that we develop to evaluate project proposals to **create new refuges or expand existing refuges.** . . .”¹⁰*

And the associated acquisition boundary is defined as,

“A defined area within which we (USFWS) are authorized to acquire all the acreage. The Director approves an acquisition boundary after we have completed the land protection planning and environmental compliance process. . . .”¹¹

⁸ [Federal Register :: National Wildlife Refuge System Planning Policies \(602 FW 1-4\) for the U.S. Fish and Wildlife Service](#)

⁹ See [MtNRC Comment on National Refuge System Planning Policies \(602 FW 1-4\) for USFWS, Oct. 16, 2023](#) (attachment I)

¹⁰ Draft Policy - Exhibit 1 602 FW 1 p. 3

¹¹ Draft Policy - Exhibit 1 602 FW 1 p. 1

The USFWS does not cite the statutory basis for this proposed conservation area, and as stated above, it is a Land Protection Plan. The fact that this is not described clearly to the commenting public as a steppingstone in the Wildlife Refuge Planning process may constitute a deceptive practice.¹² As shown above, USFWS and Partners have not disclosed relevant facts pertaining to this proposed conservation area which is misleading to the general public who have no knowledge of associated policy changes and programs. Failure to provide clarity and disclose relevant facts affects public perception and is an issue of general concern. The service seems to be seeking to avoid significance by breaking these actions down into component parts without clearly defining terms to the public.

4. USFWS Actions Fail to Follow Basic NEPA Process and Falls Short of Requirements Under the Administrative Procedures Act (APA)

The NEPA process normally includes publication of a Notice of Intent (NOI) in the Federal Register before scoping meetings are held and comments are solicited from the public. So far, our review has shown no notice issued to the Federal Register relating to this proposed land protection plan. When an agency develops, amends, or repeals a rule, the Administrative Procedure Act requires publication of a notice of proposed rulemaking (NPRM) or notice of intent (NOI) in the Federal Register.¹³

5 U.S. Code § 553(b)

(b) “General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

- (1)** a statement of the time, place, and nature of public rule making proceedings;
- (2)** reference to the legal authority under which the rule is proposed; and
- (3)** either the terms or substance of the proposed rule or a description of the subjects and issues involved.”

DOI and the USFWS failed to post this on the [semiannual regulatory flexibility agenda](#) as required by the Regulatory Flexibility Act, Executive Order 12866, and Departmental Manual 318. USFWS also did not provide on its scoping release a regulation identification number (RIN), also a required step in the rule making process.

The NEPA process requires an interdisciplinary approach with full public involvement and input into the rulemaking process. The USFWS and partners have developed [boundary maps](#) and fiscal objectives for acquiring rights in lands with no advanced notice on the Federal Register or directly to relevant authorities. A central purpose of an EIS is lost “if consideration of the cumulative effects

¹² [MCA – Deceptive Practices - 45-6-317\(1\)\(b\)](#); Black’s Law Dictionary 4th addition in defining Deceit, includes this statement, “. . . the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to be misled for want of communication of that fact. Civ. Code Cal. Sec. 1710; Civ. Code S.D. Sec. 1293 (Comp. Laws 1929, Sec. 797)”

¹³ Department of the Interior, *How to Prepare Regulations and Federal Register Notices Handbook 318 DM*, Sep. 23, 2013

of successive interdependent steps is delayed until the first step has already been taken.” *Thomas v. Peterson*, 753 F.2d 754,761 (9th Cir. 1984).

After reviewing existing refuge policy, and the corresponding proposed updates, it appears, with the Missouri River Conservation Area, that USFWS is already acting on draft policies which are not a final rule. They have put the cart before the horse, acting in a manner which obstructs the people’s confidence in the rule of law.

“ . . . *At risk are the promise of knowable and stable law, fair notice, democratic self-rule, and equal protection under the law.* . . . In *Federalist No. 62*, James Madison¹⁴ warned that when the laws become too voluminous, incoherent, and malleable, they give "unreasonable advantage . . . to the sagacious, the enterprising, and the moneyed few over the industrious and uninformed mass of the people." The laws risk becoming a tool "made for the FEW, not the MANY.””

- Neil Gorsuch et. al. *A Republic If You Can Keep It*, Crown Forum 2019 p. 44

5. Unassessed Costs and Impacts of Wildlife Corridors and Government Acquisition of Private Lands¹⁵

State and federal agencies simply do not have the statutory authority to evaluate the presence, absence, or quality of values that occur on private lands¹⁶ and are incapable of predicting future uses throughout a geospatial region composed of dozens of individual landowners. Landscape-scale conservation initiatives such as the Proposed Land Protection Plan and associated programs creates a regulatory bias against unencumbered private lands within acquisition boundaries and blurs local jurisdictional boundaries recognized in the State and Federal Constitutions.¹⁷

Reasonable acquisitions that are not expansive in nature and are compatible with local customs and cultures and within the constraints of private property rights and local self-determination will not likely be of any contention.

Nonetheless with an ever-increasing number of organizations, programs, initiatives, etc., that seek to acquire or encumber private working lands with the sole focus on fish and wildlife, local governments are becoming inundated. Other states like Washington are farther down this road than

¹⁴ "What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not that his plans may be rendered unlawful before they can be executed." - James Madison *Federalist Papers*

¹⁵ See [MtNRC Comment on National Refuge System Planning Policies \(602 FW 1-4\) for USFWS, Oct. 16, 2023](#) Sec. 3. p. 7, 8, 9 (attachment I)

¹⁶ The policy is clear that federal agencies “possess no statutory authority to evaluate the presence, absence, or quality of values that occur on private lands” (BLM Manual 6400-WSR 3.1), and that “All management plans routinely recognize that the management prescriptions being devised can only be implemented “subject to valid existing rights.” (DOI Instruction Memorandum No. 98-164 Judges note #6. Ref. IM No. 98-135).

¹⁷ “The statesman who should attempt to direct private people in what manner they ought to employ their capitals, would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted to no council and Senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.” - Adam Smith, *Wealth of Nations* Prometheus Books, Amherst New York, 1991

Montana. The Okanagan County Farm Bureau in Washington State in a report entitled *Unsustainable Costs and Impacts of Government Acquisition of Private Land* found that:

“The cumulative impacts of continued government acquisitions are not fully recognized due to piecemeal, fragmented or no reporting through the complex acquisition structure and myriad of funding sources. Millions of dollars are processed through the land acquisitions system with no cumulative accountability or transparency to the public.”

And that,

“Elected officials need to have full and accurate accounting in order to make informed policy and budget decisions and to provide the needed checks to balance the agencies’ sole-purpose agendas. Unfortunately, agency reporting that has been reviewed is not designed to be accountable or to inform but to sell the benefits of their acquisition programs to continue the funding.” (OCFB report, 2011)¹⁸

Wildlife corridors and their elements of all scales include moderate to severe land and water use restrictions. Various statutes mandate achieving a balance between the human and natural environments,¹⁹ most notably the National Environmental Policy Act and its CEQ NEPA implementation rule. The imposition of wildlife corridor systems and ecoregion planning renders compliance with that balancing mandate impossible within the boundaries of wildlife corridors and their surrounding buffer zones.²⁰

Some counties, more than others because of federal land disposition and/or geographical setting are targeted for landscape scale initiatives that seek to acquire and encumber private working lands. Taxpayers have the right and expectation to receive full and accurate information on the extent of projected acquisitions, present and cumulative costs to taxpayers, and the social and economic impacts posed by seemingly unending government programs and initiatives that paint private property as the “*threat*” to be mitigated.

The Northern Great Plains Joint Venture, National Fish and Wildlife Business plan for the Northern Great Plains, Land and Water Conservation Fund, Backcountry Conservation Areas, Montana Sage Grouse Conservation Program, USFWS refuge planning policy proposals, and many other processes active in Montana call for removal of land from private ownership and control via acquisition, conservation easements, and other regulatory mechanisms.

These initiatives blur multiple county and state jurisdictions expanding across state and national borders with the sole focus on fish and wildlife. Sole-purpose agencies and their partner special

¹⁸ Okanagan County Farm Bureau report, *Unsustainable Costs and Impacts of Government Acquisition of Private Land*, 2011

¹⁹ “Biodiversity protection on the other hand presents much more difficult problems of legitimacy and implementation within this tradition because it partially collapses the ethical dichotomy between humans and nature.” “. . . These challenges vividly manifest themselves in the efforts to fit biodiversity protection into a federal system which seeks to promote values associated with economic progress.” A. Dan Tarlock, *Biodiversity Federalism*, 54 Md. L. Rev. 1315 (1995) Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol54/iss4/7>

²⁰ See [MtNRC Comment on National Refuge System Planning Policies \(602 FW 1-4\) for USFWS, Oct. 16, 2023](#) Sec. 4. p. 9, 10 (attachment I)

interest groups must recognize these regulatory pressures imposed on landowners and the inherent threat to private property rights themselves.

6. Coordination and Consultation Requirements²¹

The coordination process was designed to ensure that proposed federal actions are responsive to local conditions, issues, needs, customs, cultures and economies. Where inconsistencies exist between proposed federal actions and existing local plans, laws, ordinances, and other policies, the federal agency is obligated to work with the coordinate government and attempt consistency with local plans and polices.

In compliance with federal and state law, including the National Wildlife Refuge System Improvement Act (NWRS), National Environmental Policy Act (NEPA), the Federal Land Management and Policy Act (FLPMA), and the National Forest Management Act (NFMA), all federal and state agencies shall consider, to the maximum extent required by law, County Land Use plans and policies, and coordinate with Montana boards of County Commissions for the purpose of planning and managing federal and state lands within the geographic boundaries of a county.

The NWRS Improvement Act specifically states at Sec. 5(a)(4)(E):

“ensure effective coordination, interaction, and cooperation with owners of land adjoining refuges and the fish and wildlife agency of the States in which the units of the System are located”

The current process was a result of and will further encourage public/private partnerships between USFWS and special interest partners which circumvents local governments, adjacent landowners, and the legislative process. Such concerns have long been established as shown in the Phillips County Land Resource Use Plan in 2012 which states under Constitutional Principles and Private Property,

“Recognize that government agencies are relying on Public/Private partnerships to gather information and to carry out the agendas of special interest groups bypassing the legislative process and the voice of the American people.”²²

Any refuge planning or landscape plan which reaches outside refuge boundaries must provide advanced notice and coordination with state and local governments and adjacent property owners before a Landscape Plan, Land Protection Plan (LPP), Land Protection Strategy (LPS), and subsequent Comprehensive Conservation Plans (CCP) are developed, amended, or revised. Private sole-purpose special interest partners should not be allowed, without consultation and coordination

²¹ See [MtNRC Comment on National Refuge System Planning Policies \(602 FW 1-4\) for USFWS, Oct. 16, 2023](#) Sec. 2. p. 4, 5, 6 (attachment I)

²² Phillips County, Office of the Commissioners. (*Phillips County Land Resource Use Plan*) July 23, 2012, Constitutional Principles and Private Property, Objective 5a p.19

with affected state and local governments, to develop landscape plans which serve as source material for developing LPPs, LPSs, or CCPs.²³

Before an acquisition boundary is established around a refuge, USFWS should first consult with and acquire written consent from landowners and local governments before including such lands within the boundary.²⁴ The Supreme Court has consistently emphasized the private property owners *right to exclude* as one of the most essential sticks in the bundle of rights characterized as property:

“The right to exclude is “a fundamental element of the property right.”” *Kaiser Aetna v. United States*, 444 U. S. 164, 179–180.; “**The right to exclude is ‘one of the most treasured’ rights of property ownership.**” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 435 (1982).

And in 2021 the High Court stated,

“we have stated that ***the right to exclude is ‘universally held to be a fundamental element of the property right,’*** and is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”

- 594 U. S. *CEDAR POINT NURSERY v. HASSID* (2021)

Federalism Implications

[Executive Order 13132](#) was issued to guarantee the division of governmental responsibilities between the national government and the States intended by the Framers of the Constitution, ensuring that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies, and to further the policies of the Unfunded Mandates Reform Act. Section 1 of this order defines ‘Policies that have federalism implications’ and refers to:

“Regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

In the United States governmental system land, natural resources, wildlife, and public health and safety have traditionally been matters primarily of local concern. The continuing expansion of federal regulatory intrusion into this realm poses significant federalism implications, which remain largely unassessed and therefore unaccounted for. A paper published by [Cornell Law Review in](#)

²³ See definitions for Landscape Protection Plan and Landscape Protection Strategy at (Draft planning policy) 602 FW 1 – Exhibit 1 p. 3 and 4

²⁴ [Presidential Executive Order 13132, Federalism. 64 Fed. Reg. 43,255 \(1999\)](#) - “The national government should be deferential to the States when taking action that affects the policymaking discretion of States and should act only with the greatest caution where state or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.”

1997 acknowledged this inherent obstacle obstructing the way for environmental biodiversity conservation stating,

“Land use is traditionally a matter of state and local concern, and an expanded federal role in this field will raise serious federalism concerns. Because the externalized effects of land-use decisions were once thought to be principally, if not exclusively, local in nature, federal intrusion into land use matters was generally regarded as unwise and contrary to the spirit of our federalist structure, if not flatly proscribed by the Constitution.”

An ever-expanding executive biodiversity policy is challenging this traditional understanding which is fundamental to our Constitutional Republic and protection of the individual in his life, liberty, and property.²⁵ The paper further acknowledges,

“. . . as pressure builds to place biodiversity conservation at the forefront of the national and international environmental agenda, environmental advocates will demand increasingly stringent controls on both federal land management and private land use.”²⁶

Congress has long required that federal land use policy prioritize the principles of *multiple use* and *sustained yield* and mandate that agencies within their environmental analysis to balance the needs of the human and natural environment in full coordination with States and their political subdivisions. As noted in another paper published by the [Maryland Law Review](#), biodiversity conservation and ecoregional planning pose statutory non-compliance issues with these long-established priorities.

“Biodiversity protection on the other hand presents much more difficult problems of legitimacy and implementation within this tradition because it partially collapses the ethical dichotomy between humans and nature.”²⁷

The paper goes on to point to the fact that federalism principles are likely to frustrate biodiversity protection for three principal reasons,

*“**First**, federalism is premised on the search for the optimum exclusive regulatory balance, and this can often frustrate necessary intergovernmental cooperation. **Second**, the maintenance of national protection floors supplemented by states is unworkable because in contrast to air and water pollution control, there are no uniform standards that one can realistically apply to biodiversity in states as different as Alaska, Arizona and Florida. **Third**, the national government must rely on powers, primarily land-use controls and*

²⁵ “Consequently, the most fundamental purpose of our federalist structure is to protect individual liberty.” Id. at 181-82 (citing Federalist No. 51; *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J. dissenting); Gregory, 501 U.S. at 458); *NFIB et. al. v. Sebelius* 567 U.S. 519 (2012) “The independent power of the States also serves as a check on the power of the Federal Government: ‘By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.’”

²⁶ Bradley C. Karkkainen, Biodiversity and Land, 83 Cornell L. Rev. 1 (1997) Available at: <http://scholarship.law.cornell.edu/clr/vol83/iss1/1>

²⁷ A. Dan Tarlock, Biodiversity Federalism, 54 Md. L. Rev. 1315 (1995) Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol54/iss4/7>

water-rights administration, that are traditionally and firmly lodged within state and local governments.”

This is one of many reasons the environmental community has failed to get the United States Senate to ratify international biodiversity conventions, and Congress has not authorized expansive biodiversity conservation measures to be implemented by the executive branch. As a result, the environmental lobby is pressuring the executive branch agencies to implement landscape scale biodiversity objectives and targets.²⁸ This is systemically resulting in statutory obligations being ignored by agencies resulting in greater regulatory burdens and unfunded mandates on small entities than necessitated by statute.²⁹

The proposed Land Protection Plan and other like-kind landscape scale biodiversity objectives constitute significant federalism implications. The separation of powers and the principles of federalism embedded within the federal and state constitutions cannot be circumvented by sole-purpose agencies and their partner special interest groups seeking to solve the supposed “biodiversity crisis” of our day.³⁰

“Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear ‘formalistic’ in a given case to partisans of the measure at issue, because such measures are typically the product of the era’s perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”

- *New York v. United States*, 505 U.S. 144 (1992)

In conclusion EO 13132 Sec. 2(i) states,

“The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.”

7. Conclusion

²⁸ J.R. Carlson at. el., [Survey of the History, Background, and Compliance of the Proposed BLM Landscape, Conservation and Health Rule with The Public Land Laws of the United States, Report to Public Record RIN 1004-AE92 – Boundary Line Foundation](#), June 2023 (FINDINGS OF FACT and CONCLUSIONS OF LAW, p. 24, 25); “The BLM and other agencies within DOI are using a patchwork of congressional delegation in conjunction with all-encompassing executive directives to collectively implement a whole-of-government and whole-of-economy climate policy agenda which is not delegated by the Congress.” - LRF, Comment, *Rights-of-Way, Leasing, and Operations for Renewable Energy: Federal Register / Vol. 88, No. 116 / Friday, June 16, 2023 / Proposed Rules*, Aug. 15th, 2023; 40 CFR 1508.1(q)(3)

²⁹ 5 USC 601 note Sec. 202 findings (5)

³⁰ Rob Gordon, [Lands and Habitat in the United States: A Reality Check - SPECIAL REPORT No. 256](#) | March 4, 2022 INSTITUTE FOR ECONOMIC FREEDOM, The Heritage Foundation.

Using acquisition planning to establish a 5.7-million-acre land protection plan with an associated acquisition boundary around an existing 53,000-acre National Wildlife Refuge sets a significant precedent and is strongly opposed. The proposed boundary is 107-fold the existing refuge. This ratio applied to the Charles M. Russel Game Refuge would pose an acquisition boundary in excess of 100 million acres. These are unprecedented actions³¹ which are not even meeting basic procedural requirements under NEPA and the Administrative Procedures Act. The Administrative Procedure Act (APA)³² is one of the essential checks on the “growth of the executive branch.” *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010).

For reasons identified in these comments and prior comments on the refuge planning policy we are deeply concerned about the cumulative and indirect effects of such a massive proposal which will induce significant changes in the pattern of land use³³ across a large multi-jurisdictional region. USFWS and partners claiming that this is simply a conservation area to streamline LWCF dollars into private lands easements is trying to hide an elephant in a mousehole.³⁴

USFWS has been unresponsive regarding other policies and initiatives within the state of Montana.³⁵ The current proposed [Missouri River Headwaters Conservation Area](#) in southwestern Montana also falls short of adequate public notice and consultation with affected state and local governments.³⁶

There is a need to adequately assess the implications of such policy changes in conjunction with a group of concerted efforts³⁷ within USFWS and DOI which may pose vast transformative impacts on the economy and policy of the State of Montana and its Counties. As a result, this current Land Protection Plan should be tabled pending the reception and assessment of relevant information to ensure compliance with FACA and all procedural requirements under relevant authorities. There are areas within the proposed boundary that need to be excluded such as the Federally Reserved TGA Grazing Districts,³⁸ and landowners need to be more thoroughly consulted.

³¹ . . . When an agency claims to have found a previously “unheralded power,” its assertion generally warrants “a measure of skepticism.” *Utility Air*, 573 U. S., at 324.”; “. . . Agencies have only those powers given to them by Congress, and “enabling legislation” is generally not an “open book to which the agency [may] add pages and change the plot line.” E. Gellhorn & P. Verkuil, *Controlling Chevron Based Delegations*, 20 *Cardozo L. Rev.* 989, 1011

³² 5 U.S.C. Subchapter II Administrative Procedure

³³ 40 CFR 1508.1(g)(2)

³⁴ “. . . Nor may agencies seek to hide “elephants in mouseholes,” *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001)

³⁵ [Rep. Rosendale Requests an Open and Public Process as the Department of Interior Considers Reintroducing Bison in Montana | U.S. Representative Matt Rosendale \(house.gov\)](#); [LETTER-230321-Gov.-Gianforte-to-Sec.-Haaland-on-S.O.-3410.pdf \(mt.gov\)](#); [DOI - bison proposal FINAL 2021.11.09.pdf \(senate.gov\)](#)

³⁶ [REP. ROSENDALE DEMANDS ANSWERS RELATING TO FISH AND WILDLIFE'S UNPRECEDENTED COVERT LAND GRAB | U.S. Representative Matt Rosendale \(house.gov\)](#); [AG Knudsen calls out USFWS for covert deal with ‘conservation oligarchs’ in Montana | Commentary | dillontribune.com](#)

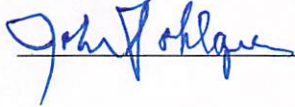
³⁷ CFR 1508.1(q)(3) **Major Federal actions** tend to fall within one of the following categories: (iii) Adoption of programs, such as a **group of concerted actions to implement a specific policy or plan**; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or **executive directive**. (emphasis ours)

³⁸ [The Repurposing of Federally-Reserved Taylor Grazing Districts For Wildlife Rewilding: A Statutory, Administrative and Legal Analysis](#). Stillwater Technical Solutions. April 22, 2020. J.R. Carlson et. al

We appreciate the opportunity to comment on this item and look forward to coordinating with USFWS on refuge system policy planning and management that affects our member counties.

Regards,

Montana Natural Resource Coalition

 John Johnson M+NRCC President