



January 17, 2025

Mr. Andrew Fois  
Chair, ACUS  
1120 20<sup>th</sup> Street NW, Ste. 706  
South  
Washington, DC 20036-3406

Re: Transmittal of “*Problems and Solutions in Agency Non-compliance with Federalism Mandates*” – in response to request for public comment on “*Consultation with State, Local, and Tribal Governments in Regulatory Policymaking.*”

Via: Electronic submission to: [info@ACUS.gov](mailto:info@ACUS.gov); and hardcopy via U.S. Postal Service.

Dear Mr. Fois:

The enclosed report, submitted to the Administrative Conference of the US (ACUS) following a request for public comment, demonstrates systematic noncompliance with federal statutes, executive orders, and principles of federalism by five federal agencies during eight major rule making actions between 2013 and 2025.

The noncompliance of the Department of Interior (BLM, FWS, and NPS), Department of Labor (OSHA), and Department of Agriculture (USFS) can be shown to have materially impacted state and county prerogatives across the nation.

The enclosed audit summarizes case studies from the administrative record to demonstrate systematic neglect of the principles of Federalism as codified in the Administrative Procedures Act (APA), the Unfunded Mandates Act, and multiple Executive Orders over time.

I support consideration of practical policy solutions for joint congressional and executive action that statutorily codifies the principles of federalism from Executive Order 13132 in the APA. This could include appropriate and substantive revision of rules governing the Office

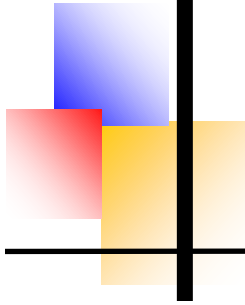
of Management and Budget (OMB) and Office of Information and Regulatory Affairs (OIRA) to implement federalism that is protective of state and local governments.

Sincerely,

Jameson Taylor, Ph.D.  
Director of Policy and Legislative Affairs  
AFA Action

cc:

President Elect Donald J. Trump  
Ms. Susie Wiles, WH COS  
Nominee Mr. Russell Vought, OMB  
Nominee Mr. Doug Burgum, Secretary of the Interior  
Nominee Ms. Lori Chavez-DeRemer, Secretary of Labor  
Nominee Mrs. Brooke Rollins, Secretary of Agriculture  
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**BOUNDARY LINE  
FOUNDATION**

HELPING ADMINISTRATIVE GOVERNMENT UNDERSTAND AND RESPECT ITS LIMITS

**Problems and Solutions  
in  
Agency Non-compliance  
with  
Federalism Mandates**

A Historical Audit of Agency Practices  
with  
Legislative and Policy Solutions

In Response to:

Consultation with State, Local, and Tribal  
Governments in Regulatory Policymaking  
Administrative Conference of the United States

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January 16, 2025

## **EXECUTIVE SUMMARY**

Since the early 1980s there have been increasing concerns about the negative effect of agency rulemakings and supra-legal executive actions on the Federal/State/local balance of power, and the administrative reworking of the national government that is producing a centralized government.

The negative impact of unanalyzed Federal actions at the State and county level includes jurisdictional conflicts, rising taxation from unfunded mandates, diminished local control over natural resources, a reduction in taxable lands, increased Federal burdens on private property, and redistribution of local resources to respond to propagating Federal edicts.

This audit summarizes case studies from the administrative record for six agencies in the Departments of Labor, Interior, and Agriculture to demonstrate systematic and willful neglect for the practices of Federalism codified in the Administrative Procedures Act, the Unfunded Mandates Act, and in multiple Executive Orders.

Three conclusions emerge from this work. First, agency neglect for consultation and meaningful impact analysis that would safeguard fundamental interests of State and local governments is pervasive throughout the executive, as agencies rarely conduct meaningful economic or consultative services during the rulemaking processes.

Second, actual deployment of federalistic programs is often in tension with the objectives of agency political and career leadership, who have an appetite for adopting rules and expanding their individual agencies.

Finally, even when agency malfeasance or individual mischief is detected, no punitive or disincentive pathway exists to rectify agency problems or reverse errant decisions.

One practical solution is for the Executive to establish a Blue-Ribbon Commission (BRC) to facilitate joint congressional and executive action that statutorily codifies the principals of federalism from Executive Order 13132 in the Administrative Procedures Act (APA). The BRC could be tasked with leading and supporting changes in the Office of Management and Budget (OMB) and Office of Information and Regulatory Affairs (OIRA) that establish regulatory frameworks that require agencies to demonstrate substantive compliance with principals of Federalism from the onset of the Rulemaking process.

While the authors recognize that the outworking of this policy solution could logjam propagation of agency rules from OMB and OIRA, the overall benefit from fundamental policy reform would result in restoration of tenth amendment prerogatives to state and local governments, and opportunities to return individual agencies to their congressionally delegated authorities and statutory mission.

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# 1.0 SITUATION APPRAISAL

## 1.1 Background -

### 1.1.1 History and Scope of Issues -

In the early 1980s, state and local governments began expressing concern about the material effect of federal preemption of state and local governmental prerogatives. Between 1988 and 1999, the executive branch and Congress responded by issuing executive orders and enacting statutes that require individual agencies to take prescriptive action to account for principles of Federalism during the rulemaking process.

Responsibility for assessing economic impacts and maintaining compliance with Federalistic statutes and executive orders is left to the agencies themselves, with the Office of Management and Budget (OMB) and Office of Information and Regulatory Affairs (OIRA) acting in administrative and budgetary capacities during the public notification and rule certification process.

For those situations involving agency error, mischief, or even malfeasance, State and local governments have little relief outside of the expensive and time-consuming labyrinth of administrative or judicial remedies. This condition is exacerbated by an expanding administrative bureaucracy, short administrative response windows, and the United States Supreme Court's Chevron<sup>1</sup> deference that once afforded agencies broad latitude to interpret their authorities during the rulemaking process.

From the beginning, agencies have been dismissive of their responsibilities to give substantive attention to Federalism mandates, prepare cost/benefit and impact analysis, or perform *meaningful* consultation with state and local governments during the rule or policymaking processes.

In some agencies, such as the U.S. Fish and Wildlife Service (FWS), a fraternal culture of elitism and errant, cult-like belief that the Endangered Species Act (ESA) is standalone law permeates the agency. This culture inhibits the outworking of procedural, consultative, or quantitative social impact directives to that agency that are designed to ensure natural resources, private property, and state and local governmental interests are protected.

One study of compliance conducted by the General Accounting Office (GAO) in 1999<sup>2</sup> under Executive Order 12612<sup>3</sup> reported that of the 11,414 Major<sup>4</sup> rules adopted by federal agencies between April 1996 and December 1998, only 26 percent even *mentioned* the topic of Federalism in their Federal Register notice, and only five (5)

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1 On June 28, 2024 the Chevron agency deference was overruled by [Loper Bright Enterprises v. Raimondo](#) decision at 45 F.4th 359 (D.C. Cir. 2022).

2 [“FEDERALISM. Previous. Initiatives have Little Effect on Agency Rulemaking.”](#) L. Nye Stevens. United States General Accounting Office. June 30, 1999.

3 [Executive Order 12612](#). Federalism. October 26, 1987.

4 “Major” rules are defined as those agency actions that will have greater than \$100-million impact on the economy under the Small Business Regulatory Enforcement Fairness Act.

34 actually conducted a federalism assessment. This is consistent with the examples in this  
35 audit and our observations over the fourteen years of professional practice.

36 GAO goes on to state:

37 *“Nearly all of these [Preamble] statements were standard,*  
38 *“boilerplate” certifications with little or no discussion of why*  
39 *the Rule did not trigger the executive order’s requirements.”*

40 and,

41 *“However, mentioning the order in the preamble to a Rule does*  
42 *not mean the agency took any substantive action. The agencies*  
43 *usually just stated that no federalism assessment was conducted*  
44 *because the Rules did not have federalism implications. Nearly*  
45 *all of these statements were standard, “boilerplate”*  
46 *certifications with little or no discussion of why the Rule did not*  
47 *trigger the executive order’s requirements.”*

48 and,

49 *“In fact, the preambles to only 5 of the 11,414 final rules that*  
50 *the agencies issued between April 1996 and December 1998*  
51 *indicated that a federalism assessment had been done - 2 in 1996*  
52 *and 3 in 1997.”*

### 53 1.1.2 Audit Approach -

54 This audit summarizes systematic and prolific non-compliance of six agencies  
55 from three executive branch departments with Federal statutes, executive orders, and  
56 principles of Federalism over a 12-year period. Our approach incorporates originally  
57 sourced documents, letters, audits, and investigative reports adopted for filing by state  
58 and local elected officials during the Administrative Procedures Act public comment  
59 process.

60 Between 2014 and 2025 the Department of the Interior, Bureau of Land  
61 Management (BLM), Department of the Interior, United State Fish and Wildlife Service  
62 (FWS), Department of Labor, Occupational Safety and Health Administration (OSHA),  
63 and Department of Agriculture, Forest Service (USFS) have consistently disregarded  
64 requests from local officials to engage in consultation. These agencies routinely ignore  
65 requirements to prepare economic impact assessments, dismiss reminders of statutory  
66 obligations, and consistently ignore the substantive views of state and county  
67 governments. Some of those examples are reported here.

68 Particularly problematic is the emergence and use of artificial intelligence (AI) in  
69 the development of “programmatic” agency documents designed to circumvent  
70 meaningful consultation process with state and local governments and the public. BLM,  
71 USFS, and FWS have all been using programmatic documents to circumvent consultation  
72 and public processes required under the National Environmental Policy Act (NEPA).<sup>5</sup>

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5 Correspondence. Adams County, Idaho to Bureau of Land Management. [“Response to MOU Required for Adams County Cooperating Agency Status, BLM Programmatic Environmental Impact Statement and Associated Resource Management Plan for Utility-Scale Solar Energy Development on Public Lands.”](#) July 17, 2023.

73 1.1.3 Purpose, Description, and History of Federalism -

74 The term “Federalism” as applied in this audit is:

75 *“Any Federal action that could have substantial direct effects on*  
76 *the States, on the relationship between the national government*  
77 *and the States, or on the distribution of power and*  
78 *responsibilities among the various levels of government.”*

79 “Federalism,” as used in the U.S. Constitution, refers to the division and sharing  
80 of power between the national, state, and county governments.<sup>6</sup> By distributing and  
81 diffusing the power among the federal, state and county governments, the Framers of the  
82 American system of government sought to balance a unified and limited national  
83 government while maintaining distinct, bottom-up autonomy in which state governments  
84 have broad and general police powers.<sup>7</sup>

85 The Federal-state-county federalistic system of the American government has  
86 additional advantages in that it increases accountability of elected officials by keeping  
87 government close to citizenry.<sup>8</sup> History demonstrates that the farther government is from  
88 the people, the less responsive and more susceptible it is to usurpation and tyranny.

89 The Supreme Court has frequently invoked certain constitutional provisions in  
90 determining when Congress exceeded its constitutional power or infringed upon state  
91 sovereignty. One well-known provision used to thwart encroachment of Federal agencies  
92 and the executive on the States is the Tenth Amendment, which provides:

93 *“...the powers not delegated to the United States by the*  
94 *Constitution, nor prohibited by it to the States, are reserved to*  
95 *the States respectively, or to the people.”*

96 During enactment and adoption of western state constitutions, the state  
97 governments were to be republican in form and provide for the diffusion of power through  
98 political subdivisions that maintain reserved and limited powers for self-government, and  
99 provisions for home rule.<sup>9</sup>

100 The condition upon which the States originally ratified the federal constitution was  
101 that the advantage was to remain with the States.<sup>1</sup> The term “Federal” comes from the  
102 Latin term “*foedus*” which means “to covenant” or “to compact.” Federalism is a  
103 covenant form of government under which the states *are to be protected by the national*  
104 *government* against foreign dangers but also enjoy internal order within their respective  
105 spheres and jurisdictions.

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6 [Constitution Annotated. “Intro. 7.3 Federalism and the Constitution.”](#)

7 The Supreme Court uses the term “Police Power” to refer to the states’ general power of governing and authority over public health, safety, and welfare. *See e.g., Nat’l Fed’n of Indep. BU.S. V. Sebelius*, 567 U.S. 519, 536 (2012).

8 “Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *Coleman v. Thompson*, 501 U. S. 722, 759 (1991) (*Blackmun, J., dissenting*).

9 The people are to be protected in all their lawful endeavors and possessions, enjoying the “exclusive right of governing themselves as a free, sovereign, and independent state” (Montana Const. Art. II Sec. II).



106 1.1.4 About The Boundary Line Foundation -

107 The Boundary Line Foundation (BLF) was established as a non-profit charity in  
108 July 2022 to upscale government-to-agency accountability, advocacy, and litigation  
109 scoping apparatus perfected by Stillwater Technical Solutions (STS) since 2011.

110 BLF supports Congress in its oversight duty by equipping the [administrative](#)  
111 [procedural record](#) and training state and county elected officials for bottom-up advocacy;  
112 by developing state-based, county commissioner and sheriff-led coalitions that engage  
113 agency appointees and career bureaucrats in policymaking; and by preparing the public  
114 record for litigation.

115 The cornerstones of the BLF [model](#) include application of statutes and authorities  
116 to agency initiatives through filing of policy analyses in the administrative record;  
117 organizing and advising of state officials, county commissioners, and sheriffs for  
118 collective representation; tactical activism that removes anonymity from federal political  
119 appointees and career bureaucrats; and, a litigation spotting program that pre-equips the  
120 administrative record for post decisional litigation.

121 BLF has extensive experience in applying the APA and dozens of other  
122 congressional acts to effect agency and executive rulemaking processes. We develop  
123 documents, programs, strategies, and multigenerational local networks that support state  
124 and county elected governmental officials when responding to Federal actions during the  
125 rulemaking process.

126 1.2 Summary: Application of Authorities -

127 For this audit, BLF accessed our database, reviewing and summarizing policy  
128 documents filed in the administrative record over a period of more than 10 years. This  
129 approach allows reviewers of this report to gauge for themselves the scope of neglect for  
130 federalism by the Departments of Labor, Interior, and Agriculture.

131 We understand that ACUS is focusing on agency consultation and compliance with  
132 principles of Federalism that could affect State, local, and tribal governments during  
133 regulatory policymaking. Meaningful consultation is a mandatory procedural process that  
134 agencies must offer to State, local, and tribal governments from the earliest point possible  
135 in the administrative rulemaking process.

136 Meaningful compliance with the government-to-government consultation mandate  
137 is also essential to ensure balancing of Federal, state, and local governmental police  
138 powers, prerogatives, and attention to avoid preemption of state and local rights.<sup>10</sup>

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10 [ACUS Recommendation 2010-1](#). *Agency Procedures for Considering Preemption of State Law*. Federal Register  
Vol. 76, No. 1. Page 81. January 3, 2011.

139 1.2.1 2 U.S.C. Ch. 25 §§ 1501 – 1552 Unfunded Mandates Reform Act -

140 The purpose of the Unfunded Mandates Reform Act (UMRA) is to:

- 141 • Strengthen the partnership between the federal government and  
142 State, local, and tribal governments.
- 143 • End imposition of federal mandates on State, local, and tribal  
144 governments that may not have adequate funding to assure  
145 compliance.
- 146 • Mandate that Congress consider funding assistance to State,  
147 local, and tribal governments to comply with federal rules and  
148 policies.
- 149 • Require that agencies develop procedures that enable State,  
150 local, and tribal officials to provide meaningful input and  
151 consultation during rulemaking.
- 152 • Require that agencies prepare budgetary cost estimates of  
153 potential impact upon State, local, and tribal governments before  
154 rule adoption.
- 155 • Review of the presence and synergistic effect of proposals with  
156 existing federal edicts on State, local, and tribal governments.

157 **2 U.S.C. § 1532 (a)(5)** - Requires individual agencies to provide a statement  
158 describing its consultation with officials of affected State, local, and tribal governments.  
159 The summary *shall* include an evaluation of comments and concerns.

160 **2 U.S.C. § 1533** - Mandates that before adopting regulations that could  
161 significantly affect small governments, agencies must develop a plan that provides notice  
162 of mandates. Agencies are required to allow opportunities for meaningful and timely  
163 input on proposals. Once rulemaking is complete, agencies are required to inform,  
164 educate, and advise State and local governments.

165 **2 U.S.C. § 1534** - Mandates that agencies develop effective processes for elected  
166 officers of State, local, and tribal governments (or their coalitions) to provide meaningful  
167 and timely input for developing regulatory proposals that contain significant federal  
168 intergovernmental mandates.

169 Each of these statutes employ the non-discretionary term “*shall*” in their  
170 construction. They are complemented by the directives in [E.O. 13132](#) Section 6 and [E.O.](#)  
171 [13175](#) Section 5. Both further the policies of the UMRA.

172 When federal actions impose budgetary costs and impacts on local governments  
173 and the private sector, those impacts must be assessed and accounted for to ensure special  
174 consideration to small governments and private sector interests in rulemaking. UMRA  
175 addresses this with the purpose of assisting agencies in their consideration of actions by:

176 *“Requiring that Federal agencies prepare and consider*  
177 *estimates of the budgetary impact of regulations containing*  
178 *Federal mandates upon State, local, and tribal governments and*  
179 *the private sector before adopting such regulations, and*  
180 *ensuring that small governments are given special*  
181 *consideration in that process.”<sup>11</sup>*

182 Governing by executive edict led to them ignoring statutory obligations, resulting  
183 in greater than necessary regulatory burdens and unfunded mandates on small entities.<sup>12</sup>

#### 184 1.2.2 Executive Order 13132: Federalism -

185 Executive Order 13132 of August 4, 1999, provides for division of governmental  
186 responsibilities between the national government and the States as intended by the  
187 Framers of the Constitution. Separation of powers ensures that principles of federalism  
188 guide the executive departments and agencies when formulating and implementing rules  
189 and policies in furtherance of UMRA.

190 E.O. 13132 § 1(a) is the only section specifically quoted by ACUS in [89 FR](#)  
191 [102852](#). The entire order provides clear directives for agency compliance during  
192 rulemaking.

193 Although agencies have historically been quick to certify that their proposed  
194 actions comply with E.O. 13132, many federal actions affect the distribution of power at  
195 all levels of government, even if they do not have substantial effects on the States or on  
196 the relationship between the national government and the States. Consequently, most  
197 agency actions have federalism implications that require greater diligence than was  
198 reported by GAO.

199 The E.O. 13132 § 1(b) definition of “State” or “States” includes all political  
200 subdivisions within a State, and the term “State and local officials” includes all elected  
201 officials. This broadens the applicability and requirements of E.O. 13132.

202 The order’s non-discretionary directive that each agency must maintain processes  
203 and procedures to ensure meaningful consultation means that timely notification must  
204 take place as early in the process as possible.

#### 205 1.2.3 - Executive Order 12866: Regulatory Planning and Review -

206 [Executive Order 12866](#) was issued at 58 FR 51735 on September 30, 1993.

207 The Order was issued to initiate Federal regulatory reform, to require agencies to  
208 respect the prerogatives of State, local, and tribal governments, and to require that the  
209 agency rulemaking process be effective, consistent, and understandable to the public.

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11 2 U.S.C. 25 § 1501(7)(B).

12 5 U.S.C. 601 note Sec. 202 findings (5).

210 E.O. 12866 directs federal agencies to adopt only those regulations required by  
211 statute, which are necessary to fill statutory gaps or address market failures, or to protect  
212 the health of the public, the environment, or the well-being of Americans.

213 E.O. 12866 section 1(9) directs agencies to seek views of State, local, and tribal  
214 officials before adopting regulations that uniquely affect those governments. It requires  
215 agencies to assess the cumulative effect of federal regulations on State, local, and tribal  
216 governments and the availability of resources to implement those mandates. Similarly,  
217 agencies are required to attempt harmonization of federal actions with related State, local,  
218 and tribal governmental functions.

219 Section 4 of E.O. 12866 requires agencies to involve the State, local, and tribal  
220 governments and the public in the regulatory planning process, and to maximize  
221 opportunities for consultation and conflict resolution. It also requires annual preparation  
222 of a unified regulatory agenda, and a regulatory plan for more significant actions that the  
223 agency expects to address in that calendar year.

224 Section 4(e) directs that the OIRA Administrator meet quarterly with State, local,  
225 and tribal government representatives to identify existing and proposed regulations that  
226 may affect those governments.

227 Section 5(b) encourages State, local, and tribal governments to assist OIRA in  
228 identifying those regulations that impose significant burdens, that have outlived their  
229 usefulness, or that are inconsistent with the public interest.

#### 230 1.2.4 Executive Order 12372: Intergovernmental Review of Federal Programs -

231 Executive Order 12372, issued at 47 FR 30959 on July 14, 1982, fosters  
232 intergovernmental partnerships and strengthens federalism by relying on State and local  
233 processes for governmental coordination and review of federal financial assistance or  
234 federal development at the local level.

235 Section 1 of E.O. 12372 directs agencies to provide opportunities for consultation  
236 of State and local elected officials that provide non-federal funds or that may be affected  
237 by a Federal proposal of Federal development.

238 Section 2 of E.O. 12372 directs agencies to develop or refine their financial  
239 assistance and federal development programs to accommodate existing programs at the  
240 State level as early in the planning cycle as feasible. Agencies must attempt to  
241 accommodate the concerns of State and local officials about federal financial assistance  
242 and development programs, and direct Federal programs through the designated State  
243 channels if feasible.

244 Agencies must seek to coordinate the views of affected State and local officials  
245 between states when proposed financial assistance, federal interstate development, or  
246 potential urban impacts exist. Existing interstate mechanisms redesignated as part of a  
247 state process may be used for that purpose.

248 Agencies must support State and local governments by discouraging the  
249 reauthorization or creation of planning organizations which are federally funded, have  
250 federally prescribed membership, are established for a limited purpose, or are not  
251 accountable to State or local officials.

252 Section 4 mandates that OMB must maintain a State Single Point of Contact  
253 (SPOC) List of officially designated State entities to review and coordinate federal  
254 financial assistance and direct federal development. The most recent version of this SPOC  
255 List was published in July 2024. That list includes Arizona, Arkansas, California,  
256 Delaware, the District of Columbia, Florida, Indiana, Iowa, Kentucky, Louisiana,  
257 Maryland, Missouri, Nevada, New Hampshire, South Carolina, Utah, West Virginia,  
258 Puerto Rico, U.S. Virgin Islands, and American Samoa. States not listed have chosen not  
259 to participate in the intergovernmental review process and do not have a SPOC.

#### 260 1.2.5 Presumption Against Preemption Doctrine -

261 Federal preemption of state and common law is an important consideration during  
262 the agency rulemaking and consultation process. This will particularly be the case as  
263 agencies retool their rulemaking behaviors to accommodate the U.S. Supreme Court  
264 *Loper Bright Enterprises v. Raimondo* decision, which relegates statutory interpretation  
265 back to the judiciary.

266 Federal preemption is either express, i.e., Congress explicitly allows preemption  
267 by statute or implied by the structure and purpose of the regulatory framework. Implied  
268 preemption has two additional categories; either field, where federal regulation would  
269 leave no room for state regulation, or conflict, where only state law that is incompatible  
270 with the federal regulation would be displaced by the proposed rule.<sup>13</sup>

271 [Executive Order 13132](#) is the foundation for agency preemption of state law. As  
272 discussed in Section 1.2.2, the Order prescribes principles, rulemaking criteria, and  
273 requirements for meaningful government-to-government consultation. E.O. 13132 also  
274 contains requirements for agencies to consider when assessing the potential to preempt  
275 state law.

276 E.O. 13132 requires agencies to provide a federalism impact statement (FIS)  
277 whenever regulations would have federalism implications or potentially preempt state  
278 law.

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13 Sharkey, Catherine M. *Inside Agency Preemption*. Michigan Law Review, Vol. 110, Issue 4. 2012.

279 1.2.6 Anti-commandeering Doctrine -

280 *“The Federal Government may neither issue directives*  
281 *requiring States to address particular problems, nor command*  
282 *the States’ officers...to administer or enforce a federal*  
283 *regulatory program. It matters not whether policymaking is*  
284 *involved, and no case-by-case weighing of the burdens or*  
285 *benefits is necessary; such commands are fundamentally*  
286 *incompatible with our constitutional system of dual*  
287 *sovereignty.*<sup>14</sup>

288 **2.0 NEGLECT OF FEDERALISM IN AGENCY POLICYMAKING**

289 *2.1 Department of Labor -*

290 2.1.1 Proposed OSHA Emergency Response Standard Rule -

291 On February 5, 2024, OSHA published its 250-page proposed Emergency  
292 Response Standard (ERS) in the Federal Register<sup>15</sup>. The proposed ERS would impose  
293 vast and transformative changes to the national emergency response system, affecting  
294 1,054,611 Emergency Responders and 331,472 volunteers; would foreseeably regulate  
295 *private* emergency service providers; impose *infrastructure vulnerability* assessments on  
296 local governments, require medical exams for volunteers, and mandate amendment of 29  
297 OSHA State Plans and programs.<sup>16</sup>

298 On March 13, 2024, attorneys for the Boundary Line Foundation filed a [Freedom](#)  
299 [of Information Act](#) (FOIA) request with OSHA with the express intent of obtaining  
300 Federalism consultation records and certifications for the proposed ERS under E.O.  
301 13132.

302 The FOIA requested results of OSHA’s consultation with State and local officials,  
303 including the nature of their concerns, and the required agency response regarding the  
304 proposed OSHA ERS:<sup>17</sup>

305 *“All documents, records, notices, electronic mail or other*  
306 *documentation related to the Federalism consultation activities*  
307 *required under Executive Order 13132,<sup>18</sup> including descriptions*  
308 *from State and Local government contacts, their response, and*  
309 *documentation of state and local governmental concerns*  
310 *reported to the Office of Management and Budget by OSHA*  
311 *showing compliance.”*

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14 Printz v. United States, 521 U.S. 898 (1997).

15 U.S. Department of Labor, Occupational Safety and Health Administration. Proposed Rule. Emergency Response Standard. [Federal Register Vol. 89, No. 24. at 7774](#). Monday, February 5, 2024.

16 Ibid. 89 FR at 7776.

17 [Freedom of Information Act Request](#); Proposed Emergency Response Standard Rule Docket No. OSHA-2007-0073. Budd-Falen Law Office. March 13, 2024.

18 Section6(c)(1),(2), Consultation. [Executive Order 13132, August 4, 1999, Federalism](#).

312 After significant delay, on May 13, 2024, [OSHA Directorate of Standards Deputy](#)  
313 [Director Andrew Levinson](#) provided a formal and incomplete FOIA response<sup>19</sup> to the  
314 FOIA, reporting that OSHA had not consulted with any of the 29 OSHA Plan States, nor  
315 state and local governments who would be affected by the [\\$662,172,447](#) annual cost of  
316 the proposed ERS Rule:

317 *“On Federalism consultation – As noted in the Notice of*  
318 *Proposed Rulemaking for the Emergency Response proposed*  
319 *rule, OSHA did not conduct any consultative services pursuant*  
320 *to Executive Order No. 13132. See [89 FR 7774](#), 7998 (Feb. 5,*  
321 *2024). Therefore, OSHA has located no responsive records. As*  
322 *such, we are issuing to you a no record response on this item.”<sup>20</sup>*

323 On July 22, 2024, [thirty-seven legislators](#) from 15 states and [five senior state](#)  
324 [executives](#), the [Western States Sheriffs' Association](#), thirty-one counties, and [nineteen](#)  
325 [non-profit](#) organizations across twenty-six states filed opposition to the proposed ERS by  
326 adopting and submitting a BLF *Statutory and Case Law Survey of the Emergency*  
327 *Response Standard* to the proposed ERS administrative record.<sup>21</sup>

328 The notice-and comment period for the proposed ERS closed on July 22, 2024,  
329 and the next day, July 23, 2024, OSHA published in the Federal Register a [Notice of](#)  
330 [Informal Hearing](#) before Department of Labor administrative law judges, beginning on  
331 November 12, 2024.

332 Testimony on the proposed ERS by elected sheriffs and the leadership of the  
333 National Sheriffs' Association, the Western States Sheriffs' Association, and two  
334 statewide sheriffs' associations at the [November 13, 2024 Department of Labor](#)  
335 [administrative hearing session](#) reflected key elements from the ERS statutory survey.

336 As reported in testimony by five elected Sheriffs and demonstrated in the BLF  
337 survey filed by dozens of elected officials the proposed ERS and its procedural process  
338 is irreparably flawed:

- 339 • The 29 OSHA plan states required to adopt the proposed ERS  
340 within six months of its promulgation were not consulted as  
341 required by longstanding Federalism requirements.
- 342 • The assumptions used to determine the benefit from the  
343 proposed ERS are fundamentally flawed because OSHA does  
344 not have jurisdiction over States or units of local governments  
345 used to perform the cost/benefit analysis. As a result, the  
346 Secretary of Labor is not able to meet the legal obligation for

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19 [Correspondence](#). U.S. Department of Labor, Occupational Safety and Health Administration to Budd Falen Law Office. Andrew Levinson, Director, Directorate of Standards and Guidance. May 13, 2024.

20 [Correspondence](#). [U.S. Department of Labor to Attorney Karen Budd-Falen](#). Andrew Levinson, Director. OSHA Directorate of Standards and Guidance. May 13, 2024.

21 [A Statutory and Case Law Survey of the Proposed OSHA Emergency Response Standard](#). Report to the Public Record, Docket No. 89, No. 24. The Boundary Line Foundation. July 19, 2024.

347 meeting the “*economically feasible*” or “*cost-effective*” factors  
348 deeply embedded in OSHA practice and case law.<sup>22,23,24</sup>

- 349 • The Secretary of Labor has not been delegated explicit authority  
350 to preempt State historic police powers as she cannot  
351 demonstrate a *clear and manifest purpose of Congress* from the  
352 enabling OSHA Act of 1970.
- 353 • Consultation with elected and appointed State and local officials  
354 early in the Rulemaking process would have revealed the flaws  
355 in the proposed ERS Rule.

### 356 2.1.2 Final OSHA Worker Representative Walkaround Rule -

357 On August 30, 2023, the Department of Labor OSHA published its Worker  
358 Walkaround Representative Designation Process Rule (OSHA WA Rule) in the Federal  
359 Register.<sup>25</sup>

360 Promulgation of the OSHA WA Rule now allows participation of third-party  
361 representatives during the OSHA industrial inspection process, expanding-by-regulation  
362 the authority of the Chief Safety and Health Officer (CSHO) to include outside unions,  
363 community organizations, non-profit corporations, environmental activist groups, or  
364 even church pastors during inspection of *union* and *non-union* workplaces.

365 On November 13, 2023, senior [executive officials from four states](#), eight  
366 [legislators from the State of Utah](#), and attorneys for the non-profits [James Madison](#)  
367 [Institute, Pelican Institute for Public Policy Research, and Liberty Justice Center](#) filed  
368 the *BLF Survey of the History, Background and Statutory Compliance of the Proposed*  
369 *Worker Walkaround Rule with the OSH Act of 1970* in the WA Rule administrative  
370 record.<sup>26</sup>

371 In its 44-page Federal Register Notice adopting the WA Rule,<sup>27</sup> OSHA was  
372 completely dismissive and did not address any of the substantive Federalism,  
373 consultation, and preemption policy issues raised by state and local elected officials.

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22 Int’l Union v. OSHA, 37 F3rd 665 (DC Cir 1994).

23 [58 Federal Register at 16,612](#). March 30,1993.

24 Michigan v. EPA, 135 S. Ct 2699 (2015).

25 [88 Fed. Reg. No. 167 at 59825-59834. August 30, 2023](#).

26 [Survey of the History, Background and Statutory Compliance of the Proposed Worker Walkaround Rule with the OSH Act of 1970](#). The Boundary Line Foundation. A Report to the Public Record Docket No. OSHA-2023-0008. November 9, 2023.

27 [Final Rule. Worker Walkaround Representative Designation Process](#). 89 Fed. Reg. No 63. Monday, April 1, 2024.



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Examples include:

- When certifying to OMB that the OSHA WA Rule complies with Section 8(a) of Executive Order 13132,<sup>28</sup> OSHA failed to adequately consult with 29 affected States that have OSHA - approved State plans;
- The process OSHA used to assess foreseeable impacts to State legislative or regulatory actions or consider alternatives neglected information that could only be revealed through the State consultation process;
- In purporting that the proposed WA Rule “*merely clarifies requirements related to workplace safety and health inspections conducted by OSHA under the OSH Act*,” OSHA dismissed the Congressional intent and statutory structure of the OSH Act itself, circumvented the procedural requirements of Executive Order 13132, and neglected relevant court precedent:<sup>29</sup>

VII. Federalism -

*“OSHA reviewed this proposed rule in accordance with the Executive Order on Federalism (E.O. 13132, 64 FR 43255, August 10, 1999), which requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when clear constitutional and statutory authority exists, and the problem is national in scope. **This proposal merely clarifies requirements related to employee representation during workplace safety and health inspections conducted by OSHA under the OSH Act.** Because these inspections are conducted by OSHA, not States, and occur under the authority of federal law, OSHA does not believe that the proposal would restrict any State policy options.”*<sup>30</sup>

In contrast to OSHA’s position that the proposed WA Rule was a mere “clarification,” the BLF Survey demonstrated **how** the WA Rule would impact 27 OSHA Plan states and territories who have OSHA State Implementation Plans.

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<sup>28</sup> [Executive Order 13132](#). Federalism. William Jefferson Clinton. August 4, 1999.

<sup>29</sup> [National Federation of Independent Businesses \(NFIB\) vs. Dougherty. CIVIL ACTION No.3:16-CV-2568 \(N.D. TEX, Feb. 3, 2017.\)](#)

<sup>30</sup> [88 Fed Reg. No. 167 at 59832.](#)

412 In its Federal Register notice, OSHA **itself acknowledged that those states and**  
413 **territories** “*would be required to adopt regulations that are identical or at least as*  
414 *effective as the rule, ...within six months of promulgation of a final rule.*”<sup>31</sup> This means  
415 that each OSHA Plan state was subject to cascading regulatory capture from the WA  
416 Rule, a violation of anti-commandeering doctrine.

417 The BLF Survey demonstrated in the public record that Executive Order 13132<sup>32</sup>  
418 directs how the OSHA principal designated officer is to consult with affected States and  
419 U.S. territories; perform detailed impact analysis on State and local governments; and  
420 provides procedural reporting to the Office of Management and Budget (OMB) and the  
421 public record through the Federal Register:

422 *Sec. 6. Consultation -*

423 *(a) “Each agency shall have an accountable process to*  
424 *ensure meaningful and timely input by State and local*  
425 *officials in the development of regulatory policies that have*  
426 *federalism implications. Within 90 days after the effective*  
427 *date of this order, the head of each agency shall designate*  
428 *an official with principal responsibility for the agency's*  
429 *implementation of this order and that designated official*  
430 *shall submit to the Office of Management and Budget a*  
431 *description of the agency's consultation process.”*

432 and,

433 *(b) “To the extent practicable and permitted by law, no agency*  
434 *shall promulgate any regulation that has federalism*  
435 *implications, that imposes substantial direct compliance costs*  
436 *on State and local governments, and that is not required by*  
437 *statute, unless:*

438 *(1) funds necessary to pay the direct costs*  
439 *incurred by the State and local governments in*  
440 *complying with the regulation are provided by*  
441 *the Federal Government; or,*

442 *(2) the agency, prior to the formal*  
443 *promulgation of the regulation,*

444 *(A) consulted with State and local*  
445 *officials early in the process of*  
446 *developing the proposed regulation;*

447 *(B) in a separately identified portion*  
448 *of the preamble to the regulation*  
449 *as it is to be issued in the Federal*  
450 *Register, provides to the Director*  
451 *of the Office of Management and*  
452 *Budget a federalism summary*  
453 *impact statement, which consists of*  
454 *a description of the extent of the*  
455 *agency's prior consultation with*

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<sup>31</sup> [88 Fed Reg. No. 167 at 59832.](#)

<sup>32</sup> [Executive Order 13132.](#) Federalism. William Jefferson Clinton. August 4, 1999.

456 *State and local officials, a*  
457 *summary of the nature of their*  
458 *concerns and the agency's position*  
459 *supporting the need to issue the*  
460 *regulation, and a statement of the*  
461 *extent to which the concerns of*  
462 *State and local officials have been*  
463 *met; and,*

464 *(C) makes available to the Director of*  
465 *the Office of Management and*  
466 *Budget any written*  
467 *communications submitted to the*  
468 *agency by State and local*  
469 *officials.”*

470 To demonstrate how neglect for the Federalism requirements would procedurally  
471 financially and procedurally impact OSHA Plan State legislatures and executive  
472 functions, the BLF Survey assessed the regulatory impacts to OSHA programs in the State  
473 of Tennessee. Under the proposed changes, **Tennessee is now required to update its**  
474 **regulations** because the OSHA WA Rule has been adopted. Specifically, the Tennessee  
475 OSHA program is enabled by Tennessee Rule 800-01-04.09, which reads:

476 *“The representative(s) of the employees shall be an employee(s)*  
477 *of the employer. However, if in the judgement of the compliance*  
478 *officer, good cause has been shown why accompaniment by a*  
479 *third party who is not an employee(s) of the employer (such as*  
480 *an industrial hygienist or safety engineer) is reasonably*  
481 *necessary to the conduct of an effective and thorough physical*  
482 *inspection of the workplace such third party may accompany the*  
483 *compliance officer during the inspection.”*

484 Adoption of the OSHA WA rule now renders the Tennessee rule non-compliant,  
485 requiring legislative action.

486 The adopted OSHA WA Rule has the potential to require executive agencies across  
487 the state of Tennessee to review their policies and programs. For example, the Tennessee  
488 Division of Occupational Safety and Health (TOSHA) is now required to review and  
489 update its field manuals to reflect the newly imposed change. Other executive  
490 departments within the State of Tennessee government, such as the Tennessee Department  
491 of Transportation (TDOT), may be similarly affected by the third-party worker inspection  
492 requirements.

493 Finally, according to the March 21, 2001, *OSHA State Plan Policies Manual* by  
494 the U.S. Department of Labor,<sup>33</sup> all states with OSHA approved programs, including  
495 Tennessee, **are required to maintain strategic plans** that publish measurable and  
496 results-oriented programmatic goals. The strategic plans of OSHA Plan States are,  
497 according to policy, required to be updated.

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33 [U.S. Department of Labor, OSHA Instruction. State Plan Policies and Procedures Manual Directive Number STP 2-022B, March 21, 2001.](#)

498 It is reasonable to conclude that all States and territories that have OSHA plans and  
499 programs are affected by the OSHA WA Rule as was Tennessee. However, in its Federal  
500 Register notice adopting the OSHA WA Rule, OSHA systematically dismissed the  
501 substantive comments about procedure, Federalism, and the substantive issues articulated  
502 in the administrative record.<sup>34</sup>

## 503 *2.2 Department of the Interior -*

### 504 2.2.1 BLM Comprehensive Landscape and Health Rule -

505 On April 6, 2023, the Bureau of Land Management (BLM) published in the Federal  
506 Register its proposed Conservation and Landscape Health Rule (CLH Rule), and on May  
507 9, 2024<sup>35</sup> BLM finalized its CLH Rule.

508 The far-reaching CLH Rule replaced the productive, market-based oil, gas,  
509 mineral, and timber extractive programs mandated by the Federal Land Policy and  
510 Management Act of 1976 (FLPMA) with a synthetic, natural resource asset capitalization  
511 and a conservation leasing system that implements international wildlife biodiversity  
512 ideology and the multinational agenda of the Paris Climate Agreement.

513 In an analysis of the CLH Rule that was filed in the administrative record by  
514 elected officials from thirty-three counties in three states, BLF concludes that the rule:

- 515 1. Illegitimately legislates through regulation a seventh  
516 principal use, violating the non-delegation, intelligible  
517 principle standard.
- 518 2. Subordinates the statutory FLPMA doctrine of multiple use  
519 to nonproductive land conservation programs not delegated  
520 to the Secretary of the Interior.
- 521 3. Subjects 245 million acres of the natural resource assets  
522 managed by BLM to international natural asset trading  
523 markets.
- 524 4. Violates the Congressional Review Act (CRA) through  
525 resurrection of the Planning 2.0 Rule.
- 526 5. Imposes in the public land laws of the United States the  
527 international conservation, leasing, and the natural asset  
528 inventory/reporting system from the Paris Climate  
529 Agreement.

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34 [Final Rule. Worker Walkaround Representative Designation Process](#). 89 Fed. Reg. at 22600.

35 [Conservation and Landscape Health - Final Rule](#). Bureau of Land Management. 89 Federal Register No. 91 at 40308. May 9, 2024.

530 6. Implements the Biden Administration’s Executive Order  
531 14008 and the America the Beautiful 30 by 30 agenda  
532 through the Department of Interior Climate Action Plan  
533 (CAP) and Secretarial Order 3399.<sup>36</sup>

534 During the rulemaking process, the Montana Natural Resource Coalition, and the  
535 Coalition of Arizona New Mexico Counties separately engaged the [Montana-Dakotas](#) and  
536 [New Mexico State](#) BLM offices in on-the-record FLPMA Title II county-to-agency  
537 coordination.

### 538 2.2.2 BLM Programmatic Sage Grouse Plan Amendments -

#### 539 *Background*

540 In 2014 and 2015 the Bureau of Land Management amended land use plans for the  
541 States of California, Colorado, Idaho, Montana, Nevada, North Dakota, Oregon, South  
542 Dakota, Utah, and Wyoming (2015 Sage-Grouse Plan Amendments) to provide for  
543 conservation of the Greater Sage Grouse (GRSG) on public lands.

544 In 2019, BLM amended several land use plans for the States of California,  
545 Colorado, Idaho, Nevada, Oregon, Utah, and Wyoming (2019 Sage-Grouse Plan  
546 Amendments). On October 16, 2019, the United States District Court for the District of  
547 Idaho preliminarily enjoined the BLM from implementing the 2019 Sage-Grouse Plan  
548 Amendments.

549 Citing “*new science*,” “*rapid changes*,” and “*effects of climate change affecting*  
550 *BLM’s public lands management*,”<sup>37</sup> on November 22, 2021, BLM issued a Notice of  
551 Intent (NOI) **to amend 77 land use plans across ten states** for greater sage-grouse  
552 conservation, and to prepare associated Environmental Impact Statements (EISs).

553 Because it is impossible to meaningfully fulfill its NEPA and federalism  
554 consultation requirements during simultaneous centrally-driven amendment of 77 land  
555 use plans, we speculate that BLM is deploying the artificial intelligence program it  
556 developed for its solar program.<sup>38</sup>

#### 557 *Engagement*

558 On March 15, 2024, BLM issued a notice of availability of the draft resource  
559 management plan amendment and EIS for the range-wide Greater sage-grouse planning  
560 area.<sup>39</sup> The Montana Natural Resource Coalition (MtNRC) developed substantive  
561 comments addressing concerns with how BLM administratively proceeded with  
562 developing the alternatives and pointed to a significant departure from the land use  
563 planning regulations at 43 CFR part 1600.

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36 “[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](#).” The Boundary Line Foundation. June 29, 2023.

37 [86 Federal Register No. 222 at 66331](#). November 22, 2021.

38 [Correspondence](#). Adams County, Idaho to Bureau of Land Management. July 17, 2023.

39 [89 Federal Register No. 52 at 18963](#). March 15, 2024.

564 Although many counties were listed as NEPA cooperating agencies, BLM  
565 inappropriately withdrew the entire planning process from the local BLM field offices  
566 and proceeded to develop amendments to the 77 RMPs across ten states under **a single**  
567 **programmatic EIS**. BLM did this despite the Federal Register NOI of November 2021  
568 explicitly stating the agency would develop “**environmental impact statements**”  
569 (plural).

570 Title II, Section 202 of the land use planning section of the Federal Land Policy  
571 and Management Act (FLPMA) mandates that BLM employ a systematic,  
572 interdisciplinary approach or integrated consideration of physical, biological, economic,  
573 and other sciences consistent with the principles of multiple-use and sustained-yield in  
574 other applicable law.<sup>40</sup> The Secretary of the Interior is, to the maximum extent permitted  
575 by law, to coordinate the land use inventory, planning, and management activities of  
576 public lands with the land use planning and management programs of other Federal  
577 departments and agencies, **and of the States and local governments within which the**  
578 **lands are located.**<sup>41</sup>

579 MtNRC expressed concern with the trend towards top-down land use planning pulling  
580 the process out of the local field offices.<sup>42</sup> Local field office personnel agreed that the process  
581 is being driven from Washington D.C. running counter to the land use planning regulations  
582 at **43 C.F.R. § 1600 Planning** which continually refer to the *Field Manager* as the primary  
583 responsible official for the key elements in developing and implementing RMPS at the field  
584 office level.<sup>43</sup> Montana Field office managers were not the officials developing and  
585 cooperating with counties in the development of the EIS. It was performed centrally through  
586 the Department of the Interior via Zoom meetings.<sup>44</sup>

### 587 *Administrative Protest*

588 On November 15, 2024, BLM issued a Notice of Availability of the proposed  
589 resource management plan amendment and final environmental impact statement for  
590 Greater sage-grouse range-wide planning.<sup>45</sup> MtNRC filed a protest letter regarding the  
591 **concurrent amendment of 77 RMPs with only one single programmatic EIS stating:**

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40 [43 U.S.C. § 1712\(c\)\(1\)\(2\)](#).

41 43 CFR § 1610.4-9 *Monitoring and evaluation* - The proposed plan shall establish intervals and standards, as appropriate, for monitoring and evaluation of the plan... The Field Manager shall be responsible for monitoring and evaluating the plan in accordance with the established intervals and standards and at other times as appropriate to determine whether there is sufficient cause to warrant amendment or revision of the plan.

42 43 CFR § 1601.0-5 (m) Resource area or field office means a geographic portion of a Bureau of Land Management district. It is the administrative subdivision whose manager has primary responsibility for day-to-day resource management activities and resource use allocations and is, in most instances, the area for which resource management plans are prepared and maintained.

43 43 CFR § 1610.1 (b) “A resource management plan shall be prepared and maintained on a resource or field office area basis, unless the State Director authorizes a more appropriate area.”

44 43 CFR § 1610.4 – 1-9 Resource management planning process.

45 [89 Federal Register No. 221 at 90311](#). November 15, 2024.

592                   *“The Sage grouse amendments represent a significant departure*  
593                   *from historic development of Resource Management Plans at the*  
594                   *field office or district level. Amending 77 RMPs across 10 states*  
595                   *under a single Environmental Impact Statement falls*  
596                   *significantly short of assessing the various local conditions and*  
597                   *knowledge that is aggregated at localized levels.”*

598                   Concluding with:

599                   *“We protest the use of a single programmatic EIS to amend 77*  
600                   *RMPs across 10 states. As stated, this disenfranchises local*  
601                   *county involvement who represent constituents who live and*  
602                   *work within these planning regions. These top-down planning*  
603                   *initiatives remove the public from the public process.”*

### 604                   2.2.3 BLM Powder River Basin Miles City RMP Amendments -

#### 605                   *Background*

606                   The Miles City BLM Field Office manages 2.7 million acres of BLM surface land  
607                   and 11.7 million acres of mineral estate across 17 eastern Montana counties. Coal  
608                   produced from Federal land in the Powder River Basin in Montana and Wyoming  
609                   accounts for 85% of all the federal coal estate<sup>46</sup> and 40% of the total U.S. annual coal  
610                   production.<sup>47</sup>

611                   BLM finalized amendments to the Miles City Field Office Resource Management  
612                   Plan (RMP) in 2015. Subsequently, the agency prepared a supplemental EIS in response  
613                   to a court order.<sup>48</sup>

614                   On October 4, 2019, BLM issued a final Supplemental Environmental Impact  
615                   Statement (SEIS).<sup>49</sup> The revised, *“reasonably foreseeable development scenario”* used in  
616                   the 2015 Miles City RMP projected current coal production from existing mines to  
617                   forecast development over a 20-year planning horizon. The revised scenario was applied  
618                   to all alternatives. A final BLM Record of Decision (ROD) was issued in 2021.

619                   The *Western Organization of Resource Councils* litigated again, forcing another  
620                   supplemental EIS. On May 8, 2023, BLM issued a draft EIS.<sup>50</sup> On May 17, 2024, BLM  
621                   issued a final SEIS and plan amendment<sup>51</sup> to address the order of the U.S. District Court  
622                   for the District of Montana.<sup>52</sup>

623                   The final supplemental EIS includes additional analysis that evaluates *“no-*  
624                   *leasing”* and *“limited coal leasing”* alternatives; discloses the public health impacts, both  
625                   climate and non-climate, of burning fossil fuels (coal, oil, and gas); and completes new

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46 [Background](#). Bureau of Land Management. BLM.gov. Retrieved January 14, 2025.

47 [U.S. Energy Information Administration - EIA - Independent Statistics and Analysis](#)

48 *Western Organization of Resource Councils, et al. v. BLM*. March 26, 2018 and July 31, 2018.

49 [84 Federal Register No. 193 at 53171](#). October 4, 2019.

50 [88 Federal Register No. 88 at 29689](#). May 8, 2023.

51 [89 Federal Register No. 97 at 43432](#). May 17, 2024.

52 *Western Organization of Resource Councils, et al. v. BLM*. CV 00076–GF–BMM. August 3, 2022.

626 coal screens in accordance with 43 CFR 3420.1–4 to determine the lands to be made  
627 available for further consideration for coal leasing in the planning area.

628 After receiving protests, BLM issued a protest resolution on November 14, 2024,  
629 finalizing a ROD to **close all Federal leasable coal estate within the Powder River**  
630 **Basin.**

### 631 *Engagement and Unresolved Protests*

632 The Mining and Minerals Policy Act of 1970 (MMPA) established the national  
633 policy of the United States as fostering and encouraging private enterprise in the  
634 development of sound and economically stable practices in the minerals exploration,  
635 mining, and reclamation industries. The Federal Land Policy Management Act (FLPMA)  
636 mandates that the Secretary of the Interior and the Secretary of Agriculture are  
637 responsible for implementing MMPA policy “*when exercising his or her authority under*  
638 *other such programs as may be authorized by law other than the mining act.*”<sup>53</sup>

639 The domestic need for and importance of federal minerals, including coal, is  
640 essential to the local tax base,<sup>54</sup> energy production, national security, and basic human  
641 welfare interests. In enacting FLMPA, Congress **explicitly mandated management of**  
642 **federal lands in the context of the need for domestic sources of minerals, food,**  
643 **timber, and fiber,** and codified these principles in the MMPA.<sup>55</sup>

644 The Miles City planning area is located in Carter, Custer, Daniels, Dawson, Fallon,  
645 Garfield, McCone, Powder River, Prairie, Richland, Roosevelt, Rosebud, Sheridan,  
646 Treasure, Wibaux, and portions of Big Horn and Valley Counties, Montana, and  
647 encompasses approximately 2.7 million surface acres of BLM-managed public land and  
648 11.7 million acres of Federal coal mineral estate.

649 The administrative and judicial records are clear that the Department of the Interior  
650 has departed from its statutory mandate to comply with a court order that elevates  
651 environmental issues over statutory mandates, contrary to established Supreme Court of  
652 the United States case law.<sup>ii</sup>

653 The multiple-use criterion used by BLM has no explicit congressionally delegated  
654 basis that is counter to, and poses a competing mechanism with, existing congressionally  
655 delegated statutory priorities.<sup>56</sup> The final BLM decision was not proven using the  
656 reproducibility and integrity standards of the Data Quality Act, violates fundamental  
657 federalism principles, and should not have been used to close the leasable coal estate on  
658 public lands.

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53 [83 Federal Register No. 97 at 23295](#). May 18, 2018.

54 [CRS - R46278](#): “Coal mining on federal lands requires the payment of royalties. The royalty for surface mined coal is a minimum of 12.5% of the gross value of coal produced, and the royalty for coal mined by underground mining methods is 8%.”

55 [43 U.S.C. § 1701\(a\)\(12\); 43 U.S.C. § 1702\(l\)](#).

56 ... 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).



659 BLM’s final decision contravenes input provided by state and county governments  
660 and mandates for the Secretary of the Interior to facilitate the orderly exploration,  
661 development, and production of mineral and energy resources by encouraging and  
662 fostering private enterprise.

663 For their socio-economic analysis study area, BLM only considered four Montana  
664 counties and one Wyoming county, three of which are mostly outside the planning region  
665 (see DEIS p. 3-106). The study area errantly **excluded nine counties within the planning**  
666 **area with subsurface coal estate available for lease within their jurisdictions.**

667 Because the RMP amendment is limited to amending those decisions for lands  
668 acceptable for further consideration for leasing, it is unclear why BLM did not take a hard  
669 look at the down-stream economic impacts associated with total prohibition of federal  
670 leasing in multiple Montana counties.

671 The final decision impedes State jurisdiction over subsurface mineral estate on  
672 trust lands within the RMP area due to the checkerboard pattern of state and federal  
673 mineral estate. The Mineral Leasing Act (MLA) savings provisions **demonstrate that it**  
674 **is not the intent of Congress for BLM to exercise exclusive administrative**  
675 **jurisdiction over mineral leasing operations requiring consistency with the laws of**  
676 **the state** in which the leased property is located.<sup>57</sup>

677 Coal mining on federal lands includes payment of royalties. The royalty for surface  
678 mined coal is a minimum of 12.5% of the gross coal value produced, and the royalty for  
679 coal mined by underground mining methods is 8%.<sup>58</sup> The federal government returns  
680 49% of federal royalty revenues collected to the states in which those revenues were  
681 generated. In Montana, 25% of the funds are then distributed to the impacted county.

682 Article XI, Section 5 of the Montana State Constitution requires that 50% of  
683 collected coal severance taxes be allocated to the Coal Severance Tax Trust Fund, which  
684 supports renewable energy development projects, regional water systems, economic  
685 development opportunities, and state-operated educational facilities.<sup>59</sup>

686 The MtNRC protest letter specifically states that:

687 *“This decision is an abuse of agency discretion. There is no legal*  
688 *basis for Department of Interior (DOI) through the Bureau of*  
689 *Land Management (BLM) to entirely close off access and*  
690 *development of one of the principal and major uses of federal*  
691 *lands, and at the same time uphold statutory requirements for*  
692 *multiple use and sustained yield.”*<sup>60</sup>

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57 [30 U.S.C. 187](#), [30 U.S.C. 189](#) “None of such provisions shall be in conflict with the laws of the State in which the leased property is situated.” “Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.”

58 See 43 C.F.R. §3473 for information pertaining to royalties and rents on coal leases.

59 Montana Department of Commerce, 2017. Montana Legislative Fiscal Division, 2015.

60 “The national government should be deferential to the state when taking action that affects the policymaking

693 It is the policy of the Congress of the United States that:

694 “... the public lands be managed in a manner which recognizes  
695 the Nation’s need for **domestic sources of minerals, food,**  
696 **timber, and fiber from the public lands including**  
697 **implementation of the Mining and Minerals Policy Act of 1970**  
698 **(84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public**  
699 **lands.”<sup>61,62</sup>**

700 The domestic need for and importance of Federal minerals including coal are  
701 critical for the local tax base,<sup>63</sup> energy production, national security, and human welfare  
702 interests. BLM must comply with the statutory mandate to provide opportunities to  
703 private business for the orderly development of mineral resources that provide economic  
704 development to rural counties and the state for present and future generations. The BLM  
705 decision fails to comply with the statutory mandate for the Secretary of the Interior and  
706 relevant agencies to facilitate the orderly exploration, development, and production of  
707 mineral and energy resources by encouraging and fostering private enterprise.<sup>iii</sup>

708 The MtNRC protest letter concluded:

709 “We believe that shutting 11.7 million acres of leasable federal  
710 coal estate in the Montana powder river basin, not to mention  
711 the Wyoming side, constitutes a withdrawal under FLPMA. The  
712 studies, reports and analyses required to be submitted to  
713 Congress by the Secretary under 43 U.S.C. § 1714 (c) are in  
714 addition to the NEPA and CEQ requirements. Agency land and  
715 mineral withdrawal proposals that are longer than two years in  
716 duration; greater than 5,000 acres in area; that would  
717 effectively eliminate a principal use; or that would affect a  
718 preexisting Act of Congress are required by statute to be  
719 submitted to Congress for action.<sup>64</sup>

- 720 • The BLM’s chosen alternative affectively withdraws 11.7  
721 million acres of federal coal estate exceeding the 5000-acre  
722 FLPMA threshold;
- 723 • Is intended to eliminate the FLPMA principal use of minerals  
724 exploration and extraction;<sup>65</sup>

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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.” [Executive Order 13132](#).

61 [43 U.S.C. 1701\(a\)\(12\), \(13\)](#) “the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.”

62 [43 U.S.C. § 1702\(1\)](#).

63 [CRS - R46278](#): “Coal mining on federal lands requires the payment of royalties. The royalty for surface mined coal is a minimum of 12.5% of the gross value of coal produced, and the royalty for coal mined by underground mining methods is 8%.”

64 See. BLM SEIS comment response. p. F-68.

65 [Correspondence](#). Montana Natural Resource Coalition to BLM Director. Re: Notice of Availability of the Proposed Resource Management Plan Amendment and Final Supplemental Environmental Impact Statement for the Miles

- 725                     • *Poses significant, foreseeable, and presently unquantified*  
726                     *impacts to State Trust Lands, Counties, and privately held*  
727                     *surface and subsurface mineral estate.*<sup>66</sup>
- 728                     • *FLPMA requires the Secretary of the Interior to furnish*  
729                     *Congress, within three months of notification, a detailed,*  
730                     *site-specific inventory and analysis of the effect the*  
731                     *withdrawal would have on public and private interests; the*  
732                     *economic impact on individuals and local communities; and,*  
733                     *a compatibility/conflict impact analysis on the state of*  
734                     *Montana, Carter, Custer, Daniels, Dawson, Fallon, Garfield,*  
735                     *McCone, Powder River, Prairie, Richland, Roosevelt,*  
736                     *Rosebud, Sheridan, Treasure, Wibaux, and portions of Big*  
737                     *Horn and Valley counties.*
- 738                     • *The public record is silent as to whether the Secretary of the*  
739                     *Interior and Director of the Bureau of Land Management*  
740                     *have met their minimum, pre-decisional administrative*  
741                     *obligations and submitted to Congress the information*  
742                     *required by FLPMA.”*<sup>67</sup>

743                     BLM’s protest resolution and ROD ignored these substantive concerns. This is a  
744                     clear example of a federal agency dismissing multiple congressional mandates and  
745                     fundamental principles of federalism that has a chilling effect on local and public  
746                     participation in federal rulemaking.

747                     2.2.4 Multi-Agency Collusion and Illegitimate MN BLM Mineral Withdrawal -

748                     On January 31, 2023, Secretary Haaland of the Department of the Interior  
749                     published in the Federal Register a Notice announcing Secretarial Withdrawal<sup>68</sup> of a  
750                     225,504-acre parcel of the mineral-rich federal lands situated in Cook, Lake, and Saint  
751                     Louis counties of Minnesota.

752                     Secretarial Public Land Order No. 7917<sup>69</sup> was the latest installment in a collusive,  
753                     nineteen-year coordinated effort by political and career employees of the U.S. Forest  
754                     Service and Bureau of Land Management, Solicitor Hillary Tompkins of the Department  
755                     of the Interior, USDA Secretary Vilsack, former Minnesota Governor Dayton, and  
756                     multinational environmental interests to extinguish mining and mineral access to the  
757                     Duluth Mineral Complex in the Superior National Forest (SNF) of Minnesota through  
758                     administrative actions.<sup>70</sup>

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City Office, Montana. June 17, 2024.

66 [43 C.F.R. § 1601.0-8 Principles](#); Of the estimated 25.8 million coal mineral estate acres within the Miles City Field Office area, 11.7 million acres are federally owned, 1.5 million acres are State-owned, and the remaining 12.6 million acres are privately owned.

67 Ibid. Correspondence. Montana Natural Resource Coalition to BLM Director. June 17, 2024.

68 [88 Federal Register No. 20 at 6308](#). January 31, 2023.

69 [Public Land Order 7917](#) for Withdrawal of Federal Lands; Cook, Lake and Saint Louis Counties, MN. U.S. Department of the Interior. Deb Haaland, Secretary of the Interior. January 31, 2023.

70 Carlson, J., et al. [“Survey and Application of the Delegated Congressional Authorities for Land and Mineral](#)

759 As precursor to Secretary Haaland’s decision to issue Public Land Order No. 7917,  
760 on Thursday, October 21, 2021, BLM published for comment in the Federal Register an  
761 application by U.S. Forest Service announcing withdrawal of the Duluth Mineral  
762 Complex.<sup>71</sup>

763 In response to BLM’s request for comment, on January 14, 2022 the Boundary  
764 Line Foundation (BLF) filed a detailed Survey of the authorities, procedural burdens,  
765 statutorily required technical studies, and inventories of private mineral inholdings  
766 located in the proposed withdrawal area.<sup>72</sup> The BLF Survey outlined the administrative  
767 requirements, technical studies, and mandatory state, local, and congressional  
768 consultation activities required of Secretary Haaland before she could legitimately issue  
769 a decision to initiate a land or mineral withdrawal.

770 The public record is silent as to how - if at all - BLM and USFS responded to the  
771 many substantive issues raised by the BLF survey:

772 1) “USFS and BLM have failed to fulfill pre-application  
773 consultation steps and responsibilities to local governments  
774 required in U.S.C § 1712(c)(9):”

775 a. *“Neither BLM nor USFS can be documented as*  
776 *having fulfilled the procedural early*  
777 *notification, land-use plan consistency, and land*  
778 *use plan “keep apprised” mandates in 43 U.S.C*  
779 *§1712(c)(9).”*

780 b. *“The public record is silent as to whether BLM*  
781 *has contacted the Minnesota Legislative*  
782 *Permanent School Fund Commission, the state*  
783 *agency responsible for administering trust lands*  
784 *that fund the Minnesota school system or*  
785 *coordinated with the St. Louis, Cook or Lake*  
786 *Land Commissioners and/or other state and*  
787 *federal administrative agencies.”*<sup>73</sup>

788 and,

789 2) *“The Secretary of the Interior does not have the discretionary*  
790 *authority to approve land and mineral withdrawal actions for*  
791 *greater than two years and affecting more than 5,000 acres*  
792 *without first furnishing Congress with: A current inventory of*  
793 *mineral and ownership interests; A compatibility, conflict and*  
794 *economic analysis of the future effect on state and county*  
795 *governments, the regional economy, and adjacent public and*  
796 *private lands:”*<sup>74</sup>

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[Withdrawals by the Secretary of the Interior](#)”. Appendix C, “Chronology of Federal Administrative Actions in the Superior National Forest 2006-2021.” The Boundary Line Foundation. January 14, 2022.

71 [86 Federal Register No. 201 at 58299](#). Notice of Application for Withdrawal and Segregation of Federal Lands; Cook, Lake, and Saint Louis Counties, Minnesota. Thursday, October 21, 2021.

72 Ibid. [BLF Survey](#). January 14, 2022.

73 Ibid. [BLF Survey](#), page 14.

74 Ibid. [BLF Survey](#), page 11.

797 and,  
798 3) “*Within three months of Federal Register notification, the*  
799 *Secretary of the Interior is required by FLPMA to submit land*  
800 *and mineral withdrawal applications that propose to segregate*  
801 *greater than 5,000 acres, or that would eliminate a Principal*  
802 *Use, or that could foreseeably modify previous Acts, to the U.S.*  
803 *Congress:”*<sup>75</sup>

804 In the waning hours of the Obama administration, on January 5, 2017, the U.S.  
805 Forest Service submitted its first application to BLM for withdrawal of the same 234,328-  
806 acre Duluth Mineral Complex parcel.

807 Concurrent with its application and in a hastily corroborated effort with the BLM,  
808 on December 14, 2016, USFS filed its non-consent for renewal of mineral leases in the  
809 SNF, and on January 13, 2017, published notice of its intent to prepare an Environmental  
810 Impact Statement (EIS).

811 As part of the EIS Scoping process for the proposed USFS mineral withdrawal, on  
812 August 11, 2017, the Northern Counties Land Use Coordinating Board (NCLUCB) of  
813 Minnesota filed Scoping Comments in the administrative record.<sup>76</sup>

814 In that submittal NCLUCB articulated the NEPA requirements for USFS to:

- 815 1. “[*Conduct*] *Consistency-review of the local land-use plans of*  
816 *three counties and the Bois Forte Band of Chippewa Tribe;*
- 817 2. *Perform FLPMA required land and mineral inventories;*
- 818 3. *Quantify impacts to local economies from mineral and land*  
819 *inholding losses;*
- 820 4. *Recommend congressional appropriations to offset revenue*  
821 *reductions to Minnesota state schools;*

822 and,  
823 5. *Establish in-perpetuity easements to ensure access to valid,*  
824 *existing land and mineral rights.”*

## 825 2.2.5 USFWS Lesser Prairie Chicken ESA Listing (2014) -

### 826 *Background*

827 On December 11, 2012, the United States Fish and Wildlife Service (FWS)  
828 published in the Federal Register a notice of proposed threatened listing for the Lesser  
829 prairie-chicken (LPC).<sup>77</sup>

830 This action opened a public comment period that ended on March 11, 2013.  
831 Stillwater Technical Solutions (STS) organized fourteen Kansas counties, the Kansas

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75 Ibid. *BLF Survey*, page 10.

76 [82 Federal Register, No. 9 at 4282](#). Friday, January 13, 2017. “[U.S.FS Mineral Withdrawal Proposal - EIS Scoping Comments and Alternatives: Vermillion and Rainy Headwaters Watershed of the Superior National Forest.](#)” Northern Counties Land Use Coordination Board. August 11, 2017.

77 [77 Federal Register No. 238 at 73828](#). December 11, 2012.

832 Electric Cooperatives, Kansans for Balanced Resource Choices, and 171 private Kansas  
833 landholders to develop comments, which were submitted to the administrative record on  
834 March 11, 2013. No federalism statement was included in the proposed threatened LPC  
835 listing notice.

836 On May 6, 2013, FWS issued a revision to the proposed LPC listing,<sup>78</sup> this time  
837 proposing to list the species as a threatened species with a special 4(d) Rule. Again, no  
838 statement of federalism was included in the proposed rulemaking notice.

839 Citing disagreements surrounding data used to propose the LPC listing, on July 9,  
840 2013, FWS issued a six-month extension of final determination in the *Federal Register*.

841 After missing the September 30, 2013 court-imposed settlement deadline for  
842 listing of the LPC, on December 11, 2013<sup>79</sup> FWS extended the listing process by issuing  
843 a 6-month rulemaking extension. At the time FWS also announced finalization of the  
844 Lesser Prairie-Chicken Range-Wide Conservation Plan (RWCP)<sup>80</sup>, and the agency's  
845 intent to consider the plan's conservation measures in their final listing for the species.

846 Although implementation of the five-state RWCP would alter the relationship and  
847 the distribution of power between five States and the federal government, as well as the  
848 various levels of government, no federalism statement was included in the notice.

849 The final Special Rule for the Lesser Prairie-Chicken was published in the *Federal*  
850 *Register* on April 10, 2014.<sup>81</sup> The notice also announced the availability of the final  
851 RWCP which had been prepared by the Lesser Prairie-Chicken Interstate Working  
852 Group.

### 853 *Systematic Neglect for Consultation with Affected Local Governments*

854 Throughout this listing process, a coalition of Kansas county governments  
855 repeatedly attempted to engage FWS in meaningful consultation of the rulemaking  
856 process. These government-to-government overtures were repeatedly dismissed and  
857 rebuffed by the agency, even after the 32-county Kansas Natural Resource Coalition  
858 (KNRC) completed, adopted, and transmitted to FWS and other agencies a  
859 comprehensive *Natural Resource Coordination Plan*<sup>82</sup> and *Lesser Prairie Chicken*  
860 *Conservation, Management, and Study Plan*.<sup>83</sup>

861 The Endangered Species Act at 16 U.S.C. § 1533(b)(1)(A) mandates that US Fish  
862 and Wildlife Service is required to consider the conservation efforts of the political  
863 subdivisions of the state of Kansas, including KNRC:

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78 [78 Federal Register No. 87 at 26302](#), May 6, 2013.

79 [78 Federal Register No. 238 at 75306](#), December 11, 2013.

80 [The Lesser Prairie Chicken Range-wide Conservation Plan](#). Western Association of Fish and Wildlife Agencies, et.al. 373 pages. October, 2013.

81 [79 Federal Register No. 69 at 20074](#), April 10, 2014.

82 [Natural Resource Coordination Plan](#). Kansas Natural Resource Coalition. August 8, 2013.

83 [Lesser Prairie Chicken Conservation, Management and Study Plan](#). Kansas Natural Resource Coalition. October 14, 2013.

864                    *The Secretary shall make determinations required by subsection*  
865                    *(a)(1) solely on the basis of the **best scientific and commercial***  
866                    *data available to him after conducting a review of the status of*  
867                    *the species and after taking into account those efforts, if any,*  
868                    *being made by any State or foreign nation, or any political*  
869                    *subdivision of a State or foreign nation, to protect such species,*  
870                    *whether by predator control, protection of habitat and food*  
871                    *supply, or other conservation practices, within any area under*  
872                    *its jurisdiction; or on the high seas.*

873                    During a September 11, 2013, meeting with **FWS Deputy Director for**  
874                    **Endangered Species Paul Souza**, and **Department of the Interior Counselor to**  
875                    **Assistant Secretary Michael Bean**, KNRC formally invoked the doctrine of  
876                    coordination. Coordination is a statutory form of meaningful government-to-government  
877                    consultation mandated in the Federal Land Policy and Management Act. FWS personnel  
878                    reluctantly participated in two coordination meetings and were dismissive of the requests  
879                    and technical input put forward by KNRC.

880                    The October 18, 2013, agenda calling Coordination Meeting Number 2,  
881                    specifically requests FWS to send “*delegates who have the latitude, position, and*  
882                    *authority to speak for USFWS on regional policy, technical, and Lesser Prairie Chicken*  
883                    *issues that will be discussed.*” During the November 1, 2013, meeting, FWS sent only  
884                    the Kansas Field Office Supervisor, who refused to discuss how the Service was “*taking*  
885                    *into account*” the KNRC county plans. Further, Ms. Heather Whitlaw was unwilling - at  
886                    the direction of the Department of the Interior Solicitor - to describe how FWS was  
887                    attempting consistency between the KNRC plan and the draft Range-Wide Conservation  
888                    Plan. The Supervisor’s response was to simply read a prepared statement that said:

889                    *“...language was that she [Solicitor Jacobsen] cannot agree*  
890                    *with the Coalition’s interpretation of federal authorities and*  
891                    *feels that the project leaders/staff person, such as myself, is not*  
892                    *prepared to debate this today.”*

893                    On November 7 and 8, 2013, KNRC held a formal public hearing to which FWS  
894                    officials were specifically invited. The Solicitor of FWS Rocky Mountain Region and  
895                    FWS Director Dan Ashe were both requested to attend the formal public hearing to give  
896                    testimony and provide rationale behind FWS’s disagreement with federal statutes,  
897                    executive orders, and Council on Environmental Quality regulations presented in the  
898                    KNRC *Natural Resource Plan*.

899                    FWS refused repeated invitations and did not attend a formal public hearing. In  
900                    written correspondence the Supervisor stated that the public hearing was “*not the right*  
901                    *forum for discussions*” of conservation plans. The public hearing was conducted without  
902                    FWS participation and was documented to the administrative record by a professionally  
903                    generated, KNRC Finding of Fact and Conclusions of Law document.<sup>84</sup>

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84 [“Findings of Fact and Conclusions of Law of the Kansas Natural Resource Coalition In Re: The Advisability of Listing the Lesser Prairie Chicken as a Threatened Species Under the Endangered Species Act.”](#) Kansas Natural Resource Coalition. January 29, 2014.

904 2.2.6 USFWS Missouri Headwaters Conservation Area -

905 *Background*

906 On September 15, 2023, the United States Fish and Wildlife Service (FWS) issued  
907 a proposed rule in the Federal Register to update planning policy 602 FW 1–4<sup>85</sup> for the  
908 National Wildlife Refuge System (Refuge System). The policy updates propose to  
909 “modernize” refuge management by incorporating landscape conservation plans, climate  
910 change theory, and anthropogenic impact to refuge management.

911 In their comments, the Montana Natural Resource Coalition of Counties (MtNRC)  
912 identified several items of concern with the current proposed rule. On September 8, 2023,  
913 Montana Representative Rosendale issued a letter<sup>86</sup> to FWS Director Martha Williams  
914 addressing significant concern that FWS and its environmental non-governmental  
915 partners were creating the Missouri Headwaters Conservation Area (MHCA) to establish  
916 a 5.7-million-acre conservation area spanning five counties in Southwestern Montana.

917 On September 20, 2023, FWS announced the proposed Missouri Headwaters  
918 Conservation Area which would authorize the Service to procure up to 250,000 acres of  
919 conservation easements within the 5.7-million-acre MHCA footprint. With **no notice**  
920 **published in the Federal Register**, FWS published notice **on its website** to initiate a  
921 public scoping period. Initially, the scoping period was proposed to end on October 26,  
922 2023. After correspondence from the Montana Attorney General’s office,<sup>87</sup> the comment  
923 window was extended through November 27, 2023, to incorporate three in-person  
924 meetings.

925 At the time USFWS revealed the MHCA Land Protection Plan, they were also in  
926 the process of rewriting their Refuge Planning Policy to incorporate and **prioritize**  
927 landscape scale conservation planning and climate change theory.<sup>88</sup> Up until the  
928 publication of the Federal Register notice for the proposed rulemaking, MtNRC and its  
929 member counties received no notice or information indicating this planning effort was in  
930 progress.<sup>89</sup>

931 *Neglect to Coordinate or Consult with Affected Local Governments and Landowners*

932 FWS has not cited any statutory or authoritative basis behind the proposed  
933 Missouri MHCA land acquisition, conservation easement purchases, or policy changes.  
934 Refuge policy changes were not described clearly to local governments or the public, and  
935 the FWS neglects to provide maps and boundary information that would enable

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85 [88 Federal Register No. 178 at 63547](#). National Wildlife Refuge System Planning Policies (602 FW 1-4) for the U.S. Fish and Wildlife Service. September 15, 2023.

86 [Letter from Representative Rosendale to Director Williams](#). Re: Missouri Headwaters Conservation Area. September 8, 2023.

87 The [letter submitted by the Montana Department of Justice on September 20, 2023](#) identified serious concerns and lack of transparency relating to the Service’s proposed conservation area.

88 [88 Federal Register No. 178 at 63547](#). National Wildlife Refuge System Planning Policies (602 FW 1-4) for the U.S. Fish and Wildlife Service. September 15, 2023.

89 [“Comments re: National Wildlife Refuge System Planning Policies \(602 FW 1-4\) for the U.S. Fish and Wildlife Service \(Docket No. FWS-HQ-NWRS-2023-1124\).”](#) Montana Natural Resource Coalition. October 16, 2023.



936 meaningful public consideration.<sup>iv</sup> Failure to provide clarity and disclose relevant facts  
937 affect public perception and is an issue of general concern.

938 When an agency develops, amends, or repeals a rule, the Administrative Procedure  
939 Act requires publication of a notice of proposed rulemaking (NPRM) or notice of intent  
940 (NOI) in the Federal Register.<sup>90</sup> The NEPA process requires an interdisciplinary approach  
941 with full public involvement and input into the rulemaking process. FWS and Federal  
942 agencies in general have no statutory authority to evaluate the presence, absence, or  
943 quality of values on private lands,<sup>91</sup> and are incapable of accurately predicting future uses  
944 throughout a geospatial region composed of dozens of individual landowners.

945 The interagency coordination process was designed to ensure that proposed federal  
946 actions are responsive to local conditions, issues, needs, customs, cultures, and  
947 economies. Where inconsistencies exist between proposed federal actions and existing  
948 local plans, laws, ordinances, and other policies, the federal agency must assist and  
949 coordinate with local governments to attempt consistency with local plans and policies.

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

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

955 The proposed FWS land protection plan, with its international, landscape-scale  
956 biodiversity objectives,<sup>92</sup> have significant federalistic implications.<sup>93</sup> The separation of  
957 powers and the principles of federalism enshrined in federal and state constitutions cannot  
958 be circumvented by single-purpose agencies seeking to resolve a “*biodiversity crisis*.”<sup>94</sup>  
959 USFWS has been unresponsive regarding other policies and initiatives within the state of  
960 Montana.<sup>95 96 97</sup> To date, MtNRC has not been contacted and consulted with by USFWS

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90 “How to Prepare Regulations and Federal Register Notices Handbook 318 DM.” Department of the Interior. September 23, 2013.

91 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.

92 Karkkainen, B.C. *Biodiversity and Land*. Cornell Law Review. Vol. 83, Issue 1. November 1997.

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

94 Gordon, Rob. *Lands and Habitat in the United States: A Reality Check - Special Report No. 256*. Institute for Economic Freedom, The Heritage Foundation. March 4, 2022.

95 [Rep. Rosendale letter to Director Williams](#) Requesting an Open and Public Process as the Department of Interior Considers Reintroducing Bison in Montana. September 8, 2023.

96 [Letter re: Secretary’s Order 3410 Restoration of American Bison & the Prairie Grasslands](#). From Governor Giaforte to Secretary Haaland. March 21, 2023.

97. [Letter from Senator Daines to Director Williams](#). Regarding Missouri Headwaters Conservation Area. September 9, 2023.

961 regarding the Missouri Headwaters Conservation Area Land Protection Plan, and the  
962 Draft LPP has not been released.

963 *2.3 Department of Agriculture -*

964 2.3.1 USFS Criminal Probations Rule -

965 On October 3, 2023, the US Department of Agriculture Forest Service (USFS)  
966 published its Proposed Criminal Prohibitions Rule (CPR) in the Federal Register,<sup>98</sup> and  
967 on Monday November 25, 2024 USFS adopted the Criminal Prohibitions Rule.<sup>99</sup>

968 In its notice adopting the CPR, the USFS purports to:

969 *“...enhance consistency of the Forest Service’s law*  
970 *enforcement practices with those of State and other Federal*  
971 *land management agencies”*

972 and that the CPR:

973 *“...streamlines enforcement of some of the criminal*  
974 *prohibitions found in 36 CFR part 261, subpart B, which are*  
975 *enforceable only through issuance of an order, by moving*  
976 *them to 36 CFR part 261, subpart A, which contains criminal*  
977 *prohibitions that are enforceable without issuance of an*  
978 *order.”*

979 and,

980 *“...the final rule updates the prohibitions to enhance*  
981 *protection of persons visiting and working on NFS lands*  
982 *from theft of personal property and from disorderly conduct*  
983 *by other visitors”*

984 The administrative record indicates the CPR was adopted absent any consultation  
985 with representatives of the State<sup>100</sup> or national sheriffs’ associations who share  
986 jurisdictional responsibility and have preeminent police power over county lands within  
987 the national forest system, and that in adopting the CPR, USFS illegitimately delegates  
988 to itself police powers not found in the organic USFS Act of 1897.<sup>101</sup>

989 Upon adoption of the CPR, USFS also dismisses substantive comments to the  
990 record by the Western States Sheriffs’ Association<sup>102</sup> that the proposed rule would:

991 *“take a direct route toward assimilating state law into the Code*  
992 *of Federal Regulation”*

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98 [U.S. Department of Agriculture, Forest Service. Proposed rule. Request for public comment. Federal Register Vol. 88, No. 190. October 3, 2023.](#)

99 [U.S. Department of Agriculture, Forest Service. Final Rule. Law Enforcement: Criminal Prohibitions. Vol 89, No. 227. November 25, 2024.](#)

100 [Comments to the Record. USFS Criminal Probation Rule, RIN 0596-AD 57. Hood River County Sheriff’s Office. Matthew T. English, Sheriff. December 3, 2023. Page 2.](#)

101 [16 USC §475. Purposes for which forests may be established and administered. June 4, 1897.](#)

102 [Western States Sheriffs’ Association. Comments on Criminal Prohibitions Rule. RIN 0596-AD57 December 2, 2023.](#)

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and,

*“Many of the proposed changes appear to take a direct route toward assimilating state law into the Code of Federal Regulation. Through this assimilation and, by channeling a large portion of Subpart B orders to the category of Subpart A orders, the nationalization of enforcement of rules becomes troubling.*

*While we recognize that Congress provided the USFS with the authority to create needful rules and regulations to effectively manage NFS lands, we stand firm in the belief that the law prohibits assimilation of state law on those lands held under proprietary interest. Most lands managed by the USFS in the western United States fall under the definition of proprietary interests.*

*We oppose this effort to bolster the federal enforcement tool chest through the assimilation of state law and in fact, we believe by doing so, the USFS may create significant legal challenges across the lands they manage in the western United States. The County Sheriff, working within the legal systems in each of the western states, is best suited to address crimes against persons and property.*

*The various legal ramifications for any person charged with alcohol and drug offenses in a state are designed to carry long term impacts associated with not only a citation, but several other requirements related to rehabilitation of the offender and long-term consequences that State legislatures have implemented to increase the safety to the public. The federal government has not legislated in the same manner and is therefore not designed to effectively address these lesser offenses.<sup>103</sup>”*

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103 Ibid. Comments on Criminal Prohibitions Rule. Western States Sheriffs Association.

### 3.0 DISCUSSION, LEGISLATIVE, AND POLICY REMEDIES

In the fourteen years that BLF has been educating and equipping local and state governments and the administrative record we have catalogued dozens of examples of agency ineptness, neglect, and even malfeasance when it comes to protecting local prerogatives through meaningful consultation.

While the examples in this audit are indeed compelling, they provide only a sample — a mere glimpse — of the scope and magnitude of issues facing the average American.

Three conclusions emerge from the glaring examples documented by this audit:

1. Federal agencies cannot be relied upon to police themselves to assure compliance with Federalism mandates, to carry out consultation mandates, to prepare impact assessments, or not to pencil-whip certifications for the Office of Management and Budget.
2. There are no disincentives to non-compliance with Federalism mandates; in fact, the opposite is the case. Every incentive exists for agencies to bypass consultation with State and local officials, to not prepare cost or cultural impact assessments, and not expend time and resources to facilitate consultation with State, local, or tribal governments.
3. The scope of the problem is broad enough to warrant a fundamental, top-down updating of the administrative rulemaking process at the rulemaking chokepoint: the White House Office of Management and Budget and Office of Information and Regulatory Affairs.

Some remedies for consideration include:

- Codifying federalism principles into the Administrative Procedure Act (APA) with specific and detailed mandates that must be implemented *prior* to submitting a rule or policy for OMB consideration.
- Decentralize the initial rulemaking process to incorporate State attorneys general and interested governments at its earliest possible stage in the rulemaking process, ideally prior to public notice in the Federal Register;
- Require agencies to demonstrate their congressionally delegated statutory authorities and fully describe any jurisdictional impact(s) from a proposed rule prior to initiating the rulemaking process.
- Build in simple statutory checks and balances facilitating appropriate supervision of agency actions.
- Build litigation access opportunities and protections for State and local governments who have limited resources into the APA.
- Incorporate the *Loper Bright* decision deference parameters, clarify delegation on-delegation principles, and the anti-commandeering doctrine.
- Consider appropriate civil or criminal provisions for willful malfeasance.

## End Notes

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- i "The powers delegated by the proposed constitution to the federal government are few and defined, those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. **The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the state...**" (James Madison, Federalist No.45)
- ii "Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97, 100 (1983); NEPA is essentially procedural; it does not demand that an agency make particular substantive decisions. *Stryker's Bay Neighborhood Council v. Karlen* (1980), 444 U.S. 223, 227-28, 100 S.Ct. 497, 499-500, 62 L.Ed.2d 433, 437; "In 1989, the U.S. Supreme Court reiterated that NEPA does not mandate particular results but simply prescribes a process." (CRS - *The National Environmental Policy Act (NEPA): Background and Implementation*) The Court further clarified that: "other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed, rather than unwise, agency action." - *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989)
- iii The [National Mining and Minerals Policy Act of 1970](#) states: "*The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs...*"
- iv Montana Code Annotated 2023- Deceptive Practices 45-6-317(a)(b). Black's Law Dictionary 4th edition 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)"