# Otero County Sheriff's Office

3208 N. White Sands Blvd., Alamogordo, NM 88310

David Black, Sheriff — Sean Jett, Undersheriff

575-437-2210


Hello, I am David Black, Sheriff of Otero County, New Mexico. I also serve in the capacity of Secretary of the New Mexico Sheriffs Association and Vice President of the Southwest Border Sheriff's Coalition.

In submitting this letter, I wish to have additional comments added to the record and to make known my support of the ACUS comments authored by the Boundary Line Foundation.

I have been closely monitoring and submitting testimony in reference to the numerous rule making processes like the OSHA Emergency Response Standard and the USFS Criminal Prohibitions Rule.

County Sheriffs are often at the forefront of emergency response efforts, specifically in rural and wilderness areas. Otero County, New Mexico, as an example, is comprised as follows: 89% is federal, state and tribal land, 1.1 million acres to the Lincoln National Forest, 275 square miles to the White Sands National Park, vast high desert areas, 1,000's of overlapping acres used by and belonging to military installations such as Holloman Air Force Base, White Sands Missile Range, and Ft Bliss Army Base, which is stationed out of El Paso, Texas, and 463,000 acres making up the Mescalero Apache Indian reservation.

At 6,627 square miles, Otero County is the third largest county in the State of New Mexico, and the 35$^{th}$ largest in the United States.

In reference to the OSHA Emergency Response Standard, some larger Sheriff's Offices employ full-time, professional responders. For Otero County, the majority of fire fighters, emergency medical services and search and rescue operations rely heavily on hundreds of dedicated volunteers. These volunteers, who more often than not, sacrifice their personal time and resources to perform these functions. In doing so, they have become the backbone to the success of many emergency response missions, not only in Otero County, but across the State of New Mexico and across the Country.

The State and Tribal governments have jurisdiction over all aspects of emergency response. State and Tribal statutory and regulatory frameworks for emergency response have presumption against preemption.

Congress did not delegate authority to OSHA for the adoption of emergency response standards which would conflict with existing governmental statutory and regulatory frameworks enacted and enforced by the states, their political subdivisions and tribal governments.

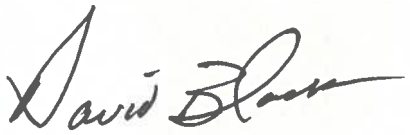
Executive Order 13132 explicitly acknowledges the states' inherent authority to manage public health, safety, and welfare. OSHA's overreach into emergency response infringes on this fundamental power, as evidenced by the Tenth Amendment. It appears OSHA is on track to preempt the Police authority of all local Sheriff's.

In reference to the USFS Criminal Prohibitions Rule, the USFS purports to embrace consistency of the Forest Service's law enforcement practices with those of State and other Federal land management agencies.

The administrative record indicates the CPR was adopted absent any consultation with representatives of the State or National Sheriffs Associations, who share jurisdictional responsibilities, and have preeminent police power over county lands within the national forest system. In adopting the CPR, it is apparent USFS illegitimately delegates itself police powers not found in the organic USFS Act of 1897.

In speaking with a number of Sheriff's, County Commissioners, Local government officials and Tribal Officials, it was realized we were not afforded the opportunity to participate or consult in any part of the rule making processes with the government agencies authoring or implementing these rules. It is also apparent they do not have a problem in not consulting with State, Local, and Tribal entities, as they have not only demonstrated via their conduct, but also by their very admission of not having done so. Had the consultation occurred with elected and appointed state and local officials early in the Rulemaking process, it would have clearly presently the flaws in the proposed ERS Rule.

Statutory changes by Congress are needed to compel government agencies to consult with Local, State, and Tribal officials to ensure the voices of the officials are heard and to discuss and evaluate impact assessments.



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

Federal Register Vol. 89, No. 243
Wednesday, December 18, 2024

THE BOUNDARY LINE FOUNDATION

James R. Carlson
Chairman
Monadnock Building
53 West Jackson, Suite No. 1734
Chicago, IL 60604
j.carlson@boundarylinefoundation.org

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.

# Table of Contents

# 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[1] 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[2] under Executive Order 12612[3] reported that of the 11,414 Major[4] 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)

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.

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

GAO goes on to state:

> "*Nearly all of these* [Preamble] *statements were standard, "boilerplate" certifications with little or no discussion of why the Rule did not trigger the executive order's requirements.*"

and,

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

and,

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

### 1.1.2 Audit Approach -

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

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

Particularly problematic is the emergence and use of artificial intelligence (AI) in the development of "programmatic" agency documents designed to circumvent meaningful consultation process with state and local governments and the public. BLM, USFS, and FWS have all been using programmatic documents to circumvent consultation and public processes required under the National Environmental Policy Act (NEPA).[5]

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 Resouce Management Plan for Utility-Scale Solar Energy Development on Public Lands*." July 17, 2023.

### 1.1.3 Purpose, Description, and History of Federalism -

The term "Federalism" as applied in this audit is:

> *"Any Federal action that could have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."*

"Federalism," as used in the U.S. Constitution, refers to the division and sharing of power between the national, state, and county governments.[6] By distributing and diffusing the power among the federal, state and county governments, the Framers of the American system of government sought to balance a unified and limited national government while maintaining distinct, bottom-up autonomy in which state governments have broad and general police powers.[7]

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

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

> *"...the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."*

During enactment and adoption of western state constitutions, the state governments were to be republican in form and provide for the diffusion of power through political subdivisions that maintain reserved and limited powers for self-government, and provisions for home rule.[9]

The condition upon which the States originally ratified the federal constitution was that the advantage was to remain with the States.[i] The term "Federal" comes from the Latin term "*foedus*" which means "to covenant" or "to compact." Federalism is a covenant form of government under which the states *are to be protected by the national government* against foreign dangers but also enjoy internal order within their respective spheres and jurisdictions.

---

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).

### 1.1.4 About The Boundary Line Foundation -

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

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

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

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

## 1.2 Summary: Application of Authorities -

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

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

Meaningful compliance with the government-to-government consultation mandate is also essential to ensure balancing of Federal, state, and local governmental police powers, prerogatives, and attention to avoid preemption of state and local rights.[10]

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

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

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

- Strengthen the partnership between the federal government and State, local, and tribal governments.
- End imposition of federal mandates on State, local, and tribal governments that may not have adequate funding to assure compliance.
- Mandate that Congress consider funding assistance to State, local, and tribal governments to comply with federal rules and policies.
- Require that agencies develop procedures that enable State, local, and tribal officials to provide meaningful input and consultation during rulemaking.
- Require that agencies prepare budgetary cost estimates of potential impact upon State, local, and tribal governments before rule adoption.
- Review of the presence and synergistic effect of proposals with existing federal edicts on State, local, and tribal governments.

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

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

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

Each of these statutes employ the non-discretionary term "*shall*" in their construction. They are complemented by the directives in E.O. 13132 Section 6 and E.O. 13175 Section 5. Both further the policies of the UMRA.

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

> "*Requiring that Federal agencies prepare and consider estimates of the budgetary impact of regulations containing Federal mandates upon State, local, and tribal governments and the private sector before adopting such regulations, and* ***ensuring that small governments are given special consideration in that process.***"[11]

Governing by executive edict led to them ignoring statutory obligations, resulting in greater than necessary regulatory burdens and unfunded mandates on small entities.[12]

### 1.2.2 Executive Order 13132: Federalism -

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

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

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

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

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

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

Executive Order 12866 was issued at 58 FR 51735 on September 30, 1993.

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

---

11 2 U.S.C. 25 § 1501(7)(B).

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

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

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

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

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

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

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

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

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

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

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

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

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

### 1.2.5 Presumption Against Preemption Doctrine -

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

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

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

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

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

### 1.2.6 Anti-commandeering Doctrine -

> *"The Federal Government may neither issue directives requiring States to address particular problems, nor command the States' officers…to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.*[14]

# 2.0 NEGLECT OF FEDERALISM IN AGENCY POLICYMAKING

## 2.1 *Department of Labor* -

### 2.1.1 Proposed OSHA Emergency Response Standard Rule -

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

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

The FOIA requested results of OSHA's consultation with State and local officials, including the nature of their concerns, and the required agency response regarding the proposed OSHA ERS:[17]

> *"All documents, records, notices, electronic mail or other documentation related to the Federalism consultation activities required under Executive Order 13132,[18] including descriptions from State and Local government contacts, their response, and documentation of state and local governmental concerns reported to the Office of Management and Budget by OSHA showing compliance."*

---

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.

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

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

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

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

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

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

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

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.

meeting the "*economically feasible*" or "*cost-effective*" factors deeply embedded in OSHA practice and case law.[22,23,24]

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

### 2.1.2 Final OSHA Worker Representative Walkaround Rule -

On August 30, 2023, the Department of Labor OSHA published its Worker Walkaround Representative Designation Process Rule (OSHA WA Rule) in the Federal Register.[25]

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

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

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

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.

Examples include:

- When certifying to OMB that the OSHA WA Rule complies with Section 8(a) of Executive Order 13132,[28] 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:[29]

> *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."* [30]

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.

---

[28] Executive Order 13132. Federalism. William Jefferson Clinton. August 4, 1999.

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

[30] 88 Fed Reg. No. 167 at 59832.

In its Federal Register notice, OSHA **itself acknowledged that those states and territories** "*would be required to adopt regulations that are identical or at least as effective as the rule, …within six months of promulgation of a final rule*."[31] This means that each OSHA Plan state was subject to cascading regulatory capture from the WA Rule, a violation of anti-commandeering doctrine.

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

> *Sec. 6. Consultation -*
>
> *(a) "Each agency shall have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. Within 90 days after the effective date of this order,* ***the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order and that designated official shall submit to the Office of Management and Budget a description of the agency's consultation process****."*
>
> and,
>
> *(b) "To the extent practicable and permitted by law,* ***no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments****, and that is not required by statute, unless:*
>
> *(1)* ***funds necessary to pay the direct costs*** *incurred by the State and local governments in complying with the regulation* ***are provided by the Federal Government; or****,*
>
> *(2) the agency,* ***prior to the formal promulgation of the regulation,***
>
> *(A)* ***consulted with State and local officials early*** *in the process of developing the proposed regulation;*
>
> *(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register,* ***provides to the Director of the Office of Management and Budget a federalism summary impact*** *statement, which consists of a description of the extent of the agency's prior consultation with*

[31] 88 Fed Reg. No. 167 at 59832.

[32] Executive Order 13132. Federalism. William Jefferson Clinton. August 4, 1999.

> *State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and,*
>
> *(C)* ***makes available to the Director*** *of the Office of Management and Budget* ***any written communications submitted to the agency by State and local officials****."*

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

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

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

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

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

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

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

## 2.2 *Department of the Interior* -

### 2.2.1 BLM Comprehensive Landscape and Health Rule -

On April 6, 2023, the Bureau of Land Management (BLM) published in the Federal Register its proposed Conservation and Landscape Health Rule (CLH Rule), and on May 9, 2024[35] BLM finalized its CLH Rule.

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

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

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

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.

6. Implements the Biden Administration's Executive Order 14008 and the America the Beautiful 30 by 30 agenda through the Department of Interior Climate Action Plan (CAP) and Secretarial Order 3399.[36]

During the rulemaking process, the Montana Natural Resource Coalition, and the Coalition of Arizona New Mexico Counties separately engaged the Montana-Dakotas and New Mexico State BLM offices in on-the-record FLPMA Title II county-to-agency coordination.

## 2.2.2 BLM Programmatic Sage Grouse Plan Amendments -

*Background*

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

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

Citing "*new science*," "*rapid changes*," and "*effects of climate change affecting BLM's public lands management*,"[37] on November 22, 2021, BLM issued a Notice of Intent (NOI) **to amend 77 land use plans across ten states** for greater sage-grouse conservation, and to prepare associated Environmental Impact Statements (EISs).

Because it is impossible to meaningfully fulfill its NEPA and federalism consultation requirements during simultaneous centrally-driven amendment of 77 land use plans, we speculate that BLM is deploying the artificial intelligence program it developed for its solar program.[38]

*Engagement*

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

---

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.

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

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

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

*Administrative Protest*

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

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.

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

Concluding with:

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

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

*Background*

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

BLM finalized amendments to the Miles City Field Office Resource Management Plan (RMP) in 2015. Subsequently, the agency prepared a supplemental EIS in response to a court order.[48]

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

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

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

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.

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

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

*Engagement and Unresolved Protests*

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

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

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

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

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

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 (CADC 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).

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

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

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

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

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

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

The MtNRC protest letter specifically states that:

> "*This decision is an abuse of agency discretion. There is no legal basis for Department of Interior (DOI) through the Bureau of Land Management (BLM) to entirely close off access and development of one of the principal and major uses of federal lands, and at the same time uphold statutory requirements for multiple use and sustained yield.*"[60]

---

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*

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

> "*... the public lands be managed in a manner which recognizes the Nation's need for* ***domestic sources*** *of* ***minerals,*** *food, timber, and fiber from the public lands* ***including implementation of the Mining and Minerals Policy Act of 1970*** *(84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands.*"[61,62]

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

The MtNRC protest letter concluded:

> "*We believe that shutting 11.7 million acres of leasable federal coal estate in the Montana powder river basin, not to mention the Wyoming side, constitutes a withdrawal under FLPMA. The studies, reports and analyses required to be submitted to Congress by the Secretary under 43 U.S.C. § 1714 (c) are in addition to the NEPA and CEQ requirements. Agency land and mineral withdrawal proposals that are longer than two years in duration; greater than 5,000 acres in area; that would effectively eliminate a principal use; or that would affect a preexisting Act of Congress are required by statute to be submitted to Congress for action.*[64]
>
> - *The BLM's chosen alternative affectively withdraws 11.7 million acres of federal coal estate exceeding the 5000-acre FLPMA threshold;*
> - *Is intended to eliminate the FLPMA principal use of minerals exploration and extraction;* [65]

---

*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(l).

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

- *Poses significant, foreseeable, and presently unquantified impacts to State Trust Lands, Counties, and privately held surface and subsurface mineral estate.*[66]
- *FLPMA requires the Secretary of the Interior to furnish Congress, within three months of notification, a detailed, site-specific inventory and analysis of the effect the withdrawal would have on public and private interests; the economic impact on individuals and local communities; and, a compatibility/conflict impact analysis on the state of Montana, Carter, Custer, Daniels, Dawson, Fallon, Garfield, McCone, Powder River, Prairie, Richland, Roosevelt, Rosebud, Sheridan, Treasure, Wibaux, and portions of Big Horn and Valley counties.*
- *The public record is silent as to whether the Secretary of the Interior and Director of the Bureau of Land Management have met their minimum, pre-decisional administrative obligations and submitted to Congress the information required by FLPMA."*[67]

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

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

On January 31, 2023, Secretary Haaland of the Department of the Interior published in the Federal Register a Notice announcing Secretarial Withdrawal[68] of a 225,504-acre parcel of the mineral-rich federal lands situated in Cook, Lake, and Saint Louis counties of Minnesota.

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

---

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*

As precursor to Secretary Haaland's decision to issue Public Land Order No. 7917, on Thursday, October 21, 2021, BLM published for comment in the Federal Register an application by U.S. Forest Service announcing withdrawal of the Duluth Mineral Complex.[71]

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

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

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

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

    b. *"The public record is silent as to whether BLM has contacted the Minnesota Legislative Permanent School Fund Commission, the state agency responsible for administering trust lands that fund the Minnesota school system or coordinated with the St. Louis, Cook or Lake Land Commissioners and/or other state and federal administrative agencies."* [73]

and,

2) "*The Secretary of the Interior does not have the discretionary authority to approve land and mineral withdrawal actions for greater than two years and affecting more than 5,000 acres without first furnishing Congress with: A current inventory of mineral and ownership interests; A compatibility, conflict and economic analysis of the future effect on state and county governments, the regional economy, and adjacent public and private lands*:"[74]

---

*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*, page14.

74 Ibid. *BLF Survey*, page 11.

and,

3) *"Within three months of Federal Register notification, the Secretary of the Interior is required by FLPMA to submit land and mineral withdrawal applications that propose to segregate greater than 5,000 acres, or that would eliminate a Principal Use, or that could foreseeably modify previous Acts, to the U.S. Congress*:"[75]

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

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

As part of the EIS Scoping process for the proposed USFS mineral withdrawal, on August 11, 2017, the Northern Counties Land Use Coordinating Board (NCLUCB) of Minnesota filed Scoping Comments in the administrative record.[76]

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

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

*and,*

5. *Establish in-perpetuity easements to ensure access to valid, existing land and mineral rights."*

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

*Background*

On December 11, 2012, the United States Fish and Wildlife Service (FWS) published in the Federal Register a notice of proposed threatened listing for the Lesser prairie-chicken (LPC).[77]

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

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.

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

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

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

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

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

The final Special Rule for the Lesser Prairie-Chicken was published in the *Federal Register* on April 10, 2014.[81] The notice also announced the availability of the final RWCP which had been prepared by the Lesser Prairie-Chicken Interstate Working Group.

*Systematic Neglect for Consultation with Affected Local Governments*

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

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

---

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.

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

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

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

> *"…language was that she [Solicitor Jacobsen] cannot agree with the Coalition's interpretation of federal authorities and feels that the project leaders/staff person, such as myself, is not prepared to debate this today."*

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

FWS refused repeated invitations and did not attend a formal public hearing. In written correspondence the Supervisor stated that the public hearing was "*not the right forum for discussions*" of conservation plans. The public hearing was conducted without FWS participation and was documented to the administrative record by a professionally generated, KNRC Finding of Fact and Conclusions of Law document.[84]

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.

### 2.2.6 USFWS Missouri Headwaters Conservation Area -

*Background*

On September 15, 2023, the United States Fish and Wildlife Service (FWS) issued a proposed rule in the Federal Register to update planning policy 602 FW 1–4[85] for the National Wildlife Refuge System (Refuge System). The policy updates propose to "modernize" refuge management by incorporating landscape conservation plans, climate change theory, and anthropogenic impact to refuge management.

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

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

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

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

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

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.

meaningful public consideration.[iv] Failure to provide clarity and disclose relevant facts affect public perception and is an issue of general concern.

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

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

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

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

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

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.

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

## 2.3 *Department of Agriculture* -

### 2.3.1 USFS Criminal Probations Rule -

On October 3, 2023, the US Department of Agriculture Forest Service (USFS) published its Proposed Criminal Prohibitions Rule (CPR) in the Federal Register,[98] and on Monday November 25, 2024 USFS adopted the Criminal Prohibitions Rule.[99]

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

> "*…enhance consistency of the Forest Service's law enforcement practices with those of State and other Federal land management agencies*"

and that the CPR:

> "*…streamlines enforcement of some of the criminal prohibitions found in 36 CFR part 261, subpart B, which are enforceable only through issuance of an order, by moving them to 36 CFR part 261, subpart A, which contains criminal prohibitions that are enforceable without issuance of an order*."

and,

> "*…the final rule updates the prohibitions to enhance protection of persons visiting and working on NFS lands from theft of personal property and from disorderly conduct by other visitors*"

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

Upon adoption of the CPR, USFS also dismisses substantive comments to the record by the Western States Sheriffs' Association[102] that the proposed rule would:

> "*take a direct route toward assimilating state law into the Code of Federal Regulation*"

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.

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.*[103]"

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

# 3.0 DISCUSSION, LEGISLTATVE, 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

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)"