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Via hand delivery

MT Fish Wildlife Commission
c/o Dept. of Fish Wildlife and Parks
1420 East Sixth Avenue
P.O. Box 200701
Helena, Mt 59620-0701

RE: Comments re Proposed Purchase of Montana Great Outdoors Conservation Easement - Phase 1

Dear Chair Robinson and Commissioners,

These comments are presented on behalf of WRH Nevada Properties, LLC ("WRH"), the owner of approximately 830,000 deeded mineral acres in western Montana. WRH's mineral estate includes deeded access rights and the right to repurchase land to exercise its right to explore for and develop the subject minerals. WRH's deeded rights are in addition to statutory rights associated with the dominant mineral estate under Montana law. The proposed action to which these comments are directed is but one project in a larger state land acquisition program that has and continues to damage WRH's protected property rights and significantly affects the human environment directly, indirectly, and cumulatively by fundamentally changing the relationship between man and critical natural resources. The exhibits attached to this comment are fully incorporated by reference. Some of the exhibits are voluminous and publicly available. In those cases, excerpts are provided with a link so that the entire document may be incorporated.

Background

In June 2021, Montana Fish Wildlife and Parks ("FWP") proposed the Montana Great Outdoors Conservation Easement Project- Region 1. Ex. 1-A. FWP did not issue a scoping notice for the project until January 25, 2022. Ex. 1-B. A mineral remoteness report was delivered to TPL on December 12, 2022. Ex. 1-C. On July 13, 2023, an appraisal report for the project was delivered to FWP and USFS. Ex. 1-D.[1] On April 15, 2024, FWP issued a draft EA. On June 20, 2024, Montana Fish Wildlife and Parks ("FWP") issued a Decision Notice finding that purchasing the Montana Great Outdoors Conservation Easement-Phase 1 ("MTGO-1") would have no significant impacts to the human environment. Ex. 1-E. The proposed action to acquire the MTGO-1 is scheduled for consideration by the FWP Commission on August 16, 2024. Ex 2. A public comment period on the proposed action is open until July 25, 2024. Ex. 3.

[1] The Appraisal Report exceeds one thousand pages. Ex. 1-A is attached with the understanding that the whole Appraisal Report is or will be made part of the project record.

FWP prepared an Environmental Assessment "EA" pursuant to the Montana Environmental Policy Act ("MEPA").[2] Ex. 4. According to the EA, the MTGO-1 project covers 32,981 acres. Id. at 4. It is part of a two-phase project totaling 85,792 acres located in Lincoln, Sanders, and Flathead Counties, Montana. Id. - Attached Multi Resource Management Plan ("MRMP") at 1.

The MTGO-1 project is one of many related projects (both completed and proposed) comprising the so-called "Forever Montana" vision promoted by the Trust for Public Lands ("TPL") and others.[3] Ex. 5. The MTGO-1 and many other related projects comprising TPL's Forever Montana vision received funding from the Montana Forest Legacy Program ("MFLP"). Ex. 4 at 9. For example, the Lost Trail Conservation Project was first proposed by TPL. Ex. 31. In that proposal, TPL draws upon other similar projects to illustrate the scope of the organization's Forever Montana vision for government acquisition and control of private land in NW Montana. The scope and interrelated nature of the program is seen from the various projects described and depicted on the accompanying table and maps. Ex. 44.

The MFLP is a state land acquisition program administered and managed by FWP. The program receives funding from several sources, including the federal FLP (16. U.S.C. 2103c(l)(2)), which is administered and managed by the US Forest Service (USFS"). Ex. 6 at 10. According to the MFLP Assessment of Need ("AON"), prepared by FWP and its many partners, since its inception in 2000, through 2020, the MFLP acquired and converted over 260,000 acres of privately land to public management using over $83M of FLP funding to leverage an additional $102.5M over the same time period. Ex. 6 at 9. Since 2020, the MFLP has provided an additional $45.85M to leverage an unknown amount of money for the acquisition and the planned acquisition of another 192,000 acres of privately owned land, including the MTGO-1 project. Exs. 7 - 10.

The dominant funding source for MFLP is the federal Land and Water Conservation Fund ("LWCF"). 54 U.S.C. 200301 *et seq*. Beginning in 2021, the LWCF was permanently funded by enactment of the Great American Outdoors Act ("GAOA"). Ex. 17 at 7. As a result, mandatory funding of the FLP increased dramatically. Id. at 8, and Fig. 2. The increase in federal FLP funding is the key reason for increased funding and activity under the MFLP in furtherance of the Forever Montana vision.[4] WRH has submitted substantive comments on prior MFLP projects. Ex. 30. Those prior comments are incorporated by this reference.

In addition to direct acquisition, FWP and its partners continue to work actively with the United States Fish and Wildlife Service ("USFWS") and others to create new federal system units (referred to as Conservation Areas).[5] For example, FWP worked with USFWS to create the Lost

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[2] Montana Code Annotated ("MCA") §75-1-101 *et seq.*
[3] https://www.tpl.org/forever-montana
[4] It appears the Forever Montana label is TPL's effort to rebrand the broader 30x30 vision cited in support of government management agencies growth strategy stemming from recognition of rural opposition to increasing government control of private land. Ex. 45.
[5] Former FWP Director Martha Williams left that position for an appointment to the USFWS as Principal Deputy Director in January 2021. In March of 2022 she was sworn in as the 23rd Director of USFWS.

Trail Conservation Area ("LTCA"), discussed in the 2020 Notice of Decision for coordinated state acquisition of the Lost Trail Conservation Easement ("LTCE"). Ex. 10.

The 2020 EA prepared by USFWS stated that establishing the LTCA as a federal system unit of the National Wildlife Refuge System is necessary for the USFWS to acquire up to 100,000 acres of conservation easements surrounding the existing 7,876-acre Lost Trail Wildlife Refuge. ("LTWR"). Ex 15 at 5. The EA specifically compared the proposed federal conservation easements to the LTCE also proposed within the LTCA for acquisition by FWP. Id. Nothing in the EA for the LTCA or the accompanying Land Protection Plan ("LPP") evaluates or even mentions the pending federal acquisition of any conservation easements. Id. The USFWS stated the contemplated acquisition of 100,000 acres within the LTCA would also be paid for with the LWCF, which provides authority for USFWS to acquire land or an interest in Land within "System units." See 54 U.S.C. 200306(a)(2).

The July 13, 2022, press release announcing the establishment of LTCA reiterates that establishing the new System Unit is necessary to authorize the purchase of conservation easements. There is no mention of the pending acquisition of a conservation easement. Ex. 16. However, a notice in the federal register, published the same day, announced,

> This notice advises the public that the U.S. Fish and Wildlife Service (Service) has established the Lost Trail Conservation Area (LTCA), the 568th unit of the National Wildlife Refuge System. The Service established LTCA on July 13, 2022, with the purchase of a 38,052-acre conservation easement in Flathead and Lincoln counties, Montana. Ex. 18

The previously unannounced 38,052-acre conservation easement was later identified as the Lost Trail Conservation Area Easement ("LTCAE"). Ex. 19. Though not directly relevant to these comments on the MFLP, WRH that a system unit required to authorize the acquisition of conservation easements cannot be established by acquiring an unannounced conservation easement for which that system unit is required.

On April 22, 2024, another unannounced conservation easement was conveyed by Green Diamond to the Trust for Public Land ("TPL"). This 14,403.57-acre easement lies within the federal LTCA adjacent to and south of the state owned LTCE. Ex 20, Exhibit A. TPL conveyed the easement deed to the USFWS on May 15, 2024. Ex. 21. That day, both documents were recorded in Lincoln County 30 minutes apart. Like the LTCAE, the entire transaction appears to have been done without public notice or participation. The funding mechanism and the role of TPL, FWP, and others involved with implementing the Forever Montana vision are unknown.

USFWS is not the only federal agency working with FWP and its partners to implement the Forever Montana vision. Since 1986, the "Lolo" National Forest has acquired fee title to more than 200,000 acres. Ex. 22 at 8.[6] On January 31, 2024, Lolo published its Notice of Intent under

[6] https://www.fs.usda.gov/detail/lolo/landmanagement/planning/?cid=fseprd1162221

the National Environmental Policy Act ("NEPA") to prepare an Environmental Impact Statement ("EIS") for assessing alternatives in the ongoing Management Plan revision process. Ex. 23. Though not clear from available records, the USFS also received LWCF funding directly or through NGOs, including TPL, to acquire some or all of the acreage described. See, e.g., Ex. 32. The Beavertail to Bearmouth (B2B) project is another example of landowner conveyance to TPL followed immediately by conveyance to a federal agency. Id. Overall, TPL has facilitated the conveyance of more than 26,000 acres of private land since 2021, much of it characterized by split estates. Id. The Lolo forest is but one example of federal private land acquisition projects undertaken in Montana during that period. Ex. 33.

Montana Forest Legacy Program Requirements

The FLP was established in 1990 in response to the conversion of private timberlands to other uses in areas of the United States where most of the forested areas are held in private hands. Ex. 6. At 7. The MFLP, which was established in 2020, is required to comply with "FLP Guidelines." Id. at 12. The FLP Guidelines, promulgated by the USFS, were last updated in 2017. Ex. 24. Preparation and federal approval of the AON and a Forest Action Plan ("FAP") are prerequisites for the state program to access federal grant money. Ex. 6 at 11. Montana's AON correctly states that the establishment of Forest Legacy Areas ("FLA") is also required for the MFLP to receive federal funding. Id. 29.

At the project level, FWP (as administrator of the MFLP) holds title to acquired land and is responsible for developing projects and managing the land held by the state in accordance with recorded documents, the grant agreement, and the federal FLP Guidelines. Ex. 24 at 35. Montana adopted its latest FAP in 2020. Ex. 25. The minimum requirements for state FAPs found in the FLP Guidelines include 1) an assessment of the threat that forest areas will be converted to non-forest uses and projected future uses of forest resources; 2) protected land in the state (meaning public land) and land held by NGOs; and 3) mineral resource potential at the program level. Ex. 24 at 19. Per the Discussion Section below, these programmatic requirements, and likely others, are not satisfied.

DISCUSSION

The MTGO-1 project (and the MFLP generally) is in violation of program requirements, including but not limited to those summarized above, in the following respects:

1. The FAP fails to assess the threat of forest land conversion relative to the purposes of the MFLP. See Ex. 25. There is some discussion of population growth and development pressure in a section of the AON describing three designated FLAs. Ex. 6 at 31. However, there is no data on land use patterns, tract sizes, or trends offered in support of stated strategies that include the targeted acquisition and conservation (i.e., management control) of "large, unfragmented tracts of forest land through tools like conservation easements and expand the use of existing tools and authorities were current infrastructure exists." Ex. 25 at 52. Nor is there adequate assessment of the forestry industry or any demonstration that a declining supply of timber

from private lands is having an adverse effect. The failure to properly assess a need to protect forested lands does not support the program's stated implementation strategy. The acquisition of large tracts of forested lands in areas dominated by public ownership of forested lands does not comply with the FLP Guidelines.

2. The FAP fails to address "Protected land in the State, to the extent practical, including Federal, State, municipal lands, and private conservation organization lands" as they relate to the purpose of the MFLP. Specifically, there is no discussion of impacts or needs in areas of the state that are already dominated by public ownership of forested lands. As with other projects completed or proposed in the FLAs, a significant majority of land is publicly owned. Ex. 11. Looking specifically at the proposed action, the MTGO-1 project proposes the acquisition of nearly 33,000 acres of private land in three counties. According to Lincoln County, 76% of land in the County is publicly owned. Ex. 12.[7] Flathead County states that 81% of its land is publicly owned. Ex 13.[8] Sanders County reports that 82% of the County is publicly owned. Ex. 14.[9] The failure to show that additional government land acquisition is necessary to meet the purposes of the MFLP does not support the program's implementation strategy of pursuing "the conservation of large, unfragmented tracts of forest land through tools like conservation easements." Ex. 6 at 52. The acquisition of large tracts of forested lands in areas of the state dominated by public ownership without any identified need does not comply with the FLP Guidelines and is inconsistent with the federal FLP statute.

3. The FAP fails to address mineral resource potential as it relates to the MFLP. At the programmatic level, the MFLP ignores the requirement to address mineral potential in the FAP. Similarly, the AON does not mention mineral potential in any of the three designated FLAs or anywhere else in the state. At the programmatic level, MFLP proports to comply with the federal FLP Guidelines, which define surface mining and associated "surface disturbance activities" as prohibited uses that are noncompatible with the program's purpose. Ex. 24 at 51. The omission of mineral resource potentials at the programmatic level is especially vexatious given the well-documented historical, economic, cultural, and social importance of mining in areas of the state directly affected by the MFLP. A casual review of publicly available peer-reviewed scientific literature clearly demonstrates the rich mineral resource potential of the area. Ex. 29. Yet, as discussed below, the eligibility of each project (including the proposed action) hinges on faulty and demonstrably false mineral remoteness reports. The failure to analyze mineral resource potential at the programmatic level does not support the program's implementation strategy of pursuing "the conservation of large, unfragmented tracts of forest land through tools like conservation easements." Ex. 6 at 52. The acquisition of large tracts of forested lands in areas of the state dominated by public ownership without consideration of mineral resource potential does not comply with the FLP Guidelines and is inconsistent with the federal FLP statute.

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[7] https://lincolncountymt.us/wp-content/uploads/2016/05/Adopted_Lincoln_County_Growth_Policy_Update_2019.pdf
[8] https://www.nrcs.usda.gov/sites/default/files/2022-09/FlatheadCounty-Montana-LongRangePlan.pdf
[9] https://www.nrcs.usda.gov/programs-initiatives/eqip-environmental-quality-incentives/montana/whats-available-in-my-county/sanders-county

MFLP Project Eligibility Requirements.

Eligibility of land to enter the FLP requires each tract to be "free of encumbrances that allow uses incompatible with the FLP, including but not limited to Mineral reservations." Ex. 24 at 26. Exceptions may apply if the State determines "that third-party interests do not pose a threat to effective protection and management. If such a determination is made, it must be supported by written documentation." Id. Thus, the decision to purchase land encumbered by mineral reservations is dependent on state action.

> If the State learns of outstanding rights that could impact the effective protection and management of a project, the project should not be submitted to the National Panel for funding consideration unless the State believes that either the outstanding rights can be acquired, extinguished, or demonstrated to pose a threat so remote as to be negligible. Id.

In such cases, a State official is required to "attest in a mineral determination letter that the possibility of surface disturbance related to the exercise of the reserved right is so remote as to be negligible." Id. at 27. In cases where

> State law views mineral reservations to come with presumptive easements (that is, use of the land needed for extraction and storage is viewed as part of the reservation), and ***then that land is probably not eligible***. Id. at 28 (***emphasis*** added).

"The title of the interest acquired must be free of encumbrances inconsistent with the purposes of the Forest Legacy Program (FLP)." Id. at 45.

> When FLP funds are used in acquiring lands or interests in lands, the FLP requires assurance of a title free of encumbrances inconsistent with the FLP purposes. This can be met via an opinion from the State agency through legal counsel, State Attorney General, or by purchasing title insurance for the full value of the property that names the interest holder as the beneficiary. Id.

The FLP Guidelines outline the following requirements for determining the eligibility of property deemed to be encumbered by mineral reservations.

> The minerals ownership must be determined before acquisition, and if there are severed mineral interests, then the outstanding mineral interests must be acquired to the extent possible. In the case where the mineral rights are not, or cannot be, acquired, a determination by a qualified geologist must be obtained as to the likelihood of mineral development (see Section 8 – Project Eligibility and Development for additional information on title and third-party interests). The acquisition can proceed if the possibility of mineral development is so remote as to be negligible. If severed mineral rights cannot be acquired, and those severed rights pose a threat to surface disturbance (that is, the "remoteness" standard cannot be

> met), that portion of the property is not eligible. Limited (impact, footprint, duration) oil and gas extraction might be permissible if it is determined that the conservation values can be protected, and the activity will not have negative impacts. Surface mining must be excluded from FLP tracts except for gravel sites in support of allowed activities on the property and, on a case-by-case basis, on adjacent properties where such uses are in support of those same conservation values, for example, reciprocal road-maintenance agreements for timber management. Id at 46.

Perpetuity

The concept of perpetuity applies to both ends of projects undertaken pursuant to the MFLP. At the front-end perpetuity must be demonstrated to establish eligibility for government acquisition of the land.

> Land acquisition requires certain activities to ensure the appropriate use of Federal funds and that landowners are justly compensated. Additional activities, such as Baseline Documentation Reports and Multi-Resource Management Plans, are necessary to ensure the resource values are protected and conserved in perpetuity. Id. at 45.

At the back end (post-closing), perpetuity applies to resource management, document retention, and acceptance by the IRS of a landowners' charitable contribution (discussed below),

> Landowners with completed FLP conservation easements on their property(s) have the long-term responsibility for managing their land in a manner consistent with the purposes of the FLP and the terms specified in the conservation easement and Multi-Resource Management Plan. Id. 15-16
>
> All FLP conservation easements and deeds must include certain provisions to ensure the FLP tracts are protected in perpetuity and managed consistent with the purposes of the FLP, and to ensure the FLP conservation investment is maintained in perpetuity. (See Section 14 – Conservation Easement Language and Section 15 – Fee Simple Purchase Deed Language for required and suggested language for conservation easements and fee simple deeds.) Id. at 46-47.

Multi-Resource Management Plans

As discussed below, the MRMP for the proposed action was negotiated without public participation and does not provide for public notice or participation in the procedure for plan modification.

> All FLP-funded conservation easements and fee acquisitions must have a Multi-Resource Management Plan that addresses the resource elements of the U.S.

Department of Agriculture, Forest Service, and Forest Stewardship Program. These plans must be reviewed and approved by the State forester or designee. Cost-share and donated tracts are required to have an approved Multi-Resource Management Plan only when management activities are anticipated. Multi-resource management plans shall be reviewed by the landowner and the State forester or designee periodically, at a minimum of every 10 years, and following a change of ownership. They also must be updated as needed (see Section 17 – Multi-Resource Management Plans for additional guidance on these plans). Id. at 47.

Appraisal and Appraisal Review

The market value of properties acquired using FLP funds must be determined by an appraisal that meets Federal appraisal standards known as the Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA) and Uniform Standards of Professional Appraisal Practice (USPAP). Id.

Tax Considerations

Many acquisitions of FLP conservation easements involve bargain sales in which the grantors receive Federal tax benefits. Amending such conservation easements could have tax implications for the grantor as well as implications for a nongovernmental easement holder in the case of a cost-share or fully donated tract (for example, loss of tax-exempt status, intermediate sanctions, or loss of status as an "eligible donee" of tax-deductible easements). Some amendments may require appraisals to determine whether the changes involve private benefit or private inurement. Legal experts should make determinations of private benefit and private inurement. Additionally, Federal tax law does not allow the modification of the perpetual nature of a conservation easement. Id. at 79.

DISCUSSION

The MTGO-1 does not comply with MFLP project eligibility requirements, including but not limited to those summarized above, in the following respects:

4. According to the FLP Guidelines, project eligibility requires that each tract be "free of encumbrances that allow uses incompatible with the FLP, including but not limited to Mineral reservations." Ex. 24 at 26. "The title of the interest acquired must be free of encumbrances inconsistent with the purposes of the Forest Legacy Program (FLP)." Id. at 45. The federal FLP Guidelines clearly state that surface mining and associated "surface disturbance activities" are prohibited uses that are noncompatible with the program's purpose. Ex. 24 at 51. Yet, according to the EA, 50% of nearly 33,000 acres that will be directly affected by the proposed government acquisition of the MTGO-1 easement is encumbered by reserved mineral rights. Ex. 4 at 9. The MTGO-1 project area is encumbered by mineral reservations incompatible with the project's purpose and is therefore ineligible for MFLP funding.

5. According to the FLP Guidelines, where state law provides statutory access and use of land for extraction and storage, the land is probably not eligible" for funding. Ex. 24 at 28. Montana law provides the right of way to access, explore, and develop the dominant mineral estate. Title 82, Ch. 2, MCA, See also *Hunter v. Rosebud Cnty.*, 240 Mont. 194, 198, 783 P.2d 927, 929 (1989). Additionally, Montana law affords mineral estate owners the right of eminent domain. See e.g., §82-2-221. In addition to statutory rights, WRH also holds deeded access and surface use rights, including the right to repurchase land covered by the proposed MTGO-1 project. These rights are not limited to surface mining activities but include a right to conduct surface disturbing exploration and development. The MTGO-1 project area is encumbered by statutory and contract rights to access, disturb, and repurchase the surface for exploration, development, refinement of minerals, and other mining-related purposes. The outstanding rights held by WRH and others are incompatible with the project's purpose, which is therefore ineligible for MFLP funding.

6. The plain language of the FLP Guidelines requires that "if there are severed mineral interests, then the outstanding mineral interests must be acquired to the extent possible." Ex. 24 at 46. At no time in the course of the proposed action (or any other MFLP project or any complementary federal or private land acquisition project) has FWP or any other project participant ever made any effort to acquire any interest in WRH's deeded mineral rights. In response to WRH's project scoping comments in the EA, FWP stated that a prior landowner offered to purchase WRH's mineral rights. Ex. 4 at 9. First, that is untrue; no such offer was ever made. See e.g., Ex. 30 at [Bates 184]. Second, the requirement to acquire severed mineral rights "to the extent possible" is an obligation of the state as the party responsible for accepting federal grant funding in whom title to acquired lands is conveyed. The plain language of the FLP Guidelines says, "The State Lead Agency is responsible for making a determination of compatibility on a case-by-case basis consistent with the forest values and benefits of the specific project." The steadfast refusal by FWP and its many partners to comply with the plain language of the FLP Guidelines is best understood as a mutual effort to circumvent MFLP eligibility requirements to obtain federal grant funding needed to implement the State's goal of targeting and acquiring large, unfragmented tracts of forest land through tools like conservation easements." Ex. 6 at 52. The outstanding rights held by WRH and others are incompatible with the project's purpose, which is therefore ineligible for MFLP funding.

7. In the MTGO-1 Project and all other MFLP projects completed or proposed since the adoption of the current AON, FWP has relied upon an exception that allows for the acquisition of property that is severed from the mineral estate. Specifically, the FLP Guidelines state,

> The acquisition can proceed if the possibility of mineral development is so remote as to be negligible. If severed mineral rights cannot be acquired, ***and*** those severed rights pose a threat to surface disturbance (that is, the "remoteness" standard cannot be met), that portion of the property is not eligible. Ex. 24 at 46 (***emphasis*** added).

As noted, FWP and its partners have systematically skipped the first steps, jumping straight to obtaining opinions from preferred consultants regarding the likelihood of surface mining. For

example, TPL engaged a reputable and widely respected PhD geologist for the Lost Trail Conservation Project to evaluate mineral potential. She told them clearly that the geologic formations known to be present "is always a target terrain for Sullivan-type ZNPbAg deposits." Ex. 27, (quoting then President of Tintina Montana. Black Butte Copper Project. TPL terminated her engagement and replaced her with the same person who authored the mineral assessment for the MTGO Project.

In preparing the MTGO report, it does not appear that the author communicated directly with anyone having personal knowledge of ongoing exploration activities. This is significant because on page one of that report, the author purports to have complied with BLM Manual 3031. Ex. 1-C at 1. However, that manual expressly requires an intermediate level of detail for agency decisions restricting "mineral exploration and development." Ex. 28 at .23.A.1. Clearly, the proposed government action, in this case, does those things by precluding mineral activity on 50% of the property, and subjecting the remaining 50% of outstanding mineral rights to additional regulation while precluding aggregation of adjoining mineral interests to improve the economic viability of extracting valuable minerals.

In such cases, the procedural standards set forth in the BLM Manual require contacting claimants and/or lessees. Id. at .23.B.4. At no time was WRH contacted regarding its mineral holdings, and WRH's invitation to conduct a confidential review of its proprietary data was rejected based on the government's unfounded assertion that WRH must submit its proprietary for public examination. FWP and its partners wrongly refused to recognize and examine the importance and value of WRH's proprietary data to further the Forever Montana vision of acquiring large, unfragmented tracts of forest land through tools like conservation easements." Ex. 6 at 52. The outstanding rights held by WRH and others are incompatible with the project's purpose, which is therefore ineligible for MFLP funding.

8. FWP has confused and misapplied the MFLP eligibility standard applicable to mineral reservations. The mineral assessment performed by TPL's preferred consultant opined that,

> the ***probability of extraction*** from the property, by surface or subsurface mining methods, of metallic and industrial minerals, construction materials, abrasives, petroleum products (oil and gas), coal resources, geothermal resources, critical minerals, and sand and gravel is so remote as to be negligible, within the meaning of Section 170(h)(5)(B)(ii) of the Internal Revenue Code and its applicable regulations. Ex. 1-C at 19.

That is not a correct statement of the IRS standard. Regardless, the standard that governs IRS approval of charitable split-estate contributions under Section 170(h)(5)(B)(ii) of the Internal Revenue Code and Treasury Regulation § 1.170A-14 (g) (4) is not the applicable for determining MFLP project eligibility. That applicable standard is set forth in the FLP Guidelines, which require a state official to,

> attest in a mineral determination letter that the possibility of ***surface disturbance related to the exercise of the reserved right*** is so remote as to be negligible. Ex 24 at 27 (***emphasis*** added).

> the project should not be submitted to the National Panel for funding consideration unless the State believes that either the outstanding rights can be acquired, extinguished, or demonstrated to ***pose a threat*** so remote as to be negligible. Ex. 24 at 26 (***emphasis*** added).

The same standard applies to the possibility that rights of way may be exercised, "The right of way may already be extinguished or so close to the end date that the possibility of exercising the right of way is negligible." Ex. 25 at 28. In the EA, FWP explained,

> if the survey indicates that ***the possibility of surface disturbance related to the exercise of mineral rights is so remote as to be negligible***, the state may determine that third-party interests do not pose a threat to the effective protection and management of the property. Accordingly, the project would remain eligible for FLP funding. Ex. 4 at 9 (***emphasis*** added).

Thus, the overall "possibility of surface disturbance" must be assessed, not the "probability of extraction." The MTGO-1 project does not meet the stated standard. WRH holds statutory and deeded rights to access its mineral properties to conduct ground-disturbing exploration activities. WRH holds the right to repurchase thousands of acres of land covered by the MTGO-1 project and other easements improperly acquired under the MFLP. These activities may include road building, construction of related improvements such as employee housing, administrative buildings, drill core shacks, etc. The proprietary data compiled by WRH's senior exploration geologist supports a conclusion that ground-disturbing exploration on the proposed MTGO-1 project and other MFLP projects in the area is not remote but "virtually certain." Ex. 28 at 2.

Additional problems with the mineral assessment are seen in the evaluation of mineral occurrence. The tabulated Occurrence Potential for Minerals states a "moderate" potential for Metallic Minerals and for Common Variety Mineral (Decretive stone). Each of those mineral types is assigned a Low Development Potential with a "C" Level of Certainty. Ex. 1-C at 18, Table 2. It is noted that moderate occurrence and low development potential do not meet the "so remote as to be negligible" standard, which is derived from the IRC codes and implementing Treasury Regulations cited above has been defined as,

> a chance which persons generally would disregard as so highly improbable that it might be ignored with reasonable safety in undertaking a serious business transaction.' " * * * Stated differently, it is "a chance which every dictate of reason would justify an intelligent person in disregarding as so highly improbable and remote as to be lacking in reason and substance." * * * <u>Ten Twenty-Six Inv'rs v.</u>

> Comm'r of Internal Revenue, 113 T.C.M. (CCH) 1516 (T.C. 2017). *See also Briggs v. Comm'r of Internal Revenue*, 72 T.C. 646, 657 (1979), aff'd, 665 F.2d 1051 (9th Cir. 1981) citing *Estate of Woodworth v. Commissioner*, 47 T.C. 193, 196 (1966), and *United States v. Provident Trust Co.*, 291 U.S. 272 (1934).

Low and moderate potential is not the same as so highly improbable as to be lacking in reason. Indeed, there are currently 45 state-licensed rock quarries in and around the MTGO Project. Ex. 35. Thus, it is impossible to conclude that Low Development Potential for decorative stone equates to "so remote as to be negligible. To the contrary, it appears that stone quarrying has thrived in the area. Similarly, WRH is working diligently to identify development opportunities based on extensive public and private information that points directly to the significant potential for mineral development. Exs. 29, 29A (figures 2 and 3), and 29B. It cannot be said that low to moderate potential for occurrence and development supports a conclusion that the likelihood of surface disturbance is so remote as to be negligible.

It is unknown whether FWP complied with the requirement for a State official to attest that "the possibility of ***surface disturbance*** related to the exercise of the reserved right is so remote as to be negligible." If so, it was done in error. There is a high probability of surface disturbance related to WRH's mineral reservations, and because such activity is incompatible with program requirements, the MTGO-1 project is ineligible for entry in the MFLP.

9. Another concept embedded in the MFLP that has a counterpart in federal tax law is "perpetuity." As explained, when determining eligibility for the MFLP, "Baseline Documentation Reports and Multi-Resource Management Plans are necessary to ensure the resource values are protected and conserved in perpetuity." Ex. 24 at 45. In direct contradiction of that requirement, MTGO-1 conservation easement proposed for acceptance by the FWP Commission acknowledges WRH's right to engage in surface-disturbing mining activities. Specifically,

> If a third party owns or leases the oil, natural gas, or any other mineral substance at the time this Easement is executed, and their interests have not been subordinated to the Easement, the Landowner must notify the Department as soon as practical after the Landowner becomes aware of any proposed exploration or extraction activity by such third party, which is not subject to the terms of this Easement unless expressly subordinated thereto. The landowner and the Department shall confer to review the proposed activity and determine proposals to mitigate any potential impact on the Land and the Conservation Values of the proposed activities. Subject to Montana Code Annotated § 82-10-504, the Landowner and the Department shall subsequently cooperate in an effort to encourage the third party to adopt recommended mitigating measures in the third party's exploration and development activities. Ex. 4 Att. at 9-10 of 34

Because, for the reasons already explained, ground disturbing activities and reacquisition for mining purposes are a virtual certainty, the MTGO-1 project does not satisfy the MFLP requirement to protect and conserve resource values in perpetuity and the MTGO-1 project is not eligible for entry in the MFLP.

10. The FLP Guidelines establish minimum appraisal requirements. Ex. 24 at 47. They require the use of the Uniform Appraisal Standards for Federal Land Acquisition, which specify the following methodology for mineral valuations when the government acquires land,

> Under federal law, the sales comparison approach is normally the most reliable approach to value for properties involving minerals. As a result, in federal acquisitions, the appraiser cannot default to using an income approach or other valuation method that may be acceptable for typical industry purposes. Indeed, both federal courts and industry professionals have criticized valuations of mineral property for just compensation purposes that improperly disregard the sales comparison approach. An unsupported statement that comparable sales do not exist is insufficient. Moreover, in appraising property involving minerals, "[e]lements of sales of quite distant properties, even those with different mineral content, may be comparable in an economic or market sense when due allowance is made for variables." Significant variables or elements for mineral properties may include location (relative to market demand, processing facilities, transportation options, etc.), certainty (e.g., proven or unproven deposits), mineral content or type, mineral quality, mineral quantity, and zoning or permitting status. Ex 34 (internal citations omitted).[10]

Despite clear direction from the US Justice Department, it does not appear the FWP's appraiser identified or relied on any comparable sales of mineral properties. Instead, the author relied exclusively on the faulty mineral potential report (Ex. 1-C) discussed above to conclude that,

> Based on this expert report, the likelihood of future development of commercially valuable mineral deposits on the subject property is remote. Proving the presence of economically recoverable minerals would require a significant investment of money and time. Given the information at this time, it is unlikely that a potential buyer would place any material value on the mineral rights. Therefore, the appraisers conclude that the mineral development potential has no impact on the subject property's market value. Ex. 1-D at 2-62.

Had the project proponents exercised their responsibility to contact the mineral owners they would have learned that WRH is actively engaged in confidential discussions with multiple potential buyers having an interest in mineral exploration and potential development in the MTGO Project area and on other properties already entered or proposed for entry in the MFLP program. The

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[10] https://www.justice.gov/d9/enrd/legacy/2015/04/13/uniform-appraisal-standards.pdf

appraisal conducted for the MTGO Project does not satisfy the required program standards, so the MTGO project is not eligible for entry in the MFLP.

11. As stated above, "many acquisitions of FLP conservation easements involve bargain sales in which the grantors received Federal tax benefits." Ex. 24 at 79. Viewed collectively, the failure to assess mineral resource potential at the program level, the failure to contact third-party mineral holders, the refusal to review proprietary data bearing on the proposed action, reliance on non-existent offers to purchase the mineral estate, the preparation and acceptance of a mineral assessment concluding that any intelligent person would disregard the mineral potential for more than 300 square miles of land located in the highly mineralized Belt Basin based on three days of casual surface examination, the lack of comparable sales data for other mineral properties in the appraisal documents, and other facts presented herein, all support a reasonable inference that FWP, TPL, Green Diamond and others have taken these steps to maximize the possibility of realizing significant tax benefits to incentivize the proposed action. The MTGO project is not eligible for entry in to the MFLP based on FWP's systematic failure and seemingly willful refusal in project after project to comply with the FLP Guidelines.

MEPA

The purpose of the MONTANA ENVIRONMENTAL POLICY ACT (MEPA) is to declare *a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state* . . . (75-1-102(2), MCA). Ex 36.[11]

MEPA requires state government to coordinate state plans functions and resources to achieve environmental, economic, and social goals. MEPA also implicates various constitutional provisions including Inalienable Rights. Art. II, Section 3. Right of Participation. Art. II, Section 8. The Right to Know. Art. III, Section 9. Protection and Improvement. Art. IX, Section 1. Id.

MEPA is intended to facilitate better decisions that balance Montana's clean and healthful environment without compromising the ability of people to pursue their livelihoods as enumerated in MEPA and the Constitution and free from government overreach. MEPA instructs there should be a balance between people and their environment, between population and resource use, and between short-term use and long-term productivity. Id.

In 1995, the Legislature enacted **Senate Bill No. 231** (Chapter 352, Laws of 1995), clarifying that the state's policy under MEPA is to protect the right to use and enjoy private property free of undue government regulation. MEPA always required an economic and social impact analysis, but Senate Bill No. 231 further specified that when agencies conduct that analysis, regulatory impacts on private property rights and ALTERNATIVES must be considered. Id.

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[11] https://leg.mt.gov/content/Publications/Environmental/2021-mepa-handbook.pdf

An environmental review may not include a review of actual or potential impacts beyond Montana's borders or consider actual or potential impacts that are regional, national, or global in nature unless the environmental review is conducted by the Department of Fish, Wildlife, and Parks for the management of wildlife and fish or a review beyond Montana's borders is required by law, rule, regulation, or federal agency. Id.

The preceding statements include by reference all pertinent provisions of law and legislative materials. The following statements are excepted from FWP's implementing regulations for MEPA. The authorizing and implementing statutes cited for each regulation are also incorporated by reference. The failure to specifically mention statutory or regulatory requirements under MEPA shall not be construed as a waiver of WRH's right to rely upon those authorities.

ARM 12.2.429 DEFINITIONS

(1) "Action" means a project, program, or activity directly undertaken by the agency; a project or activity supported through a contract, grant, subsidy, loan, or other form of funding assistance from the agency, either singly or in combination with one or more other state agencies; or a project or activity involving the issuance of a lease, permit, license, certificate, or other entitlement for use or permission to act by the agency, either singly or in combination with other state agencies.

(7) "Cumulative impact" means the collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through pre-impact statement studies, separate impact statement evaluation, or permit processing procedures.

(18) "Secondary impact" means a further impact on the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action.

(12) "Human environment" includes, but is not limited to, biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment. As the term applies to the agency's determination of whether an EIS is necessary (see ARM 12.2.430(1)) , economic and social impacts do not by themselves require an EIS. However, whenever an EIS is prepared, economic and social impacts and their relationship to biological, physical, cultural and aesthetic impacts must be discussed.

(15) "Programmatic review" means an analysis (EIS or EA) of the impacts on the quality of the human environment of related actions, programs, or policies.

ARM 12.2.430 GENERAL REQUIREMENTS OF THE ENVIRONMENTAL REVIEW PROCESS.

Section 75-1-201, MCA, requires state agencies to integrate use of the natural and social sciences and the environmental design arts in planning and in decision-making, and to prepare a detailed statement (an EIS) on each proposal for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment.

ARM 12.2.431 DETERMINING THE SIGNIFICANCE OF IMPACTS

(1) In order to implement 75-1-201, MCA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an EIS and also refers to the agency's evaluation of individual and cumulative impacts in either EAs or EISs. The agency shall consider the following criteria in determining the significance of each impact on the quality of the human environment:

> (a) the severity, duration, geographic extent, and frequency of occurrence of the impact;
> (b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur:
> (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;
> (d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values:
> (e) the importance to the state and to society of each environmental resource or value that would be affected;
> (f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions and
> (g) potential conflict with local, state, or federal laws, requirements, or formal plans.

(2) An impact may be adverse, beneficial, or both. If none of the adverse effects of the impact are significant, an EIS is not required. An EIS is required if an impact has a significant adverse effect, even if the agency believes that the effect on balance will be beneficial.

ARM 12.2.432 PREPARATION OF ENVIRONMENTAL ASSESSMENTS

(3)(d) an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment. This evaluation may take the form of an environmental checklist and/or, as appropriate, a narrative containing a more detailed analysis of topics and impacts that are potentially significant, including, where appropriate, terrestrial and aquatic life and habitats; water quality, quantity, and distribution; geology; soil quality, stability, and moisture; vegetation cover, quantity, and quality; aesthetics; air quality; unique, endangered, fragile, or limited environmental

resources; historical and archaeological sites; and demands on environmental resources of land, water, air, and energy;

(3) (e) an evaluation of the impacts, including cumulative and secondary impacts, on the human population in the area to be affected by the proposed action. This evaluation may take the form of an environmental checklist and/or, as appropriate, a narrative containing a more detailed analysis of topics and impacts that are potentially significant, including, where appropriate, social structures and mores; cultural uniqueness and diversity; access to and quality of recreational and wilderness activities; local and state tax base and tax revenues; agricultural or industrial production; human health; quantity and distribution of employment; distribution and density of population and housing; demands for government services; industrial and commercial activity; locally adopted environmental plans and goals; and other appropriate social and economic circumstances;

(3) (f) a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented;

The above-listed authorities do not represent an exhaustive list of unmet MEPA requirements but serve only as a framework for the following discussion.

DISCUSSION

FWP acted arbitrarily and in violation of all other applicable standards in moving forward with the proposed project prior to conducting required environmental review. MEPA is fashioned after NEPA which provides persuasive authority for the interpretation of MEPA and its implementing regulation. One purpose of MEPA is to foster government transparency through public participation. To accomplish this purpose environmental review is triggered when a government action is proposed and before substantive work to implement the proposal is performed. FWP violated this requirement by using TPL (and perhaps others) as a surrogate acting in agency with FWP, to advance the MTGO project proposal through the federal funding application process. This is evidenced by the fact that federal FLP funding for MTGO was approved prior to issuance of the scoping notice on January 25, 2022. Ex. 7. The same process has been used for other MFLP projects. For example, the LTCE was proposed by TPL on April 1, 2019. Ex. 31. Project funding was approved in FY 2019 based on completed transactional documents discussed below, including a binding purchase agreement. Ex, 7. Only after this work to implement the proposal was completed did FWP issue a scoping notice proposing the acquisition on April 6, 2020. Ex. 43.

FWP acted arbitrarily and in violation of all other applicable standards in issuing a decision notice with a finding of no significant impact based on an environmental assessment ("EA") that failed to meet the minimum standards of MEPA. The EA inadequately describes the need for the proposed project as it relates to the purpose of the MFLP, including, without limitation, the failure to consider and balance the economic, cultural, and social effect of acquiring more government property in an area of the State that is dominated by public land ownership and management. The EA also fails to properly identify objective facts demonstrating there is any threat of private lands

being converted to non-forestry use or that such conversion would have a detrimental effect on the human environment where a majority land is already managed for multiple use (including forestry) per federal law.

The EA fails to evaluate direct, cumulative, and secondary impacts on the physical environment, including geological, air, and energy. The project will directly affect more than 15,000 acres by effectively withdrawing them from mineral entry forever in the richly mineralized Belt Basin from exploration and potential development of critical and supply-limited minerals. It has the secondary effect of materially hampering exploration and potential development on another 15,000 acres by preventing the aggregation of mineral occurrences on adjoining lands. Cumulatively, the MFLP will magnify these effects already imposed on hundreds of thousands of acres of private land and proposed for nearly 200,000 more acres of private land that are essential for conversion from fuel-based to material-based energy sources. Exs. 37- 42.

The EA fails to properly evaluate the proposed action's direct, cumulative, and secondary impacts on the human environment locally, at the state or regional level, and beyond. The proposed action will directly affect jobs in the field of mineral exploration, forcing students and technicians trained in Montana to go elsewhere, prohibiting or limiting mineral-based activities in the project area and cumulatively over hundreds of thousands of acres. The action disregards the cultural heritage of an area where mining has provided significant generational opportunities. By removing such opportunities, the proposed action will also impact potential tax revenues from mining and mining-related businesses that depend on access to mineralized properties.

The EA failed to consider reasonable alternatives that might include participation in federal resource planning to protect the forest industry from potential impacts related to population growth. As discussed above, FWP was required to make every effort to acquire mineral rights or subordinate surface uses. A reasonable alternative would have included refraining from encumbering vast areas of the state with perpetual management restrictions in favor of acquiring mineral and associated surface rights in more limited areas of critical ecological importance or by surface use agreement allowing for acquisition of some more limited project areas.

FWP acted arbitrarily and in violation of all other applicable standards in failing to prepare a detailed statement (EIS) at the program or project level to address the significant impacts the proposed action and related projects have and will continue to have on the human environment. The severity, duration, and geographic extent of the impacts are significant. The proposed action creates a total perpetual ban on access to natural resources in favor of conservation in an area where nearly 80 percent of the land is already under government control. The probability of the impact is assured. Indeed, it is the very purpose of the proposed action. The growth-inhibiting aspect of the action is clearly intended by tying up private land and precluding development and use in perpetuity. This significant impact requires an EIS, whether it is seen as beneficial or detrimental. ARM 12.2.431(2). The value of the impacted resources is largely unquantified. However, the quality of the geologic data supports plans for significant expenditure of exploration resources, resulting in significant economic benefits for the area. The importance of the mineral resources hosted in geologic formations affected by the proposed action is significant, especially

in light of the exponential increase in domestic demand for secure supplies of critical and indispensable materials for technical and energy applications. Project approval based on an EA that found no significant impact flies directly in the face of national priorities for securing supply chains and increasing exploration and production of materials identified as critical and indispensable. Exs. 37- 42. The precedential impact of the proposed action in the context of future actions is apparent from piecemeal project approvals performed without any programmatic analysis at the state or federal level, while vast tracts of the state are subjected to permanent government management and control. The significant conflict between the MFLP and federal FLP Guidelines and tax code is discussed above. An EIS should be required under any single one of the severity factors found in FWP's MEPA regulations.

FWP acted arbitrarily and in violation of all other applicable standards in failing to provide adequate participation in management decisions that prohibit and/or significantly deter humans from using natural mineral resources in the MFLP project and program areas. At the scoping stage, FWP announced that Federal FLP funds would be the likely funding source if the proposal were to proceed. But that funding has already been secured. Before the scoping notice was released, the MTGO project was identified by the USFS as the number one ranked FLP project for Fiscal Year 2022. Those rankings were prepared by the National Review Panel using the FLP Project Scoring Guidance. The "Scoring Guidance" states a greater emphasis has been placed on readiness, requiring states to submit documentation to the FLIS in support of the readiness score. To be considered for FLP funding, the state had to show that a project was sufficiently ready to be completed within two years of the grant award. The readiness criteria require the state to document that certain due diligence tasks have been completed by the October 18, 2021, FLIS deadline. Among the tasks to be completed in advance are a market analysis, a draft conservation easement, proof of cost share commitments, executed options or purchase agreements, and a mineral assessment and determination of remoteness for any severed mineral rights. The MTGO was ranked as the number one FLP project for fiscal year 2022, at the maximum allowable funding level of $20 million. Therefore, it is clear that the above-listed due diligence items were completed before the FLIS deadline. A proposal triggers MEPA. Submittal of an application that includes the conservation easement, funding secured, purchase agreements executed, and (of immediate concern to WRH) a mineral assessment and remoteness report for over 59,000 acres of WRH's mineral estate has been prepared. As stated above, acting on a proposal through surrogates to put together the transaction before engaging with the public does not satisfy the requirements for public participation under MEPA. Moreover, doing so without notice to mineral estate owners who are directly affected by the flawed remoteness study in violation of FLP Guidelines deprived WRH of its due process rights under the state and federal constitutions.

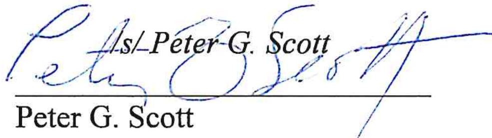
The failure to satisfy public participation obligations is also apparent in the process used to negotiate easement documents that make natural resource management decisions without any notice or opportunity for public participation or by affected property owners such as WRH. Specifically, the state negotiated the MRMP behind closed doors and established a process for modification of the MRMP that excludes the public from participating in future management decisions. Conservation Easements held by the government are public property. MEPA requires public participation in decisions affecting the human environment. The requirement is especially

pertinent in this case, where the effect of management decisions precluding and limiting the use of property and mineral resources is permanent. Failing to include the public and affected property owners in resource management violates MEPA's public participation requirements. The failure to provide WRH with a meaningful opportunity to participate violates its due process rights under the state and federal constitutions.

WRH respectfully request that the Commission deny the proposed action and return the proposal to FWP with direction to complete a programmatic EIS for the MFLP and properly tiered environmental review only for projects that comply with the program eligibility requirements.

Regards,

PETER G. SCOTT, LAW OFFICES, PLLC



Peter G. Scott

Att: Referenced Exhibits 1-45 w/ Index

Cc: WRH Nevada Properties, LLC