

The following is a summary of S1470, "Forest Jobs and Recreation Act" introduced by Montana Senator Jon Tester.

This piece of legislation is nothing more than a wilderness bill, crafted in secret meetings between the Montana Wilderness Association, Trout Unlimited, National Wildlife Federation, Sun Mountain Lumber and RY Lumber. The other stakeholders that use these areas were left out of the process including the local governments.

If this legislation is signed into law it will devastate the economies of numerous small communities in Montana.

There are three types of public land (National Forest) changes proposed in S1470: Wilderness (W), Recreation Areas (RA) and Stewardship projects. The W and RA areas can be viewed as one combined area with respect to restrictions, since the restrictions on Recreation Areas are very close to the proposed Wilderness. The combined W and RA areas amount to about 1 million acres. The Stewardship projects are for habitat restoration only and add up to a total of 100,000 acres over the 10 - 15 years allowed for completion. After the habitat restoration is complete there will be NO MORE activity in those areas. The one-shot logging projects will be done...forever. The result will be that in the long run, when the designations and treatments resulting from this bill are complete, Montana will have 1.1 million acres of new designated and de-facto wilderness. There is NO general multiple use specified. This is in violation of the Multiple-Use Sustained Yield Act. The result of this bill would be to take the public land out of productive commercial use.

If you compare the latest version of the Beaverhead-Deerlodge Partnership Draft (2007) (BDP) with the Tester Bill it appears that the Tester Bill is a direct expansion of the BDP. The terms and conditions are much the same; the names of the areas are the same, with some added. Some of the acreages have been changed. Please see the table at the bottom of this document which indicates the areas and acreages.

The BDP and therefore S1470 were developed by a small handful of wilderness activists from the Montana Wilderness Association, other environmental groups and small local businesses. This was done behind closed doors, with no involvement of the public or from local government, in violation of the federal coordination laws.

This is a land lock-up bill, with nothing substantial given to the public in exchange for a million acres of wilderness.

Neither Montana nor the Nation needs any more wilderness. Currently there are 107 million acres of designated wilderness out of a total of 190 million acres of National Forest. That's over 50%. Just because the Montana Wilderness Association says we haven't had any Wilderness designations in 25 years does not mean we need more. Their arguments as to the need for this wilderness does not carry any scientific weight.

#### SPECIFIC PROBLEMS AND CONCERNS RE S1470 PROVIDING REASONS TO OPPOSE THE BILL

*References from S1470 by page no.*

p. 4 The stewardship projects are for habitat restoration only; no goal of multiple-use, sustainable forestry (i.e. growing trees for future harvest).

- p. 7 "Access road" is defined as a temporarily road that must be obliterated before completion of the project.
- p. 9 Restoration projects may include removal of access roads to "State, tribal, or private land"
- p. 15 Proceeds from the sale of products of the stewardship projects must be reinvested only in other restoration projects in stewardship areas
- p. 15 The stewardship contracts are not to EXCEED 10 years. They could be less.
- p. 41 The termination of the Secretary's authority under this bill expires after 15 years, meaning that the Wilderness and Recreation Areas are designated forever, with no continuing oversight under this bill.
- p. 15 Stewardship party is to "offset the value of goods". There is no explanation of what that means.
- p. 17 "Habitat connectivity" is an undefined term specified as a criterion for prioritizing projects. Considering its implied meaning, this is a highly subjective measure.
- p. 17 "Road density" (e.g. 1.5 mi/sq mi) is specified as the main criterion for prioritizing activities. "Road density" is highly subject to manipulation and should not be used.
- p. 17 "Reduction in road density (that) would benefit affected wildlife" is another highly subjective, unscientific measure specified to be used to determine activities.
- p. 19 The Secretary MAY develop trails. This is not required.
- p. 20 In the stewardship and restoration areas NO new permanent roads are allowed
- p. 21 What is the definition of "uncharacteristic" wildfires or insect infestations? Certain wildfires and certain insect infestations will be allowed, at the whim of the forest manager(s).
- p. 21 Prescribed fires are to "mimic" natural fires. Could that mean a "let-burn" policy?
- p. 22 Revenue can only be used for fish and wildlife habitat restoration. No general, unrestricted economic benefit from these contracts.
- p. 24 Three community projects are named (Blackfoot Challenge, Blackfoot Community Project and Seeley Lake Coordinated Forest Management Project) and committee appointments are specified. These projects are not defined, and the committee appointments leave out local government.
- p. 26 The stewardship projects can be appealed by anyone; meaning environmental groups could appeal and stop any given project. This makes the stewardship portion of the Act uncertain as to whether it will ever be accomplished.
- p. 27 By allowing only one EIS and NO additional analyses prior to implementation of the project the Data Quality Act is violated. In other words, no one is allowed to challenge the "science" presented in the EIS.
- p. 28 Changes in the EIS can be made in consultation with collaborative groups (environmental groups) only AFTER the project is underway.

Implications of the last two items: A project could be started with an EIS that is acceptable to all concerned, then easily changed through "consultation" with, for example, the Montana Wilderness Association, behind closed doors.

p. 30 All consultation is with resource advisory committees (RAC) or local collaborative groups. Local government coordination, as required by NEPA, the FLPMA and NFMA are not included. This will cause a violation of these federal laws.

p. 30 "Ecological restoration" projects qualify as stewardship projects. To understand what that means, one should read a document entitled "Citizens Call for Ecological Forest Restoration" ("Call"), produced and signed by 120 environmental groups. It is a 21 page detailed blueprint for "ecological restoration" and has the goal of ZERO commercial activities on the National Forests. This document has all of the elements contained in S1470, including what a "job" means and definition of "training". Jobs included in this kind of project include only those related to road decommissioning and forest restoration. These are temporary jobs, as the Call document strongly urges a passive approach to forest management...the sooner you can get out of the forest and not touch it again, the better.

p. 31 Partnerships are to be established with non profit youth groups to do these projects.

p. 37 Impacts of climate change are to be included in the analysis of projects

p. 41 All landscape restoration projects (stewardship portions) of this bill expire in 15 years, leaving the permanent wilderness intact.

p. 53 "adequate access to the private property to ensure the reasonable use and enjoyment of the property by the owner." "reasonable use" is up to the agency and "enjoyment of the property by the owner" could mean "adequate access" is limited to the owner only. Implies there will be private property within the boundaries of some of the wilderness areas and this should disqualify the area from wilderness consideration.

p. 54 In Wilderness, grazing will only be permitted if it was established in a given area before Sept. 3, 1964 per section 4(d)(4) of the Wilderness Act (16 17 U.S.C. 1133(d)(4)), subject to additional, unknown regulations adopted subsequent to the Wilderness Act.

p 54 House Report 101-405 (Feb. 21, 1990) "provide(s) for the designation of certain public lands as wilderness in the State of Arizona"; and "Subject to the conditions and policies outlined in this report, the general rule of thumb on grazing management in wilderness should be that activities or facilities established prior to the date of an area's designation as wilderness should be allowed to remain in place and may be replaced when necessary for the permittee to properly administer the grazing program." Does this report constitute a law or regulation that applies to Montana?

p. 56-57 Outfitter & guide permits in existence at the time of this Act will be the only ones allowed in Wilderness. No new outfitter / guide permits.

p. 63 No timber harvests in Lost Creek Protection Area.

p. 65 - Recreation areas: prohibited activities include mining and timber harvest, off-road travel; almost managed as wilderness.

p. 64, p. 68, p. 71, p. 73 Recreation areas: "motorized travel shall be permitted within the National Recreation Area only on approved, designated trails and routes." All snowmobiles would be restricted from use off designated trails and routes.

S1470 TABLE OF ACREAGES

	<b>BDP 2007</b>	<b>S1470</b>	<b>Change</b>
<b>WILDERNESS</b>			
Anaconda-Pintler	65,400	56,680	(8,720)
Lee Metcalf	17,800	18,950	1,150
East Pioneers	87,500	76,775	(10,725)
Electric Peak	9,400	4,653	(4,747)
Lima Peaks	35,100	35,120	20
Highlands	20,400	20,392	(8)
Italian Peaks	29,522	29,508	(14)
Lost Cabin	5,220	5,223	3
Mt Jefferson	4,500	4,465	(35)
Quigg Peak	8,200	8,388	188
Sapphires	43,500	53,327	9,827
Snow Crest	92,000	89,798	(2,202)
Stony Mountain	15,500	14,261	(1,239)
West Big Hole	92,800	44,084	(48,716)
Dolus Lakes	8,300	9,367	1,067
West Pioneers	34,400	25,742	(8,658)
Bob Marshall / Scapegoat		71,378	71,378
Bob Marshall Add		7,599	7,599
Mission Mountains Add		4,501	4,501
Blacktail Mountains		10,667	10,667
Roderick		29,869	29,869
Centennial Mountains		23,256	23,256
Farlin Creek		661	661
Ruby Mountains		15,504	15,504

Humbug Spires		8,892	8,892	
<b>Total Wilderness PROTECTION AREA</b>	<b>569,542</b>	<b>669,060</b>	<b>99,518</b>	
Lost Creek	11,600	15,134	3,534	
<b>Total Protection RECREATION AREA</b>	<b>11,600</b>	<b>15,134</b>	<b>3,534</b>	
West Bighole		94,237	94,237	Moved from Wilderness and expanded
West Pioneers		129,252	129,252	
Thunderbolt Creek		22,037	22,037	
Three Rivers		74,274		
Otatsy		1,271	1,271	
<b>Total Recreation</b>	<b>-</b>	<b>321,071</b>	<b>246,797</b>	
<b>Total Wilderness &amp; Rec STEWARDSHIP AREA</b>	<b>581,142</b>	<b>1,005,265</b>	<b>349,849</b>	
Beaverhead-Deerlodge		70,000	70,000	
Three Rivers		30,000	30,000	
Big Hole	212,500		(212,500)	
Clark Fork	110,500		(110,500)	
Highlands	183,000		(183,000)	
Pioneer	87,500		(87,500)	
Upper Rock Creek	79,000		(79,000)	
Tobacco Roots	26,000		(26,000)	
	<b>698,500</b>	<b>100,000</b>	<b>(598,500)</b>	
<b>Grand Totals</b>	<b>1,279,642</b>	<b>1,105,265</b>	<b>(248,651)</b>	

There will be 211,000 acres of BLM, state school trust land, and private property within the boundaries of the wilderness in the Beaverhead Deerlodge National Forest if this bill becomes law. These lands will not be able to be managed in a way that provides profits for our schools, local governments and individual property owners.

Citizens for Balanced Use has just completed a legal review of S1470 and has found that it violates the following laws and our U.S. Constitution.

National Environmental Policy Act

National Forest Management Act

Multiple Use Sustained Yield Act

Endangered Species Act

Clean Water Act

Clean Air Act

Data Quality Act

Council on Environmental Quality regulations

Administrative Procedure Act

Federal Advisory Committee Act

Separation of Powers requirements of the U.S. Constitution

Fifth Amendment to the U.S. Constitution

Tenth Amendment to the U.S. Constitution

#### LEGAL DEFECTS IN S1470

The Bill surreptitiously alters the Coordination requirements of the Forest Management Act and the National Environmental Policy Act.

To the detriment of every county, city, and local district of government in Montana, this Bill provides the federal agencies with a means to evade and avoid the requirements in the Forest Management Act and the National Environmental Policy Act that the agencies “coordinate” with local government.

A. The National Forest Management Act.

The National Forest Management Act mandates that the Secretary of Agriculture “Shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, *coordinated with the land and resource management planning processes of State and local governments* and other Federal agencies.”

To local governments this mandated coordination is critical. In 1982, the first rules issued by the Secretary of Agriculture after the statutory mandate was created, the Secretary directed Forest Service line officers to assure that forest service personnel “coordinate” federal planning efforts with local governments. 36 C.F.R. Section 219.7 provides:

“The responsible line officer shall coordinate regional and Forest planning with the equivalent and related planning efforts Of other Federal agencies, State and local governments and the Indian tribes.”

The Secretary then defines what he means by “coordinate” by requiring the following actions:

1. give early notice of preparation of federal plan;
2. review plans and policies of local government, the review to include:
  - a. consider objectives of local government
  - b. assess interrelation of impacts between local and federal plans and policies
  - c. determine how Forest should deal with the impacts
  - d. consider alternatives for resolution of conflicts between local policies and federal
  - e. meet with local government at beginning of planning to develop protocol for coordination
  - f. seek input from locals to resolve conflicts
  - g. monitoring and evaluation to consider impacts

This level of coordination is critical to local governments which are responsible for the economic stability of public health and safety of its constituents.

Senator Tester’s Bill provides an escape mechanism for the Forest line officers by requiring in section 102(a)(2) that as to stewardship and restoration projects on a “land-scape scale”, the Secretary shall coordinate with “applicable advisory committees or local collaborative groups”. There is no mention in S 1470 of the duty to coordinate with local government.

So, does this amount to a repeal of the National Forest Management Act’s requirement of coordination? The answer to the question is debatable. It is a valid argument to say that under S 1470 the Secretary does not have to coordinate

with local government as to any “landscape-scale restoration projects” because S 1470 specifically requires coordination only with non-governmental committees.

Even those who would argue that S 1470 does not strictly repeal the coordination requirements of the Forest Management Act, must admit that it provides “weasel room” for line officers to evade and avoid the coordination requirements.

The impact of this provision of S 1470 strikes at the very heart of the protection to local government for which counties and special interest government districts have worked so hard for the past twenty years. Through coordination, local government has been able to hold the agencies at bay when trying to put down local ranchers and recreation users.

Whether intentionally, or accidentally, S 1470 strikes a potentially deadly blow to every local government associated with the national forests subject to this Bill.

#### B. National Environmental Policy Act.

Senator Tester’s S 1470 has the same impact on NEPA which provides that “it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve **and coordinate** Federal plans, functions, programs, and resources...”

In bringing about this coordination, all federal agencies are directed to cooperate with local government. 42 USC Section 4331 (a) and (b).

S 1470 either specifically amends NEPA as to “landscape-restoration projects” in the wilderness areas designated by the bill, or provides the evasive path for forest personnel to ignore and avoid the coordination requirements.

C. Intentionally and maliciously, or unintentionally and ineptly, the impact of S 1470 is the same: the language of Section 102 (a) (2) will undo years of progress made by local governments to get the Forest Service to the table on an equal discussion basis.

#### I. Senator Tester’s Wilderness Bill, S. 1470 Removes Management Discretion Given to the Secretary by the National Forest Management Act

The National Forest Management Act of 1976 and its predecessor acts endow the Secretary of Agriculture with a vast amount of discretion to plan for and administer the forests for the public good. The Act provides that the Secretary shall take into account the newest and highest quality information regarding management of the Forests. It also provides that he will take input and advice from local government, state government and all members of the public. There is no provision of the Act that provides for the Secretary to just arbitrarily apply a particular management technique to the exclusion of alternatives.

The provisions of the National Environmental Policy Act, of course, provide that the Secretary will seek public input under NEPA before adapting and applying a technique to the exclusion of others. In making his decisions, he must take into consideration all management acts relating to the forests, the Endangered Species Act, the Clean Water and Clean Air Act and the Data Quality Act.

But, S. 1470 just arbitrarily dictates to the Secretary that he WILL apply each standard “described in the inland native fish strategy relating to the conservation and management of riparian habitat” to each landscape scale restoration project. Section 102 (b) (2) (C). There is no exception. It is a mandate, no matter what the Secretary might find that would negate the usefulness of the standards.

Thus, the Senator, with limited input, in a bill written behind closed doors and with input from a very select group of special interests, has mandated the application of native fish strategy **REGARDLESS OF THE CONDITIONS AND CIRCUMSTANCES PRESENT WHEN THE PROJECT IS PLANNED---AND REGARDLESS OF THE DETERMINATION OF BEST AVAILABLE SCIENCE---AND REGARDLESS OF PUBLIC INPUT.**

This provision is not only contrary to the discretion granted by the National Forest Management Act, it violates the National Environmental Policy Act by evasion, and it violates the Separation of Powers requirements of the United States Constitution.

As to the latter point, Congress is indeed the manager of the federal lands including the forests. The Constitution so provides. But, Congress can delegate, and has delegated, to the executive branch the authority to manage the forests and other federal lands. That having been done, Congress has no authority, under the separation of powers, to meddle in the authority it has granted. Congress, no doubt, could reclaim the authority it delegated. But, it cannot have it both ways. It cannot delegate management authority, and then meddle by requiring the managers to apply an arbitrary rule that negates the general authority granted.

By requiring that the native fish strategy be applied, without question and without regard to the circumstances, Congress would also be taking away from local government access to management techniques through coordination.

II. Senator Tester's Wilderness Bill denies due process of law to a person who appeals from a decision as to a project.

Section 102 (b)(5) deprives an appellant of due process of law. The provision authorizes the Secretary to include in any appeal taken from a project decision "other individuals involved in monitoring of the landscape-scale restoration project (including the applicable project advisory committee or local collaborative group) to provide input to the Forest Service regarding the final decision of the Forest Service."

If a grazer, or a recreation user, or a unit of local government, goes to the expense of appealing a decision on a project, the Bill allows anti-use organizations and individuals to involve themselves in the appeal. The Bill bestows standing on committee and organization members who might have no standing at all. The Bill thus changes the process that is available to adversely effected persons through the Administrative Procedure Act and through the appellate rules of the Service.

Due process of law guarantees to all citizens the protection of statutory processes which have been established. Under the Administrative Procedure Act, and under Administrative rules issued by the Secretary, an appellant is entitled to a process uniquely styled to his/her facts, and open to only those who have been previously identified as having standing. This Bill provides standing to the world, regardless of the issue and regardless of adverse impact.

III. Senator Tester's Wilderness Bill severely limits the full impact of the National Environmental Policy Act.

Section 102 (6) provides that the Secretary will comply fully with the National Environmental Policy Act when planning and implementing projects. But, then, in subsection © (i) the Bill allows the Secretary to conduct additional environmental studies after the NEPA review has been conducted, "***after consultation with resource advisory committees or local collaborative groups***".

The Bill grants exclusive input to the special interest groups who have helped the Senator to draft this Bill behind closed doors, without public meetings or public hearings, without input from or coordination with either the State or local government. This provision violates the provisions of NEPA, the process established by Council on Environmental Quality regulations, the coordination requirements of the Forest regulations and National Forest Management Act, and the requirements of the Federal Advisory Committee Act by allowing select special interest groups to exert undue influence on the agency.

Subsection (D) further compounds the violation by MANDATING that the Secretary “consult with advisory committees or local collaborative groups” before any environmental analysis is conducted to reduce conflict and expedite project implementation. This provision also cuts out the entire rest of the public from any meaningful input to and on the environmental issues and concerns related to the project.

#### IV. Senator Tester’s Wilderness Bill violates the Fifth Amendment to the United States Constitution.

Section 202 (f) violates the Fifth Amendment to the United States Constitution by restricting private property in such a way as to interfere with investment backed expectations. The measuring test established by Penn Central Transportation Company v. City of New York, provides that a taking can occur when an investment backed expectation of a property owner is taken or so severely restricted as to constitute a taking.

This Section places the use of private property totally in the discretion of a line officer of the Forest Service---one of the least qualified protectors of property interests in the world. It does not provide for exclusion of private property from wilderness designations, and it does not provide for payment for private property surrounded as an in holding by the wilderness designation. Rather, it provides that the Secretary shall provide “adequate access to the private property to ensure the reasonable use and enjoyment of the property by the owner.”

The term “adequate” leaves it totally to the discretion of a line officer as to what type of access to permit. It provides no basis for the owner to have any input into the determination of “adequate” access; it provides no arbiter for determining whether the access allowed is truly “adequate”; it leaves it to a bureaucrat to determine adequacy, and to determine when to change any definition of access. It also leaves it to a line officer bureaucrat to determine what is “reasonable use and enjoyment” of the owner’s property.

This section takes from the owner that element of control of his property which would assure protection of his investment backed expectation, and which would assure him any practical use of his property. The section is a move by Congress to “take” control of an owner’s property, put it in the hands of a bureaucrat and make no compensation to the owner.

This Bill in no way is comparable to the method of designating wilderness in the Owyhee Public Lands Management Act passed in 2009. In that bill, no private land was included in wilderness except on a voluntary basis, with the owner agreeing to inclusion or, in the alternative, receiving compensation for his property.

The spirit, and letter of the Fifth Amendment is violated by the provisions of this section. It allows for a taking without compensation of any type. It allows for that taking without even allowing a basis for the owner to file a

takings claim. The jurisdictional basis for establishing a taking will always be held in abeyance by the Forest Service's line officers through simple manipulation of access.

In providing a basis for depriving an owner of virtually all practical use of his property, without establishing the base line for a taking claim, the Bill deprives an owner of private property of due process of law. The owner can seek, and should seek, compensation pursuant to the Monterey Dunes Case in which the U.S. Supreme Court allowed a land owner to sue for damages in a jury trial.

This is a blatant attack on the property rights of owners of private property engulfed by wilderness decided on by select special interest groups working with the Senator behind closed doors, outside the public scrutiny.

V. Senator Tester's Wilderness Bill Evades the National Environmental Policy Act and the Coordination Requirements of the National Forest Management Act by Establishing Special Use Areas in Sections 205-210

The Bill establishes special protective areas and recreation areas in sections 205 through 210, without any public input, meaningful or otherwise, in violation of the National Environmental Policy Act.

Only a very select group of forest users were allowed to participate in the drafting of this Bill. Neither the groups involved in the drafting, nor the Senator himself, will attend public meetings to discuss the contents of the Bill and answer questions regarding its drafting and its purposes.

The policy which Congress itself established in the National Environmental Policy Act is violated by this Bill. In NEPA, Congress declared it to be in the national interest to involve the public through meaningful participation in reviewing and analyzing proposals for land use projects. This Bill evades that policy completely by arbitrarily designating special interest areas, the boundaries thereof, and the rules for administration thereof.

Senator Tester, his staff, and his self appointed and designated drafting organizations have refused to meet with multiple use organizations, grazing organizations and all but a very limited representation of timber and logging interests to even discuss the contents of this Bill.

Public claims that this Bill is supported by and was drafted by a great cross section of users of the forest lands are simply not accurate. Local governments impacted by the special area designations have been ignored and kept outside the circle of drafters. Montana elected officials including commissioners, mayors, representatives and senators have

been ignored and kept outside the circle of drafters. This is a special interest bill, designed to cater to and serve the whims of a very select group of organizations.

Not only is the lawful policy of the National Environmental Policy Act violated by the Bill, so is the statutory mandate that land use decisions affecting local government be coordinated with those units of local government. The counties and cities adversely impacted by the Bill's designations and land use restrictions have been ignored in the drafting of the Bill.

In short, this Bill represents a statement that Congress can ignore policy and law which it has created. This Bill puts Congress itself above the executive department and above the people of the United States by violating statutes that bind the public, that bind local governments, that bind private business.

VI. Senator Tester's Wilderness Bill, S. 1470 violates the Tenth Amendment to the United States Constitution By Restricting Access of Public Safety and Health Emergency Services through Memoranda of Understanding

Section 202 (1) provides that within a year after enactment, the Secretary shall offer a memorandum of understanding with local law enforcement, medical responders and search and rescue organizations of "each political subdivision of the State" affected by the wilderness designations "to ensure" authorization for entry into the wilderness areas.

The tenth Amendment to the United States Constitution guarantees to local jurisdictions the authority to exercise the police powers related to public safety and health, without restriction by the federal government. There is no provision in the Constitution which allows the federal government, Congress or otherwise, to restrict access of law enforcement authorities to carry out their duties to protect the public health and safety.

For Congress to assert an authority to restrict access by the terms of this wilderness bill, and subsequent memoranda of understanding, is a clear violation of the Tenth Amendment.

The Congress oversteps its constitutional bounds by ignoring local authorities in making sweeping land use designations which may hamper provision of local police services to the citizens of a state. The overreaching is not cured by offering to enter into memoranda of understanding, which can be controlled by the Secretary and his line officers, to set forth the parameters which are already set by the Tenth Amendment.

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