

June 26, 2023

The Honorable Shannon Estenoz
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Public Comments Processing
Attn: FWS-HQ-NWRS-2022-0092
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SUBMITTED VIA FEDERAL ERULEMAKING PORTAL

**Re: Comments on New Drain Tile Setbacks
Docket ID No. FWS-HQ-NWRS-2022-0092
OMB Control Number 1018-New Drain Tile Setbacks**

Dear Assistant Secretary Estenoz:

The organizations and persons listed at the end of this comment appreciate the opportunity to provide comment on the U.S. Fish and Wildlife Service's ("Service") proposed new regulation, as published in the Federal Register on April 28, 2023, regarding drain tile setbacks for wetland easement contract compliance.¹

The meaningful notice and comment process of this proposed regulation presents an opportunity to significantly improve the coordination, interaction, and cooperation between the Service and the landowners affected by the interpretation and enforcement of wetland easements.

In North Dakota and Minnesota, various stakeholders, including landowners, farmers, businesses, state and local governments, road authorities, and rural communities, consistently face regulatory restrictions on water management practices. These restrictions require coordination with agencies implementing the Clean Water Act, the wetland conservation compliance provisions for farm program participants and federal crop insurance policyholders under the Food Security Act of 1985,² property rights issues related to the federal government's ownership of waterfowl production area easements managed by the Service,³ and state and local regulations regarding water management systems.

Effective water and land management is crucial for the success of agriculture and maintenance of local infrastructure. However, the Service's historical mismanagement of wetland easements and the National Wildlife Refuge System Act (the "NWRSA") has had highly significant negative

¹ 88 Fed. Reg. 26244.

² See 16 U.S.C. §§ 3801 et seq. (commonly known as "Swampbuster").

³ National Wildlife Refuge System Administration Act, Pub. L. No. 89-669, §§ 4 and 5, 80 Stat. 927 (codified at 17 U.S.C. §§ 668d-668ee, *as amended* Pub. L. No. 105-57).

impacts on the agricultural industry, highways, roads, infrastructure, rural communities, and upon taxpayers and private landowners in the Prairie Pothole Region (PPR).⁴

The proposed new regulation represents a substantial step backward in addressing the valid concerns raised by landowners burdened by the Service's interpretation and enforcement of wetland easements. It is crucial to establish and maintain clear and reasonable guidelines for the scope of the Service's wetland easements and the activities that may or may not damage protected wetland acres. Clarity regarding the protected wetland acres is essential for effective water management in the agricultural industry and rural communities.

Landowners, farmers, state and local governments, and land improvement contractors have long sought regulatory certainty from Congress, the courts, and the Service regarding the scope of wetland acres protected by the Service's easements. Unfortunately, the process for mapping protected wetland acres for easements granted before 1976 has been woefully inadequate, often violating established legal court precedents. Appeals processes have provided little meaningful relief for landowners with legitimate disputes over the Service's claims of authority under its easements.

These concerns are compounded by the criminal and civil enforcement authority granted to the Service for easement violations.⁵ The threat of criminal prosecution instills fear in landowners and discourages the exercise of lawful property rights due to a lack of clarity regarding the scope of wetland easements.

The undersigned organizations have a long history of stalwartly advocating for equitable relief from the Service's practice of asserting unbridled jurisdiction over any property subject to or even potentially subject to a wetland easement. We are very concerned that the proposed regulation for calculating setback distances for drain tile will further exacerbate the ongoing justifiable frustration that landowners hold in relation to the Service.

⁴ The Prairie Pothole Region (PPR) is an expansive area of the northern Great Plains that contains thousands of shallow wetlands known as potholes. These potholes are the result of glacier activity in the Wisconsin glaciation, which ended about 10,000 years ago. The decaying ice sheet left behind sporadic depressions formed by the uneven deposition of till in ground moraines. These depressions are called potholes, glacial potholes, kettles, or kettle lakes. They fill with water in the spring, creating wetlands, which may range in duration from highly ephemeral to semi-permanent. The region covers an area of about 800,000 sq. km and expands across five U.S. states (Minnesota, Iowa, North and South Dakota, and Montana) and three Canadian provinces (Saskatchewan, Manitoba, and Alberta).

⁵ See, e.g., 16 U.S. Code § 668dd(f) (providing for fines United U.S. Code title 18 or imprisonment for up to one year, or both, for knowingly violating or failing to comply with any provisions of the National Wildlife Refuge System Act).

These wetland easements negatively impact land values throughout the PPR. Notwithstanding, these impacts could be significantly mitigated by the Service and landowners jointly implementing a much more reasonable approach to wetland mapping and drain tile setbacks.

Additionally, drain tile offers substantial conservation benefits when used responsibly as a water management tool. We seek to work cooperatively with the Service to either maintain the existing 2020 policy or to develop an even better, more transparent, and objective policy for calculating drain tile setbacks. This policy should be understandable by ordinary landowners, providing them regulatory certainty and confidence.

Finally, based on recent experiences with the Service's mapping of wetland easements, we consequently possess serious reservations about the implementation of this new regulation.

I. EASEMENT IMPACTS TO LAND VALUES

We respectfully disagree with the preamble to the new regulation, which asserts that "the Service's wetland easements have a minimal impact on property value and limit the landowner's use and enjoyment of the property to a minor degree."⁶ These impacts and limitations are not minimal.

A. Legal uncertainty over protected wetland acres has a serious impact on property value and limits the landowner's use and enjoyment of property.

The legal uncertainty surrounding the identification of protected wetland acres negatively affects property value. Easement terms prohibit activities such as draining, filling, leveling, or burning wetlands located on the easement acres; however, easements granted before 1976 lack agreed upon maps indicating the location, boundary, and acreage of the protected wetland acres.

According to the Service's estimates, pre-1976 easements protect 758,645 wetland acres out of approximately 4.8 million easement acres. Since the easements describe the entire parcel as subject to the easement's restrictions, it remains unclear which 758,645 acres are protected wetlands.

The Service claims that the easement summaries associated with each contract describe the number of purchased acres, but these summaries often apply to multiple parcels and do not assign acreages to specific parcels within the easement contract. This lack of clarity has led to needless disputes between landowners and local refuge managers over the location, boundaries, and acreage of protected wetlands.

In an attempt to address these many disputes, Service Director Aurelia Skipwith issued helpful and structured guidance on December 23, 2019 regarding the mapping of all pre-1976 waterfowl production area perpetual easements. Maps were developed and sent to landowners, representing a unilateral decision by the Service over the disputed scope of easement contracts. Landowners objecting to the location, boundary, or acreage of the new maps were allowed to

⁶ 88 Fed. Reg. 26245.

appeal the map back to the same Service employees involved in issuing the first map. Disagreements not resolved at the local refuge manager level could be appealed to the Service Regional Director. The Regional Director's decision could be appealed to the Service Director in Washington, D.C.

Nonetheless, landowners reported negative interactions with Service employees over their arbitrary pre-1976 wetland easement mapping and administrative review process. In mapping, the Service excessively claimed protection over acres that showed evidence of wetness during only one or two years of extreme, precipitation conditions. Many of the mapped acres appeared wet for the first time several decades after the easement was negotiated and granted. Landowners were sent maps from the Service containing protected acres of less than one-tenth of an acre, sometimes delineated on maps as being less than one one-hundredth of an acre. Applying a setback distance to numerous protected wetland acres less than one-tenth of an acre would effectively expand the Service's jurisdiction to cover nearly the entire parcel of land subject to the easement's terms.

It is against this backdrop that we remain especially concerned about the Service's new regulation. This new regulation likely will result in the Service attempting to unilaterally decide which drain tile setbacks violate the easement terms, without providing transparent and reasonable methodologies for calculating setback distances.

Considering these many legitimate concerns, we remind the Service of the Eighth Circuit Court of Appeals ruling in United States v. Johansen⁷, which ruled that wetland easements are strictly limited to the acreage provided in easement summaries and do not cover every wetland that may develop on an encumbered tract or fluctuating acreages due to increased rainfall.

B. The Service's short-sighted approach against drain tile water management on easements lands deprives landowners of a highly useful tool to protect land values from soil salinity impacts.

Saline soils are detrimental to agricultural production, wetland functions, as well as waterfowl. Cropland with saline soils is less valuable than cropland where the salinity has been managed by drain tile. Agricultural land within the PPR is at risk for salinization due to poor drainage and fluctuations of high precipitation with extended dry periods which leads to waterlogged conditions, subsequent evaporation, and accumulation of water-soluble salts. Wetland ponds are especially capable of developing increase in salinity which can be removed from the ponds to surrounding basins by overland flow as the pond level reaches its spill point. Wetlands have also been known to leach salts from their pond to surrounding shallow ground water during dryer periods.

The Service's muscled approach against installation of drain tile as a water management tool on easement tracts deprives landowners of an effective method to manage salinity. Responsible design and construction of drain tile can maintain the hydrology of the protected wetland acres

⁷ 93 F.3d 459 (8th Cir. 1996).

while safeguarding the non-protected acres from accumulating water-soluble salts. The Service's short-sighted approach against installation of drain tile as a water management tool on easement tracts deprives landowners of a highly effective method to manage water.

II. RESPONSIBLE USE OF DRAIN TILE AS WATER MANAGEMENT & CONSERVATION TOOL

We support reasonable, subsurface management of water on cropland to reduce the saturation of soil, thereby reducing surface run-off, soil erosion, sediment transfer, and sorbed phosphorus to downstream waterbodies. Subsurface water management systems, like drain tile, reduce erosion in cropland by about 40 to 60 percent.⁸ Sloan et al. (2017) showed that drainage may increase low flows but decrease intermediate flows while having minimal impact on the larger floods.

Filtering stormwater runoff through the soil profile reduces phosphorus and turbidity dramatically. The promotion of subsurface water management increases production on current farmland, allowing non-cropland to be reserved for other uses such as habitat, hunting, and recreation.

Subsurface drainage increases storage capacity in the soil by continually removing excess, or "loose" water, which otherwise leads to saturated conditions, from the soil profile. This loose water is not available for use by plant roots. It fills the soil pore normally occupied by air and leads to drowning of crops. Plant roots use "capillary" water, which is held to soil particles by surface tension.

Under drained conditions, it should take the water table three to four days to fall to drainage depth. In contrast, undrained fields may take several weeks for evaporation alone, risking salt accumulations, to lower the water table to a similar depth. If there is an intervening rain, it will take longer.

Moreover, some soils drained with tiles may have a higher capacity to store water because tile drainage improves soil structure. Better soil structure means that the soil is more porous and is therefore better able to store water.⁹ In short, drain tiles remain an excellent water management tool and should not be unreasonably restricted.

⁸ See Environmental Benefits of Tile Drainage by Heather Fraser & Ron Fleming (Oct. 2001) (citing Baker J.L. and Johnson, H.P. 1976. Impact of subsurface drainage on water quality. Proceedings from the 3rd National Drainage Symposium, Chicago, Ill.; Hill, A.R. 1976. The environmental impacts of agricultural land drainage. *Journal of Environmental Management*. 4:251-274; Irwin, R.W. and Whiteley, H.R. 1983. Effects of land drainage on stream flow. *Canadian Water Resources Journal*. 8(2):88-103; Belcher, H.W. and Fogiel, A. 1991. Research literature review of water table management impacts on water quality. Agricultural Engineering Department, Michigan State University; and Thomas et al. Agricultural drainage effects on water quality in Southeastern U.S. *Journal of Irrigation and Drainage Engineering*. 121(4):277-282. 1995).

⁹ See Fraser & Fleming at Section 4.0.

III. EXISTING SERVICE POLICY ON DRAIN TILE SETBACKS

The new regulation does not mention the existing Service-issued guidance on drain tile setbacks for wetland easements. This is unacceptable. Our organizations worked very closely with the Service to address drain tile setbacks for wetland easements, which productively resulted in the February 26, 2020 guidance from Service Director Aurelia Skipwith regarding drain tile setbacks and legal action on easements. This 2020 consensus guidance should not simply be cavalierly dismissed by the Service.

The proposed new regulation must not replace the transparent, reasonable, and objective guidance issued by Director Skipwith in 2020. We strongly oppose any such efforts to do so.

The 2020 guidance outlines the Service's methodology for providing drain tile setback recommendations on wetland easement tracts, utilizing the van Schilfgaarde equation to compute lateral effect distances of drain tile. This guidance specifies that if the setback distance calculated using the van Schilfgaarde equation lies beyond the up-gradient catchment boundary of a wetland area, the Service sets the drain tile setback for that wetland area at the catchment boundary. If the calculated setback distance lies within the up-gradient catchment boundary, the 2020 guidance instructs the use of the van Schilfgaarde-calculated setback distance. The van Schilfgaarde equation is applied for areas down-gradient from the wetland area.

The 2020 guidance is clear and enables ordinary people from the regulated community to easily understand and calculate the setback distance for perforated drain tile. It establishes what conduct is prohibited without requiring a Service case-by-case analysis, ensuring transparency to prevent arbitrary and discriminatory enforcement of easement terms and prohibitions in the NWRSA. We support and strongly recommend that the Service continues to recognize and fairly implement the sensible and balanced 2020 guidance.

We fully support the 2020 guidance on calculating drain tile setbacks and urge the Service to revise the proposed regulation to implement the existing Service guidance.

In the preamble, the comments regarding "minimal effect" versus no effect suggest that the Service intends to discontinue the existing 2020 guidance on calculating drain tile setbacks. The preamble compares "Swampbuster" provisions of the Food Security Act of 1985, allowing drain tile with "minimal effect" on wetlands, to the Service's wetland easement agreement provisions that allow for no effect to protected wetlands. Additionally, the preamble acknowledges that the understanding of the effects that drain tile on wetland hydrology is an evolving science.

The question at issue revolves around the acceptable negligible hydrologic effect of drain tile on wetlands. Various lateral effect or scope and effect equations have been developed to estimate the degree to which drain tile will lower adjacent hydrology.

To ensure full transparency and allow the regulated community to provide meaningful feedback, the Service should publish the methodologies it proposes to determine drain tile setback

distances. This would enable stakeholders to materially comment on the application of those methodologies to their property rights.

Without this transparency, the new regulation will likely result in a system of vague rules dependent on locally developed practices and parochial beliefs of refuge managers in local offices, as was the case prior to the issuance of the 2020 guidance. This could improperly lead to setback distances calculated by local refuge managers that apply arbitrary multipliers, such as three to seven times or more, compared to the setback distances calculated by the NRCS using the van Schilfgaarde equation.

IV. SPECIFIC CONCERNS WITH PROPOSED NEW REGULATION

The proposed regulation introduces the requirement of individual drain tile setback distances determined by the Service based on site-specific factors. This imposes an additional layer of unnecessary bureaucracy, complexity, and uncertainty for landowners, who would need to coordinate with the Service and adhere to these setback distances to avoid legal repercussions.

A. The Service's new regulation raises concerns regarding Due Process related to criminal and civil enforcement of the National Wildlife Refuge System Act.

Damaging wetlands protected by the Service's wetland easement carries serious criminal and civil consequences. The Service's new regulation fails to sufficiently consider constitutional Due Process considerations, a similar concern highlighted recently by the U.S. Supreme Court case in Sackett v. Environmental Protection Agency. Penal statutes must be clearly defined so that ordinary people can understand what actions are prohibited, and enforcement must not be arbitrary or discriminatory.¹⁰ Unfortunately, the Service's regulation entirely disregards these central Constitutional principles.

One of the major issues with the new regulation is that the Service determines individual setback distances for drain tile on a case-by-case basis, making it exceedingly difficult for ordinary people to understand what conduct on their private lands is prohibited. By not providing a baseline methodology for calculating setback distances, the rules lack transparency and opens the door for arbitrary and discriminatory enforcement. This lack of clarity also fails to notify landowners of their obligations under the easement terms or the NWRSA.

The Service's new proposed rule puts landowners in an untenable position. If a landowner disagrees with the drain tile setback distance determined by the Service, the landowner or the landowner's land-improvement contractor may not confidently proceed with drain tile construction at a much more reasonable setback since the previous setback distance provided

¹⁰ Sackett v. Env'tl Prot. Agency, 2023 WL 3632751, at *15 (U.S. May 25, 2023) (citing Skilling v. U.S., 561 U.S. 358, 402-03 (U.S. 2010)).

by the Service might form evidence of culpability in a prosecution or civil action alleging a violation of the Service's wetland easement terms.

To correct this inherent procedural ambiguity, the Service should establish a bona fide expeditious administrative appeal process for drain tile setback distances. The appeals process must be through an agency that is independent from the direction and control of the Service and should provide a full and fair opportunity for a landowner to present the landowner's case before an impartial hearing officer.

Another concern is whether landowners may challenge the Service's drain tile setback distance in court. Even if the answer is yes, landowners know the uphill battle faced under deferential standards of review that the agencies enjoy. Consequently, many landowners who disagree with the drain tile setback distance calculated by the local refuge manager, when faced with this array of poor options only, will choose to do nothing.

Accordingly, landowners should be placed on a much more level playing field with the Service. The Service must consistently be more responsive, accommodating, and respectful of landowners' private property rights. Landowners must be able to meaningfully challenge a Service-determined drain tile setback distance both administratively and judicially.

B. The Service's lack of transparency in its methodologies for calculating drain tile setbacks prevents ordinary people from understanding which drain tile conduct is permissible and which conduct is criminally prohibited.

The Service's present lack of transparency in the methodologies used to calculate drain tile setbacks further hinders understanding of permissible conduct. The new regulation should provide clarity and transparency on the resources used for calculating drain tile setback distances.

The new regulation requires the Service to establish drain tile setback distances based upon the best available science, considering soil characteristics, tile diameter, the depth of the tile below the surface, and/or topography that ensure protected wetland areas are not drained. The new regulation notes that the Service will provide these setback distances to landowners upon request. However, the Service does not commit itself to provide these setback distances within a specific or reasonable timeframe, nor does it say that it will detail to the landowner how it has technically determined these distances.

There is already widespread disagreement between landowners and the Service as to which acres of an easement meet the easement's terms as protected waterfowl production areas. Landowners are reporting that the Service mapped as protected acres some of their land that showed only minimal evidence of wetness and marsh vegetation for just one or two years in the entire history of available aerial imagery. Despite there being no evidence that these acres were wet at the time the easement contracts were negotiated, the Service brazenly claimed jurisdiction.

Now, with this new proposed regulation, the Service seeks to make another unilateral decision – asserting that additional acres outside of its claimed wetlands are restricted from drain tile because the tile might affect the acres claimed as protected wetlands by the Service.

The Service proposes, within a few years, that it may unilaterally determine which wetlands are subject to the easements restrictions and what drainage activities will and will not impact those wetlands. This readily appears to be an interim Service measure only. Unfortunately, landowners are all too familiar with what will likely come next from the Service – a complete prohibition on drain tile on their entire property.

In this vein, the Service proposal is entirely unacceptable. The Service may not unilaterally determine which wetlands are subject to the easements restrictions and what drainage activities will and will not impact those wetlands. Any Service determination must acknowledge private property rights and intently recognize landowner input. It must be timely, scientifically sound, reasonable, and be fully reviewable by an objective third-party.

C. If the Service issues a final rule requiring a case-by-case analysis of drain tile setbacks, which it should not do, the Service should require setback distances to be provided within a reasonable period, not to exceed two weeks.

The proposed rule would allow the Service to provide setback distances within a Service-provided timeframe. Numerous past negative experiences by landowners in the PPR, who have dealt with the Service in regard to determining setback distances, clearly evidence that this unilateral Service-determined timeframe is likewise unacceptable. Accountability dictates that timeframes must be specified and certain.

Additionally, clear guidance should be provided to Service employees regarding calculation methodologies to ensure consistency and prevent the development of local or discriminatory standards. The calculation of a drain tile setback distance should be a quick process, taking minutes rather than days, months, or years.

The proposed regulation requires landowners to submit materials and follow specific procedures to request drain tile setback distances from the Service. This simply adds administrative burden and potential delays for landowners who may need to proceed with water management activities in a timely manner. Once again, the Service must be a better partner. It must be more reasonable and accommodating to landowners.

D. The Service should revise the proposed regulation to make clear that maintenance and repairs of drain tile installed in conformance with Service guidance or in coordination with the Service is permissible without further agency coordination.

The preamble to the new regulation notes that landowners who coordinate their tiling plans with the Service and adhere to Service-determined setback distances will not later be held criminally responsible or civilly liable for disturbing, injuring, or destroying a unit of the National Wildlife

Refuge System (i.e., draining a protected wetland area) provided the subsurface drainage system is not modified, enhanced, or replaced.

To avoid unnecessary coordination with the Service, the proposed regulation should clarify that maintenance and repairs of drain tile systems installed in accordance with Service guidance or coordination are permissible without any further agency involvement.

Landowners who adhere to Service-determined setbacks should not be held criminally or civilly responsible for disturbing or destroying protected wetland areas, if the subsurface drainage system is not modified, enhanced, or replaced in a way that increases hydraulic efficiency to impact protected wetlands.

E. The Service should make clear that drain tile systems installed in reliance upon, and conformance with, the 2020 Service guidance for drain tile setbacks will not be required to remove drain tile even if it is later found to have an adverse effect on protected wetland areas.

The preamble to the new regulation contains contradictory and ambiguous statements asserting that the proposed rule codifies the Service's existing drain tile setback practices, but that the new regulations apply only to setbacks provided by the Service beginning on the effective date of the final rule.

As previously noted, the Service has a current effective and reasonable policy for determining drain tile setback distances. The published methodology allows landowners burdened by Service wetland easements to readily determine and calculate for themselves setback distances compliant with the Service's policy. Landowners do not need to unnecessarily wait in a long line for a Service-conducted case-by-case analysis on a unilaterally determined Service-provided timeframe.

The current 2020 policy is in effect and significantly differs from the Service's new proposed regulation. Accordingly, we dispute the Service's assertion that the new regulation codifies the Service's existing drain tile setback practices. Existing drain tile setback practices provide a clear methodology using the van Schilfgaarde equation that can be calculated by landowners and their land-improvement contractors. The new regulation does not.

Landowners and their land-improvement contractors have relied on the effective and reasonable 2020 policy. Landowners who have already installed drain tile systems on their properties may face substantial financial loss and loss of significant water management tools if the Service unilaterally and arbitrarily determines that the tile has adverse effects on protected wetland areas. The proposed regulation does not provide any guarantees or compensation for landowners who have followed the Service's provided setback distances but later find themselves required to remove or modify the drain tile systems. This simply is not good governance.

The Service should offer solid assurances that landowners who followed agency's policies will be afforded protection from any criminal or civil responsibility. This should be so even if the agency later rescinds or revises its policies on drain tile setbacks.

F. The Service should make clear that information collected from landowners to calculate drain tile setbacks is confidential.

Finally, the new regulation provides no assurances that data collected from landowners by the Service to conduct the case-by-case evaluation will be confidential. We are concerned that some of the data, such as drain tile design plans, will contain proprietary information and information that landowners understandably view as highly sensitive.

Accordingly, information submitted by landowners to the Service must not be subject to disclosure under the Freedom of Information Act. The Service should make this clear to facilitate ongoing cooperative efforts between the Service and landowners.

V. CONCLUSION

Overall, we are highly concerned that the Service's new proposed regulation, if promulgated, will have significant negative impacts on landowners in the PPR, including unlawful limitations on property rights, decreased land value, unnecessary and unreasonable restrictions on agricultural activities, compliance burdens, and financial loss.

We respectfully but strongly recommend the Service withdraw the proposed regulation in its entirety and continue to follow the existing effective and reasonable 2020 guidance on calculating drain tile setbacks for the Service's wetland easements and enforcement.

Sincerely,

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The Honorable Kevin Cramer, U.S. Senator
The Honorable John Hoeven, U.S. Senator
The Honorable Kelly Armstrong, U.S. Representative
The Honorable Tina Smith, U.S. Senator
The Honorable Amy Klobuchar, U.S. Senator
The Honorable Brad Finstad, U.S. Representative
The Honorable Angie Craig, U.S. Representative
The Honorable Dean Phillips, U.S. Representative
The Honorable Betty McCollum, U.S. Representative
The Honorable Ilhan Omar, U.S. Representative
The Honorable Tom Emmer, U.S. Representative
The Honorable Michelle Fischbach, U.S. Representative
The Honorable Pete Stauber, U.S. Representative
The Honorable Charles Grassley, U.S. Senator
The Honorable Joni Ernst, U.S. Senator
The Honorable Mariannette Miller-Meeks, U.S. Representative
The Honorable Ashley Hinson, U.S. Representative
The Honorable Zachary Nunn, U.S. Representative
The Honorable Randy Feenstra, U.S. Representative
The Honorable John Thune, U.S. Senator
The Honorable Mike Rounds, U.S. Senator
The Honorable Dusty Johnson, U.S. Representative