Budd-Falen Law Offices, L.L.C.

Karen Budd-Falen [1]
Franklin J. Falen [1]
Brandon L. Jensen [1,2]
Kathryn Brack Morrow [1,2,3]
Laura C. Rowe [1]
Abigail M. Jones [1,4,5]

300 East 18th Street
Post Office Box 346
Cheyenne, Wyoming 82003-0346
Telephone 307/632-5105
Telefax 307/637-3891
main@buddfalen.com
www.buddfalen.com

[1]admitted in Wyoming
[2]admitted in Colorado
[3]admitted in New Mexico
[4]admitted in New Jersey
[5] admitted in New York

**MEMORANDUM**

**TO:** **LOCAL GOVERNMENTS AND INTERESTED PARTIES**

**FROM:** **KAREN BUDD-FALEN**
**BUDD-FALEN LAW OFFICES, LLC**

**DATE:** **OCTOBER 12, 2010**

**RE:** **COORDINATION/COOPERATION IN FEDERAL AGENCY DECISION MAKING PROCESSES**

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Federal law mandates that the local government be fully informed of and involved in federal decision making processes on federal and private lands, provided that the local government has complied with certain federal requirements. The purpose of this Memorandum is to ensure your local government understands how to enforce its rights of participation in a meaningful way.

I. Federal Laws Mandating Local Government Participation In Federal Decision Making Processes

It is important for the local government and the citizens to understand the legal relationship between the local government and the federal and state agencies. Federal law mandates that federal agencies "coordinate" (1) with local governments to develop land management plans and policies and/or (2) jointly with local governments to consider and protect the environment as well as the customs, culture and economic stability of the local citizens during federal agency decision making processes. Specifically:

a. Pursuant to the regulations implementing the National Environmental Policy Act ("NEPA"), local governments are accorded "joint planning authority" if the local government adopts an environmental protection or planning ordinance (environmental ordinance). In general, "joint planning authority" means that the local government, working jointly with the federal agency, can be involved in (1) development of alternatives to the proposed federal action, (2) consideration of

mitigation measures, (3) consideration of local customs and culture and economic stability, (4) joint hearings, (5) joint environmental studies, and (6) joint environmental assessments ("EA") or joint environmental impact statements ("EIS").[1] This process applies to all federal agencies and to state agencies that accept funding from a federal agency for that specific purpose. Specifically, every time a decision is made or action is taken by any federal agency (or state agency) constituting a "major federal action," the local government can be a joint lead or cooperating agency for the purpose of completing the EA or EIS.

b. According to regulations adopted pursuant to the Federal Land Policy and Management Act ("FLPMA") and the National Forest Management Act ("NFMA"), the Bureau of Land Management ("BLM") and the Forest Service must "coordinate" with local governments, state governments and Indian tribes. BLM and Forest Service regulations also require these two federal agencies to consider and protect "community stability." Community stability is a combination of the economic and social stability within the local government. Because neither the BLM nor the Forest Service have the expertise, personnel or monetary resources to define "community stability," local governments are using the local land use planning process to define these terms, thus allowing the local government to "coordinate" with the BLM and Forest Service in protecting "community stability."

II. Understanding the Role of Local Governments in Federal Decision Making Processes

First, neither the local government land use plan nor the local government environmental ordinance mandate that federal agencies follow local law. Rather, the federal laws and regulations mandate that federal agencies coordinate with local governments and preserve local environments, cultures, customs and economies.

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[1] Technically the NEPA regulations allow two levels of participation by local governments. First, federal agencies are required to "cooperate with State and local agencies to the fullest extent to reduce duplication between NEPA and State and local requirements . . . . Such cooperation shall to the fullest extent possible include: (1) joint planning processes; (2) joint environmental research and studies; (3) joint public hearings (except where otherwise provided by statute); (4) joint environmental research." 40 C.F.R. §1506.2(b). Second, the NEPA regulations state that "[Federal] agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, . . . . Such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies." 40 C.F.R. §1506.2(c).

Again, the adoption of the land use plan and environmental ordinances is a mechanism to facilitate the local government's involvement in the federal land use decision making process.

Second, local government involvement in federal decision making processes does not mean that the local government has "veto" power over federal agency actions. Local governments cannot "veto" federal agency decisions. However, this does not mean that local governments have no influence in federal decisions. In my opinion, the most important roles that the local government can play in the federal decision process are (1) preparation of adequate environmental, economic, social, cultural and other data which the federal agency is required to consider; (2) development of alternatives and mitigation to the federal proposed action as required by NEPA; and (3) protection of private property rights. NEPA requires both the consideration of environmental, economic and other data in the decision making process as well as the development of alternatives and mitigation to major federal agency actions. If the local government completes the proper data and develops alternatives to protect the local environment, tax base, customs, culture, and history of the citizens, the federal agency must either accept the local government's alternatives or justify rejection of such alternatives on the record. Should the federal government reject the local government's alternatives or fails to consider the proper data, the local government is in a better position to meaningfully proceed against the agency in Federal District Court.

III. Purpose of the Land Use Plan and Environmental Ordinance

In my judgment, the two most important documents which the local government should adopt are the comprehensive land use plan and the environmental ordinances. As stated above, the purpose of the environmental ordinance is to facilitate the local government's "joint planning authority" as required by NEPA regulations at 40 C.F.R. §1506.2. Specifically, these regulations state:

> b. [Federal] agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law . . . such cooperation shall to the fullest extent possible include:
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> 1. Joint planning processes;
> 2. Joint environmental research and studies;
> 3. Joint public hearings . . .; and
> 4. Joint environmental assessments.
>
> c. [Federal] agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and <u>comparable State</u>

> and local requirements, unless the agencies are specifically barred from doing so by some other law . . . . such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling those requirements as well as those federal law so that one document will comply with all applicable laws.
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> d. To better integrate environmental impact statements into State or local planning processes, [environmental impact] statements shall discuss any inconsistency of a proposed action with any approved State or local plan and law (whether or not federally sanctioned). Where inconsistencies exist, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.
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> 40 C.F.R. §1506.2(b)(c)(d). (Emphasis added).

For local governments, this means that if the local government has adopted an environmental ordinance (an ordinance that requires consideration of the environment), the local government has the mechanism to be treated as a joint planning authority in all decision making processes regarding "major federal actions significantly affecting the quality of the human environment." As a joint planning agency, the local government can be involved in holding public hearings, designing environmental studies and completing environmental documents such as the EIS or EA which consider the physical environment as well as local customs, cultures and the economic well being of the local area.

The second document is the comprehensive land use plan. Regulations require that the BLM and Forest Service "coordinate" with the local government if that government has adopted a land use plan. 36 C.F.R. §219.7, 43 C.F.R. §§1610.3-1 and 1610.3-2. Coordination means of equal rank or order; one not subordinate to another. BLACK'S LAW DICTIONARY, 303, (5th ed. 1979).

A land use plan is NOT zoning. The local government cannot, for example, tell the BLM or the Forest Service that they will cut certain trees in certain areas or allow livestock grazing in other areas. Rather, the land use plan is a document that contains the technical data about the economic structure, community stability, history, physical environment, customs and cultures of the local area. Since federal law requires that federal agencies consider the affect of their decisions on the physical environment, the economic structure, and the history, customs and cultures of the local area, the land use plan is the document which can define those terms.