

# LOCAL GOVERNMENT PARTICIPATION IN FEDERAL AGENCY DECISION MAKING

JANUARY 17, 2018

## CONSISTENCY REVIEW

Both the National Environmental Policy Act (NEPA)<sup>1</sup> and the Federal Land Policy and Management Act (FLPMA)<sup>2</sup> require a “consistency review” with the plans, policies or laws adopted by a local government.

According to NEPA, if in the course of writing an environmental impact statement (EIS), a local government makes its land use

LAND USE PLANS OF THE SECRETARY [OF THE INTERIOR] UNDER THIS SECTION SHALL BE CONSISTENT WITH STATE AND LOCAL PLANS TO THE MAXIMUM EXTENT HE FINDS CONSISTENT WITH FEDERAL LAW AND THE PURPOSES OF THIS ACT.

plan or policy available to the lead federal agency, the lead agency must “discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the [impact] statement should describe the extent to which the [federal] agency would reconcile its proposed action with the [local government]

plan or law.” 40 C.F.R. §§ 1506.2, 1506.2(d). Emphasis added. Additionally, NEPA commands that copies of comments by State or local governments must accompany the EIS or environmental assessment (EA)

throughout the review process. 42 U.S.C. § 4332(c). In other words, according to FLPMA for the BLM and NEPA for all “major

federal actions,” if a land use plan or other federal agency decision is inconsistent with a local land use plan, the federal agency owes an explanation to the local government of how achieving consistency would have resulted in a violation of federal law.

## LOCAL PARTICIPATION

Federal Statutes give local governments the ability to substantially influence federal decisions and specifically interact with federal agencies beyond those that are available to the general public. These include completion of a “consistency review” with a local land use or natural resource plan; recognition of a State or local government as a cooperating agency; and coordination between the federal agencies and the State and local governments. Understanding and using these processes further the statutory mandates of State and local governments to protect the health, safety and welfare of their constituents.

## COOPERATING AGENCY STATUS

Cooperating agency status gives a local government the ability to participate as part of an agency decision making process, usually as part of the ID Team [identification team]. Pursuant to NEPA, an applicant for cooperating agency status must be both (1) a locally elected body such as a conservation district board of supervisors or a county commission and (2) possess "special expertise." A local government's special

expertise is defined as the authority granted to a local governing body by state statute. For example, in Wyoming, conservation districts have state statutory authority related to the conservation of soil and water resources, control and prevention of erosion, conservation, development, utilization of water, stabilization of the ranching or farming industry; preservation for wildlife; protection of the tax base, etc. See Wyo. Stat. §§ 11-

16-103; 11-16-135; 11-10-122(b)(iii). Those statutory requirements outline the districts' areas of special expertise under NEPA. Wyo. Stat. § 11-16-122(b)(viii). Similarly, Wyoming's county commissions are authorized to participate as cooperating agencies and have the special expertise regarding the "health, safety, welfare, custom, culture and socio-economic viability of the county." Wyo. Stat. §§ 18-3-504(v); 18-5-208(a).

## COORDINATION

FLPMA, which governs the BLM, provides the clearest, strongest, and most detailed requirements for coordination with local land use plans of any federal statute. Aside from the directive that the BLM engage local governments in coordination, FLPMA provides four specific instructions to the BLM as a means to accomplish it. They are:

\*To the extent practical, the BLM must stay apprised of local land use plans.

\*The BLM must assure that local land use plans germane to the development of BLM land use plans are given consideration.

\*To the extent practical, the BLM must assist in resolving

inconsistencies between local and BLM land use plans.

\*The BLM must provide for the meaningful involvement of local governments in the development of BLM land use programs, regulations, and decisions. This includes early notification of proposed decisions that may impact non-federal lands. 43 U.S.C. §1712(c)(9).

The National Forest Management Act (NFMA) also requires coordination.

The NFMA requires:

*[T]he 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.*

The fact that the Forest Service is directed to "coordinate" with local governments implies, by its plain meaning, that the Forest Service must engage in a process that involves more than simply "considering" the plans and policies of local governments; it must attempt to achieve compatibility between Forest Service plans and local land use plans.

Both Wyoming conservation districts and county commissions are specifically authorized to "coordinate" with the BLM and Forest Service. Wyo. Stat. §§ 18-3-5004(a)(v); 18-5-208(b) Wyo. Stat. § 11-16-122(b)(xxviii)

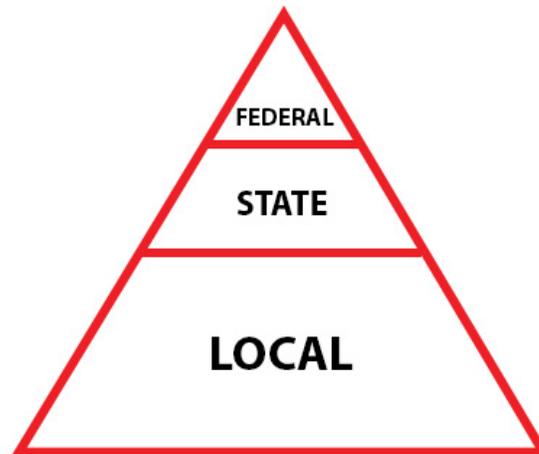
## LOCAL “LAND USE PLAN”

When people think of local “land use plans,” they typically have in mind the general planning document that counties use to determine zoning, public services and facilities, transportation, and the like. But these plans apply to land that is largely within the county’s jurisdiction and are based upon specific state authorization.

By contrast, many rural counties and conservation districts have also officially adopted a separate land use plan or natural resources management plan that applies to the surrounding federal land or reflects the local government’s position on federal decisions. For the rest of this report, “local land use plan” will refer exclusively to local government plans that focus on federal land management or participation in other federal agency decision-making processes.

For those unfamiliar with local land use planning participation for federal decisions, the very idea may seem odd. After all, local governments do not have jurisdiction over the federal government, and local land

use plans cannot require federal managers to take specific actions. For example, neither a county nor a conservation district can dictate in its land use plan how many grazing AUMs will be allocated for a given area of public range, or that wild horse populations shall be managed below appropriate management levels (“AML”) to provide for more cattle grazing. These decisions are within the authority of the



federal agency. However, rural counties’ socioeconomic well-being, health, safety, and culture can be strongly impacted by the management of the surrounding public lands. Moreover, counties are generally required by state law to oversee the economic, social, and general well-being of the people and resources that are within their jurisdictions, while soil and water conservation districts are

required to provide for the ongoing stability and health of soil and water resources. The reasons a local government would go through a process to develop the type of land use plan described in this memorandum is to ensure the local socioeconomic well-being, customs and culture and natural resource health are considered in federal decisions.

Finally, I believe that it is critical that the various local governments in an area work closely together in making their land use plans complimentary to each other, so that the local governments can work together to influence federal agency decisions. Although counties and conservation districts have overlapping physical boundaries, their missions and areas of expertise are complimentary to each other. The goal in local land use planning is to have plans that support the local citizens, the local economy and the local environment. That goal will not be realized if the various local governments write their plans in a vacuum without consideration of the expertise and data possessed by other local governments within an area.

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## LAND USE PLAN TEMPLATE

Although there is no right or wrong way to write a local land use or natural resources plan, the most effective ones I have seen contain the following:

### **A. Background and Authority**

1. History, Background, Economy and "Custom and Culture"

This section should include a general description of the conservation district or county including information on the history, economy, "custom and culture," importance and uses of the federal or public land from the local perspective, water needs and uses, soils and other natural features and the economic, cultural and natural resource values that are important to the local constituents.

2. Process for "Coordination"

I also recommend this section include statements regarding the process that the local government proposes to engage with the federal government. Issues to be considered by the local government would be (1) how often to meet with the federal agencies to discuss any local government policies that may impact the federal government and any policies

or proposed decisions of the federal government that may impact the local jurisdiction, (2) how and when the local government will notify the federal agencies regarding its local land use plan, (3) whether there will be opportunity for informal communication between the local government and the federal agencies and how that informal communication will occur and (4) similar processes designed to ensure coordination between these units of government.

### **B. Policy Statements**

The heart of a local land use plan is a list of policy statements describing what the local government wants to happen (or not to happen) during federal decision-making processes. These policies should pertain to resources that the local government anticipates may be affected by future agency planning. For example, a local government may want to set policy on livestock grazing, timber extraction, road maintenance and closure, water, fire prevention and suppression, oil and gas or mineral extraction and potentially many others. The types of federal decisions that involve coordination or cooperating agency status

prescribes future agency action (such as a BLM or Forest Service land use plan, economic analysis for critical habitat under the ESA, alternatives analysis under NEPA, etc.). The purpose of this section for the local government therefore should be the local government's "desired future condition" from the local perspective.

I would also recommend that this section be written with an eye toward influencing the types of federal decisions that will be impacting the local area. For example, all BLM and Forest Service offices keep quarterly lists of proposed upcoming actions or decisions. These lists can be reviewed so that a local government can anticipate the types of issues that should be brought to it in the future. With regard to endangered species listings or critical habitat designations, the multi-district settlement agreement and the U.S. Fish and Wildlife Service work plan lists plants and animals, by state, that will be reviewed and considered for listing or critical habitat by the FWS over the next five years. This is also information a local government can review to start to develop its policies or desired future actions to be

considered by the federal agencies.

### **C. Data**

Policies or desired future conditions are strongest when local governments can support them with good reasons. For example, a policy that timber extraction continues on a National forest is much stronger if it is supported by data showing that forest thinning promotes forest health, and that logging is important to the local government's socio-economic base. Even "soft" information, such as the cultural and historic relevance of logging within the local government is important to include. By contrast, it is not enough for a land use plan to simply state that the local government's policy is to support continued logging on federal lands.

Rather, once those goals are described, the local plan should include local data and information supporting socio-economic, and environmental reasons for these policy goals. This data can include soil surveys, road and trail maps, tax base information, historical journals, wildlife population information, water rights information, descriptions of water storage or conveyances on federal lands, mineral location, water quality monitoring data, population statistics and information, economic information such as types of local employers, circulating dollar or value added industries, etc.

### **D. Analysis or Mitigation**

Finally, I would suggest the plan present some analysis of both the negative and positive influences that can happen to the "desired future

conditions or policies because of actions by the federal government. For example, if the local government has a policy of "economic stability," the data should show the facts necessary to achieve this policy. The analysis would then review the proposed actions of the federal agency to determine which federal actions are beneficial versus detrimental. I do not believe this has to be an exhaustive list or analysis.

Additionally, if there is an adverse impact on the natural environment, local citizens "custom and culture" or the local economy, NEPA requires the consideration of alternative actions or mitigation. Thus, local governments can use this part of the local land use plan to start to think about alternatives and/or mitigation.

## **FINAL LOCAL LAND USE PLAN REQUIREMENTS**

First, there are some very important principals to keep in mind for local governments participating in federal agency decision-making processes. First, local land use plans cannot urge the violation of federal law. For example, a local land use plan that urges the building of new roads in a wilderness or the taking of threatened or endangered species is not valid and will not

be considered by the federal decision makers.

Second, a local land use plan does not create any new legal authority for a local government to take over the federal agencies. Nor are federal agencies simply required to comply with a local land use plan. Rather, local land use plans get their power and influence from the

federal statutes that require the federal agencies to take these local plans into account when doing federal planning, making management decisions, or doing NEPA analyses. In effect, these statutes tell the federal agencies that if they have been presented with a local land use plan, they must attempt to accommodate it in

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their planning and management decisions.

Third, as stated above, the special expertise of a local government is governed by state statute. If your state's statutes give the local government program authority or responsibility in a certain

area(s) that is what your special expertise is.

Fourth, local land use plans have to be adopted following the procedures set forth in your state's statutes. Some states have very strict procedural steps and time frames that govern the preparation of a

land use plan, and in other states, the procedural steps are more relaxed and include shorter time frames.

I hope that this is helpful in preparation of your local land use plans. Should you have any questions, please do not hesitate to contact me.

Budd-Falen Law Offices is located in Cheyenne Wyoming. We are a law firm dedicated to giving a voice to the Western States on property issues. Please visit us on Facebook at Budd-Falen Law Offices L.L.C and follow us on Twitter @Buddfalenlaw

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