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COORDINATION AND PLAN CONSISTENCY REVIEW UNDER FLPMA SECTION 202(C)(9)

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The Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 – 1787, requires that the Interior Secretary "manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law." 43 U.S.C. § 1732(a). The requirements for the development of land use plans[1] are set forth in FLPMA Section 202, 43 U.S.C. § 1712. Subsection (c)(9) of this section imposes coordination and consistency requirements on the Interior Secretary. Specifically, this provision states:

> (9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, . . . and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, [1] to the extent he finds practical, keep apprised of State, local, and tribal land use plans; [2] assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; [3] assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and [4] shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines,

[1] In its regulations, the Bureau of Land Management refers to "resource management plans" rather than "land use plans." We use the term "land use plans" to be consistent with the terminology used in FLPMA, unless quoting a BLM regulation or other agency document.

> land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary 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.

43 U.S.C. § 1712(c)(9) (reference to "statewide outdoor recreation plans" removed; numbering added for reference purposes).

This provision is based on settled law recognizing that the States and local governments are "free to enforce [their] criminal and civil laws on federal land so long as those laws do not conflict with federal law." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976)); *see also People ex rel. Deukmejian v. Cty. of Mendocino*, 36 Cal. 3d 476, 491, 683 P.2d 1150, 1160 (1984) (holding that county regulation of aerial spraying of pesticides was not preempted by federal law). Even though the public lands are owned by the United States, States and local governments have the authority to plan for and regulate activities occurring on the public lands, unless such regulation is preempted by a federal law. FLPMA Section 202(c)(9) explicitly recognizes and protects that authority.

FLPMA Section 202(c)(9) also is based on the recommendations of the Public Land Law Review Commission. In its seminal report to the President and to the Congress, *One Third of the Nation's Land,* which provided the underpinning for much of FLPMA, the Commission explained that State and local units of government "represent the people and institutions most directly affected by Federal programs growing out of land use planning." *One Third of the Nation's Land* 61 (1970).[2] The Commission felt so strongly about the need to involve State and local governments in the planning and management of the public lands that it recommended the following:

> To encourage state and local government involvement in the planning process in a meaningful way, as well as to avoid conflict and assure the cooperation necessary to effective regional and local planning, the Commission believes that consideration of state and local impacts should be mandatory. To accomplish this, *Federal agencies should be required to submit their plans to state or local government agencies*. . . .
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> The coordination [between federal agencies and State and local governments] which will be required if the Commission's recommendations are adopted is so essential to effective public land use planning that it should be mandatory. . . . *The Commission recommends, therefore, that Congress provide by statute that*

[2] Available at https://archive.org/details/onethirdofnation3431unit (last visited Feb. 3, 2017). The Public Land Law Review Commission was established as an independent federal agency by an act of September 19, 1964 (78 Stat. 982). Its function was to review the federal public land laws and regulations and recommend a public land policy. For more background, see National Archives, Records of the Public Land Law Review, available at http://www.archives.gov/research/guide-fed-records/groups/409.html (last visited Feb. 3, 2017.

> *Federal action programs may be invalidated by court orders upon adequate proof that procedural requirements for planning coordination have not been observed.*

Id. at 63 (italics in original).

The report of the House Interior and Insular Affairs Committee accompanying the House bill (which provided much of the text of FLPMA) similarly stated:

> The underlying mission for the public lands is the multiple use of resources on a sustained-yield basis. Corollary to this is the selective transfer of public lands to other ownership where the public interest will be served thereby. The proper multiple use mix of retained public lands is to be achieved by comprehensive land use planning, *coordinated with State and local planning*.

H.R. Rep. No. 94-1163, at 2 (1976), *reprinted* in 1976 U.S.C.C.A.N. 6175, 6176 (emphasis added).

Unfortunately, the Interior Department agency chiefly responsible for complying with the requirements of FLPMA, the Bureau of Land Management (BLM), has largely ignored FLPMA Section 202(c)(9), including the requirement that federal land use planning be closely coordinated with state and local land use planning. Instead, the BLM has been shifting authority for land use planning and management from its field offices to Washington D.C. This trend was accelerated by two recent Interior Department programs, the Climate Change Adaptation Program and the Landscape-scale Mitigation Program. Both of these programs were created by administrative fiat through a series of executive and secretarial orders, manual revisions, and agency policy documents, without compliance with the Administrative Procedure Act.[3] These programs were to be implemented by means of new BLM planning rules, along with new "mitigation policies" issued by another Interior Department agency, the Fish and Wildlife Service, that lacked any legal authority.[4]

Needless to say, the development these national programs, without any opportunity for input from public land and resource users or, for that matter, authorization from Congress, has led to widespread mistrust of the Interior Department and its agencies, particularly in the western "public lands" states that are dependent on access to and use of the public lands. Planning for and management of the public lands had clearly shifted to Washington, and was being controlled by national programs that the States and their local governments had no role in developing, despite the role envisioned by Congress when it enacted FLPMA.

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[3] *See, e.g.*, Secretary of the Interior Order No. 3289 (Sep. 14, 2009) (amended Feb. 22, 2010); U. S. Dept. of Interior, *Climate Change Adaption Plan* (2014); Secretary of the Interior Order No. 3330 (Oct. 13, 2013), U.S. Dept. of Interior, *Public Lands Policy, Landscape-Scale Mitigation Policy*, 600 DM 6 (Oct. 23, 2015).

[4] Bureau of Land Management, *Resource Management Planning*, 81 Fed. Reg. 89580 (Dec. 12, 2016); U.S. Fish and Wildlife Service, *Endangered Species Act Compensatory Mitigation Policy*, 81 Fed. Reg. 95316 (Dec. 27, 2016); U.S. Fish and Wildlife Service, *Mitigation Policy*, 81 Fed. Reg. 83440 (Nov. 21, 2016).

The balance of this paper will discuss in detail the requirements imposed by FLPMA Section 202(c)(9). It will also address the BLM's improper attempt to use the process mandated by the National Environmental Policy Act to avoid meaningful coordination with the States and their local governments and ensuring that the BLM's planning and management of the public lands are consistent with State and local planning efforts.

A. An Analysis of FLPMA Section 202(c)(9).

On its face, FLPMA Section 202(c)(9) imposes a number of different and overlapping requirements and obligations on the Interior Secretary and, therefore, on the BLM with respect to coordinating with State and local governments and maintaining consistency with the land use plans, programs and policies of State and local governments. These requirements are discussed below.

1. 43 U.S.C. § 1712(c)(9) (first sentence)—Duty to Coordinate.

First, the BLM must "coordinate" the agency's "land use inventory, planning, and management activities" with "the land use planning and management programs of the States and local governments within which the lands are located." 43 U.S.C. § 1712(c)(9) (first sentence). In coordinating, the BLM must consider the "policies of approved State and tribal land resource management programs." *Id.* The verb "coordinate" means "to put in the same order or rank" or, alternatively, "to bring into common action, movement, or condition: HARMONIZE." Merriam-Webster's Collegiate Dictionary 255 (10th ed. 2000). In other words, the requirement to "coordinate" requires that the BLM treat the land use planning and management activities of State and local governments as equal in rank and *harmonize* the BLM's land use inventory, planning, and management activities with the activities of State and local governments "to the extent consistent with the laws governing the administration of the public lands."

The plain language of FLPMA Section 202(c)(9) indicates that the requirement to coordinate is significantly broader than simply coordinating BLM and local land use plans. Instead, coordination should occur with respect to all BLM "land use inventory, planning, and management activities" and all State and local government "land use planning and management programs." *Id.* Thus, coordination is required, for example, in connection with assessing the resource, environmental, ecological, social, and economic conditions prior to developing land use plans and other land planning and management guidance; developing and identifying the policies, guidance, strategies and plans for consideration in developing land use plans; formulating land use and resource management alternatives; and developing management measures that are used to implement land use plans following their adoption.

As noted, BLM inventory, planning, and management activities do not have to be coordinated with State and local governments if doing so is inconsistent with "*the laws governing the administration of the public lands*." *Id.* (emphasis added). Thus, on its face, this limitation applies when a federal ***law*** governing public land management, such as FLPMA, conflicts with a State or local government land use planning and management program. Federal laws that do not address the "administration of the public lands" are irrelevant to this limitation, however. Likewise, agency regulations, directives, policies, and guidance documents are irrelevant because they are not laws. Consequently, the existence of Secretarial orders,

regulations, policies, directives, and similar agency guidance documents do not limit the BLM's obligation to coordinate, with the objective of resolving inconsistencies. Likewise, the existence of Secretarial and agency policies and directives do not serve as a basis to avoid ensuring consistency.

Finally, agency regulations, directives, policies, and guidance documents, such as BLM rules governing land and resource planning and management, Secretarial orders and directives, the BLM Land Use Planning Handbook, the Interior Departmental Manual, and the Interior Department's Climate Change Adaptation Plan and Landscape-scale Mitigation Program, are themselves subject to coordination under FLPMA Section 202(c)(9) to the extent such documents provide substantive direction for land use planning and management.

2. 43 U.S.C. § 1712(c)(9) (second sentence)—Implementation Requirements.

Second, "in implementing this directive," i.e., the requirement to coordinate, the BLM must do four things:

1. "to the extent [the Secretary] finds practical, keep apprised of State, local, and tribal land use plans;"

2. "assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands;"

3. "assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and"

4. "provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands."

43 U.S.C. § 1712(c)(9) (second sentence).

The first and third requirements are qualified by the phrase "to the extent [the Secretary] finds practical." The word "practical" has several meanings, but the one that makes sense in this context is "capable of being put to use or account: USEFUL." Merriam-Webster's Collegiate Dictionary 912 (10th ed.). In most cases, it will be useful to the BLM to perform requirements 1 and 3 because each requirement must be satisfied to properly complete the coordination process. Moreover, the performance of each requirement is necessary for the BLM to fulfill its obligation to ensure that BLM land use plans are "consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act," which appears in the final sentence of FLPMA Section 202(c)(9).

Requirement 2—giving consideration to State, local, and tribal plans that are germane in the development of land use plans for public lands—logically follows from the basic obligation to coordinate as well as the consistency requirement in the final sentence of FLPMA Section

202(c)(9). Obviously, meaningful coordination requires that the BLM carefully consider State and local land use plans that pertain to public land uses or that may be impaired by a BLM land use plan containing conflicting resource use designations or implementation strategies. Consequently, this requirement is not subject to any limitation.

Additionally, Requirement 4—requiring that the BLM provide "meaningful public involvement" for State and local government officials "in the development of land use programs, land use regulations, and land use decisions for public lands"—is not qualified by the phrase "to the extent he finds practical." Requirement 4 also applies broadly to a range of BLM actions that affect the planning and management of public lands. Thus, State and local governments must be provided "meaningful public involvement . . . in the development of land use programs, land use regulations, and land use decisions for public lands." 43 U.S.C. § 1712(c)(9) (second sentence). Again, this includes agency directives, policies, and guidance documents (e.g., Interior Department and BLM handbooks and manuals), which, as discussed above, also are subject to coordination. Coordination must take place before these documents are used in connection with land use planning and management, including the development of land use plans.

3. 43 U.S.C. § 1712(c)(9) (third sentence)—Advice to the Secretary.

The next sentence of FLPMA Section 202(c)(9) specifically authorizes "such officials," i.e., "State and local government officials, both elected and appointed," to advise the Interior Secretary (and BLM as the Secretary's delegated authority) on the "development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State." This sentence requires government-to-government coordination between State and local officials and the Secretary (or the BLM Director) on land use plans, guidelines, and regulations affecting the management and use of the public lands, thereby ensuring that the concerns and recommendations of State and local governments are recognized and addressed. This process allows the BLM to coordinate its own planning and management activities and maintain consistency with State and local governments to the greatest extent possible, including the BLM's development of rules, policies, and guidelines that apply when land use plans are developed and implemented.

4. 43 U.S.C. § 1712(c)(9) (fourth sentence)—Consistency with State and Local Plans.

The fourth and concluding sentence of FLPMA Section 202(c)(9) is extremely important. This sentence mandates that BLM land use plans "be consistent with State and local plans *to the maximum extent* [the Secretary] finds consistent with Federal law and the purposes of this Act" (emphasis added). This obligation is called the "consistency requirement" and is intended to ensure that BLM and local land use plans are consistent, *unless* a federal law or the purposes of FLPMA itself conflict with and, therefore, preempt the provision in the local land use plan.

The consistency requirement is related to and follows logically from the three previous sentences of this provision. As discussed, the BLM must coordinate its land use inventory, planning, and management activities with State and local governments and consider "the policies of approved State and tribal land resource management programs" (first sentence); keep apprised of State and local land use plans, assure that these plans are considered in the development of

land use plans for public lands, and affirmatively assist in resolving inconsistencies between "Federal and non-Federal Government plans" to the extent practical (second sentence); and receive advice from State and local governments on "the development and revision of land use plans."

Based on this coordination, the BLM must identify and consider potential conflicts with State and local government planning documents, and ensure that these conflicts are avoided or resolved during the planning process to the maximum extent practical. This means that coordination should begin early in the land planning process so that potential conflicts and inconsistencies can be immediately identified and taken into account as the land use plan is developed. This ensures that consistency with State and local planning is maintained or, at worst, conflicts are minimized through coordination.

B. The Improper Use of Cooperating Agency Status to Avoid Coordination.

One of the most frustrating aspects of BLM land use planning is the BLM's refusal to acknowledge its obligations under FLPMA Section 202(c)(9). Instead, the BLM has attempted to claim that cooperating agency status under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332, satisfies the agency's coordination and plan consistency review obligations. The BLM's new Resource Management Planning Rules, adopted in December 2016, but rescinded by Congress under the Congressional Review Act, would have exacerbated this serious problem.

NEPA, when applicable, requires federal agencies to complete a particular process prior to acting, including the preparation of an environmental impact statement prior to undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). However, NEPA does not impose any substantive requirements on federal agencies or override the laws that the agencies administer. The Supreme Court has explained:

> [I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. . . . If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. . . . Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989) (citations and footnote omitted); *see also Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (en banc) (NEPA "does not impose any substantive requirements on federal agencies—it exists to ensure a process." (quoting *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996)).

The BLM, however, has been using the NEPA process as a way to avoid complying with its obligations under FLPMA Section 202(c)(9). This is accomplished by inviting state and local governments to participate in the NEPA process as cooperating agencies. Under NEPA,

cooperating agencies work under the direction of the lead agency—here, the BLM—to satisfy the procedural requirements imposed by NEPA. *See*, *e.g.*, 40 C.F.R. § 1501.6(b) (describing the duties of cooperating agencies); James Connaughton, Council on Environmental Quality, Memorandum for the Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Jan. 30, 2002) (the Connaughton Memorandum) (discussing factors to consider in determining whether State or local governments are capable of participating in the NEPA process as cooperating agencies and the circumstances under which they may be terminated).[5] The Connaughton Memorandum cautions that "cooperating agency status under NEPA is not equivalent to other requirements calling for an agency to engage in other governmental entity in a consultation or ***coordination*** process . . . ." *Id*. at p. 1, n. 1(emphasis added).

The Connaughton Memorandum also contains a list of factors to be used in determining whether to invite, decline or end cooperating agency status. These factors include:

- Does the cooperating agency understand what cooperating agency status means and can it legally enter into an agreement to be a cooperating agency?

- Can the cooperating agency participate during scoping and/or throughout the preparation of the analysis and documentation as necessary and meet milestones established for completing the process?

- Can the cooperating agency provide resources to support scheduling and critical milestones?

- Does the cooperating agency provide adequate lead-time for review and do the other agencies provide adequate time for review of documents, issues and analyses?

- Can the cooperating agency(s) accept the lead agency's final decisionmaking authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action? For example, is an agency unable or unwilling to develop information/analysis of alternatives they favor and disfavor?

Thus, it is apparent that the role and duties of a cooperating agency differ significantly from, and cannot be used as substitute for, the requirements for coordination and plan consistency review imposed by FLPMA Section 202(c)(9).

The Interior Secretary has adopted regulations, codified at 43 C.F.R. part 46, to implement NEPA's procedural requirements as well as the Council on Environmental Quality's NEPA regulations. The Secretary's regulations also address the selection of cooperating agencies and their role in the NEPA process, and are generally consistent with Chairman Connaughton's Memorandum. *See* 43 C.F.R. §§ 46.225, 46.230. Among other things, these regulations require that the BLM "work with cooperating agencies to develop and adopt a

[5] Available at http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-CoopAgenciesImplem.pdf (visited April 5, 2016).

memorandum of understanding that includes the respective roles, assignment of issues, schedules, and staff commitments so that the NEPA process remains on track and within the time schedule." 43 C.F.R. § 46.225(d).

Moreover, in the case of State and local governments, the memorandum of understanding "must include a commitment to maintain the confidentiality of documents and deliberations" prior to the release of any NEPA document. *Id*. This requirement is problematic. Many local governments cannot effectively coordinate with the BLM if their discussions and any documents exchanged are subject to a strict confidentiality requirement. Elected officials involved in coordination meetings (e.g., county commissioners and supervisors) are required by open meeting laws and similar requirements to coordinate in an open and transparent fashion, including conducting meetings that are open to the public. Furthermore, most States and local governments are subject to public records acts which require disclosure of documents.

The Secretary's regulations also provide that "throughout the development of an environmental document" the BLM will "collaborate, to the fullest extent possible, with all cooperating agencies concerning those issues relating to their jurisdiction and special expertise." 43 C.F.R. § 46.230. Section 46.230 goes on to identify activities that, with the BLM's agreement, cooperating agencies may "help to do." *Id.* These activities are intended to assist the BLM in fulfilling its procedural obligations under NEPA, rather than coordinating on a government-to-government basis on BLM land use inventory, planning, and management activities.

Finally, the BLM's use of cooperating agency status as a substitute for meaningful coordination under FLPMA Section 202(c)(9) places an unfair burden on local governments. Some local governments may be unable to fulfill the obligations of a cooperating agency and decline to become a cooperating agency. In that case, the BLM would be excused from coordinating, which would violate FLPMA Section 202(c)(9). FLPMA does not require State and local governments to become a cooperating agency before the Secretary's obligations to coordinate are triggered.

For these reasons, it is improper to combine coordination under FLPMA Section 202(c)(9) with the NEPA process. Certainly, State and local governments that elect to participate in the NEPA process as cooperating agencies should be invited to do so in accordance with Council on Environmental Quality's guidance and the Interior Secretary's regulations. But participation in the NEPA process as a cooperating agency is not a substitute for government-to-government coordination under FLPMA Section 202(c)(9). Regardless of whether a State or local government participates in the NEPA process as a cooperating agency, however, the BLM must independently satisfy its obligation to coordinate with that unit of government and to ensure plan consistency in accordance with FLPMA.