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MEMORANDUM

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

FROM: **KAREN BUDD-FALEN**
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DATE: **APRIL 14, 2016**

RE: **NEGATIVE IMPACTS OF DRAFT BLM PLANNING 2.0 ON LOCAL GOVERNMENT INVOLVEMENT IN BLM DECISIONS**

On February 11, 2016, the Bureau of Land Management ("BLM") introduced new draft planning regulations ("draft Planning 2.0") to "enable the BLM to more readily address landscape-scale issues . . . and to respond more effectively to environmental and social change." The statutory authority for the BLM to adopt these new planning regulations is the Federal Land Policy and Management Act ("FLPMA"). FLPMA was adopted in 1976; that Act (1) changed the BLM's mission from the disposal of public land to retention of these lands, (2) required the BLM to prepare land and resource management plans ("RMP") which govern all activities on the BLM-managed lands, and (3) required that BLM lands be managed for "multiple use and sustained yield."

FLPMA itself, as well as the current BLM regulations, mandate the involvement of State and local governments and Indian Tribes (collectively "local governments") in the BLM's decision making process. However, although the BLM claims that the draft Planning 2.0 regulations do not change the BLM's "practice" in developing RMPs, some areas in the draft rules are a significant departure or the language of the agency's previous planning rules and in some cases a significant departure for the agency's interpretation of FLPMA. In my view, these changes are detrimental and severely limit local governments' involvement in the BLM planning process. The BLM's rationale for these changes makes no sense. Words mean something; thus, if there is no change "in practice" as the BLM claims, why is there a change in the language being used to support that practice?

The comment period on the draft Planning 2.0 rules ends May 24, 2016. I recommend that you review the following sections as you prepare your

comments to this draft. Note that this analysis ONLY pertains to the significant changes in local government influence in the BLM planning process. The BLM draft Planning 2.0 regulations cover many other issues as well that are not the subject of this opinion.

A. General Comments:

1. The draft Planning 2.0 regulations would eliminate the mandatory notification requirements from the BLM to impacted local governments and replace them with a requirement that the BLM only notify those local governments "that have requested to be notified or that the [BLM] responsible official has reason to believe would be interested in the resource management plan or plan amendment." In other places, the new regulation replaces the required notification requirements with the requirement for notification to only those local governments the BLM believes would be "concerned with" or "interested in" the federal land use plan.
2. Throughout the draft Planning 2.0 regulations, the BLM proposes to replace the word "shall" and replace it with the word "will." Although some courts have determined that the word "will" denotes a mandatory action, others have held that the word "will" must be read in context to determine its meaning. On the other hand, I found no court cases that held that the word "shall" can have any other meaning except a mandatory command. If this BLM change denotes "no change in practice," it is hard to understand why this change is necessary.
3. FLPMA requires management of BLM lands for multiple use and sustained yield. Nowhere in FLPMA does Congress allow the management of BLM lands for "social changes." However, according to BLM draft Planning 2.0, "Goal 1" is to "improve the BLM's ability to respond to social and environmental change in a timely manner."
4. It is not clear how the draft Planning 2.0 rules intersect with the requirements for environmental, economic and "custom and culture" analysis pursuant to the National Environmental Policy Act. For example, the draft Planning 2.0 rules describe BLM's planning as a two-step process with the first step being for the BLM and public to understand the

current "baseline in regards to resource, environmental, ecological, social and economic conditions in the planning area." NEPA also requires that baseline information be gathered and additionally, that the status quo management be the "no action alternative." I believe it is critical to ensure that the "status quo" or "no action alternative" accurately reflect the current baseline and not be some departure from analysis that accurately describes exactly the conditions as they exist.

5. The comment period for review of draft land use plans is shortened from 90 days to 60 days and the comment period for review of land use plan amendments is shortened from 90 days to 45 days.

B. Local Government Involvement in BLM Land Management Plan Decisions.

The BLM draft Planning 2.0 regulations represent a significant departure in the way that local governments can become involved in the BLM decision making process. Specifically the draft regulations provide less opportunity for local governments to have meaningful and significant input in violation of FLPMA.

1. Consistency Review With Local Land Use Plans, Policies and Programs

a. The draft Planning 2.0 regulations strictly limits the types of local government plans that the BLM will consider as part of its consistency review. Existing BLM regulations state that:

> The BLM is obligated to take all practical measures to resolve conflicts between federal and local government land use plans. Additionally, the BLM must identify areas where the proposed [BLM] plan is inconsistent with <u>local land use policies, plans or programs</u> and provide reasons why inconsistencies exist and cannot be remedied.

43 C.F.R. §§ 1610.3-1(d)(1), (2), (3) (Emphasis added).

In contrast, the draft Planning 2.0 regulations would eliminate any consistency review for local land use "policies, programs and processes" and only consider inconsistencies with "an officially adopted land use plan." This change would require a local government to have a "land use plan," and not just a land use policy or program for consistency review. This type of language

will limit many local governments' ability to take advantage of the consistency review requirements if they do not have an "officially approved or adopted land use plan."

b. The draft Planning 2.0 regulations eliminates this entire section from the existing regulations:

> (d) In developing guidance to Field Manager, in compliance with section 1611 of this title, the State Director shall:
>
> (1) Ensure that it is as consistent as possible with existing officially adopted and approved resource related plans, policies or programs of other Federal agencies, State agencies, Indian tribes and local governments that may be affected, as prescribed by §1610.3–2 of this title;
>
> (2) Identify areas where the proposed guidance is inconsistent with such policies, plans or programs and provide reasons why the inconsistencies exist and cannot be remedied; and
>
> (3) Notify the other Federal agencies, State agencies, Indian tribes or local governments with whom consistency is not achieved and indicate any appropriate methods, procedures, actions and/or programs which the State Director believes may lead to resolution of such inconsistencies.

43 C.F.R. § 1610.3-1(d).

In other words, local government involvement would be limited to ONLY BLM land use plans and not the guidance provided from the BLM State Director to develop such land use plans.

c. BLM is also proposing to weaken its consistency review requirements by adding that consistency with local land use plan will only be "to the maximum extent the BLM finds practical and consistent with the purposes of FLPMA and other Federal law and regulations applicable to public lands, and the purposes policies and programs of such laws and regulations."

In contrast, the existing regulations require that:

> (a) Guidance and resource management plans and amendments to management framework plans shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments and Indian tribes, so long as the guidance and resource management

> plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands, including Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise, and other pollution standards or implementation plans.
>
> (b) In the absence of officially approved or adopted resource-related plans of other Federal agencies, State and local governments and Indian tribes, guidance and resource management plans shall, to the maximum extent practical, be consistent with officially approved and adopted resource related policies and programs of other Federal agencies, State and local governments and Indian tribes. Such consistency will be accomplished so long as the guidance and resource management plans are consistent with the policies, programs and provisions of Federal laws and regulations applicable to public lands, including, but not limited to, Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise and other pollution standards or implementation plans.

43 C.F.R. § 1610.3-2(a), (b).

In other words, under the existing regulations, so long as a local land use plan, policy or program was consistent with Federal statute, the local land use plan, policy or program would be included in the consistency review analysis by the BLM. Under draft Planning 2.0, the local land use plan is required to be (at least in the opinion of the BLM) consistent with Federal law, and "the purposes, policies and programs of such laws and regulations." Requiring that local land use plans be consistent with BLM policies and programs significantly diminishes the ability of local governments to influence these same BLM policies and programs. For example, FLPMA mandates "multiple use and sustained yield." Describing the policy for how such multiple use is to be achieved is exactly the type of information that can and should be included in a local land use plan. Under the draft Planning 2.0 regulations however, the local government would be prohibited from including a policy to achieve multiple use in a local land use plan that is different from the BLM's policy for achieving multiple use. This draft rule significantly limits the scope of what can be included in a local land use plan.

d. There is also a shift in the burden of showing that an inconsistency exists from the BLM to the local governments. Specifically, under the draft 2.0 Planning regulations, the BLM will only consider inconsistencies with a local land use plan if the BLM is specifically notified, in writing, about a specific inconsistency.

e. The BLM is proposing to change the phrase "assist in resolving, to the extent practical and consistent with Federal law, inconsistencies between Federal and non-Federal government plans." (Emphasis added). The original word used on this section was "practicable" rather than "practical." Although the BLM claims that the change in wording is simply for readability, these two words have different meanings. Practicable is a more narrowly defined term meaning "capable of being put into practice." In contrast, "practical," in this context, means capable of being put to use." To understand the distinction, synonyms of "practicable" are possible, doable, and feasible; a synonym of "practical" is useful or sensible. In terms of the consistency review, the BLM then would propose to change the meaning of the requirements from, the agency must assist in resolving inconsistencies to the extent possible (practicable) to resolving inconsistences to the extent sensible or useful (practical).

2. Local Governments as Cooperating Agencies

a. Although the BLM claims it is only trying to be consistent with existing practices and current BLM terminology, the BLM is eliminating the term "cooperating agency" as used in NEPA and replacing it with the term "eligible governmental entity" as described in the Department of the Interior regulations at 43 C.F.R. § 46.225(a). According to the BLM regulations, an "eligible governmental entity" can be considered as a "cooperating agency." Although it appears that the definition of an "eligible governmental entity" is similar to a "cooperating agency," I think this change in language is going to cause great confusion and may certainly exclude some local government participation if the local government does not understand that an "eligible governmental entity" is the same as the more familiar "cooperating agency."

b. Of greater concern is the BLM's addition of the term "as feasible and appropriate" given the eligible governmental entities' "scope of their expertise." Although BLM states that it intends no change from current practice or policy, this language could certainly be used by the BLM to strictly define a local government's special expertise or to determine that local government participation is not "feasible or appropriate" if adopted by the draft Planning 2.0 regulations.

c. Additionally, the BLM authorized officer would no longer be required to notify the BLM State Director if a request for "cooperating agency" is denied. Under the existing regulations, if a BLM authorized officer denies a request for cooperating agency, he shall notify the State Director who shall conduct an independent review to determine if the denial was appropriate. That State Director's review would be eliminated under the draft planning 2.0 regulations.

3. Coordination

FLPMA requires that the BLM "coordinate" its plans and programs with those of State and local governments, although the statute is silent on how such "coordination" is to occur. Under any definition however, "coordination" implies some measure of input and trying to work together. In contrast, under the draft Planning 2.0 regulations, "coordination" would only include the BLM providing to local governments "the opportunity for review, advice and suggestions on issues and topics which may affect or influence other agency or governmental programs." Additionally, while currently "coordination" is to occur "consistent with Federal laws," the draft Planning 2.0 regulations would also add that "Coordination" would occur consistent with "the purposes, policies and programs of use [Federal] laws and regulations." The policies under the Federal statutes can change with the President, Secretary of the Interior and BLM Director in control at the time. That may limit the ability of local governments to coordinate in some circumstances.

4. Governor's Consistency Review

The new draft Planning 2.0 rules place more work on the Governor during the "Governor's Consistency Review."

a. The Governor is required to identify inconsistencies between State and local government plans to bring to the attention of the Director of the BLM. The BLM will only consider "identified" inconsistencies between State and local plans and the proposed resource management plan if such inconsistencies are noted by the Governor.

b. BLM will only accept the Governor's recommendation if the BLM Director determines that the Governor's recommendations "provide for a reasonable balance between the national interest and the State's interest."

In sum, I believe that these draft Planning 2.0 regulations detrimentally deprive local governments of the ability to influence BLM land use plans. By placing such significant constraints on local governments, the entire premise behind the "government-to-government" interaction is weakened. I strongly urge your participation in this rulemaking effort by providing comments to the BLM on draft Planning 2.0 regulations.

Should you have any questions, please do not hesitate to contact me.