

BUDD-FALEN LAW OFFICES

L.L.C.

ATTORNEYS FOR THE WEST

KAREN BUDD-FALEN

BRANDON L. JENSEN¹

¹ ALSO LICENSED IN CO

² ALSO LICENSED IN NE, SD & ND

³ ALSO LICENSED IN AR

300 EAST 18TH STREET • POST OFFICE BOX 346

CHEYENNE, WYOMING 82003-0346

TELEPHONE: 307/632-5105

TELEFAX: 307/637-3891

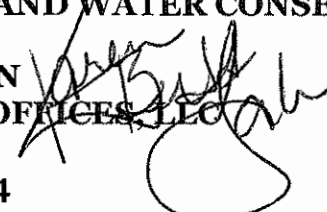
WWW.BUDDFALEN.COM

FRANKLIN J. FALEN²

JORDAN P. WIMPY³

MEMORANDUM

TO: NEW MEXICO SOIL AND WATER CONSERVATION DISTRICTS

FROM: KAREN BUDD-FALEN
BUDD-FALEN LAW OFFICES, L.L.C. 

DATE: SEPTEMBER 19, 2014

RE: MAKING A DIFFERENCE IN FEDERAL DECISION-MAKING, PLANS, POLICIES AND PROGRAMS - SUBSTANTIVE PARTICIPATION BY LOCAL GOVERNMENTS IN FEDERAL AGENCY DECISION MAKING - TEMPLATE AND PROCEDURES FOR ADOPTION OF LOCAL LAND OR RESOURCE PLANS

Locally elected governments and elected officials have far ranging and important responsibilities to their constituents, described by state statutes as protecting the "health, safety and welfare of the citizens." That responsibility includes specifically interacting with federal agencies on all federal issues impacting the local community, county or conservation district. To give the locally elected governments the strongest voice it can have during this "government-to-government" interaction, local governments should adopt "local land use plans" or "resource plans" to set local policy regarding the use and management of federal lands and the adoption of federal policies, programs and other types of federal decision-making.

Federal agencies and departments are mandated by various federal statutes to engage local governments in federal decision-making processes related to federal plans, policies and programs that will impact the local land use, management of natural resources, the citizens and the local tax base. The adoption of a local land use or resource plan by a local government is a critical tool allowing a local government to have a substantive impact on federal decisions, plans, policies and programs. In fact, federal agency consideration of a local land use plan, resource plan or "officially adopted policy" plays a key role in the success of a local government under the National Environmental Policy Act, the Federal Lands Policy and Management Act or the National Forest Management Act. Having a well-written land use or resource plan considerably strengthens a local government's position when working with federal agencies.

The purpose of this Memorandum is to (I) define a local land use or resource plan for the purposes of substantively participating in federal decision-making processes; (II) present a summary of the federal statutory authority related to local cooperating agencies, coordination and consistency reviews; (III) provide background on how to know what policies a local government should consider, (IV) provide a template or elements necessary for an effective local land use or resource plan; (V) provide an analysis of the planning authority, process and procedures for land use planning by New Mexico soil and water conservation districts; and (VI) describe some final local land use plan requirements.

I. 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* and reflects the local government’s position on federal decisions.

For those unfamiliar with local land use planning participation for federal decisions, the very idea may seem odd. Local governments do not have jurisdiction over the federal government, and local land use plans cannot require federal land managers to take specific actions. For example, neither a county nor a conservation district can dictate in its land use plan how many grazing animal unit months (“AUMs”) will be allocated for a given grazing allotment, or that wild horse populations shall be managed below appropriate management levels (“AML”) to provide more forage for livestock grazing. These decisions are within the authority of the federal agency. However, the socioeconomic wellbeing, health, safety, and culture of a rural area can be strongly impacted by the management of the surrounding federal or public lands. Moreover, local governments are generally required by state law to oversee the economic, social, and general wellbeing 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 wellbeing, the culture and customs of the local citizens and natural resource health are considered in federal decisions.

There are two other important points that local governments should consider in writing local land use or resource plans. First, it is critical that the various local governments, such as County Commissions and Conservation Districts, work closely together in making their land use or resource 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 or resource 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.

Second, I recommend that local governments invite the various federal agencies to participate in the preparation of a local land use or resource plan. At a minimum, I believe that federal agencies should be given the opportunity to provide comments on draft plans. While it is certainly the choice of the various federal agencies whether they will provide input into the local land use or resource management plan, and the final content of the local land use or resource plan rests fully with the elected local body, providing an opportunity for federal input is necessary so that the local government is considering all comments and preparing a final document that best fits its needs and articulates its goals and visions for its county or district.

II. STATUTORY REQUIREMENTS FOR LOCAL GOVERNMENT-TO-FEDERAL GOVERNMENT INTERACTION AND INFLUENCE

A. The National Environmental Policy Act (“NEPA”)

NEPA applies to “every major Federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The courts have interpreted this to mean that every time the federal government spends any amount of money for almost any decision, NEPA compliance is required. There are several ways local governments can participate in the NEPA process, depending on the type of federal decision, the level of commitment of the local government and the goal of the local government.

1. Consistency review

First, the local government can use its local land use or resource plan as part of the federal agency’s “consistency review” process. Under this option, if the federal agency, in the course of writing an environmental impact statement (“EIS”), receives a local land use or resource plan, NEPA commands the federal agency to “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 [environmental 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).

Second, NEPA requires 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).

2. Cooperating agency status.

Local governments may also participate in the NEPA process as “cooperating agencies.” 40 C.F.R. §§ 1501.6, 1508.5. Pursuant to NEPA, an applicant for cooperating agency status must both (1) be 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. As declared by the New Mexico legislature, the purposes for the creation of soil and water conservation districts include:

- (1) control and prevent soil erosion;
- (2) prevent floodwater and sediment damage;
- (3) further the conservation, development, and beneficial application and proper disposal of water;
- (4) promote the use of impounded water for recreation, propagation of fish and wildlife, irrigation and for urban and industrial needs; and
- (5) by the application of these measures, conserve and develop the natural resources of the state, provide for flood control, preserve wildlife, protect the tax base and promote the health, safety and general welfare of the people of New Mexico.

N.M.S.A. § 73-20-26B.

The New Mexico legislature made the following findings in support of its enabling the creation of soil and water conservation districts:

- A. Considered and resolved by legislative determination, it is declared that:
- (1) the land, waters and other natural resources are the basic physical assets of New Mexico, and their preservation and development are necessary to protect and promote the health and general welfare of the people of the state;
 - (2) the improper use of land and related natural resources, soil erosion and water loss result in economic waste in New Mexico through the deterioration of the state's natural resources; and
 - (3) appropriate corrective and conservation practices and programs must be encouraged and executed in New Mexico to conserve and develop beneficially the soil, water and other natural resources of the state.

NMSA § 73-20-26A.

In these areas, soil and water conservation districts have “special expertise.”

3. Joint planning

In certain circumstances, local governments can act as a joint lead on a NEPA document with the federal agency. 40 C.F.R. §§ 1501.5; 1506.2. However, several criteria must first be met. First, this requirement ONLY applies if the local government has adopted a type of planning statute, like NEPA. These state or local NEPA type requirements must be used to assist the local government to make local decisions. It is not enough for a local government to pass a type of NEPA statute that does not assist the local government to have enough information to reach a local decision.

Additionally, the local NEPA-type statute has to be uniformly applied. To truly be a local planning statute, the local government cannot just apply it in one situation but not in another similar situation.

Finally, not all states have a statutory structure allowing the local government to adopt a NEPA-type ordinance. Any NEPA-type ordinance must also be compliant with state law.

4. Consistency review and comments

NEPA also provides direction for those who want to provide consistency review comments. NEPA recommends that the local comments and review not just criticize the federal agency's methodology or decision, but also describe alternatives and mitigation and explain why the local alternatives or mitigation measures are more appropriate. 40 C.F.R. § 1503.3(b)(d). If additional information is needed, cooperating agencies are to explain what information is necessary to provide adequate comments or participation. 40 C.F.R. § 1503.3(c). These requirements strongly fit with what needs to be in a local land use plan.

B. Federal Land Policy and Management Act ("FLPMA")

FLPMA, which governs the BLM, provides detailed requirements for "coordination" and "consistency" with local land use plans and encourages local governments to participate as "cooperating agencies." FLPMA also provides for the "Governor's consistency review."

1. Coordination

With regard to "coordination," FLPMA states:

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

43 U.S.C. § 1712(c)(9a). See also 43 C.F.R. § 1610.3-1 (stating "(a) In addition to the public involvement . . . the following coordination is to be accomplished with other Federal agencies, state and local governments and federally recognized Indian tribes. The objectives of the coordination . . . (1) Keep apprised on non-Bureau of Land Management plans; (2) Assure that BLM considers those plans that are germane in the development of resource management plans; (3) Assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal government plans.")

2. Consistency review

As related to the requirements that BLM plans be "consistent" with local land use plans, FLPMA states:

In implementing this directive [coordination], the Secretary shall to the extent he find practical, keep apprised of State, local and tribal land use plans' 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; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and 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 early public notice of proposed decisions which may have a significant impact on non-Federal lands. . . . 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)(9b). Emphasis added.

FLPMA regulations echo this requirement stating:

(a) In addition to the public involvement . . . the following coordination is to be accomplished with other Federal agencies, state and local governments and federally recognized Indian tribes. The objectives of the coordination . . . (1) Keep apprised on non-Bureau of Land Management plans; (2) Assure that BLM considers those plans that are germane in the development of resource management plans for plans; (3) Assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal government plans.

43 C.F.R. § 1610.3-1. Emphasis added. See also 43 C.F.R. § 1610.3-2 Consistency requirements. With regard into these consistency review requirements, it is very important to note:

State Directors and Field Managers shall, to the extent practical, keep apprised of State and local government and Indian tribal policies, plans, and programs, but they shall not be accountable for ensuring consistency if they have not been notified, in writing, by State and local governments or Indian tribes of an apparent inconsistency."

43 C.F.R. § 1610.3-2(c)

In other words, according to FLPMA, if a BLM land use plan is inconsistent with a local land use plan, the BLM owes an explanation of how achieving consistency would have resulted in a violation of federal law.

3. Cooperating agency status

FLPMA also encourages cooperating agency status by stating that "When developing or revising resource management plans, BLM State Directors and Field Managers will invite eligible Federal agencies, state and local governments, and federally recognized Indian tribes to participate as cooperating agencies." 43 C.F.R. § 1610.3-1(b).

4. Governor's consistency review

Finally, FLPMA requires that the BLM provide for a separate Governor's consistency review as part of the land use planning process. According to that provision:

(e) Prior to the approval of a proposed resource management plan, or amendment to a management framework plan or resource management plan, the State Director shall submit to the Governor of the State(s) involved, the proposed plan or amendment and shall identify any known inconsistencies with State or local plans, policies or programs. The Governor(s) shall have 60 days in which to identify inconsistencies and provide recommendations in writing to the State Director. If the Governor(s) does not respond within the 60-day period, the plan or amendment shall be presumed to be consistent. If the written recommendation(s) of the Governor(s) recommend changes in the proposed plan or amendment which were not raised during the public participation process on that plan or amendment, the State Director shall provide the public with an opportunity to comment on the recommendation(s).

43 C.F.R. § 1610.3-2(e). Importantly, the regulations continue:

If the [BLM] State Director does not accept the recommendations of the Governor(s), the State Director shall notify the Governor(s) and the Governor(s) shall have 30 days in which to submit a written appeal to the Director of the Bureau of Land Management. The Director shall accept the recommendations of the Governor(s) if he/she determines that they provide for a reasonable balance between the national interest and the State's interest. The Director shall communicate to the Governor(s) in writing and publish in the Federal Register the reasons for his/her determination to accept or reject such Governor's recommendations.

Id.

C. The National Forest Management Act (“NFMA”)

1. Coordination

NFMA, which governs the U.S. Forest Service, requires the agency to “coordinate”. 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.

16 U.S.C. § 1604(a). Emphasis added.

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.

2. Cooperating agency

The Forest Service regulations also mention cooperating agency. They state:

Federal agencies, States, counties and local governments, including State fish and wildlife agencies, State foresters and other relevant State agencies. Where appropriate, the responsible official shall encourage States, counties and other local governments to seek cooperating agency status in the NEPA process for development, amendment, or revision of a plan. The responsible official may participate in planning efforts of States, counties, local governments, and other Federal agencies, where practical and appropriate.

36 C.F.R. § 219.14(a)(1)(iv).

III. BEFORE YOU START TO WRITE A PLAN

Because the purpose of a local land use plan or policy is to shape federal agency decision-making, I recommend the first step is for the local government to determine the issues that the local land use plan should cover. Those issues will be largely set by the issues that the federal agencies will be considering. Reviewing the Endangered Species Act (“ESA”) candidate species list, proposed critical habitat designations, proposed listings and the mega-settlement list can inform the local government of the ESA actions likely to take place impacting the area into the future. The Forest Service lists its proposed NEPA actions on a website called the Schedule of Proposed Actions (“SOPA”) by forest unit and the BLM lists its proposed actions by state on an “ePlanning” website. Local governments should review proposed wilderness

designations, Wild and Scenic Rivers Act designations and reviews, and roadless areas to determine if those designations will impact the local government, environment, tax base or custom and culture. I also recommend reviewing websites of environmental groups to determine if any of their projects or proposals will impact the local area. Given the litigious nature of these groups, it is highly likely that these groups will be litigating against the federal agency in support of a project or program. Because litigation settlement agreements will almost always require some type of planning or NEPA compliance, the local government should be prepared with specific policies that the federal agency must consider as part of its planning and decision-making process.

IV. LAND USE PLAN TEMPLATE

Although there is no right or wrong way to write a local land or resource plan, the most effective ones I have seen contain all of the following elements:

A. Local Government Background

This section of the land or resource plan includes a general description of the local government. That description should contain factual information on the history, economy, “custom and culture,”² 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.

I also recommend this section include a statement regarding what the local government expects when it engages with the federal government, such as BLM and Forest Service through coordination, and that the local government expects to be given early notification of any opportunities for cooperating agency status by all federal agencies as part of the decision making process.

B. Goals/Objectives/Local Policy Statements and Desired Future Conditions

² Culture is defined as the customary beliefs, social forms and material traits of a group; an integrated pattern of human behavior passed to succeeding generations. *Webster's New Colligate Dictionary*, 227 (1975). Custom is a usage or practice of the people, which by long and unvarying habit, has become compulsory and has acquired the force of law with respect to the place or subject-matter to which it relates. *Bouvier's Law Dictionary*, 417 (1st ed. 1867). In translating these definitions to a local government's land use plan, the questions that could be posed are what activities, events or elements of the physical or social environment have shaped the citizens, history or economy in the local area? Some considerations could be: is the local economy based upon some type of production agriculture or mining and how did that come about? Was the general ancestry in an area from a certain country and/or nationality and why? How have the long human traditions and economics in a particular area changed over time and why?

The heart of a local land use or resource plan is a list of goals, objectives or policy statements describing what the local government wants to happen (or not to happen) (i.e., desired future conditions) within the federal decision-making processes. These policies should pertain to resources that the local government anticipates may be affected by future federal 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. If the local government is participating in a NEPA process, these can be thought of as the “desired future conditions.” The types of federal decisions that involve coordination, consistency reviews 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.). Thus the purpose of this section of the local land or resource plan should be the local government’s “desired future condition” from the local perspective.

C. Local Data

Policies or desired future conditions are strongest when local governments can support them with good factual information. 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 socioeconomic 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 a local government sets forth its desired future conditions, the local plan should include local data and information supporting socioeconomic, and environmental reasons for these policy statements. 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, Alternatives and Mitigation

Finally, the local plan should 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 statement describing the requirements for local “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 in line with the local government’s policy statement. I do not believe this has to be an exhaustive list or analysis. However, the purpose of local government involvement in federal agency decisions is to substantially influence those federal decisions by being

able to predict whether federal actions will have a positive or negative impact on the local citizens, the environment and the economy.

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 to alleviate or lessen the impact of detrimental federal agency decisions.

V. FINAL LOCAL LAND USE PLAN REQUIREMENTS

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, the federal agencies must attempt to accommodate it in their planning and management decisions.

Third, as explained above, New Mexico conservation districts' "special expertise" is governed by state statute.

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.

-END-