

**" Butte County Government Coordinating Ordinance
for Actions Affecting Land and Natural Resources Use "**

WHEREAS: We, the People of Butte County, State of South Dakota, reaffirm the fundamental rights of mankind as enumerated in the Declaration of Independence and acknowledge the limited nature of government as intended by the nation's founding fathers. Based on these cherished traditions, we declare that all land and natural resource use decisions affecting Butte County shall be guided by the principles of protecting private rights, protecting local customs and culture, maintaining traditional economic structures through self-determination, and opening new economic opportunities through reliance on free markets. Resource decisions made in this manner will maintain or enhance environmental quality.

WHEREAS: Federal and state lands make up a part of Butte County, and Butte County's economy is dependent on business activities that use these lands and other natural resources. These activities are inseparably tied to the small private lands in Butte County. The nature and intent of Butte County government is to protect the heritage, custom and culture of county citizens through protection of private rights, the facilitation of a free market economy, and the establishment of a process to ensure self-determination by local communities and individuals. It is therefore necessary to develop and implement planning mechanisms that focus on the affects of actions taken by federal and state agencies as they relate to land and natural resources use in Butte County.

WHEREAS: actions taken by federal and state agencies without consultation and coordination with the County and which are not in compliance with the Comprehensive Plans and other County laws, could conflict with and defeat the purposes and goals of the Comprehensive Plans and such laws, could fail to preserve the custom, culture, economic stability and environmental quality of the county, and could otherwise work to the detriment of the livelihood and well-being of the citizens of Butte County; now, therefore,

BE IT HEREBY ORDAINED, by the Board of County Commissioners of Butte County adopt the following "Government Coordinating Ordinance. "

ARTICLE 1. PRELIMINARY PROVISIONS

Section 1. Intent

- The intent of this ordinance is to create a county planning process which will:
1. Promote the protection of not only the physical environment but also the customs, culture, and economic stability of the County.
 2. Require that federal and state agencies abide by existing laws which require them to conduct joint planning with the county on actions affecting land and natural resources use in the County.
 3. Ensure full compensation to the county citizens when environmental protection necessitates use of private property, and/or reduces the value of said private property.
 4. Provide a positive guide for federal and state agencies in their development and implementation of regulations affecting land and natural resources use in Butte County.

Section 2. Coordination With Comprehensive Plan and Existing County Law

- A. The provisions of this Ordinance shall be in addition to and, to the extent permitted by law, coordinated with the final Butte County Comprehensive Plan adopted. The effectiveness of the Ordinance, however, shall not depend upon adoption of the Comprehensive Plan or the authority of the County to adopt such a plan.
- B. This Ordinance shall be coordinated with existing and future County ordinances, resolutions, policies and plans. It is intended as a set of provisions that shall provide a general framework as well as specific guidance and shall work in conjunction with other County ordinances, resolutions, policies and plans. In the event this Ordinance conflicts with such other ordinances, resolutions, policies and plans, the provisions of this Ordinance shall be given effect to the fullest extent possible.

Section 3. Definitions

- (1) "Culture" (Webster's New Collegiate Dictionary, 1975, 277): 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.
- (2) "Coordinate" (Black's Law Dictionary, 5th ed. 1979, 303): Coordinate is defined as equal, of the same rank, degree or importance, not subordinate.

ARTICLE 2. GENERAL GUIDANCE

- A. The county and its citizens support the continued multiple use of federal and state lands, as well as the other natural resources of Butte County. To the fullest extent required or permitted by law, Federal and State agencies shall inform the county commission of all actions considered, proposed or taken, that affect or have the potential to affect the use of land and natural resources within Butte County. If the county is affected by such actions, the Butte County Commissioners shall be consulted and coordinated with in accordance with the laws of South Dakota.

Federal and state agencies proposing actions that will impact the Butte County heritage, customs and culture shall submit their request for scoping to the Butte County Commission prior to any federal and state initiative of action. Report(s) on the purposes, objectives and estimated impacts of such actions, including economic, to the Butte County Commissioners, in writing, and in a timely manner. These report(s) shall be provided to the Butte County Commissioners for review and coordination prior to any federal and state initiation of action. These actions will be in concordance with the Ordinance establishing the Butte Co. Environmental Planning and Review Process.

- B. Before any action is considered, proposed or taken in or near Butte County affecting cultural resources, recreational, wildlife or wilderness uses, agriculture, timber, wood products, mining, minerals, land disposition, and acquisition, water resources, air resources, or other resources needed to maintain the custom, culture, and economic

viability of Butte County citizens federal and state agencies shall in this (i) notify the County Commissioners of any proposed action, (ii) provide a detailed statement assessing the specific effects on custom, economy and environment of Butte County, and (iii) use all mitigation measures and alternatives adopted with the concurrence of the Butte County Commissioners and in accordance with the Butte Co. Environmental Planning and Review Process and the National Environmental Policy Act.

ARTICLE 3. SPECIFIC GUIDANCE

Section 1. Agriculture

The custom and culture associated with agricultural production in Butte County is necessary to the livelihood and well-being of its citizens. Therefore, it is the policy of Butte County to protect and promote the continuation of agricultural pursuits by protecting private property rights, relying on self-determination, and ensuring open market conditions.

- A. To the extent permitted by law, federal and state agencies shall avoid taking actions that are inconsistent with any Butte County provision in the Comprehensive Plan without the concurrence of the County Commissioners.
- B. To the extent permitted by law, federal and state agencies shall avoid taking actions that have the effect of obstructing, or making financially inefficient agricultural and livestock production within Butte County.
- C. To the extent permitted by law, federal and state agencies shall give adequate consideration to the use of lands as agricultural lands in the Comprehensive Plans and as otherwise consistent with the custom, culture and economy of Butte County.
- D. Opportunities for grazing livestock on federal and state lands should be continued at levels consistent with custom and culture and protection of equitable property rights.
- E. Federal and state governments should not obstruct agricultural opportunities on their respective land and should adhere to multiple use principles.
- F. Butte County shall establish a Grazing Advisory Board. Pursuant to federal law, federal and state land managing agencies shall coordinate with the Board on all matters affecting livestock grazing on public lands.
- G. Butte County shall develop, in coordination with federal and state governments, an effective Section 8 process pursuant to the Public Rangeland Improvement Act of 1978 and shall implement procedures and guidelines to account for the allocation and expenditure of range improvement funds.
- H. Incentives for improving grazing lands and promoting good land stewardship shall be developed through:
 - a. Encouraging permittee ownership of range improvements.
 - b. Appropriate fee schedules;
 - c. Allowing subleasing of equitable property rights;
 - d. Allotment management plan flexibility; and
 - e. Increasing grazing capacity by conservation practices or allowing other economic benefits.

Section 2 Timber and Wood Products

The custom and culture associated with timber and wood products production in Butte County is necessary to the livelihood and well-being of its citizens. Therefore, it is the policy of Butte County to protect timber resources and

promote economic opportunity relying on self-determination, and ensuring open market conditions.

A. To the extent permitted by law federal and state agencies shall avoid taking actions that reduce opportunities for a timber and wood products industry to be continued at levels consistent with the custom, culture and economy of Butte County.

B. Butte County Commissioners shall promote timber sale sizes that provide opportunities for a wide spectrum of producers and that allow for local entrepreneurship. Opportunities for a sustainable wood products industry shall be continued at levels consistent with custom and culture and as affected by prevailing market conditions.

C. The pursuit of private timber production within the county shall be unhindered by state, federal and local regulations which would restrict the economic viability of such production or reduce the investment backed expectations of the private timber owner unless full and just compensation is made to the property owner.

Section 3. Mining and Minerals

Butte County Commission recognizes that the use of mining and mineral resources are significant to preservation of the custom, culture and economic stability of its citizens and protection and use of their environment. Therefore, it is the policy of Butte County to encourage procedures and site specific plans that provide for the long term availability and responsible development of its mineral resources.

Any federal or state action that has or could have the effect of changing existing use of mining or mineral resources within the County shall be critically considered in relationship to the historic and current use of such resources in the County. The procedure in Article 2 of this ordinance will be followed for any proposed Federal or State action. Butte County encourages retention of and compliance with the 1872 federal mining law.

Section 4. Land Disposition and Acquisition

Recognizing that land is essential to local industry and residence, it shall be the policy of this county that the design and development of all federal and state lands disposal, including land adjustments and exchanges, be carried out to the benefit of the citizens of Butte County.

Butte County Commission may pursue and consider:

A. Increased opportunities for local economic development by encouraging no decrease in the amount of private and non-federal land within the county.

B. Federal and state land agencies shall be encouraged not to acquire any private lands or rights in private lands within Butte County without first attempting:

a. that as a minimum, parity in land ownership status be maintained; and
b. ensuring that all private property interests and rights are protected

and/or
enhanced because land going out of private ownership affects the custom and culture and the tax base of the county.

C. Federal and state managed lands that are difficult to manage or which lie in isolated tracts are requested to be targeted for disposal as private lands. First right of purchase will go to the present permittee or owner of adjoining land.

D. Butte County Commissioners will work with the South Dakota State and School Land Office in coordinating land exchanges so as to maximize private-owned lands.

E. The general public, the state of South Dakota, and local communities shall be notified of, consulted about, and otherwise be involved in all federal and state land adjustments in Butte County. Federal agencies shall coordinate land adjustments within Butte County. Furthermore, Butte County shall enforce its right under federal law to be the lead planning agency or joint lead planning agency in all federal and state lands adjustments occurring within the county's political boundaries.

F. Butte County Commissioners shall regulate land withdrawals for hazardous and non-hazardous waste storage and determine the types and points of origins of such waste, in accordance with the Butte County Environmental Planning and Review Process and in coordination with the state agencies.

G. Pursuant to federal law, before federal and state land agencies can change land use, adverse impact studies on uses shall be conducted and mitigation measures adopted with concurrence from Butte County Commissioners. Adverse impact studies shall include, but not be limited to, addressing community stability, local custom and culture, grazing rights, timber production viability, flood prone areas and access.

H. The county will discourage federal and state agencies from acquiring land within Butte County. The County will only agree if the agencies agree to pay property fees based on current tax levies on par with private ownership.

Section 5. Cultural Resources, Recreation, Wildlife and Wilderness

Butte County Commission may promote and facilitate public and private recreational, cultural, wilderness and wildlife opportunities compatible with local custom and culture and within the constraint of private property rights and local self-determination.

The custom and culture associated with cultural resources, recreation, and wildlife in Butte County are necessary to the livelihood and well-being of its citizens and protection and use of their environment. It is the continuing policy of Butte County to (i) promote for all citizens safe and productive surroundings, (ii) preserve important historic, cultural and natural aspects of our County heritage, and (iii) maintain an environment which supports diversity and variety of individual choice.

The purpose of this section is to provide clear guidance to federal and state agencies when actions by such agencies may affect cultural resources, recreation, wildlife and wilderness in Butte County.

A. Before any action is considered, proposed or taken affecting cultural resources, recreational, wildlife or wilderness uses in Butte County, federal and state agencies shall submit their request for scoping prior to any action affecting heritage, culture or customs. The agencies shall in this order (i) notify the County of any proposed action, (ii) provide a detailed statement assessing the specific effects on custom, culture, economy and environment of Butte County, and (iii) use all mitigation measures and alternatives adopted with the concurrence of the County and in accordance with the Butte County Environmental Planning and Review Process.

B. In connection with any action related to sensitive, threatened or endangered plant or animal species, a federal and state agency will coordinate with our land and natural resources use regulations by:

(i) Not less than one year before the effective date of any action, give actual notice to Butte County of the intent to consider or propose a species for listing, or to change or propose critical habitat;

(ii) Base the listing of a species on the best scientific and commercial data relating specifically to Butte County and not generalized over a wider geographic area;

(iii) List a species as threatened or endangered only after taking into account the efforts of Butte County to conserve the species;

(iv) Only implement a recovery plan if it will provide for conservation of a species on a global basis;

(v) In designating critical habitat, take economic impacts into account and based upon such impacts exclude as critical habitat all impacted areas unless failure to designate would result in extinction of the species;

(vi) Adequately mitigate any impact on private property rights, custom, culture, economic stability, protection and use of the environment, including but not limited to any impact on public use and access.

(vii) Complete and forward to Butte County Commission in a timely manner all documentation required by law when designating critical habitat;

(viii) Consider and directly respond to comments submitted by Butte County Commission;

(ix) Not develop protective regulations or recovery plans if a Butte County plan is in place to conserve the species within Butte County;

(x) Protect the species through alternatives with the least impact on the custom, culture and economic stability and use of the environment of Butte County.

C. The reintroduction of species dangerous to human beings by private individuals or organizations is prohibited in Butte County. Dangerous animals include, but are not limited to bears, wolves, and lynx. The reintroduction of other species in Butte County is discouraged and must be approved and coordinated with the County Commission if proposed.

D. If federal or state agencies require private property for habitat of species said agency(s) will pay just compensation by figuring, but not limited to, true market valuation and loss of future income for said private property if eminent domain is invoked.

Section 6 Water Resources

Butte County Commission recognizes that the conservation and development of water resources are essential to preservation of the custom, culture and economic stability of its citizens and protection and use of their environment. The protection of existing water rights and water uses within the County is also of primary importance to the custom, culture and economic stability of Butte County.

A. The protection of existing water rights and water uses within the County is of primary importance to the County's economic and cultural well-being. Therefore, transfer in water use should be carefully consider in relationship to the history, traditions and culture of Butte County. Pursuant to federal law, any federally proposed designation of Wild and Scenic Rivers and all federal policies regarding riparian management in Butte County shall be coordinated with the County Commission and shall comply with all County water use plans. In addition, Butte County shall coordinate with all plans for the protection of all aquatic Threatened and Endangered species within its boundaries. Federal law requires that federal agencies managing waterways and wetlands containing such species shall coordinate their management activities and plans with the County Commission.

B. Any federal or state action that has or could have the effect of changing existing water rights or water uses within the County shall be critically considered in relationship to the historic and current use of water in Butte County by humans, agriculture, livestock and wildlife. Federal and state agencies proposing any actions that will affect Butte County heritage, culture and customs shall submit their request for scoping to the Butte County Commissioners prior to any federal and state initiation of action. It is the intent of the County Commissioners to assist federal and state agencies in the planning and management of the County's natural, cultural, economic and environmental resources related to water use. Pursuant to

federal law, all federal and state agencies must, when taking any action related to water use or water rights, (i) notify the County Commissioners of proposed actions, (ii) provide a detailed statement assessing the specific effects on the custom, culture, economy and environment or Butte County, and (iii) all mitigation measures and alternatives adopted shall have concurrence of the County Commissioners, following the Butte County Environmental Planning and Review Process.

C. Any proposed designation of wild and scenic rivers or definition of wetlands, any action affecting the management of river flows or the sources or uses of irrigation, and any other federal or state action that has any effect on water rights or water uses within the County shall be coordinated with the County Commissioners and shall not violate any private property water rights.

D. Butte County Commission has the authority to develop wild and scenic river designations of its own design and to define and designate wetlands. To the extent such authority is exercised, and otherwise in accordance with law, federal and state agencies shall act in compliance with acceptance and enforcement of such designations and definitions. In addition, the County Commissioners have the authority to continue to develop, in coordination with private land owners and governmental agencies, water management plans that encompass water resources on both governmentally owned and privately owned lands.

E. Butte County Commissioners have the authority to establish development regulations for point source and non-point source water pollution. To the extent such authority is exercised, and otherwise in accordance by law, federal and state agencies shall be subject to, and shall comply with all administrative requirements, controls, processes, and sanctions of such development regulations.

F. The use of water that originates from sources outside Butte County has been and continues to be an important part in the preservation of custom, culture and economic stability and the protection and use of the environment of Butte County. The provisions of this section shall therefore apply fully to actions taken by federal and state agencies with respect to such outside source.

G. As required by federal law before any federal or state agency acquires or agrees to acquire any interest in water rights in Butte County, directly, indirectly or in trust, for any purpose (including for transfer to or use in any other jurisdiction), by donation, purchase, condemnation or otherwise, such agency shall fully comply and coordinate with the Butte County Commissioners. The Commission shall also insure that any water rights acquired by federal and state agencies within Butte County shall be pursuant to established state statutes. In addition, federal and state agencies shall not acquire for any public purpose any interest in water rights within Butte County without (i) first coordinating and consulting with the County Commissioners, (ii) ensuring that private water rights are protected and enhances, and (iii) ensuring that, as a minimum, parity in water rights is maintained. In this context, parity means that when a federal or state agency acquires any interest in privately owned water rights within Butte County, the agency shall, at the same time, dispose of water rights of like use and value within Butte County to the private sector. These decisions must comply with the Butte County Environmental Planning and Review Process.

H. The County will coordinate with other agencies to develop a definition of "natural" hydrologic environment so as to assess the use of water in the county by man, vegetation, livestock, and wildlife within the context of historical use. The County shall base its water use policy on the "Water Budget", which shall in turn be based on the relationship between precipitation, surface and ground water, evapotranspiration and water use with the county.

I. Butte County recognizes the principles contained in South Dakota State Water Law as they exist at this time.

J. Butte County shall develop its water use policy to ensure both water quantity and water quality. In addition, the County may develop repairman management plans in concert and coordination with landowners, ranchers, and the appropriate state and federal agencies.

Section 7 Clean Air

Butte County recognizes that the conservation and use of clean air resources are essential to preservation of the custom, culture and economic stability of its citizens and protection and use of their environment.

A. Any federal or state action that has or could have the effect of changing existing use of air resources within the County shall be critically considered in relationship to the historic and current use of air resources in the County by humans, agriculture, livestock and wildlife. Any proposed designation of federal or state pollution non-attainment areas and any other federal or state action that has any effect on air resources within Butte County shall be coordinated with the County Commissioners and shall comply with all County air quality standards if any.

Section 8 Access and Transportation

Butte County will develop and maintain a transportation network that optimizes accessibility within the County and that minimizes the cost of movement between all communities and across public lands. Access to or across federal and state lands shall not entail encumbrances or restrictions on private property rights.

ARTICLE 4. MONITORING AND ENFORCEMENT

Section 1. Monitoring

Butte County Commissioners shall have the authority to develop and maintain monitoring and compliance standards to evaluate and enforce compliance by federal and state agencies with the provisions of this Ordinance, the Comprehensive Plan, and other ordinances, resolutions, policies and plans of Butte County. Federal and state agencies shall coordinate with the collection of all monitoring data and in the analysis of all resource condition evaluations.

Section 2 Enforcement

A. The County Commissioners shall have the authority to bring an action to enforce this Ordinance in any court or administrative tribunal of competent jurisdiction and may seek cumulative remedies, including any criminal or civil penalties allowed by law, equitable relief, and monetary compensation when the tax base or the health safety or general welfare of the citizens of the County is at issue. Prior to bringing an action, steps will be taken to notify the persons involved about the violations.

B. Any complaint by a citizen alleging a violation of the private property rights or a devaluation of said private property protected by this Ordinance shall be filed with the prosecuting attorney of Butte County, who, within 30 days of such filing shall determine whether a criminal action shall be brought against any person, including, but not limited to, any person acting under the color of law as an employee of any federal or state governmental agency, set forth in 18 U.S.C. 241. Prosecutions for violating property rights are encouraged.

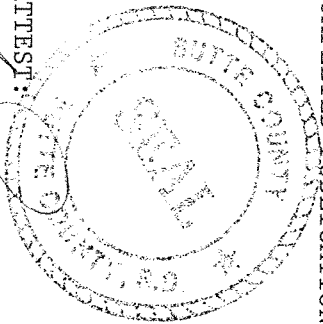
In furtherance of the purposes of this Ordinance, it is the intent of the County to develop and maintain a research date base of information regarding the custom, culture, economy and environment of Butte County.


This ordinance replaces ordinance #94-2 which was effective March 1, 1994.

FIRST READING - 1/3/95
SECOND READING - 2/7/ 95

THIS ORDINANCE WAS ADOPTED BY A MAJORITY VOTE OF THE BUTTE COUNTY COMMISSIONERS FEBRUARY 7, 1995.

THIS ORDINANCE WILL BECOME EFFECTIVE ON THE TWENTIETH DAY AFTER ITS COMPLETED PUBLICATION.




RICHARD REDER
CHAIRMAN, BOARD OF BUTTE COUNTY
COMMISSIONERS

ATTEST:


AUDITOR

Appendix 1

Federal Laws Requiring Coordination with Counties

A. INTRODUCTION

County and local governments in rural America are facing challenges to the viability of their economies and the well-being of their citizens. Western states are especially vulnerable to these challenges because of the presence of large amounts of lands under the ownership and administration of various federal agencies. County governments and their rural constituents are rapidly losing their sovereignty and tax base. Erosion of the tax base results in less money available for schools, roads, and other locally determined and desired services. Two common reasons for county economic hardships resulting from federal programs and actions are: 1) the transfer of exempt organizations, and 2) the loss of industries, jobs, and tax revenues that are dependent on the land and natural resource use. Adverse spin-offs of this basic problem include loss of sovereignty and self-determination, loss of civil rights and private property rights, and diminution of democracy. County governments, however, do have options available to address their needs as provided in the U. S. Constitution and through existing federal and state laws and regulations.

The U. S. Constitution was drafted by 55 delegates from the 13 original states. It was signed on September 17, 1787, by 39 of the delegates, but only after agreement that the Constitution would be amended by a Bill of Rights. The delegates wanting the Bill of Rights feared the Constitution alone did not limit the powers of the federal government to the extent desired. The states later ratified the ten amendments of the Bill of Rights which became December 15, 1791.

Technically, it is a misnomer to call the first ten amendments to the Constitution a Bill of Rights. They were intended to be a declaration of prohibitions against the federal government. "In the minds of the Founders, usurpation and intervention by the federal government in the affairs of the states and people were the most ominous threats to the happiness and welfare of the American society."¹ The Founders also did not want to have the federal government serve as the watchdog over the states' responsibility to protect the rights of their citizens.² Thus, the Founders wrote a Constitution, including a Bill of Rights, that strictly limited the powers of the federal government and allocated many powers to the states and reserved the remaining powers to the American people. The Tenth Amendment clearly articulates these principles.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

¹Skousen, W. Cleon. 1985. *The Making of America*. The Center for Constitutional Studies. P.O. Box 37110, Washington, D.C. 20013.

²ibid.

The sovereign states were to exist from external control except for the powers specifically granted to the federal government in the Constitution. The federal government's role was largely to guarantee that the states could exist as sovereign governments, to maintain armed forces for national defense, and to facilitate the coordination of matters affecting the states, collectively. The powers and the rights vested to the states by the U. S. Constitution guaranteed to them the basic powers and rights of self-determination.

Congress has demonstrated a long history of concern for the protection of custom, culture and economies of those local communities and counties adjacent to or containing federal lands. Federal laws and their implementing agency regulations provide a window of opportunity for county governments.

Although the economic stability of counties is an important consideration in the management of federal lands, neither the Congress, the courts, nor the agencies in charge of federal lands have specifically defined "economic or community stability." These government bodies and land management agencies cannot define "economic or community stability" because there can be no national definition. Community economic stability must be defined on a county level by those who are dependent on the use of land and natural resources for economic survival.

Even though federal laws and regulations are written to give county government the opportunity to influence federal decisions actions, it would serve little purpose to merely attach, as appendices to this document, copies of relevant federal laws and regulations in their entirety. Those documents are readily available, but because of their legalistic and cumbersome nature, they are not now used by county governments for the purpose to which the comprehensive plan is addressed. However, it is imperative for county government to become thoroughly familiar with the content of the laws and regulations in order to take advantage of the opportunities they provide. Thus, the following reviews provides a brief explanation for county government by presenting the essential elements of the most important laws and regulations impacting land and natural resource use in Butte County. Once county government is familiar with the pertinent laws, and the opportunities they offer, it is poised to act as necessary in defense of custom, culture, and economic and community stability.

A. 1 NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

42 U.S.C. 4331 (b)

"[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to ... (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice."

Webster's New Collegiate Dictionary, 277 (1975)

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.

Bouvier's Law Dictionary, 417 (1st ed. 1867).

A custom is a usage or practice of the people, which, by common adoption and acquiescence, and 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.

42 U. S. C. 4332(2)(c)

All federal agencies shall prepare an environmental impact statement (EIS) or an environmental assessment (EA), (i.e. a NEPA document) for "every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment."

42 U. S. C. 4332 (C)(iii)

Such EIS or EA shall include, among other things, alternatives to the proposed action.

42 U.S.C. 4332(C)

Copies of comments by State or local governments must accompany the EIS or EA throughout the review process.

40 C.F.R. 1502.16(c)

Each NEPA document shall include a discussion of possible conflicts between the proposed federal action and local land use plans.

40 C.F.R. 1506.2(b)

Federal agencies shall "cooperate to the fullest extent possible" to reduce duplication with State and local requirements. Cooperation shall include:

- (1) Joint planning
- (2) Joint environmental research
- (3) Joint hearings
- (4) Joint environmental assessments

40 C.F.R. 1506.2(d)

Environmental impact statements must discuss any "inconsistency of a proposed plan with any approved State and local plan and laws (whether or not federally sanctioned)."

Where inconsistencies exist, the EIS should describe the extent to which the agency would reconcile its proposed action to the plan or law.

40 C.F.R. 1508.20(e)

Mitigation includes (a) avoiding the impact altogether, (b) limiting the degree of the impact, (c) repairing, rehabilitating or restoring the affected environment, (d) reducing the impact by preservation opportunities, or (e) compensating for the impact by replacing or providing substitute resources or environments.

Legislative History

Section-by-section Analysis of Section 101 (a) summary Broad National goals are as follows:

- 1). Fulfill the responsibilities of one generation to the next.
 - 2). Each individual should be assured of safe, healthful, and productive surroundings in which to live and work...
 - 3) It is essential that the widest and most efficient use of the environment be made to provide both the necessities and the amenities of life.
 - 4) Preserve ... diversity and a variety of individual choice.
 - 5) Achieve a balance between population and resource use which will permit high standards of living and wide sharing of life's amenities.
 - 6) Enhance the quality of renewable resources.
- S. REP. NO. 91-295, 91st Cong. (emphasis added)

A. 2 COURT CASES UPHOLDING LOCAL LAND USE PLANNING

California Coastal Commission v. Granite Rock Co.,
480 U. S. 572 (1987)

State land use planning is allowed on federal lands as long as such land use planning does not include zoning. Federal agencies cannot claim "Constitutional Supremacy" if the agency can comply with both federal law and the local land use plan.

Wisconsin Public U. S. Intervenor v. Mortier,
111 S. Ct. 2475 (1991)

When considering preemption, the U.S. Supreme Court will not assume that the State's historic powers are superseded by federal law unless that is the clear manifest purpose of Congress.

Douglas County v. Lujan,
810 F. Supp. 1470 (1992)

S local government, because of a concern for its environment, wildlife, socio-economic impacts and tax base, has standing to sue federal agencies and seek relief for violations of NEPA.

A. 3 BUREAU OF LAND MANAGEMENT REGULATIONS

43 C.F.R. 1601.3-1(a)

In addition to public involvement, the BLM is obligated to coordinate³ its planning processes with local government land use plans.

43 C.F.R. 1610.3-1(c)(1)

In providing guidance to BLM personnel, the BLM State Director shall assure such guidance is as "consistent as possible with existing officially adopted and approved resource related plans, policies, or programs of other State agencies, Indian tribes and local governments that may be affected."

43 C.F.R. 1610.3-1(e)

The BLM is obligated to take all practical measures to resolve conflict between federal and local governments land use plans.

43 C.F.R. 1610.3-2(a)

The BLM plan must be consistent with officially approved and adopted local land use plans, as long as such local plans are consistent with federal law and regulations.

43 C.F.R. 1610.3-2(c)

Prior to BLM resource management plan or management framework plan approval, the BLM shall submit a list of known inconsistencies between the BLM plan and local plans to the governor.

43 C.F.R. 1610.3-2(c)

The BLM has no duty to make its plan consistent with a local government plan, if the BLM is not notified by the local government of the existence of its local plan.

A. 4 CLEAN AIR ACT⁴

³Coordinate is defined as "equal, of the same rank, order, degree or importance; not subordinate." Black's Law Dictionary 303 (5th ed. 1979).

⁴Citations for The Clean Water Act, The Clean Air Act, The Soil and Water Resources

42 U.S.C. 7401(a)(3)

"[T]he prevention and control of air pollution at its source is the primary responsibility of State and local governments..."

42 U.S.C. 7401(a)(4)

"Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional and local programs to prevent and control air pollution."

42 U.S.C. 7402(1)

The federal government "shall encourage cooperative activities by the State and local government ..."

42 U.S.C. 7421

Each State "shall provide for a satisfactory process of consultation with general purpose local governments ..."

A. 5 CLEAN WATER ACT

33 U.S.C. 1251(g)

Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. 1252(A)

The Environmental Protection Agency "shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs" for preventing water pollution.

A. 6 ENDANGERED SPECIES ACT

Idaho Farm Bureau Federation et. al. v. Babbitt,

Conservation Act, The Rural Environmental Conservation Act, the Resource Conservation Act, and Presidential Executive Order 12866 entitled Regulatory Planning and Review were provided by Robert G. Boggess, Attorney, 316 Denny Building, P.O. Box 1644, Walla Walla, Washington 99362, (509) 529-0733.

No. 93-0168-E-HLR (Dec. 14, 1993).

The FWS is required to follow all procedural mandates in the ESA when listing a species as threatened or endangered, including (1) listing the species within one year of publication of the notice of proposed listing, otherwise FWS must withdraw the regulation; (2) providing actual notice to local governments prior to listing; (3) providing adequate public review of data used to list the species; and (4) adequately considering and responding to public comments regarding the proposed listing.

16 U.S.C. 1533(b)(5)(A)(ii)

Not less than ninety days before the effective date of the regulation, the FWS is required to give actual notice to local governments of its intent to propose a species for listing or change or propose critical habitat.

50 C.F.R. 423.16(c)(i)(ii)

Once notified, the local government has the opportunity to comment on the proposed species listing or critical habitat designation.

16 U.S.C. 1533(i)

The FWS must directly respond to the "State agency"⁵ comments.

16 U.S.C. 1533(f)(5)

Other federal agencies must also consider local government and public comments regarding the management of threatened or endangered species.

16 U.S.C. 1533(b)(1)(A)

The listing of a species as threatened or endangered by the FWS is to be based on the best scientific and commercial data available.

16 U.S.C. 1533(b)(i)(A)

The FWS shall list species only after taking into account efforts of State or political subdivisions to protect the species.

16 U.S.C. 1533(b)(2)

⁵Under the ESA, a "State agency" is a division, board, or other governmental entity that is responsible for the management and conservation of fish, plant, or wildlife resources within a State. 50 C.F.R. 424.02(1).

Critical habitat designations must take economic impacts into account. Areas may be excluded as critical habitat based upon economic impacts unless the failure to designate the area as critical habitat would result in extinction of the species.

Douglas County v. Lujan,
810 F. Supp. 1470 (1992)

The FWS is required to complete full NEPA documentation when designating critical habitat.

16 U.S.C. 1533(f)(1)

The FWS shall develop and implement recovery plans for the survival of endangered species unless he finds that such a plan will not provide for conservation of the species.

National Wildlife Federation v. Coleman,
529 F. 2d 359 (1976) cert. denied 429 U.S. 979 (1977)

Pursuant to the Endangered Species Act, the FWS is responsible for species listing, the designation of critical habitat and the development of protective regulations and recovery plans. Once a species is listed, federal agencies have the responsibility to consult with the FWS under Section 7 of the ESA. However, once consultation has occurred, the agency is then free to make the final determination. The FWS does not have power over federal agency actions.

54 Fed. 554 (January 6, 1989)

The Sensitive Species Program was created on January 6, 1989 by the FWS and is implemented by all federal agencies. These federal agencies are to give "special consideration: to those plant and animal species that the FWS is considering for listing but lacks the scientific data to list.

A. 7 FOREST and RANGELAND RENEWABLE RESOURCES PLANNING ACT OF 1974

16 U.S.C. 1604(a)

(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.

A. 8 FOREST SERVICE REGULATIONS

36 C. F. R. 221.3(a)(1)

The F.S. is obligated to consider and provide for "community stability"⁶ in its decision making processes. See also S. Rept. No. 105.22; 30 Cong. Rec. 984 (1897); *The Use Book* at 17.

36 C.F.R. 219.7(a)

The F.S. is obligated to coordinate with equivalent and related planning efforts of local governments.

36 C.F.R. 219.7(d)

The F.S. is obligated to meet with local governments, to establish process for coordination. At a minimum, coordination and participation with local governments shall occur prior to F.S. selection of the preferred management alternative.

36 C.F.R. 219.7(d)

The F.S. in its decision making processes is obligated to coordinate⁷ with local governments prior to selection of the preferred management alternative.

⁶"community stability" is defined as a combination of local custom, culture and economic preservation. As described by the Forest Service: History and Objects of Forest Reserves
Forest reserves are for the purpose of preserving a perpetual supply of
timber
for home industries, preventing destruction of the forest cover which
regulates
the floor of streams, and protecting local residents from unfair competition
in the
use of the range...
We know that the welfare of every community is dependent upon a cheap
and
plentiful supply of timber; that a forest cover is the most effective means of
maintaining a regular stream flow for irrigation and other useful purposes,
and
the permanence of the livestock industry depends upon the conservation
use of
the range. Forest Service, United States Department of Agriculture, *The
Use
Book* 13 (1906 ed.).

⁷Coordinate is defined as "equal, or the same rank, order, degree or importance; not

36 C.F.R. 219.7(c)

The F.S. is obligated, after review of the county plan, to display the results of its review in an environmental impact statement. See also 40 C.F.R. 1502.16(c) and 1506.2

36 C.F.R. 219.7(c)(4)

The F.S. is obligated to consider alternatives to its alternative if there are any conflicts with county land use plans.

36 C.F.R. 219.7(f)

The F.S. is required to implement monitoring programs to determine how the agency's land use plans affect communities adjacent to or near the national forest being planned.

A. 9 HISTORIC PRESERVATION ACT REGULATIONS

36 C. F. R. 800.5(e)(1)(i)

If a Federal, State or local action is determined to have an adverse affect on an historic property, the State and Federal Historic Preservation officer shall consult with the head of the local government, if requested by the local government.

A.10 RESOURCE CONSERVATION ACT OF 1981

16 U.S.C. 3411(5)

Congress finds that solutions to "chronic erosion-related problems should be designed to address the local social, economic, environmental, and other conditions unique to the area involved to ensure that the goals and policies of the Federal Government are effectively integrated with the concerns of the local community...."

16 U.S.C. 3432

"[T]he local unit of government is encouraged to seek information from and the cooperation of ...(2) agencies of the Department of Agriculture or other Federal agencies...."

16 U.S.C. 3451

subordinate." Black's Law Dictionary 303(5th ed. 1979).

"It is the purpose of this subtitle to encourage and improve the capability of State and local units of government and local nonprofit organizations in rural areas to plan, develop, and carry out programs for resource conservation and development."

16 U.S.C. 3455

"In carrying out the provisions of this subtitle, the Secretary [of Agriculture] may ... (2) cooperate with other departments and agencies of the Federal Government, State, and local units of government, and with nonprofit organizations in conduction surveys and inventories, disseminating information, and developing area plan"

16 U.S.C. 3456(a)(4)

The Secretary of Agriculture may provide technical and financial assistance only if "the works of improvement provided for in the area plan are consistent with any current comprehensive plan for such area."

A.11 RURAL ENVIRONMENTAL CONSERVATION ACT

16 U.S.C. 1508

"[T]he Secretary [of Agriculture] shall, in addition to appropriate coordination with other interested Federal, State, and local agencies utilize the services of local, county, and State [soil] conservation committees.

A.12 SOIL AND WATER RESOURCES CONSERVATION ACT

16 U.S.C. 2003(b)

"Recognizing that the arrangements under which the Federal Government cooperates ... through conservation districts, with other local units of government and land users, have effectively aided in the protection and improvement of the Nation's basic resources, ... it is declared to be policy of the United States that these arrangements and similiar cooperative arrangements should be utilized to the fullest extent possible...."

A.13 WILD AND SCENIC RIVERS ACT

16 U.S.C. 1271

It is Congressional policy to protect ". . . historic, cultural or other similiar values in free-flowing rivers or segments thereof."

16 U.S.C. 1279(b)

Wild and scenic river designations of federal lands cannot affect valid existing rights.

16 U.S.C. 1282(b)

The Secretary of the Interior, the Secretary of Agriculture, or the head of any other Federal agency, shall assist, advise, and cooperate with States or their political subdivisions . . . to plan, protect, and manage river resources. Such assistance, advice, and cooperation may be through written agreements or otherwise.

16 U.S.C. 1284(b)

Under the Wild and Scenic Rivers Act, any taking by the United States of a water right which is vested under either State or Federal law shall entitle the owner thereof to just compensation.

16 U.S.C. 1276(c)

The study of any river for designation under the Act shall be pursued in as close cooperation with appropriate agencies of the affected State and its political subdivisions as possible. "[and] shall be carried on jointly if request for such joint study is made by the State. . ."

16 U.S.C. 218(e)

The Federal agency charged with the administration of any component of the national wild and scenic rivers system "may enter into written cooperative agreements with . . . the appropriate official of a political subdivision of a State for State or local government participation in the administration of the component."

16 U.S.C. 1283(3)

Wild and scenic river designations cannot affect valid existing leases, permits, contracts or other rights.

16 U.S.C. 1277(c)

The federal government is precluded from condemning or taking private land adjacent to a wild or scenic river so long as the local zoning ordinances protect the value of the land.

A.14 PRESIDENTIAL EXECUTIVE ORDER 12866 - REGULATORY PLANNING AND REVIEW (September 30, 1993)

Introduction

"The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves health, safety, environment, and well being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory policies that respect the role of State, local and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a system today."

Section 1(b)(9)

"Wherever feasible, agencies shall seek views of appropriate State, local and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local and tribal regulatory governmental functions."

Section 5(b)

"State, local tibal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest."

Section 6(a)(1)

"In particular, before issuing a notice of proposed rule making, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those who are expected to be burdened by any regulation (including, specifically, State, local and tribal officials) Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rule making."

A.15 PRESIDENTIAL EXECUTIVE ORDER 12630 - GOVERNMENTAL ACTIONS AND INTERFERENCE WITH CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS (March 15, 1988)

Section 1(a)

"The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. . . . Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutional protected property right, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required."

Section 1(c)

"The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections afforded by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental actions."

Section 3(c)

"The Just Compensation Clause [of the Fifth Amendment] is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated taking or authorized that payment of compensation. Accordingly, governmental actions that may have significant impact on the use of value or private property should be scrutinized to avoid undue or unplanned burdens on the public fisc."

Bibliography