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Via http://www.regulations.gov and FedEx

Neil Kornze, Director
Bureau of Land Management
U.S. Department of the Interior
Attention: 1004-AE39
1849 C Street NW, Room 2134LM
Washington, D.C. 20240

Re: Garfield County, CO Comments on "Proposed Rules, Resource Management Planning," 81 *Federal Register* 9674 (February 25, 2016)

Dear Director Kornze:

We represent the Board of County Commissioners of Garfield County, CO ("County") and file these comments on the Bureau of Land Management ("BLM"), "Proposed Rules, Resource Management Planning," 81 *Fed. Reg.* 9674 (February 25, 2016) ("Planning 2.0") on behalf of the County. The County is also part of the 2.0 Coalition, a coalition of western rural local governments, which is filing separate comments on the proposed rule. The County appreciates the opportunity to comment on the proposed rulemaking and for the extension of the comment period for an additional 30 days. The April 13, 2016 webinar and the participation of Leah Baker at the April 20-21, 2016 Garfield County-sponsored Energy and Environment Symposium were valuable additions to our understanding of this proposed rule and we thank you for those actions.

Garfield County has been a partner with the federal land managers in land use planning and values the opportunity to work side-by-side with BLM and the U.S. Forest Service to shape the use of federal lands and resources in our County. While the County appreciates the BLM's efforts to enhance public participation and modernize the land use planning process to take advantage of new technology, scientific information and understanding of resource issues, as we explain below, the County is concerned with some of the proposed changes.

Summary of Garfield County Comments

BLM's stated rationale for the rule proposal is to make "future land-use planning more collaborative, transparent, and effective . . . The changes will increase opportunities for early engagement by state and local government, Tribes and other stakeholders in BLM's land-use decision-making while adopting a broader landscape-scale, science-based approach to managing public lands and incorporate modern technology into the agency's process." These are laudable

goals but, as proposed, they raise concerns. The County's primary concerns with the rule, which will be addressed below, are the potential of the proposed rule to:

- diminish the role of local governments in federal land use planning;
- limit the role of local governments as cooperating agencies;
- dilute the Federal Land Policy and Management Act ("FLPMA") requirement for "coordination" and "consistency" with local governments;
- alter the direction in FLPMA to consider local impacts in favor of "landscape," national and international concerns;
- negatively impact BLM's already reduced capacity to do work on the ground;
- increase litigation over plan objectives;
- invite bias in data quality in the planning assessment and monitoring phases of planning; and
- encourage the designation of Areas of Critical Environmental Concern ("ACECs") in areas that are not suitable.

In addition, BLM's Economic Analysis and National Environmental Policy Act ("NEPA") environmental review of the rule are inadequate.

The management of public land has been and will always be controversial because these decisions involve people's deeply held values and interests around their quality of life, from a job that supports a family, to a place to fish or ride a mountain bike to a quiet and undisturbed landscape to "get away from it all."[1] A "science-based approach," as described in the proposed Planning 2.0 rule, won't solve the inherent tension between public land use and public land conservation – resolution of these values will take good policy decisions.

The question BLM needs to consider is whether the proposed rule will support good policy in conformity with FLPMA or will the proposed rule tilt the playing board in conflict with FLPMA? That question is particularly acute in this era of heightened conflict over federal management of public lands in the 12 public land states. The higher-profile incidents of the Bundy family scofflaws, the Malheur Refuge takeover and the calls by the Utah legislature for the "return" of federal land are the extreme examples of the concerns that result from federal control of 30%-86% of the public land states. People's lives and livelihoods depend on the management choices BLM makes in public land counties. The land use planning process must be structured in a way that gives appropriate weight to local concerns as well as the national interest.[2] That is not just our opinion, but is the relationship FLPMA requires between BLM and local governments – "coordination," "consideration," "consistency" and "meaningful public involvement of State and local government officials" in "land use programs," "land use regulations" and "land use decisions." 43 U.S.C § 1712(c)(9).

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[1] Congressional Research Service, "Federal Land Ownership: Overview and Data," (December 29, 2014) ("CRS, Federal Land").

[2] *Id.* at 22 ("Other issues of debate include who decides the national-local balance, and how those decisions are made.").

It is useful to reflect back on the purpose of FLPMA's passage in 1976. The enactment of FLPMA was the result of a 5-year congressionally directed study by the Public Land Law Review Commission ("PLLRC") to examine how federal lands were being managed. The Report, *One Third of the Nation's Land* (1970), recommended a sea change – from statutes allowing disposal of federal land to the states and private interests to a law requiring retention of these lands under federal management. FLPMA directed that the retained lands be managed based on "multiple-use"[3] and "sustained-yield"[4] principles "projected through a land use planning process coordinated with other Federal and State planning efforts." 43 U.S.C. § 1701(a)(2). Garfield County believes these important FLPMA principles were put in place by Congress in recognition that federal land retention and management would have a profound impact on public land local economies. *Id.* (a)(13). These principles were intended to assist BLM in balancing conflicting uses and non-uses, local and national interests in a manner that would support public land communities.

There is no doubt that federal land use planning is a difficult task. The Supreme Court put it this way, "'Multiple use management' is a concept that describes the task of achieving a balance among the many competing uses on public lands, 'including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.'" *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004) ("*SUWA*"). We believe that FLPMA's direction to coordinate with state and local governments makes sense from a practical and not just a legal point of view – we can help. This rulemaking should be the opportunity to strengthen the relationship between BLM and local governments in land use planning and to learn from 10 years of implementation of BLM's "cooperating agency" rule to provide clear direction about the essential role of local governments in the planning process. Garfield County is troubled that the proposed rule appears to weaken rather than strengthen the role of local governments in public land use planning.

Garfield County's Quality of Life and Economy Depend on Federal Land Management that is Consistent with Local Plans

Garfield County, CO is located in western Colorado about 150 miles west of Denver and 330 miles south of Salt Lake City, UT. Garfield County is one of the largest counties in

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[3] "The term 'multiple use' means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output." 43 U.S.C. § 1701(a)(1).

[4] "The term 'sustained yield' means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." 43 U.S.C. § 1701(a)(7).

Colorado at over 3,000 square miles/1,893,120 acres and has 56,000 residents. The western portion of the County is a high desert plateau and sparsely populated while the eastern portion of the County is in the Rocky Mountain foothills and contains the majority of the population. The federal government manages 60% of the County: BLM – 615,973 acres; U.S. Forest Service – 515,865 acres; and Bureau of Reclamation – 2,335 acres.

Garfield County and its neighboring counties, Rio Blanco, Mesa, and Pitkin, form an integrated economic region. Mesa, Rio Blanco and Garfield counties share a common reliance on natural resource extraction (coal and oil and gas), ranching and tourism. Pitkin County, home to the internationally renowned Aspen and Snowmass Village ski resorts, is focused on a recreation economy. Garfield County has six municipalities – Glenwood Springs, Rifle, Carbondale, Silt, Parachute and the unincorporated municipality of Battlement Mesa, and New Castle. Each of these communities and counties relies on the management of federal lands and resources for their economic well-being.

The foundation of the Garfield County economy rests, as it has for over 100 years, on natural resource development, tourism and agriculture. Tourism to area hot springs, skiing at Sunlight Mountain Ski area near Glenwood Springs, rafting on the Colorado River, biking, hunting, fishing and hiking on public lands, second/retirement homes and the associated retail activity are important contributors to the County's economy. Agriculture and ranching with their working landscapes contribute to the economy and culture of the County. However, the financial backbone of the County's economy is oil and gas.

Garfield County is the leading producer of natural gas in Colorado with over 10,000 producing wells. The County also contains significant, untapped oil shale resources. With the advent of horizontal drilling and modern hydraulic fracturing technology the County saw a natural gas boom in 2002-2009. Increased supplies and low natural gas prices have slowed the boom, but oil and natural gas production continues to be a major economic contributor to the County and state. In 2014, the County produced 1.57 million barrels of oil and 512 billion cubic feet of natural gas, a significant share of the statewide totals. The County's top taxpayers in 2014 were oil and gas companies; 72.9 percent of total County property tax assessed values were accounted for by the oil and gas industry. These revenues play an important role in the services we offer our citizens. For example, the Colorado River Fire Rescue is a regional fire authority that serves 780 square miles of the County with 47 FT/27 PT employees. In 2014, 77.5% of the revenue for this fire authority came from oil and gas development.

Garfield County Active Partner in BLM Land Management but BLM Needs to do More

Over the years, Garfield County has participated in planning, oil and gas leasing and project-specific NEPA efforts of the BLM and in many cases served as a NEPA cooperating agency. For example, the County served as a cooperating agency in the "Book Cliffs Plan Amendment," the "Previously Issued 65 Leases Environmental Impact Statement (EIS)," the "Roan Plateau Resource Supplemental EIS," the "NW Colorado Greater Sage-Grouse FEIS and Plan Amendments" and, most recently, provided comments on the November 2016 BLM lease sale which includes leases in Garfield and Mesa County. The County and constituent

municipalities are important partners in these federal planning efforts. During planning the County relies on the relationship that FLPMA directs for "coordination," "consistency" and "meaningful public involvement of State and local government officials" in "land use programs" and "land use decisions" to provide thoughtful input to BLM. 43 U.S.C. § 1712(c)(9).

Garfield County has worked hard to improve its capacity to provide meaningful comments to BLM in its decision-making. For example, in their comments and role as a cooperating agency in the "Previously Issued 65 Leases EIS" in 2015, Garfield County carefully balanced the role of recreation and oil and gas in the County by supporting efforts to protect the Thompson Divide, but encouraging recognition of the private property interests of the lessees in that area and the continuation of development on the balance of the 65 leases.

In 2013 and 2014, at significant cost, the County prepared a Greater Sage-grouse Conservation Plan for the County. The purpose of the Plan was to "provide private and public land owners with land management principles, policies, incentives, and establish management practices based on the best available science that are tailored to fit Garfield County's unique landscape and habitat characteristics for the species." The Plan provided for adaptive management, was based on detailed habitat modeling and supported federal laws and policies for the protection of the species. This conservation plan is a formally adopted component of the Garfield County Land Use Plan. In 2013, relying on this plan, we provided comments on the BLM, Draft "NW Colorado Greater Sage-grouse EIS and Resource Management Plan" ("NW-CO GSG RMP") and the revised FEIS. Unfortunately, BLM did not live up to the FLPMA direction to make land use plans "consistent with State and local plans to the maximum extent" consistent with Federal law. 43 U.S.C. § 1712(c)(9). Despite the County's best efforts, including participation as a cooperating agency under an MOU with BLM and hosting four formal coordination meetings with the BLM and other federal and state agencies, there remain significant inconsistencies between the NW-CO GSG RMP and the County plan that BLM did little to reconcile. The BLM's NW-CO GSG RMP ignored the County plan and applied a generic plan amendment developed in Washington, D.C. ill-suited to the topographic reality of sage-grouse habitat in Garfield County. BLM did not even consider the County plan as an alternative in the NEPA process and failed to give it the "hard look" required by NEPA, particularly for a cooperating agency proposal. The County had hoped to see in Planning 2.0 that BLM has learned from these and similar experiences and would provide stronger direction in the proposed planning rule to reinforce the FLPMA directive for real "coordination" with local governments to achieve "consistency" between local and federal planning. That BLM has not done so is Garfield County's most significant concern with Planning 2.0.

Section-by-Section Comments

Section 1601.0-2 Objective. This provision would modify the current rule in several positive ways by removing unnecessary text and referencing the actual language in FLPMA. The County is concerned with the proposed change to add some, but not all of FLPMA's declaration of policy. 43 U.S.C. § 1701. The proposed rule would add paragraphs (8) and part of (12), but no other text from this statutory provision. 81 *Fed. Reg.* 9683-84. First, we strongly suggest adding language from paragraph (2) to emphasize the role of coordination "with other

Federal and State planning efforts." This would serve to highlight the importance of coordination with state and local governments in FLPMA's provisions for planning.

We also suggest that the reference to paragraph (12) include the FLPMA reference to the Mining and Mineral Policy Act of 1970, 30 U.S. § 21(a) ("MMPA") which directs the Departments of Interior and Agriculture to "foster and encourage private enterprise" in the development of an "economically sound and stable domestic minerals industry" and "the orderly and economic development of domestic minerals." If Congress in 1976 felt the direction in the MMPA was important enough to include in FLPMA as an implementation requirement, the BLM should likewise include that language in the rule. The BLM also proposes to remove current rule language to "maximize resource values for the public" because it is "vague." 81 *Fed. Reg.* 9683. The current language is not vague, as claimed by BLM, merely out of favor. We think such a change will signal to the BLM and any reviewing court that there should be a greater emphasis on conservation than on utilization of resources. The language should be retained because it better reflects FLPMA's multiple use and sustained yield principles. *See* notes 3 and 4.

Similarly, BLM might consider if the phrase "promote the principles of multiple use and sustained yield management" is an accurate statement of the governing statute given the mandatory direction in FLPMA Section 302, "The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed . . ." 43 U.S.C. § 1732(a). FLPMA does not direct "promotion" of these principles, but rather compliance with a mandatory directive – "shall" manage the public lands under principles of multiple use and sustained yield. These principles are fundamental to protecting the interests of the County in federal land management planning and should be emphasized in the rule.

Section 1601.0-4 Responsibilities. The proposed rule changes to the current rule are an example of where the planning balance can be tipped too far from local interests to national interests. The decision on the "planning area" and on the BLM deciding official would move from a Field and State Office focus to the BLM Director in Washington, D.C. These changes from a planning area and deciding official with which the County has a decades-long familiarity to a planning area based on a "landscape" focus and deciding official designated out of Washington, D.C. are a concern. First, the proposal does not provide the criteria that would be used by the Director to exercise his discretion to establish a planning area. While the County appreciates the more detailed discussion provided at the April 13th webinar on how the process to select a planning landscape based on "management concerns" will work, it is a concern that neither the proposed rule nor preamble provides this important context. The BLM should provide the landscape designation criteria or describe the method to develop the criteria for designating the planning area in the rule and not just in the unenforceable Planning Handbook.

Second, delineating a planning area by "management concerns" across a landscape, as described in the April 13th presentation, is not that helpful and the County remains puzzled on how multiple "management concern" landscapes would "nest" in one planning area. This concept needs more detailed analysis. We also are worried that these "management concerns"

will be national concerns and fail to address local concerns. FLPMA directs that local government "coordination" be conducted in the context of where "the lands are located." 43 U.S.C. § 1712(c)(9). Furthermore, although BLM claims that landscapes can be of any size, the BLM, "Preliminary Determination: Economic and Threshold Analysis for Planning 2.0 Proposed Rule" ("Economic Analysis 2.0"), indicates that the planning landscapes will be "broader." "The BLM envisions a shift towards a broader geographic extent of planning areas, and this change would allow for fewer plans." Economic Analysis 2.0 at 7. Landscape planning has the strong potential to dilute the voice of any one county in favor of national voices. The BLM Economic Analysis confirms our concern that this change could shift the balance to "individuals and groups that are concerned about issues at a regional or national scale." *Id.* Further, BLM admits this change would be "a burden to some individuals or groups if the implementation results in public involvement opportunities being held further from their location . . ." *Id.*

This provision also would put the authority with the BLM Director to decide who is responsible for managing the planning effort. This can remove decision-making from the local level (Field Office and State Office) to the national level where the decision-maker is further from the land and the people more acutely dependent on the BLM's management decisions. This is a concern for local governments who know and work with local BLM officials on a day-to-day basis. During the March 25, 2016 BLM public meeting, BLM indicated that the intent was to do planning at the district level and that in most cases the State Director would continue to perform the traditional supervisory role over planning in the state, unless the planning area crossed a state border. At the April 13th webinar, the BLM explained that its "delegation of authority manual" designates the State Director as the deciding official for activity plans and the Field Office manager for site-specific actions. This manual reference is not widely known and it would better inform and reassure the public if this "delegation" direction for plan decision-making was made clear in the final rule or preamble. If existing delegation direction at the local and state level is to govern, the final rule should so state. As written, the proposed rule is open to the possibility that key planning decisions will be made by the BLM Washington Office, where the voices of the national NGOs arguing for national interests over local are the loudest and those of the local government the weakest. *See also* comments on Section 1610.1(b).

Section 1601.0-5 Definitions.[5] The County is concerned with the retention of certain language in the *cooperating agency* definition that has been used in the past to exclude counties as cooperating agencies in the NEPA process for plans. The terms "as feasible and appropriate" and "given the scope of their expertise" were used by some Field Offices to make it difficult for local governments to play their NEPA-directed role in planning by arguing that the county lacked any "special expertise," and was therefore not an "appropriate" cooperating agency. The

[5] BLM proposes to change the use of "shall" to "will" in several definitions and in other proposed revisions. BLM should carefully consider these changes in light of what it intends to make mandatory. The "Federal Register Documents Drafting Handbook" (Section 3) and the guidance to the "Federal Plain Writing Act of 2010" ("Federal Plain Language Guidelines") direct that "must" is the only word to be used to impose a legal obligation and "must not" are the only words to use to say an act is prohibited. The use of "will" does not convey a mandatory requirement. It is, therefore, not clear if BLM in this rule proposal is intending to change mandatory requirements to discretionary actions. BLM should clarify these proposed changes from "shall" to "will."

BLM's 2005 planning rule was directed at improving local government involvement in planning through the NEPA process. 70 *Fed. Reg.* 14561, 14562, 14564 (March 23, 2005). BLM should consider making a clear distinction between federal agencies as cooperating agencies – jurisdiction and or special expertise are required– and state and local governments. It should be assumed that a state or local government in the planning area have something to offer BLM and should always be invited to cooperate. Such participation is consistent with the direction in NEPA and FLPMA for the inclusion of local governments in land use planning. BLM should use this planning rule to reinforce the role of the cooperating agencies.

The County questions the definition of *"high quality information."* This is a new term that we understand from the March 25th public meeting is derived from the Data Quality Act, 44 U.S.C. §§ 3504(d)(1) and 3516. Why not reference that originating statute in the preamble, rule and Handbook so that the body of law that interprets that Act can be applied in this context? The definition refers to "any representation of knowledge such as facts or data, including best available science." 81 *Fed. Reg.* 9686. This is vague and could lead to poor information and decision making. Although the rule emphasizes avoidance of bias in favor of accuracy and reliability, adding other sources of information in addition to "best available science" is a red flag. In this era of dueling scientists and "citizen science" we are concerned that the definition does not adequately protect the quality of the data that BLM will consider. We also question BLM's capacity to "police" these requirements, in light of the many competing demands the Bureau faces.

The BLM has added *"mitigation"* to the definition section and defined it as "the sequence of avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts." The preamble explains that "mitigation standards" will be developed in plans to guide minimization and compensation for impacts. 81 *Fed. Reg.* 9686. Required mitigation is not the land management standard in FLPMA which rather provides, "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the land."[6] The cited FLPMA provision assumes "due degradation" is lawful, BLM in the mining regulations and courts interpreting this FLPMA requirement have so found.[7] Neither are mitigation nor implementation plans required for an EIS under NEPA.[8] BLM cites no statute in support of their proposed addition to FLPMA regulations, but rather an Interior Department Manual. 81 *Fed. Reg.* 9686. We understand that this mitigation provision reflects policies of Secretary Jewell and President Obama, but *regulations* need to conform to *statutory law* enacted by Congress. This proposed addition does not conform to FLPMA.

BLM proposes a new definition of *"officially approved and adopted land use plans."* BLM is removing the broader language of "policies, programs, and processes" and "resource

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[6] 43 U.S.C. § 1732(b). The definition is also different than the definition of "mitigation" in the BLM mining regulations. 43 C.F.R. § 3809.9.

[7] 43 C.F.R. § 3809.9. *See also*, Solicitor, M-37007, "Surface Management Provisions for Hardrock Mining," (October 23, 2001); *Biodiversity Conservation Alliance v. Bureau of Land Management,* 2010 WL 3209444 (D. Wyo. 2010) (oil and gas context).

[8] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (agencies are not constrained by NEPA from deciding that other values outweigh environmental costs).

related plans" in favor of a more narrow term "land use plans." The County objects to this change as it limits the FLPMA coordination and consistency responsibilities of BLM. The FLPMA "coordination," "consideration," "advice" and "consistency" provisions are broadly written and not limited to "officially approved and adopted land use plans." 43 U.S.C. § 1712(c)(9). FLPMA requires coordination with "the land use planning and management programs of States and local governments" and "policies of approved State and tribal" land management programs, directs "consideration [to be] given to State, local and tribal plans that are germane in the development of land use plans," invites "advice" on the "development and revision of land use plans, land use guidelines, land use rules and land use regulations for the public lands within such State," and requires plans to "be consistent with State and local plans to the maximum extent [BLM] finds consistent with Federal law and the purposes of their Act." *Id.* BLM is frank to admit that with this change, "There would be no regulatory requirements for consistency with the 'policies, programs, and processes' of other Federal agencies, state and local governments, and Indian tribes." 81 *Fed. Reg.* 9686. This violates FLPMA's planning requirements. And, not all agencies prepare "land use plans." The wildlife agencies of public land states do not conduct land use planning but do develop wildlife habitat and management "policies" and "programs" that are relied on by BLM for land use planning. State environmental agencies do not conduct land use planning, but their environmental "policies, programs, and processes" are ones with which BLM decisions must be consistent. Counties typically do have land use plans, but they also enact ordinances and pass resolutions that BLM should consider. Other federal agencies likewise have important "policies, programs, and processes" with which BLM should be consistent but are not land use plans. For example, the Federal Energy Regulatory Commission ("FERC") has the authority under the Federal Power Act § 24 to withdraw and reserve BLM public lands for power purposes upon an applicant's application. Although this FERC withdrawal authority is not a land use plan, it is an important planning consideration for BLM. This definitional change would narrow the coordination and consistency requirements and should not be made.

Finally, BLM's removal of the definition "*consistent*" (81 *Fed. Reg.* 9685) raises a similar concern. BLM claims this word is "commonly used terminology" and does not need a regulatory definition. Garfield County would suggest that in the context of land use planning, there is confusion in the BLM and with the public over the meaning of "consistency" with state and local plans. BLM should use the rule to clarify the consistency concept, not narrow its application and remove it from the definition section. The existing rule, 43 C.F.R. § 1601.05(c), provides good direction to BLM and the public on what is meant by the FLPMA consistency provision and should be retained.

Proposed Section 1601.0-4 changes to existing 43 C.F.R. § 1610.1(b) to remove default planning area. This provision (proposed Section 1601-04) would remove the Field Office as the "default" planning area to move to a "landscape level" plan. *See also* comments on Section 1601.0-4. While the County recognizes there are legitimate landscape concerns that planning should address, like wildfire, exotic plant species, and wildlife migration corridors, there is a concern that local interests, resources, and voices could be diluted by the landscape approach. The County saw this firsthand in BLM's implementation of the NW Colorado Greater Sage-grouse Plan Amendment, a frequently cited example of BLM "landscape" planning, where the

County's unique sage-grouse habitat was lumped in with dissimilar habitat under a "landscape approach." The County's research and data were ignored and a "uniform" standard written in Washington, D.C. was applied.

The Field Office-focused planning area makes sense as an area that BLM and the County can understand and plan for. This proposed switch to an ever-changing landscape focus raises a number of questions. Is a "landscape" consistent with the FLPMA-defined area for planning, "tracts or areas for the use of public lands?" 43 U.S.C. § 1712(a). FLPMA's direction is that these "areas [are] large enough" to "provide for periodic adjustments." 43 U.S.C. § 1701(a)(1). When FLPMA talks about "coordination" it focuses on an area where the "lands are located." 43 U.S.C. § 1712(c)(9). That FLPMA language seems to imply a more focused area than a "landscape" of millions of acres like the sage-grouse RMPs (67 million acres) or the Desert Renewable Energy Conservation Plan ("DRECP") (22.5 million acres). *See also* comments on Section 1601.0-4.

Furthermore, moving to a "landscape" analysis could dilute the importance to a local area of a particular public land use by considering it within this larger context. "Determining the appropriate size and configuration of an area [in planning] can be the critical factor in assessing the consequences of an action."[9] The impact on a county of a planning decision, for example, to put in place an oil and gas leasing moratorium for a planning process in the county, might be significant to Garfield County, but at a larger scale the impact could be portrayed as less significant because there are alternative supplies of oil and gas from other areas. We think this is inconsistent with FLPMA's repeated focus on local concerns and the impact of planning decisions on those concerns. *See infra* at 17.

Finally, moving from the Field Office to a larger scale would require more travel costs and could diminish the ability of local governments and the area citizens to participate. For example, larger scale BLM planning efforts like the DRECP in California present complications and an overwhelming level of complexity and material (22 million acres and an 8,000-page DEIS) that make meaningful local government involvement almost impossible. Indeed, in the DRECP example, even though local governments were part of the planning process (covering BLM, state and private lands), at the end of the FEIS, the local governments pulled out and asked for more time to consider the DRECP planning decisions.[10] BLM recognizes that the proposed change would create new burdens. *See, e.g.*, Economic Analysis 2.0 at 7 ("it may be a burden to some individuals or groups if the implementation results in public involvement opportunities being held further from their location . . ."). There are NEPA, planning and management tools that BLM could use to consider landscape issues across several Field Offices or District Offices other than proposing planning landscapes at a scale that makes it difficult for local governments to meaningfully play the role assigned to them by FLPMA.

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[9] Coggins, *Public Natural* Resources *Law,* § 30:3 at 30-12 *citing Sierra Club v. Clark*, 756 2d 686, 689 (9th Cir. 1985).

[10] The counties, like San Bernardino County, were concerned that the DRECP FEIS would dedicate the majority of county developable land to either conservation or renewable energy and called a halt to their participation in the DRECP until the county completed further consideration of the DRECP.

Section 1601.0-8 Principles. The proposed change to this section of the current rule (81 *Fed. Reg.* 9688) is another example where Garfield County believes the role of local interests is diminished. The proposal removes the language directing consideration in planning decisions of the impacts "on local economies" and instead will consider the impacts of plans on "resource, environmental, ecological, social and economic conditions at appropriate scales . . ." BLM admits that this will allow a "broader" consideration of more "conditions" at appropriate scales, rather than just the impacts on "local economies." 81 *Fed. Reg.* 9688. As pointed out in the Economic Analysis 2.0 at 7, "the proposed rule would allow information to be considered that might not have been considered under the current rule . . . it is possible that considering these impacts could lead to different planning and implementation decisions than would planning under the current planning rule." The Economic Analysis identifies those who can be impacted by BLM's new analysis "scale" as "mineral, energy, recreation and grazing industries," conservationists, recreationists and "those who live or work near the public lands." *Id.* Garfield County suspects that is the point of the proposed change – to reduce consideration of local impacts in favor of the "bigger picture" – and we believe it will have a negative impact on counties like ours. This proposed change is inconsistent with the repeated emphasis in FLPMA that local interests need to be considered during planning.[11] It should not be made.

Sections 1610.1-2 Plan Components and 1610.1-3 Implementation Strategies. These two provisions describe one of the most significant changes to the planning process. The sections provide for a distinction between "plan components," planning level management direction, and plan "implementation measures," how BLM would implement the plan. The first includes decisions that can only be changed through a Plan amendment and, the second, directions that can be changed by BLM after 30-days' notice. The stated purpose behind these changes is to allow the BLM greater flexibility in modifying (adaptive management) how they approach meeting the plan goals and objectives (plan components) during implementation. Garfield County supports a more flexible approach to making modifications to how a plan is implemented so long as the process is transparent and the FLPMA coordination role for local governments if respected. This is not the case with the proposed change which provides no role for local government to provide input on BLM's implementation strategies.

We support BLM's statement in response to questions at the March 25th public hearing that oil and gas stipulations would be considered a "plan component," not an "implementation measure" subject to change after notice. It is important for federal oil and gas lessees to know at the leasing stage what the legally binding constraints are that apply to a lease. We disagree with those who argue that lease stipulations can be changed unilaterally by BLM during implementation. Garfield County believes that would conflict with the Mineral Leasing Act regulations, violate contract law and undercut leasing of federal minerals.

The County, however, is concerned with two things. First, BLM has not provided for local government coordination on implementation strategies. We would argue that FLPMA's coordination directive including "management activities" would require local government

[11] *See also* note 5 regarding proposed change from "shall" to "will." In this case, the proposed rule change would not make "public involvement" and consistency with FLPMA principles a legal obligation. This would violate FLPMA's intent.

coordination on implementation strategies. There is no opportunity for local government "coordination" in the proposed rule, only an informal public "review." BLM should revise this proposed rule. Second, the proposed 30-day "review" period when BLM will entertain comments on changes to implementation measures, but will not respond to the comments or apparently disclose who has made comments. As grounds for that approach, BLM states that when an implementation measure is applied to a specific BLM action or third-party proposal it will be subject to site-specific NEPA and comment at that time. That makes no sense. At the time of site-specific NEPA, the public would be commenting on a specific proposed action and not the implementation strategy. And, it could be difficult to convince BLM to change its mind on the proposed implementation measures after it has long since received and responded to comments. Finally, it does not seem consistent with BLM's focus on transparency and good government that BLM will entertain comments "behind closed doors" without the opportunity for those with a different perspective or information to provide a counterpoint comment to BLM. The rule should provide for greater comment transparency by publishing comments as received.

Another troubling component is the new requirement that plan objectives "would be specific and measurable and have established time frames for achievement." 81 *Fed. Reg.* 9690. Given that BLM does not know if it will have the budget to timely meet these plan objectives at the time a plan is prepared, the County is concerned that this unnecessarily opens the door to litigation against the agency for failure to meet a plan objective deadline. In *SUWA* at 69-71, in which the Supreme Court rejected a challenge based on BLM's failure to act consistent with a land use plan, the Court made clear that a land use plan:

> is not ordinarily the medium for affirmative decisions that implement the agency's 'project[ions].' . . . Quite unlike a specific statutory command requiring an agency to promulgate regulations by a certain date, a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them. It would be unreasonable to think that either Congress or the agency intended otherwise, since land use plans nationwide would commit the agency to actions far in the future, for which funds have not yet been appropriated.

The Court went on to distinguish that "usual" situation from where the "*language in the plan itself creates a commitment binding on the agency*," (emphasis added) and warned "a judicial decree compelling immediate preparation of all the detailed plans called for in the San Rafael plan would divert BLM's energies from other projects throughout the country that are, in fact, more pressing." *Id.* at 71. We are concerned that BLM's proposal to add binding timeframes for Plan objectives could lead to more litigation and compel agency actions not otherwise required. The BLM should reconsider this proposed change in light of *SUWA*.

BLM also proposes to develop a list of planning designations (in the Handbook) to "highlight and prioritize unique or special areas" and contrasts those designations with "resource use determinations" where "specific uses are excluded, restricted, or allowed in order to achieve the goals and objectives." 81 *Fed. Reg.* 9691. We question BLM's ability to forecast into the future concerning uses that may be dominant today, but obsolete tomorrow or uses that become

possible that were not known at the time of planning (*e.g.*, the technological breakthroughs for shale oil and gas or solar energy in the last decade). This zoning approach would be a change to the way BLM has managed public land in the past and reflects more recent planning efforts like the Western Solar Plan's designations of Solar Energy Zones, the DRECP, and several oil and gas related plans in Utah and Wyoming. In that approach, BLM decides where development occurs rather than allowing user groups to inform the agency of where the interest lies through lease nominations, renewable energy right-of-way applications or increased or new recreational activity in an area.

BLM simply does not have the expertise to forecast into the future about how new technology will increase or decrease interest in energy development on public lands. New interest in development in an area or new forms of recreation can be driven by economics, technology or policy initiatives that can arise unpredicted in the future. Even in the case of the recently completed Western Solar Plan (2012), BLM in the DRECP (2015) reduced the federal land it had made available for solar development over the objections of the solar industry and failed to provide adequate lands for wind development to the concern of that industry. Indeed, in a landscape plan intended to provide for renewable energy development on 10 million acres of federal land, the vast majority of the lands in the DRECP will be designated for conservation and recreation, leaving only 3.8% of those federal lands for renewable energy development. We are concerned that such "zoning," if it is not well-coordinated with the interests of the local governments and area residents, could zone out the economic foundation of our communities, as appears to be the case in the DRECP.[12]

Sections 1610.2, 1610.2-1, 1610.4 and 1610.5-1 through 1610.5-3 Public Involvement.

These several provisions address significant changes to the public involvement process and some more minor changes to notice provisions. We think it is appropriate that BLM provide more information electronically. 81 *Fed. Reg.* 9694. We have already raised our concern about any diminishment in the coordination responsibility with the proposed 30-day "review" period proposal, the lack of transparency about who is contacting BLM and what information is being provided. *See* comment on Sections 1610.1-2 and 1610.1-3.

While Garfield County supports greater public involvement in the planning process and, in particular, respect for the unique role of local governments in planning and as cooperating agencies, we are concerned about BLM's capacity to engage in the vastly increased comment processes (and review opportunities) called for in the proposal. Reviewing and responding to comments is costly and time-consuming. In this era of static or shrinking budgets, how will BLM implement this vastly increased public involvement requirement in the proposal? *See, e.g.*, Economic Analysis 2.0 at 9 ("This could increase the total cost of the planning process to the BLM . . . Any additional costs due to increased public involvement should be at least partially offset by reduced costs at other steps in [the] planning process."). We think that latter statement falls under the category of "wishful thinking," without analysis or data to support its optimism. Public involvement, "appropriate to the areas and people involved," is required (1) in the preparation of the planning assessment (during the data gathering phase and on the report

[12] *See* note 10.

documenting the planning assessment); (2) in identifying planning issues, the preliminary statement of purpose and need; (3) in formulating the preliminary alternatives and the rationale for those alternatives available for review prior to the Draft EIS; (4) in making available the preliminary procedures, assumptions, and indicators that will be used to estimate the effects of implementing the alternatives prior to the Draft RMP/DEIS; (5) on the Draft RMP/DEIS; (6) in the protest period; (7) in the monitoring and evaluation phases; and (8) during plan maintenance. 81 *Fed. Reg.* 9694-95.

BLM argues that these proposed changes will result in a more efficient planning process by airing and resolving issues earlier in the planning process. This optimistic result seems unlikely to the County when each of these comment periods will, in all likelihood, result in passionately held, differing viewpoints backed by dueling data and science. We don't think multiple comment periods make sense from a practical point of view; it is not only more work for the BLM, but it makes our participation as a local government much more difficult and expensive. It is already difficult for counties to participate as a cooperating agency or even find time to prepare adequate comments due to the time, budget and staff constraints at the local level. While counties are constrained by budgets rightly focused on the day-to-day responsibilities of a county, local, national, and even international NGOs have the focus, members and budgets to more easily participate in multiple comment periods. For those reasons, the County is concerned that these multiple public involvement opportunities could backfire and result in less input from the very local governments that FLPMA requires being included in the process. BLM recognizes this potential: "Individuals or groups who choose to participate in these opportunities may face time or other costs associated with their involvement." Economic Analysis 2.0 at 10 and 11. If BLM thinks an interim step between scoping and the draft EIS would better inform the process, and we tend to agree, BLM should provide for a single new step to address these several issues, not the proposed multiple comment periods before the draft plan. Such a comment process would be more efficient and cost-effective for BLM, local governments and the public. This change to a single new interim step would allow BLM to more effectively coordinate with local governments and do the work necessary to achieve consistency as required by FLPMA.

In response to BLM's specific request for comments on several provisions (81 *Fed. Reg.* 9696-99) we provide the following. You ask about the use of this multi-step procedure in plan amendments, we would support the BLM's position that it not apply to plan amendments. 81 *Fed. Reg.* 9696, 9710, 9712. We do not think a notice of intent is required for a plan amendment EA since the amendment proposed would have "no significant impact." 81 *Fed. Reg.* 9698, 9705. We strongly oppose BLM's suggested reduction in the comment period on the Draft RMP and DEIS. 81 *Fed. Reg.* 9699. We disagree that, as a result of new public involvement opportunities, the period to review and comment on an RMP, which is now proposed to cover a broader, landscape area, can be accomplished in 60 days. At the county level, we do not have the staff to work that rapidly to review and comment on documents that will be 100's if not 1,000's of pages in length. This proposed truncated comment period is unrealistic and inconsistent with the long-term and significant role a land use plan plays in directing BLM's work in a particular area. We would suggest no change in the length of the 90-day comment period on the Draft RMP.

In addition, we reiterate our concerns regarding Section 1601.0-5 about the quality and type of data to be considered in the planning assessment, particularly as provided by the public. The broadening of "best available scientific information" to "high quality data" (81 *Fed. Reg.* 9707) raises concerns – this is a new term to the public and we are concerned that it could open the door to unreliable information. A good example of the potential for unreliable data to enter the planning process is BLM's proposal to determine "relevant public views concerning resource, environmental, ecological, social or economic conditions of the planning area." 81 *Fed. Reg.* 9706. BLM proposes to gather this information at public hearings to help BLM "to better understand public values in relation to the planning area." This process seems highly subjective and open to manipulation. BLM is not qualified to assess "public values" at a public hearing – that is not a scientific process that results in "high quality data." For one thing, the bureau can't be certain that the self-selected group that shows up at the hearing truly represents the area's "public values." We suggest it is more appropriate, and in accord with FLPMA's direction, that BLM look to local governments for that type of information. Local government officials collect data through widely accepted demographic methods and represent the voters who elected them. Local government officials interact with residents on a more frequent basis and on a greater variety of issues than does BLM and, furthermore, are held accountable at the ballot box for taking into account "public values."

BLM asks for specific comments on the "types" of information and the "factors" to be considered in assessing the condition of the planning area. 81 *Fed. Reg.* 9707-08. These are our concerns with the proposed rule. First, we are concerned with the failure of the proposed rule to emphasize the importance of early coordination with states and local governments. Coordination should occur at the start of the planning process and throughout each stage of planning from inventory, plan assessment, planning issues, plan components, implementation strategies, plan alternatives, the Draft and plan implementation. As proposed, coordination and working towards consistency with state and local governments is not specifically called out, rather local governments are treated like the general public. This does not comply with FLPMA's requirements. 43 U.S.C. § 1712(c)(9).

Second, the change to existing sub-paragraph 1610.4-4(d) from "estimated sustained levels of the various goods, services and uses that may be attained" to the proposed sub-paragraph (c)(7) "various goods and services that people obtain from the planning area, including ecological services" is troubling. 81 *Fed. Reg.* 9708. We object to the elimination of the concept of "sustainability" from this sub-paragraph; sustainability is a fundamental FLPMA planning principle. BLM asserts in the preamble to this change that it has the authority to add "ecosystem services" to the "principal or major uses" described in FLPMA § 103(l). "Ecosystem services" is not a term in FLPMA and it is certainly not identified as a "major use." Moreover, FLPMA is clear that these "major" uses are limited to those described in the definition. 43 U.S.C. 1702(l). This change should not be made as it is in violation of FLPMA. BLM's suggested changes would also remove the existing language requiring BLM's consideration of the "degree of local dependence on resources from public land" and instead require BLM to consider "the degree of local, regional, national, or international dependence on goods and services." 81 *Fed. Reg.* 9709. Garfield County strongly objects to this proposed change. By expanding the area of analysis from the local area to the nation or the world an

impact that looms large in Silt, Colorado would seem a fly-speck in a global context. *See supra* note 9. Each of these changes would have the effect of diluting consideration of the impact of public land management decisions on public-land dependent communities. We think such changes are inconsistent with FLPMA.

Finally, BLM proposes to remove an assessment factor now considered, "specific requirements and constraints to achieve consistency with policies, plans and programs of other Federal agencies, State and local government agencies and Indian tribes." 81 *Fed. Reg.* 9709. BLM says it would not have enough information at this "early stage" of the process, but would consider this at the draft RMP stage. We don't think this statement is correct. County land use plans are no more available at the draft RMP stage than they are at the assessment stage. Moreover, FLPMA directs BLM to "keep apprised" of these plans on an on-going basis. 43 U.S.C. § 1712(c)(9). Our concern is that BLM, having not collected even initial data at the planning assessment stage, would be unlikely to consider it at the later draft RMP stage. BLM should reconsider this change and review these local government "policies, plans and programs" at an early stage to support FLPMA's coordination and consistency requirements.

Section 1610.5-4 Selection of Preferred Alternatives. BLM also proposes multiple preferred alternatives rather than a single preferred alternative and requests comments on this proposal. 81 *Fed. Reg.* 9712-13. This proposal seems nonsensical and not helpful to local governments or the public. How can there be more than one agency *preferred* alternative? At the March 25, 2016 public hearing Deputy Assistant Secretary Lyons described it as a situation when BLM can't decide and there are two differing alternatives – he gave the example of a conservation alternative versus a development alternative – in that instance BLM would identify both and let the public comment. It would seem to be that BLM, having gone through the detailed planning process described in the proposal and having the legal responsibility to "balance" FLPMA multiple uses (*SUWA*) is in the best position to identify the Bureau's preferred alternative for the public. This suggested change appears to be a way for BLM to duck its FLPMA land management responsibilities. More explanation needs to be provided on why this would be a positive change to current practice where the identification of a preferred alternative does not limit comments on all identified alternatives.

Sections 1610.3-1 Coordination of Planning Efforts and 1610.3-2 Consistency Requirements. These two sections are of the most concern to the County as they appear to undercut the FLPMA directions for coordination with state and local governments and consistency with state and local plans. 81 *Fed. Reg.* 9701-9705. The history and culture of BLM has not always been supportive of "cooperative conservation" and devolution of Bureau decision-making authority to local governments or the public. The 2005 cooperating agency rule sought to change that paradigm by using the authority in NEPA (40 C.F.R. §§ 1501.6, 1508.5, 1508.15, 1508.26) to require, except in unusual circumstances, that BLM invite local, state and Tribal governments around the planning table to satisfy NEPA's procedural requirements. The rule was necessary because this was not happening uniformly in BLM; local governments complained to the Department about the efforts by BLM to keep them out of the process. 70 *Fed. Reg.* 14561, 14562 (March 23, 2005). The proposed rule purports to take another, significant step to change that culture, but largely through increased public participation rather

than reinforcing the FLPMA coordination and consistency requirements which are separate obligations – independent of NEPA and the cooperating agency role.

FLPMA provides an elevated role for state and local government in planning. This reflects the important role of federalism in our form of government and the recognition that the management of federal land in the 12 public land states has a significant impact on state and local economies. The second paragraph of the purpose statement of FLPMA highlights this role, directing that the "land use planning process [be] coordinated with other Federal and State planning efforts." 43 U.S.C. § 1701(a)(2). FLPMA directs BLM, consistent with the laws governing the administration of public lands, to:

- *Coordinate* the land use inventory, planning, and management activities of public lands with the land use planning and management programs of . . . the States and local governments within which the lands are located;
- *Consider* the policies of approved State and tribal land resource management programs;
- *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;
- To the extent practical, *resolve* inconsistencies;
- *Provide* for meaningful public involvement of State and local government officials in the development of land use programs, regulations, and decisions for public lands;
- Officials in each State are *authorized to furnish advice* to the Secretary for the development/revision of land use plans, guidelines, rules, and regulations for the public lands in the State; and
- Land use plans *shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.*

43 U.S.C. § 1712(c)(9).

The legislative history of FLPMA illustrates the importance of these coordination and consistency requirements. In analyzing the text of the bill, the House report elaborated on the coordination requirement in the following manner: "The bill requires that the agency plans conform to land use plans of State and local governments 'to the maximum extent' consistent with applicable Federal law. The responsibility for determining whether maximum conformance has been achieved is placed in the appropriate Secretary who is expected by the Committee *to make every reasonable effort to achieve consistency.*" H.R. REP. 94-1163, 5, 1976 U.S.C.C.A.N. 6175, 6179. Emphasis added. When the House and Senate bills were merged:

> "the conferees adopted a consolidation of the Senate and House provisions for coordination of BLM land use planning with Federal, State, local governments, and Indian tribes, with revisions making clear that the ultimate decision as to determine the extent of feasible consistency between BLM plans and such other

> plans rests with the Secretary of the Interior. This affirmed the need to maintain the integrity of governing Federal laws and Congressional policies."

H.R. CONF. REP. 94-1724, 58, 1976 U.S.C.C.A.N. 6227, 6229. This change in language didn't reduce the need to coordinate, but merely clarified that the ultimate decision on consistency with federal law – after proper coordination – rests with the Secretary. *See also* H.R. CONF. REP. 94-1724, 58, 1976 U.S.C.C.A.N. 6227, 6229 ("The conferees adopted the House requirement that BLM land use planning provide for *compliance with, rather than consideration of*, both State and Federal pollution standards or implementation plans."). Emphasis added.

BLM proposes to change the coordination provision (Section 1610.3-1) by revising the clear FLPMA direction on coordination that "to the extent consistent with the *laws* governing the administration of the public lands . . ." to add "and the *purposes, policies and programs* of such laws and regulations." Emphasis added. 81 *Fed. Reg.* 9702. This proposed addition of federal "purposes, policies and programs," which can change with administrations, appears to go well beyond FLPMA's requirement that coordination with state, Tribal and local plans be assessed against the "laws governing the administration of public lands." Garfield County opposes this change as unauthorized by FLPMA. BLM also proposes to change the rule directing that "State Directors, Field Managers or District Managers" exercise the coordination responsibility to a generic "BLM." The County is concerned with this change. While we agree that "the responsibility of coordination [is BLM's] and extends beyond any individual" (81 *Fed. Reg.* 9704) we have learned that when "everyone" is responsible no one is responsible – there is no accountability. We think a better change would be to acknowledge that while it is BLM's coordination responsibility, the front-line coordination duty lies with the BLM decision-maker. He or she can then be held accountable by a local government or BLM leadership for any failure to meet the FLPMA coordination duty.

Garfield County also objects to the proposed change to Section 1610.3-1(b) regarding cooperating agencies. BLM seems to be conflating the cooperating agency status under NEPA with the separate FLPMA obligations of BLM to cooperate with local governments and to achieve consistency with state and local plans. The FLPMA obligations are required to be met whether or not a county is a cooperating agency. BLM can and should make this distinction clear by putting cooperating agency regulations in a separate rule, rather than conflate it with FLPMA duties. The current cooperating agency rule provides for accountability and supervision of any decision to deny cooperating agency status ("Field Managers who deny such requests will inform the State Director . . ."). BLM proposes to remove this requirement. The purpose of this 2005 language was to address an existing problem of Field Managers denying cooperating agency status without repercussion by requiring the approval of the State Director for any such denial of cooperating agency status. Garfield County is concerned with the elimination of this language and the message it sends to BLM employees. As stated previously, we also object to the language in Section 1610.3-1(b)(2) that coordination or collaboration with cooperating agencies is required "as feasible and appropriate given their interests, scope, expertise and the constraints of their resources . . ." First, given the emphasis in both FLPMA and NEPA on the role of state and local governments in planning it should be *assumed* by BLM that a county has both "interests" and "expertise" of value to the planning process. Any limitation to a county's

participation in planning as a cooperating agency, as the result of constrained resources, is for the county, not BLM, to address. And, even if a county can't participate as a cooperating agency, it is still entitled under FLPMA to have the separate local government coordination and consistency requirements met. The proposed rule 43 C.F.R. § 1610.3-1(c) would appear to diminish the local government's role to that of a member of the public. This proposed change should not be made to the current cooperating agency planning rules.

In the proposed revisions to the consistency requirement (Section 1610.3-2), BLM would only be required to be consistent with state and local plans "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.*" 81 *Fed. Reg.* 9703. Again, this proposed change deviates from the FLPMA directive that consistency is to be determined against "Federal law and the purposes of [FLPMA]." 43 U.S.C. § 1712(c)(9). The County believes this proposed change gives BLM more "flexibility" in consistency determinations than provided by FLPMA. The proposal also narrows the existing planning rules in several places by requiring that "plans" be "officially approved or adopted" and removing an existing reference to consistency with local governments' "policies" and "programs." As previously explained (*supra* at 8-9), we are concerned that important state or county, non-plan requirements might be excluded from the consistency requirements. Counties have official programs or policies that are relevant to BLM land use planning but are not always included in a land use plan.[13] BLM has admitted this will result in BLM considering "fewer types of documents or information when addressing the consistency requirements of FLPMA." Economic Determination 2.0 at 10. The proposed rule does not include language in the existing rule requiring ongoing consistency with local governments. *See, e.g.*, 43 C.F.R. 1610.3-1(d) and 1610.1(a). The proposed change also replaces State Directors and Field Office Managers from accountability for consistency with "responsible official" and changes the rule's language from "accountable to ensuring consistency" to "required to address the consistency requirements." These changes are not insignificant. The latter change does not appear to comply with FLPMA's stronger language that BLM is to "assure that consideration is given" and that plans "shall be consistent" with state and local plans to the *maximum* extent consistent with Federal law and FLPMA. 43 U.S.C. § 1732(c)(9). BLM should reconsider these proposals.

More significantly, the proposed rule inappropriately shifts the burden to state and local governments to find inconsistencies and then notify the "responsible [BLM] official." 81 *Fed. Reg.* 9704. Congress in FLPMA couldn't be more clear – the burden is on BLM to "keep apprised" of state, local and Tribal plans, assist in resolving inconsistencies between local and BLM land use plans and BLM is directed in mandatory language, that plans "shall be consistent with State and local plans to the maximum extent *he finds consistent* with Federal law."

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[13] A county's emergency planning and policies, routes of ingress and egress, are likely relevant to BLM planning. For example, in neighboring Rio Blanco County, Colorado, BLM failed to coordinate with the county when the Bureau decided to plant endangered cacti along county roads critical to Rio Blanco's economy. BLM's decision to do so subjects that county to repeated, costly environmental review procedures to maintain its roads. This failure of coordination is now in the Tenth Circuit. *West Slope Colorado Oil and Gas Association v. S.M.R. Jewell*, Civil Action No. 1:14-02764-JLK (Colo. D. Ct.). *See also* discussion on Section 1601.0-5.

43 U.S.C. § 1712(c)(9). BLM, not state and local government has that responsibility under the FLPMA. To add insult, the BLM's proposal also requires a local official who has found an inconsistency to properly identify the BLM official to receive this information. If the information is given to the wrong BLM official, BLM does not need to consider the input. 81 *Fed. Reg.* 9704. Again, this does not meet the FLPMA consistency standards. BLM is also proposing to make a governor a "middle man" between BLM and local governments when it comes to determining consistency. *See* 43 C.F.R. 1610.3-2(b). This change is not supported by FLPMA – BLM has a separate consistency responsibility to local governments. 43 U.S.C. § 1712(c)(9).

The proposal also narrows the areas on which a governor may comment on during the governor's consistency review, and eliminates language that requires the BLM Director to change the plan if the governor's review describes how the state's proposal can "provide for a reasonable balance between national interest and the State interest." Proposed 43 C.F.R. § 1610.3-2(b). Indeed, the BLM's proposal would seem to turn the governor's consistency review up-side-down. BLM would submit "relevant" known inconsistencies with "officially approved and adopted land use plans of state and local governments" and ask the governor to react. BLM states in the preamble, "Proposed changes would limit the inconsistencies identified by the [BLM] to those that are relevant . . . Proposed new language would clarify that the Governor's recommendations should address identified inconsistencies with state and local plans, rather than other aspects of a resource management plan." 81 *Fed. Reg.* 9704. This limits the governor's consistency review to what BLM decides is relevant instead of allowing the governor to tell BLM what is relevant from the governor's perspective. Moreover, the proposed rule only requires BLM to "consider" the governor's perspective. *Id.* This significantly weakens the governor's consistency review. FLPMA and its legislative history are direct – BLM must do more than "consider," but is to "make every reasonable effort to achieve consistency." *See supra* at 17. BLM is also considering changing the timeline and appeal process for the governor's consistency review. 81 *Fed. Reg.* 9704. Garfield County objects to these changes to the FLPMA-required consistency requirements as inconsistent with FLPMA's intent to provide a heightened role for local and state governments in planning.

Section 1610.6-2 Protest Procedures. BLM proposes to make changes to the protest procedure that would clarify standing to bring a protest (participation in the preparation of the RMP), narrows the issues to be protested (plan components inconsistent with Federal laws, policies or programs) and requires greater specificity and reference to when the protestor raised the issues during the preparation of the RMP. With regard to standing to file a protest, the proposed rule is not clear on the distinction between earlier stages of planning process involvement and "preparation of the RMP" for protest status. "A person may only submit a protest, however, if they participated in the preparation of the [RMP] or plan amendment." 81 *Fed. Reg.* 9714. It is not clear what BLM means by this distinction. This language should be clarified. The County is concerned with the proposal to narrow the issues that can be protested to plan components inconsistent with FLPMA. This language would appear to exclude protests when BLM may be in compliance with FLPMA but has exercised poor judgment in its decision. The County believes that poor decisions should be subject to challenge in a protest. Under the current rule, it is. 43 C.F.R. § 1610.5-2(a)(2)(v). *See Southern Utah Wilderness Alliance*, 128

IBLA 382, 389 (1994). This change should not be made. The County supports the new provision to make all protests as well as BLM's response to the protests public, but disagrees that it should only be in response to a "request." 43 C.F.R. § 1610.5-4. BLM should simply post all protests and the Bureau's response on its website for easy access by the public.

Sections 1610.6-4 Monitoring and Evaluation and 1610.6-5 Maintenance. The first section adds a "monitoring and evaluation" requirement for BLM's implementation of the plan components with a report to be published for review by the public. The County is concerned that this new report requirement could lead to litigation over a failure by BLM to timely issue this monitoring report. A similar issue arose for the U.S. Forest Service over the issuance of "management indicator species" monitoring reports. When the agency failed to timely issue these reports litigation ensued. BLM can ill afford to spend budget dollars on litigation. BLM should reconsider this requirement by making the issuance of a monitoring report more flexible and not mandatory. The second section clarifies under what circumstances BLM may "maintain" or correct an RMP. Public review is also provided for any maintenance action. The County again questions these "review" opportunities that do not require BLM to respond or disclose the comments the bureau receives. This process is ripe for one-sided comments to BLM outside the public view and does not specifically recognize the BLM's coordination responsibilities with state and local governments. A more significant concern is over the elimination of important limiting language in the existing rule. 43 C.F.R. § 1610.5-4. "Such maintenance is limited to further refining or documenting a previously approved decision incorporated in the plan. Maintenance shall not result in expansion in the scope of resource uses or restrictions, or change the terms, conditions, and decisions of the approved plan." This language should remain in the rule to make clear the limits of a plan maintenance action.

Section 1610.8-2 Areas of Critical Environmental Concern. The County supports the largely positive procedural changes to the designation of an "Area of Critical Environmental Concern" ("ACEC") by moving up the time in the planning process that BLM considers ACECs and eliminating a unique comment period for the designation of ACECs. Two related issues involving ACEC designation are of significant concern to the County, given how conservation NGOs are suggesting the use of ACECs as quasi-wilderness areas (*e.g.*, DRECP and Greater Sage-grouse Plan amendments). First, BLM has been firm in the past that ACECs are not to be managed as quasi-wilderness and serve a different planning function. BLM, "Areas of Critical Environmental Concern," Manual 1613.06 (1988) ("An ACEC designation will not be used as a substitute for wilderness suitability recommendations."). BLM should use the proposal to underscore that point. The related issue of concern is that BLM is proposing to change the "relevance" and "importance" criteria for an ACEC by eliminating the requirement that the ACEC has "more than local significance." *See* existing 43 C.F.R. 1610.7-2(a)(2) ("The [ACEC] . . . value, resource . . . shall have substantial significance and value. This generally requires qualities of more than local significance and special worth, consequence, meaning, distinctiveness, or cause for concern.")[14] This is a significant change and one we oppose. An ACEC designation takes an area out of FLPMA "multiple-use and sustained-yield" management for "special management." Currently, to designate an ACEC, BLM must demonstrate the area is

[14] *See also*, BLM ACEC Manual, 1613.1.11B.1 through 5.

worthy of special management due to national significance. This change in the criteria will make it much easier for BLM to designate an ACEC with only local "importance," leading to a potential proliferation of "special areas" of limited importance, but potentially off-limits to other resource uses. This could have a negative impact on the economies of public land counties.

BLM's Economic Analysis 2.0 and NEPA Analysis are Inadequate

BLM admits that it is "proposing a significant regulatory action" but has failed to provide the required "quantitative assessment of anticipated costs and benefits" and has not conducted an environmental assessment ("EA") to disclose whether the environmental impacts from this regulatory action are "significant." *See* BLM, Economic Analysis 2.0 at 1 and "Preliminary Categorical Exclusion Documentation 2016 Proposed Rules 43 C.F.R. Part 1600" ("2.0 CX"). In each case, BLM wrongly claims that the rule changes are "procedural" in nature with no economic or environmental impacts. That is not correct. First, as to the inadequacy of the Economic Analysis – in every instance where BLM determines there are "possible effects on individuals" (43 C.F.R. §§ 1601.0-8; 1610.1-1(b); 1610.1-2 and 1-3; 1610.2; 1610.3-2(a); 1610.3-2(b); 1610.4; 1610.5-1 through 5-3; and 1610.6-2) BLM states: "These potential effects are not quantifiable, so this [analysis] provides a qualitative analysis." Economic Analysis 2.0 at 6; *see also* 13. BLM recognizes that 9 provisions of the proposed rule would have impacts, yet does not provide a single quantitative assessment of what that cost will be. Throughout this comment we have highlighted BLM's admissions that the rule will have, possibly, negative impacts on local governments and the commodity and recreational industries that create a local economy. By failing to quantify these impacts, BLM is "hiding the ball" and not meeting the requirements of federal law to carefully analyze and disclose the economic impacts of regulations.

As to BLM's NEPA compliance, BLM claims it is entitled to a categorical exclusion because the rule is "*entirely* procedural in nature." *See* 81 *Fed. Reg.* 9724. Emphasis added. Yet, in the BLM's Economic Analysis 2.0 BLM states: "The proposed rule makes *largely* procedural changes . . ." BLM, Economic Analysis 2.0 at 13. Emphasis added. More importantly, these inconsistent characterizations of the proposed rule as procedural in nature are undercut by the number and breadth of the proposed changes. For example, the BLM identified "nine elements of the proposed changes that may affect individuals or groups that either participate . . . or may be affected by actions eventually proposed to implement planning decisions." *Id.* That Economic Analysis, as insufficient as it is, discloses the potential for socio-economic impacts. BLM's position that this rule is covered by a categorical exclusion is not supported and BLM should conduct an EA to determine whether significant impacts are present that would trigger the need for an EIS.

NEPA is required for "new or revised agency rules, regulations" (40 C.F.R. § 1508.18(a)) and only federal actions "which have been found to have no [significant] effect" on the human environment may be categorically excluded. 40 C.F.R. § 1508.4. BLM did prepare an EA when it initially promulgated the planning rule in 1979 (44 *Fed. Reg.* 46,386 (August 7, 1979)) and again when a major change was made. 48 *Fed. Reg.* 20,364 (May 5, 1983). The U.S. Forest Service, which undertook a similar major rewrite of its planning rules in 2012, prepared an EIS.

77 *Fed. Reg.* 21,162 (April 9, 2012). The County is concerned that the choice of a CX is driven more by the "clock" than it is by adherence to NEPA. BLM should follow better practice and take the time to conduct an EA with public comment and adequate coordination with the counties.

Conclusion

Garfield County agrees that BLM's planning process can and should be modernized, but has serious concerns with those revisions that limit the important statutory role of state and local governments in BLM land use planning. Public land counties depend on multiple use management of federal lands for their social and economic quality of life. Congress in the FLPMA planning provisions (43 U.S.C. § 1712(c)(9)) requires BLM coordination with state and local governments during planning and for BLM to strive for consistency with state and local plans.

Sincerely,

WELBORN SULLIVAN MECK & TOOLEY, P.C.

Rebecca W. Watson

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On behalf of the Garfield County Board of County Commissioners

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