BEFORE
THE
DEPARTMENT OF INTERIOR
Bureau of Land Management

REOURCE MANGEMENT PLANNING
PROPOSED RULE - 40 CFR Part 1600
RIN 1004-AE 39
Attention OMB Control Number 1004-XXX

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RIN 1004–AE39

Comments, Statutory Analysis and Recommendations on BLMs Planning 2.0 Rule

The Kansas Natural Resource Coalition
Coalition of Arizona/New Mexico Counties
New Mexico Oil & Gas Association
New Mexico Cattle Growers' Association
Colorado Independent Cattle Growers' Association
Southeast Colorado Private Property Rights Council
Women Involved in Farm Economics

The Kansas Natural Resource Coalition

Comanche	Haskell	Meade	Sedgwick
Ford	Hodgeman	Morton	Seward
Gove	Kearny	Phillips	Stevens
Graham	Lane	Rooks	
Grant	Logan	Sheridan	

"Complex Problems Solved Well"

Stillwater Technical Solutions
PO Box 93
Garden City, KS 67846

Principal Author: J.R. Carlson

Associate Researchers & Contributing Authors:
Norm MacLeod
Angus McIntosh, PhD

EXECUTIVE SUMMARY

In 1976, the Bureau of Land Management was given the daunting task of administering public lands in a way that protects principal uses, ensures productivity, and results in long-term benefits for the human and natural environments. Through the Federal Land Policy and Management Act (FLPMA) and associated resource-planning processes, BLM is responsible for administering public lands in association with State and local governments.

A consortium of local government, industry, agriculture and economic groups from four states commissioned us to perform a statutory analysis of the BLM 2.0 Planning Rule (P2R). This analysis focused on P2R in the context of seven Congressional Acts, the core purpose for land use planning, adequate protections for the human and natural environments, and BLM's responsibility to ensure access for Principal and Major Users and valid, existing, land use rights.

Our analysis revealed a near complete disconnect between the scope, purpose and intent of the Congressional record on land use planning and the P2R rule, beginning with BLM's intent to wrongfully issue itself a categorical exemption from the requirements of the National Environmental Policy Act, even though an Environmental Impact Statement is clearly required for this major federal action.

While P2R *promises* increased public involvement, better clarity through changes in terminology, and a more "nimble" process, close scrutiny demonstrates the rule is severely deficient in that it fails to comply with Data Quality Act standards for scientific information, it inappropriately relies upon executive directives, and significantly diminishes intergovernmental coordination. The proposed P2R will also result in a fragmented public record, diminution of the role, power, and authority of State and local governments by removing parity they now have in land-use planning, and create more opportunities for mischief by national or international NGOs – all of which are counter to FLPMA statute for land-use planning.

An important conclusion from our analysis is that BLM already has in place landscape-level programs that do not conflict with geopolitical boundaries. This renders P2R both redundant and unnecessary, as landscape level objectives can be met through existing means - means that are considerate of State boundaries, and require neither a rulemaking nor Congressional authorization.

Our P2R analysis, as presented in these comments, demonstrates many of its provisions are contrary to statutory mandate, conflict with geopolitical boundaries and subordinates State and local land-use planning prerogatives. As a result and in its current form, the P2R is neither necessary, legitimate nor consistent with the statutory law, and as a result should be abandoned.

BACKGROUND

Approach -

In the American system of government, all authority possessed by Federal administrative agencies is delegated by Congress through statutory acts. Statutes form the core mandates undergirding agency action, and for purposes of legal hierarchy, statutes supersede administrative rules, regulations, memoranda, executive orders, policy and guidance.

Collectively, the body of statutory law represents the bottom-up, outworking of the will of the American people, and proposed rules by Federal agencies are required to have a clear and traceable foundation to the organic acts that comprise the basis for their authority. All major Federal actions - such as the Bureau of Land Management's (BLM) Planning 2.0 Rule (P2R) - are to be adequately justified through the demonstration of need and science, having a clear purpose, with the onus and demonstration-of-need burden being upon the agency.

In recent decades, Federal administrative agencies have extrapolated their authority beyond statutory law through discretionary administrative processes, many times to the detriment of States, local government, industry and the regulated public. In the outworking of their civil-servant responsibilities, Federal agencies have promulgated policies by supralegal means, binding the regulated community to directives that have little semblance to the Congressional mandates that form the their mission.

BLM is required to balance the human and natural environments in promulgating rules, and this responsibility includes keen deference to State and local policies during natural-resource planning and rulemaking processes. BLM's authority for land use planning emanates from the entire counsel of the seven Titles that form the Federal Land Management and Policy Act of 1976[1] (FLPMA), the Public Rangelands Improvement Act of 1978[2] (PRIA), the National Environmental Policy Act of 1969[3] (NEPA), the NEPA-implementing Regulations from the Council of Environmental Quality,[4] (CEQ) and the minimum information-integrity standards of the Data Quality Act[5] (DQA).

BLM is proposing binding, legislative-related "procedural" changes through P2R, which is proposed to be the mechanism BLM uses to administer public-land planning programs and associated processes. Understanding that Congressional mandates are the base law, and the purpose of Federal agencies is to execute that law, the approach used for this analysis is to evaluate P2R in the statutory context, historical intent, and core mandates undergirding the proposed revision to the rule.

Incorporated within this statutory analysis are our comments, observations of statutory conflicts, and recommendations. We also considered procedural requirements for rulemaking and notification found in the Administrative Procedure Act (4 USC Chapter 5).

[1] 43 USC § 1701 - 43 USC § 1781. (Pub. L. 94–579, Oct. 21, 1976, 90 Stat. 2744-2794.)
[2] 43 USC § 1901 - 43 USC §1908. (Pub. L. 95-514, Oct. 25, 1978, 92 Stat. 1803-1810.)
[3] 42 USC §§ 4321 - 4370. (Pub. L. 91–190, Jan 1, 1970, 83 Stat. 852-856.)
[4] 40 CFR §§1500-1508.
[5] Section 515(a) 3504(d)(1); 3516.5; 66 Federal Register 34489. September 28, 2001
Note:- Public Law 94-579 is available at https://www.gpo.gov/fdsys/pkg/STATUTE-90/pdf/STATUTE-90-Pg2743.pdf.

Planning Rule Summary; General Comments -

BLM is proposing profound, foundational changes to the regulations it relies upon to review, develop and prepare resource management plans (RMPs). P2R proposes fundamental procedural and operational changes that will lead to wholesale, top-down philosophical changes for the administration of RMPs. P2R also proposes to revise how BLM coordinates and reconciles State, local and individual-allotment land-use plans currently having parity under FLPMA, and how BLM incorporates views of the public and interacts with State and local governments.

One foreseeable outcome of P2R is a transition *away* from the overriding FLPMA doctrine of meaningful cooperation with sovereign, elected, taxing, local governments, and derogation of local governments' statutory jurisdiction over local land use rights and planning. These conflicts, coupled with subtle redefinition of what constitutes a local government, represent a fundamental departure from local control, local interests, and local input as being central to Federal land-use planning and management processes.

BLM's promotion of a landscape-level philosophy will lead to fewer, regional and/or nationwide RMPs and result in greater discretionary authority of field personnel through the vague, transitory *Adaptive Management* and *Implementation Strategy* philosophies. BLM states that the proposed implementation strategies will be subordinate to RMP components, and that they are not to be considered planning-level directives. Under P2R, and employing the enigmatic, *Implementation Strategy*[6] concept, the public will not have clear, if any, understanding of what comprises a "strategy" until after the planning process has been completed. In reality, those affected by the planning process will not have access to the planning details that materially affect them until well into an increasingly cumbersome and bureaucratic process. This will result in greater uncertainty for residents, inholders, mining interests, oil & gas producers, agriculture, and grazing allottees that hold prior-existing land use rights.[7]

Instead of BLM having to keep apprised of and reconcile inconsistencies in local land use plans early in the planning process - which is the current requirement - the P2R rule proposes to move reconciliation of differences to coincide with the *Governor's Consistency Review* - a process that occurs <u>at end of the RMP planning process</u>. This approach will, over time, result in pressing reconciliation activities to the State capitals - which translates into moving meaningful participation *away* from local government. Indeed, P2R proposes the *opposite* of what Congress intended in FLPMA and PRIA - that land-use planning be undertaken at the local level, and <u>all actions undertaken by the Director be subject to prior existing land-use rights</u>.[8]

Throughout FLPMA, the Congressional intent was to position BLM as a coordinator, organizer and Federal overseer of public lands, resources, and land-use planning processes.[9] P2R proposes a philosophy of natural-resource based, land-use planning whose outworking diminishes the role of State and local governments, resulting in public-values based withdrawals[10] by imposition of increased regulatory burdens on productive, FLPMA-

[6] A Strategy is a centralized, actionable program to achieve an overall objective.
[7] 43 USC Savings Provision(a). (Pub. L. 94–579, title VII, § 701(a), Oct. 21, 1976, 90 Stat. 2786.)
[8] 43 USC Savings Provision(a). (Pub. L. 94–579, title VII, § 701(a), Oct. 21, 1976, 90 Stat. 2786.)
[9] 43 USC § 1701(a)(2). (Pub. L. 94–579, title I, § 102(a)(2), Oct. 21, 1976, 90 Stat. 2744.)
[10] 43 USC § 1702(j). (Pub. L. 94–579, title I, § 103(j), Oct. 21, 1976, 90 Stat. 2746.)

protected principal uses.[11] This inadvertent, readily-foreseeable consequence exchanges timber production, mineral exploration/production and livestock grazing for increasing withdrawals for environmental-value purposes - contrary to the explicit Congressional intent in FLPMA.

BLM believes binding regulations are necessary to respond to "*increasing complexity*" driven by urbanization in the resource planning process, pointing to "*diversifying*" land-use activities, "*demand for renewable and non-renewable resources*," "*proliferation of landscape scale environmental change agents such as climate change, wildlife, or invasive species,"* and the need to "*readily address*" challenges such as "*habitat connectivity*" as justification for *"new strategies and approaches to effectively manage the public lands.*" In justifying "procedural" changes, BLM says the public has "*new expectations for services to be provided by land management agencies*" - services that require "*a proactive and nimble approach to planning that allows us [BLM] to work collaboratively with partners at different scales to produce highly useful decisions that adapt to the rapidly changing environment and conditions*."

Through P2R, BLM proposes to "*improve*" a number of things, among them "*development, amendment, and maintenance of resource management plans, the ability to respond to social and environmental change in a timely manner,"* the necessity to "*improve its ability to address landscape-scale management approaches*," offering to "clarify" language, such as substituting the word "*will*" for the legal term "*shall*" throughout the rule - this to "*improve readability*."

Authorities -

To establish the basis for P2R, BLM offers one citation from FLPMA Title I,[12] two citations from FLPMA Title II,[13] and an excerpt from Department of Interior regulations supporting its decision to issue a categorical exclusion from having to prepare a environmental impact statement.[14] The Title I reference recounts goals and objectives established for the doctrines of *Multiple Use* and *Sustained Yield*; the Title II reference establishes the Secretary of Interior's responsibility to allow opportunities for involvement of Federal, State, and local governments - and the public - in land-use planning.

In what clearly is presentation of parallel authorities, BLMs Federal Register Notification extensively refers to BLMs Roadmap for Success,[15] a Department of Interior policy for adapting to climate change,[16] three Department of Interior memoranda[17,18,19] and Executive Order 13653. As presented, it appears the Director intends for these executive-branch generated documents to form the basis for P2R:

[11] 43 USC § 1702(l). (Pub. L. 94–579, title I, § 103(l), Oct. 21, 1976, 90 Stat. 2747.)
[12] 43 USC 1701(a)(7). (Pub. L. 94–579, title I, § 102(a)(7), Oct. 21, 1976, 90 Stat. 2744.)
[13] 43 USC 1712(a) and (f). (Pub. L. 94–579, title II, § 202(a) and (f), Oct. 21, 1976, 90 Stat. 2747 and 2749.)
[14] 43CFR § 46 210(i).
[15] *Winning the Challenges of the Future. A Roadmap for Success in 2016*. Bureau of Land Management. October, 2011.
[16] *Climate Change Adaptation Policy*. Department of Interior guidance document 523 DM 1.
[17] Secretarial Order 3285. *Renewable Energy Development by the Department of Interior*. March 11, 2009.
[18] Secretarial Order 3289. *Addressing the impacts of climate change of America's Water, Land, and Other Natural Resources.* September 14, 2009.
[19] Secretarial Order 3330. *Improving Mitigation Policies and Practices of the Department of Interior*. October 31, 2013.

"The Climate Change Adaptation Plan directs the DOI bureaus and agencies to strengthen existing landscape level planning efforts; use well-defined and established approaches for managing through uncertainty, such as adaptive management; and maintain key ecosystem services, among other important directives. This plan also identifies several guiding principles, including the use of the best available social, physical, and natural science to increase understanding of climate change impacts and active coordination and collaboration with stakeholders."[20]

In its FLPMA policy statement, Congress retained for itself prerogative over the withdrawal of public lands, and the authority to "*designate or dedicate federal lands for specified purposes*." Congress specifically requires "*all existing classifications of public lands.....effected by executive action or statues…..be reviewed in accordance with the provisions of this Act,*" subjecting presidential land set asides to be regulated under the Congressional mandates of FLPMA.[21]

Because the definition of withdrawal includes imposition of regulatory burdens - such as climate change directives - that foreseeably will impact land-use rights and public-value transitions, and because executive orders are subordinate to codified statutory mandates, any executive-branch directive not explicitly traceable to organic FLPMA mandates is supralegal. While it is not the scope of this analysis to evaluate the impact or merits of climate change theory, those executive-branch directives cited as a basis for P2R are directly subject and subordinate to FLPMA's core tenets.

The Federal Land Policy and Management Act -

In its policy directive in FLPMA Title I, the 94th Congress stated its objective for public lands is to ensure productivity and ongoing access in a way that serves the interest of human systems and increases the economic productivity of the nation. Care and preservation of the environment is to take place within the context and framework of productivity - a principle adhered to throughout FLPMA - and in particular in the strict construction of Title II,[22] where the mere designation of Areas of Critical Environmental Concern (ACECs) does not tacitly mean such lands should be withdrawn from public use.

In administering the doctrine of multiple use, human systems are to be given first-among-equals consideration, a principle replete throughout both FLPMA and NEPA. The central, human-based philosophy is first displayed in the doctrine of multiple use, where language requiring "*judicious use*" of public lands is combined with directives for balanced and diverse resource use - in the context of long-term needs, such that productivity remains a central theme: "*without permanent impairment of the productivity of the land.*" The doctrine of multiple use and sustained yield are to be administered in a manner that safeguards prior existing land use rights, the economy, promotes competitive access to minerals, provides for minimal encumbrance on users of public lands for grazing, ensure the scope of withdrawals for public lands are narrow, and protects the tax base of local governments.

[20] Preparing the United States for the impacts of climate change.
[21] 43 USC 1701(a)(3), (4). (Pub. L. 94–579, title I, § 102(a), (4), Oct. 21, 1976, 90 Stat. 2744.)
[22] 43 USC 1711(a). (Pub. L. 94–579, title II, § 201(a), Oct. 21, 1976, 90 Stat. 2747.)

ANALYSIS, REMARKS AND CONCLUSIONS

I. The categorical exclusion claimed by the Director is inappropriate, unsubstantiated, and contrary to the National Environmental Policy Act and established case law.

a. In arriving at the decision that preparation of an EIS is not required, the Director refers to the P2R Rule as "*procedural*" in nature. To support this conclusion, the Director cites Department of Interior Regulations 43 CFR 46.201(i), 43 CFR §46.215, and 43 CFR 46.205(c)(1), erroneously concluding P2R does not involve "*any of the extraordinary circumstances….that would require analysis under NEPA.*"

BLM's decision to grant itself a categorical exemption selectively neglects the clear, NEPA-implementing regulations of the Council of Environmental Quality (CEQ) found in 40 CFR §1508.18 (a) that specifically call out "procedural" changes as being a major Federal action subject to NEPA EIS:

> "*Major Federal action" includes actions that may be major and which are subject to federal control and responsibility. Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies;* ***new or revised agency rules, regulations, plans, policies, or procedures****;*"

b. Because P2R is a distinct project giving management direction for preparation of future RMPs, the decision to grant a categorical exemption cannot be considered in isolation from the cumulative, future effects on RMPs, human systems, or the natural environment.[23] *Native Ecos. Council v. Dombeck,* 304 F.3d 886, 893-94 (9TH Cir.2002).

> i A central purpose of an EIS is lost "*if consideration of the cumulative effects of successive, interdependent steps is delayed until the first step has already been taken*." *Thomas v. Peterson*, 753 F.2d 754, 761 (9th Cir. 1984).
>
> ii Actions must not be segmented to avoid the requisite analysis. An agency "*impermissibly segments NEPA review when it divides connected, cumulative, or similar federal actions into separate projects*" and fails to address the true scope and impact. *Myersville Citizens for a Rural Community, Inc v. F.E.R.C*, 783 F.3d 1301 (D.C. Cir.2002).

II. The proposed P2R definition of "high quality information" degrades Federal standards, dilutes existing requirements of the Data Quality Act (DQA) and is unnecessary.

a. BLM's proposal to define high quality information as:

> "*any representation of knowledge such as facts or data, including the best available scientific information which is accurate, reliable, and unbiased, is not compromised*

[23] 40 CFR §1508.7.

through corruption or falsification, and is useful to its intended users."

significantly degrades statutory Federal standards found in the Data Quality Act governing dissemination of agency information. The proposed P2R definition of what constitutes high quality information is arbitrary, vague, and seriously erodes existing standards for information quality required of BLM during resource management planning.

b. The Data Quality Act[24,25] requires information disseminated by Federal agencies to maintain four components: *Quality, Utility, Objectivity,* and *Integrity*. In promulgating the Data Quality Act, and with respect to quality of information for decision-making, Congress specifically requires: "*The more important the information, the higher the quality standards to which it should be held, for example, in those situations involving influential scientific or statistical information."*[26]

   i. The "*Objectivity*" component of DQA requires information used for resource planning to identify all sources of information, and standards for models, data, financial information or information in statistical contexts are to be documented "*so the public can assess for itself whether there may be some reason to question the objectivity of the sources.*"

   ii. The "*Reproducibility*" component of DQA requires that information used for RMPs be "*capable of being substantially reproduced subject to an acceptable degree of imprecision*."

   iii. The "*Utility*" component of DQA refers to the usefulness of the information for its intended users, including the public. In disseminating information under the "*Usefulness*" requirement, Federal agencies "*need to consider the uses of the information not only from the perspective of the agency, but also from the perspective of the public.*"

c. The proposed P2R definition of high quality information falls well short of the FLPMA standard which calls for the BLM to "*use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.*"[27] In his Federal Register (FR) notification, the Director proposes the example of *Traditional Ecological Knowledge* (TEK) as a type of information comprising high quality information. For its part, TEK refers to the knowledge from a specific location acquired by indigenous and local people who have had direct contact with the environment.

   TEK does not meet the Federal definition of what constitutes "science," falling well short of the *Quality, Utility, Objectivity,* and *Integrity* standards DQA requires for dissemination of information - particularly those for decision-making in RMPs.

[24] Section 515(a) US Treasury and General Government Appropriations Act. Pub.L. 106-554.
[25] H.R. 5658; 66 FR 49718 September 28, 2001.
[26] 66 FR 49718.
[27] 43 USC §1712(c)(2). (Pub. L. 94–579, title II, § 202(c)(2), Oct. 21, 1976, 90 Stat. 2748.)

d. Because the proposed P2R definition of "high quality information" will result in dissemination of reduced quality, non peer-reviewed, non-published, non-verifiable information that may not be publically available, and because lower quality information will result in a disenfranchised public during resource planning, the Director should adopt only the standards consistent with Data Quality Act.

III. Statutory authority for landscape level planning across State boundaries lacking; benefit of an additional, redundant landscape level planning program not demonstrated; substantive, foreseeable boundary conflicts between Federal, State and local interests not mitigated.

BLM's planning rules in 43 CFR Part 1600 govern all aspects of the RMP process, affecting land-use planning, amendments, adjudication and notification activities. The landscape level changes contemplated by P2R represent a fundamental transition away from jurisdiction-based land-use planning, encroaching, conflicting and confusing existing, landscape-level FLPMA and PRIA programs that conform to geopolitical boundaries. As a result, the P2R landscape level proposal is unnecessary, redundant and the need for it has not been demonstrated.

a. The philosophical shift proposed by P2R will subordinate State and local land-use plans to BLM Policies, errantly placing the Director in the position of deciding what constitutes land-use requirements, standards and planning criteria for local planning efforts. The P2R landscape-level proposal is <u>opposite of and counter to the statutory framework adhered to throughout FLPMA and PRIA</u>, where the Director is placed in a parallel, civil-service position of assisting in resolving plan inconsistencies, obtaining meaningful input, and submitting to local governments and grazing allotment boards through the receiving of advice - to the maximum extent possible.[28] It is the responsibility of the Secretary to attempt consistency with local planning efforts - not the other way around; thus the philosophical flaws in P2R are contrary to established statutory law.

b. The Director relies upon one sentence in FLPMA to justify landscape-level planning; specifically, that the Director has authority to "*develop, maintain, and, when appropriate, revise land use plans which provide for tracts <u>or areas</u> for the use of public lands.*" When understood in the context of FLPMA and PRIA, which focus on Federal coordination and collaboration with local and State governments in the context of their jurisdictional boundaries, reliance upon this language does not support the landscape-level planning proposal, nor may the director rely on Executive Orders or authorities that exceed FLPMA mandates.

[28] 43 USC 1712(c)(9). (Pub. L. 94–579, title II, § 202(c)(9), Oct. 21, 1976, 90 Stat. 2748.)

c. Landscape-level planning beyond the existing PRIA framework will blur existing State and local geopolitical boundaries, resulting in interstate regulatory uncertainties, cross-border conflicts in local and State judicial proceedings, and increased uncertainty for public-lands users who currently look to State adjudicatory processes for legal remedies.[29]

d. P2R does not anticipate interstate conflicts that will result, nor contemplate mitigative assessments to assess foreseeable conflicts with valid leases, permits, patents, rights of way, or other existing land-use rights.[30]

e. Landscape-level planning conflicts with the compensation, taxation and fiscal provisions of FLPMA Titles I and VII by crossing jurisdictional boundaries, complicating reimbursement programs and withdrawals - especially in those areas where Federal, State and local nexus' overlaps exist.[31]

IV. Congressional mandates and programs implementing landscape level planning already exist in FLPMA, PRIA and BLM, rendering P2R redundant and unnecessary; existing programs respect geopolitical boundaries; implementation of P2R illegitimately subordinates Princpal Uses to environmental or other non-Principal Uses.

a. PRIA (43 USC 1902) and FLPMA (43 USC 1712 et seq), when taken in *para materia* with the Mining and Minerals Policy Act, (30 USC 21a) contain sufficient statutory authority for coordinated, large area or landscape based programs for Principle or Major Uses to consider and operate within established geopolitical boundaries, rendering another layer of planning rules or operational structure unnecessary and superfluous. P2Rs proposal to subordinate mandated Principal Uses for environmental or ecological values is contrary to the Statutory construct, purpose and provisions contained in FLPMA and PRIA, and the Directors proposal will directly conflict with established and operational BLM programs, policies and practices that respect geopolitical boundaries.

b. Because <u>legal authority and programs for large area planning already exist for principle or major uses of public lands, P2R will only serve to derogate the Principle or major uses set forth in existing statute</u>. Thus P2R is in direct conflict with the plainly stated intent of Congress in existing planning laws.

V. BLM's proposal to selectively substitute "will" for "shall" dilutes accountability, violates established legal principle, has not been reasonably justified, and will result in regulatory and judicial confusion.

a. P2R is an administrative rule carrying the force and effect of law. Language throughout P2R must meet strict legal construction principles, similar to the existing 40 CFR Part §§1600 provisions. Because the

[29] 43 USC Savings Provision(g)(3) (Pub. L. 94–579, title VII, § 701(g)(3), Oct. 21, 1976, 90 Stat. 2788.); 43 USC Savings Provision(g)(6) (Pub. L. 94–579, title VII, § 701(g)(6), Oct. 21, 1976, 90 Stat. 2788.)
[30] 43 USC Savings Provision (a) (Pub. L. 94–579, title VII, § 701(a), Oct. 21, 1976, 90 Stat. 2788.)
[31] 43 USC § 1701(a)(13) (Pub. L. 94–579, title I, § 102(a)(13), Oct. 21, 1976, 90 Stat. 2744.); 43 USC Savings Provision(g)(6) (Pub. L. 94–579, title VII, § 701(g)(6), Oct. 21, 1976, 90 Stat. 2788.)

word "shall" is *not* synonymous with "will," substitution will result in subtle, but important changes, causing confusion among the regulated community and increased litigation required to clarify now foreseeable conflicts. This outweighs a passing opportunity to enhance "readability."

b. In legal contexts, "shall" is a nondiscretionary, authoritative directive to an entity, individual or group of individuals - or in this case, the Director of BLM. "Shall" authoritatively directs what *must* be done, with the expectation of compliance. The use of "will" as a synonym is inappropriate, in part because it does not impart the same level of direction and implied accountability as the word "shall."

c. Administrative rules are adjudicated through the courts, and attorneys and courts use legal dictionaries, with one of the most respected being *Black's Law Dictionary.*

From *Black's Law*:

> **shall**, *vb.* (bef. 12c) **1**. Has a duty to; more broadly, is required to <the requester shall send notice> <notice shall be sent>. • This is the mandatory sense that drafters typically intend and that courts typically uphold. **2**. Should (as often interpreted by courts) <all clients shall request mediation>. **3**. May <no person shall enter the building without first signing the roster>. • When a negative word such as *not* or *no* precedes *shall* (as in the example in angle brackets), the word *shall* often means *may*. What is being negated is permission, not a requirement. **4**. Will (as a future-tense verb) <the corporation shall then have a period of 30 days to object>. **5**. Is entitled to <the secretary shall be reimbursed for all expenses.>

The Director recognizes the term "shall" is not synonymous with the term "will" at discreet points throughout P2R: At § 1610.6-5, first sentence, the Director proposes to proposes to replace "*shall be maintained*" with "*may be maintained*," and "*shall not*" with "*does not*" later in that section. At § 1610.8-2, the Director proposes to replace "shall" with "must" in several places. The replacement of "shall" for "will" in P2R is not appropriate and should be discarded.

VI. The Director lacks discretionary authority to issue regulations contrary to statutory law; P2R "consistency" language illegitimately reverses FLPMA intent and transitions existing program to a central planning model.

a. By specifying the level, quality and content acceptable to participate in the consistency-review process, the Director illegitimately attempts to standardize State and local government plans to adhere to "*policies and programs*" dictated by local BLM offices through transient and arbitrary "*Adaptive Management*" practices. By diluting through rule his statutory responsibility under FLPMA, the Director will reverse the congressional, land-use planning parity requirement with State and local governments: "*to keep apprized of*," "*assure consideration is given to*" "*assist in resolving*," and "*provide meaningful involvement"* to State and local governments.

b. Requiring local land use plans to be consistent with BLM *policies and programs* significantly diminishes the ability of State and local governments to influence such *policies and programs* because it subordinates and regulates State and local input. Describing how policies for multiple use are to be achieved is precisely the type of information Congress intended to be included in local land use plans. Under the P2R rule, State and local governments would be inhibited in their effort to include in their own land-use plans' policies that guide the Multiple Use mandate for their jurisdictions - disenfranchising local governments and local users of public lands.

c. P2R inappropriately limits the scope of information and shifts the burden of demonstrating what constitutes an "inconsistency" to State and local government. The Director proposes to consider land-use inconsistencies *only* if he is specifically notified, in writing, thus inappropriately and illegitimately shifting the burden-of-demonstration away from the Director to State and local governments.

d. In P2R, the Director proposes to improve "readability" by exchanging the word "*practical*" for "*practicable*" in the phrase:

> "*assist in resolving, to the extent practicable and consistent with Federal law, inconsistencies between Federal and non-Federal government plans.*"

Exchanging "*practical*" for "*practicable*" in the section completely transitions the meaning of the FLPMA requirement that BLM must attempt resolution of inconsistencies to the maximum practicable extent: "*Practicable*" is a narrowly-defined term meaning "*capable of being put into practice*;" by contrast, "*practical*" - in this context - means "*capable of being put to use*." To distinguish, synonyms of "practicable" are possible, doable, and feasible;…….a synonym of "practical" is useful or sensible.

In terms of consistency review, BLM is proposing to alter the entire meaning of this section from the agency must assist in resolving inconsistencies to the extent possible [practicable] to resolving inconsistencies to the extent sensible or useful [practical]. This proposed change represents a significant diminution of the statutory intent in this section, and the proposed change should be discarded.

VII. Title VII of FLPMA requires the Secretary of Interior to identify and protect valid private property rights established by Congress for public lands.

a. FLPMA Title VII requires "*all actions by the Secretary concerned under this Act shall be subject to valid existing rights.*" Title VII enumerates several types of rights: "*lease, permit, patent, right-of-way, any other land use right or authorization existing on the date of approval of this Act;"* additionally, *"water resources*" and "*timber resources*" are identified as having potential, prior-existing land-use rights. Use of the connecting word "*or*" in the statutory construct when referring to "*land use rights*" indicates in plain usage these words are equivalent to each other.

b. In its current form and apparent intent, P2R will subject existing rights to diminishment or regulatory extinguishment, resulting in encumbering, blocking and/or interference with valid existing rights. This conflicts with foundational principles found throughout federal law and the US Constitution, and for these and other reasons P2R should be substantively reworked or abandoned altogether.

VIII. The disaggregated P2R information dissemination process increases uncertainty, will result in a fragmented public record, and will confuse the public.

a. In the Federal Register Act of 193532, The Federal Register was mandated as the official journal of the federal government. The Federal Register acts as a central repository for publication of administrative notifications, administrative rules and regulations, presidential proclamations, executive orders and official federal documents which have general applicability or the force of law. If something has been published in the Federal Register, the public is legally presumed to have been informed of its responsibility under the notification; not so with the internet and alternative forms of media proposed for information dissemination by the Director.

b. The Federal Register and Code of Federal Regulations (CFR) has the same function in administrative law as the United States Code has in the fields of criminal and civil law, and the Library of Congress and all United States law libraries maintain repositories of the Federal Register records in their stacks. Law libraries *do not* maintain collections of BLM's website or other alternative forms of information proposed by BLM to be used in the course of implementing its FLPMA, NEPA or 43 CFR Part 1600 responsibilities.

c. Section 7 of the Federal Register Act provides that publication in the Federal Register constitutes a <u>binding and constructive notice</u> of which the regulated public is acclimated, well versed and to which it refers for official federal notifications. Publication of notifications in other media - to the exclusion of the Federal Register - does not meet this objective and will result in missed opportunities for the regulated public

d. Information published in the Federal Register shall be judicially noticed. Publication in other media does not hold or have that same recognition, and publication in media other than the Federal Register results in actions that are not binding upon anyone - including BLM. In the case of *Todd v. Securities and Exchange Commission*, the court held that "*While such reports are public records the statements of facts set forth in them are not binding upon this petitioner. Litigants are not bound to take notice of executive decisions on legal questions, and a fortiori, they are not bound to take notice of the statements of fact embodied in public records compiled by administrative agencies*."

[44]USC Chapter 15

e. In several places throughout P2R the Director announces his intention to eliminate some *Federal Register* notice requirements, instead substituting notification by alternative means such as the internet or local newspapers. Such source diversification, changes methods of dissemination and alternative notifications to the exclusion of publication in the Federal Register fragments the public record, dilutes the accountability of the agency, makes research more difficult and complicates litigation. All classes of documents currently published in the Federal Register should continue, and no changes that reduce the public-response periods are justified or should be made.

NMOGA
NEW MEXICO OIL & GAS ASSOCIATION

P. O. Box 1864 · Santa Fe · NM · 87504-1864 · 505.982.2568 · www.nmoga.org

May 25, 2016

Neil Kornze, Director
Bureau of Land Management
U.S. Department of the Interior
1849 C Street NW Washington, DC 20240

Dear Mr. Kornze:

The New Mexico Oil and Gas Association represents 300 member companies, which collectively produce, refine and transport over 97% of the oil and natural gas in New Mexico. New Mexico ranks 6th among the states in production and over half of that production value originates on the federal mineral estate. In any given year, New Mexico's budget is 35% reliant on the taxes and royalties generated by the oil and gas industry. What BLM does matters to New Mexicans and our economy.

NMOGA is opposed to the proposed revisions to the planning rules as detailed in the attached comments. As written, the proposal attempts to fundamentally change the relationship of the BLM and local communities, which are dependent upon access, and use of intermingled public lands to support rural economies. The rules would violate the intent of the Federal Land Policy and Management Act by moving planning decisions further away from those most impacted by BLM, while disconnecting counties from their coordination rights and responsibilities. Regionalized planning has been a failure at the federal level - one need to look no further than the Forest Service to validate that observation.

NMOGA respectfully requests the BLM abandon this misguided effort and maintain the current planning regulations, which more closely aligned with FLPMA's intent.

Respectfully,

Steve Henke
President

Jim Carlson

From: Regulations.gov [no-reply@regulations.gov]
Sent: Wednesday, May 25, 2016 6:17 PM
To: sts@wbsnet.org
Subject: Your Comment Submitted on Regulations.gov (ID: BLM-2016-0002-0213)

Please do not reply to this message. This email is from a notification only address that cannot accept incoming email.

Your comment was submitted successfully!

Comment Tracking Number: 1k0-8ptz-3c0o

Your comment may be viewable on Regulations.gov once the agency has reviewed it. This process is dependent on agency public submission policies/procedures and processing times. Use your tracking number to find out the status of your comment.

Agency: Bureau of Land Management (BLM)
Document Type: Rulemaking
Title: Comment on FR Doc # 2016-09439
Document ID: BLM-2016-0002-0213

Comment:
Comments, Statutory Analysis and Recommendations - BLM's Planning Rule
RIN 1004-AE39
Attention OMB Control Number 1004-XXX

Comments on behalf of Stakeholders:
The Kansas Natural Resource Coalition
Coalition of Arizona/New Mexico Counties
New Mexico Oil & Gas Association
New Mexico Cattle Growers' Association
Colorado Independent Cattle Growers' Association
Southeast Colorado Private Property Rights Council
Women Involved in Farm Economics

Uploaded File(s):

- Planning Rule Comments FINAL with attachments.pdf

This information will appear on Regulations.gov:

Organization Name: The Kansas Natural Resource Coalition
Submitter's Representative: J.R. Carlson Executive Director
Government Agency Type: Local
Government Agency: Representing 19 Kansas Board of County Commissioners

This information will not appear on Regulations.gov:

First Name: J.R.
Last Name: Carlson
Mailing Address: PO Box 93
City: Garden City
Country: United States
State or Province: KS
ZIP/Postal Code: 67846
Email Address: sts@wbsnet.org

For further information about the Regulations.gov commenting process, please visit https://www.regulations.gov/#!faqs.

Jim Carlson

From: Jonathan Wood [jw@pacificlegal.org]
Sent: Wednesday, June 08, 2016 1:39 PM
To: Jim Carlson
Subject: RE: STS/KNRC Analysis of BLM Planning Rule

Jim,

I looked the comment over. It shows that you guys put a lot of work into it, which will really come in handy down the road. As you may recall from my speech at this year's conference, participation in the administrative process (like KNRC is doing with this comment) can be key, both in avoiding a bad outcome from the agencies and setting up any future political or legal response.

In light of who's signed onto the comment, I suspect the concern that P2R will complicate interjurisdictional issues (between both local and state governments) will be taken seriously by BLM.

P.S. I asked my colleague about the rails to trails issue that you had emailed me about. He says that it would likely require a political solution, with the legislature clarifying the tax treatment of these properties, rather than litigation.

Jonathan Wood
Environmental Staff Attorney
Pacific Legal Foundation
930 G St
Sacramento, CA 95814
(916) 419-7111

PLF Liberty Blog
SSRN Publications

From: Jim Carlson [mailto:jcarlson@wbsnet.org]
Sent: Saturday, May 28, 2016 6:07 AM
To: Jonathan Wood <jw@pacificlegal.org>
Subject: STS/KNRC Analysis of BLM Planning Rule

Hello Jonathan -

Attached is a *Statutory Analysis* of BLMs Planning 2.0 Rule demonstrating BLM supralegally relied on Executive Branch authorities outside of the discretionary limits of the Secretary of Interior.

Prepared for a consortium of industry, local government, and agricultural interests in four states - including some in Arizona - our analysis reviewed P2R in the context of seven Congressional Acts, providing case-law citations to support the conclusion P2R is both redundant and unnecessary. Our strategy was not merely so "*no*" to P2R, but instead *demonstrate* that Department of Interior (DOI) already has *existing* programs through which landscape level planning can be achieved. This approach will unearth intent and highlight that the real objective is to erode geopolitical boundaries of State and local governments.

To our knowledge, no one has employed a strategy of this nature at the beginning of the public rulemaking process, particularly by establishing a litigatory platform under Administrative Procedures Act from the onset. Careful reading of the analysis (lines 164-176) will demonstrate that Executive Orders directing policy for

public lands are supra-legal because all land set asides by the President (think Antiquities Act) are to be managed within the statutory framework of the Federal Land Policy and Management Act (FLPMA). This is huge; and there is more…..*much* more.

We believe - given a collaborative effort guided by local government - we can cause enough difficulty in Department of Interior to legitimately inhibit the problematic P2R rule.

Please let us me know what you think, as this one will likely go somewhere. We are encouraging Chairman Bishop to put P2R on the House NR Committees' review list.

Regards,

Jim Carlson
Executive Director
The Kansas Natural Resource Coalition
(620) 260-9169