AGENDA ITEM or FINAL CONTRACT REVIEW SUBMITTAL FORM

Agenda Item: Correspondence; Bureau of Land Management Director

Action Requested: Board of County Commissioners' Signature

Parties to the Agreement:

Term Begins: **Term Ends:** **Grant Contract #:**

Summary:

Comment letter to Neil Kornze re Proposed Resource Management Plan

Fiscal Impact:

Submitted by: Laura Seymour for David Baumgarten **Submitter's Email Address:** lseymour@gunnisoncounty.org

Finance Review: ○ Required ◉ Not Required

Comments:

Reviewed by: Discharge Date:

County Attorney Review: ◉ Required ○ Not Required

Comments:
ok - gs

Reveiwed by: GUNCOUNTY1\gstuhr Discharge Date: 5/9/2016 Certificate of Insurance Required

Yes ○ No ◉

County Manager Review:

Comments:

Reveiwed by: GUNCOUNTY1\mbirnie Discharge Date: 5/12/2016

◉ Consent Agenda ○ Regular Agenda ○ Worksession Time Allotted: 0

Agenda Date: 5/17/2016

Revised April 2015

May 17, 2016

Mr. Neil Kornze, Director
Bureau of Land Management
U.S. Department of the Interior
1849 C Street NW, Rm 2134LM
Washington, DC 20240

VIA U.S. MAIL, RETURN RECEIPT REQUESTED

Attention: 1004-AE39; OMB Control Number 1004-AE39

Re: Resource Management Planning;
Proposed Rules;
Notice Federal Register February 25, 2016 81 FR 9674

Dear Director Kornze;

The Board of County Commissioners of Gunnison County, Colorado ("Gunnison County") appreciates the opportunity to comment, and respectfully submits these comments, regarding the Bureau of Land Management ("BLM") proposal, noticed at 81 FR 9674, to amend existing rules governing the procedures used to prepare, revise or amend land use plans pursuant to the Federal Land Policy Management Act ("FLPMA").

Gunnison County recognizes that the proposed rules are intended to modernize the BLM's planning process and increase public involvement in the management of almost 250 million acres of public lands. Gunnison County supports the goals of the proposed rules to make future land use planning more collaborative, transparent and effective, and to provide meaningful opportunities for the public—including the public's local governments—to be involved in the development of BLM resource management plans ("RMP"). Gunnison County generally supports key conceptual changes to the planning process to include:

1. Earlier public submission of data and information in the planning process and new opportunities to provide preliminary statements of purpose and need, and alternatives proposed for full consideration.
2. A new step to be added to prepare and process a pre-planning assessment describing the baseline environmental, ecological, social and economic resources in the planning area.
3. Consideration of "landscape-level" planning that would provide flexibility for planning across traditional boundaries, and discretion to adjust RMP boundaries for better management.
4. A modernized protest period with opportunities for electronic submission.

To ensure that the draft rules meet the intended goals and, at the same time, provide effective mechanisms to implement those goals, Gunnison County offers the following comments:

I. <u>Acknowledgment of current disconnect between existing regulation and practice.</u>

The proposed rule makes significant acknowledgement—summed up in one exemplar quote: "The proposed change would make the planning regulations consistent with BLM practice, but would represent a change from existing regulations." 81 FR 9696.[1]

This acknowledgement means that:

1. Existing laws and regulations are not currently being followed, in practice; and
2. That ad hoc practice and policy are being implemented instead; and
3. The proposed change seeks to codify those practices into law. That is, the proposed rule appears to be a mere formality—simply establishing the BLM's current practices as law and regulation.

This evolution is contrary to accepted legal practice. Indeed, it raises the question whether RMPs developed pursuant to as-yet-codified "practice" are legal.

II. Definitions. Certain of the proposed definitions are problematic in content and syntax. Significant examples include:

A. Definition of "mitigation"

Proposed Section 1601.0-5, Definitions, would add a "new definition of mitigation" to "explain that mitigation includes the sequence of avoiding impacts, minimizing impacts and compensating for remaining unavoidable impacts."

Gunnison County suggests that this "new definition" is inconsistent with the existing—and adequate—National Environmental Policy Act ("NEPA") definition of "mitigation."

The NEPA regulations define mitigation as:

- Avoiding impact altogether by not taking a certain or parts of an action.
- Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- Rectifying the impact by repairing, rehabilitating or restoring the affected environment.
- Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- Compensating for the impacts by replacing or providing substitute resources or environments.

See: 40 CFR 1508.20

The proposed rule would expand the "mitigation" hierarchy to the "planning process": "By including this proposed definition in the planning regulations, the BLM acknowledges that this sequence also applies to the planning process." 81 FR 9686. Such an expansion would authorize preemptive, categorical prohibition (that is, avoidance) of activities based on a preliminary, threshold determination of potential impact.

B. Definition of "high quality information"

Proposed Sections 1610.1-1(c) and 1610.4(b) would add a new term—"high quality information"—and a new definition of that term. "High quality information" would be defined to be "any representation of knowledge such as facts or data, including the best available scientific information, which is accurate, reliable, and unbiased, is not compromised through corruption or falsification, and is useful to the intended users."

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[1] See also, for example; 81 FR 9685. "These proposed changes are consistent with current practice and policy." 81 FR 9686. "These changes are consistent with current practices used by the BLM." That is, practice in fact has preceeded formal adoption of rules.

This proposed definition is:

a. "Sui generis." That is, not to be found in other federal statute or regulation;
b. Sufficiently vague and dense as to cause more problems than it solves;
c. Missing the key elements of truly "high quality information." These key elements include:
1. Completeness;
2. Consistency;
3. Neutral;
4. Timely.

Gunnison County suggests that use of a concept already existing in the federal lexicon (e.g. "best scientific and commercial data available"—Endangered Species Act, Section 4) would more useful and less problematic.

III. Officially approved and adopted land use plans.

While the proposed rule acknowledges that "effective collaboration" is a "central theme," 81 FR 9678, and that it is BLM's "responsibility" to provide "opportunity" for local government "review, advice, and suggestion," 81 FR 9701, the proposal, at 81 FR 9686, states that "…the requirements of §1610.3-2 (a) would apply only to the 'land use plans' of…local governments…There would be no regulatory requirements for consistency with the 'policies, programs and processes' of local governments…" (Emphasis added.)

This proposal is flawed for three reasons:

1. It shifts the current requirement on the BLM to affirmatively demonstrate "consistency" with local government efforts to create a new burden on local government to demonstrate BLM "inconsistency" with local government requirements.

2. The proposal ignores that local governments have relevant police-power authority significantly more expansive than "land-use." These authorities include protection of public health, safety and welfare, and environmental and wildlife protection considerations.

3. The proposed terminology of "plan" versus "policies, programs and process" places the nomenclature of a local government requirement over the substance of that requirement.

As if these flaws are not sufficiently restricting—"the proposed rule requires that the local government land use plans must be officially approved and adopted." 81 FR 9729. This undefined requirement will add a wholly novel layer of potential BLM challenges to consideration of local government authority; to wit, whether the local government plans were "officially approved and adopted," when, and by whom. Further, it would be in BLM's sole discretion to determine whether local land use plans are "consistent with the purposes of FLPMA and other federal law and regulations applicable to public lands…" 81 FR 9729.

Finally, and to compound these flaws, the proposed Rule creates a new—and legally unfounded—concept of "preemption": "Where the officially approved and adopted land use plans of State and local government differ from each other, those of the higher authority will normally be followed." 81 FR 9729.

IV. Need to explicitly incorporate notice to and consultation with local governments into the RMP process.

We agree with the intent of the proposal to frontload public review and to provide greater transparency earlier on in the RMP process by making public preliminary alternatives, but we have concerns as to whether the proposed rule adequately incorporates early consultation opportunities for local governments.

V. Planning criteria would no longer be required.

While under existing regulations (i.e. 1610.4-2), proposed planning criteria must be published in a notice of intent in the Federal Register and made available for public comment though the scoping period and comment on the draft RMP, proposed regulations 1610.5-2 and 1610.5-3 would no longer require planning criteria. 81 FR 9686. How then would BLM know how to evaluate and analyze alternatives?

VI. There is a need for better coordination among BLM offices.

The proposed rule will move away from field office areas as the default RMP boundary and proposes the establishment of resource management plans that cross state lines. While Gunnison County understands that certain features of land management will not always follow artificial political boundaries, we have concerns as to the efficacy of cross-state BLM coordination to achieve this change. A reasonably anticipated, but negative, consequence of this proposal will be to make difficult BLM field office implementation of a RMP that spans multiple field offices.

VII. Need to ensure adequate public notice

The proposed RMP rule significantly reduces the type and number of RMP actions that the agency is required to notice in the Federal Register. Rather, the proposed rule creates a less formal and new method of providing public notice using "BLM's Website" for still significant changes like project amendments and Environmental Assessments. Nowhere does the proposed rule make clear whether "BLM's Website" refers to a centralized, public-usable, website that has the historic lineage for accuracy, completeness, neutrality and quality as the Federal Register.

BLM has not demonstrated a need to "fix" a Federal Register regime that "is not broken."

VIII. Need to ensure adequate time for public comment

The proposed RMP rule significantly shortens and constrains the time for public comment. At 81 FR 9683, the proposed rule shortens:

a. The minimum public comment period for draft EIS-level plan amendments from 90 days to 45 days;
b. The minimum public comment period for draft resource management plans from 90 days to 60 days; and
c. Removes the requirement to provide a 60 day public comment period on the draft resource management plan or plan amendment.

Disingenuously, the rationale offered by the draft for this curtailment of public comment opportunity is "to allow for the addition of new early opportunities for public involvement…" 81 FR 9683.

IX. Need to incorporate local community historic, economic, social or cultural values into the RMP process.

The proposed RMP rule adds an additional objective of resource management planning to the regulations "to ensure that the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values."

While the proposed rule, at 81 FR 9688, would continue to permit "consideration of impacts to local economies", consideration of these economic impacts to local communities will be diluted by removing them to an "appropriate scale" (e.g. consideration from a macro national perspective).

X. The rule attempts to ignore FLPMA procedures regarding 'withdrawals'.

The proposed rule, at 81 FR 9684, would add a new "objective of resource management planning to the regulations"; to wit, public lands "where appropriate" will be managed "to preserve and

protect (those) lands in their natural condition." Without a definition of "natural condition", this would appear to be a new functional equivalent of a "withdrawal" of BLM land from resource uses.

Procedurally, the Federal Land Policy and Management Act ("FLPMA") already provides the processes and requirements to accomplish such "withdrawals." See: 43 CFR 2310.3-4. Note: A withdrawal of land exceeding 5,000 acres requires Congressional approval.

Substantively, use of the undefined term "natural condition" appears to be an invitation to curtail and exclude historic livestock grazing use and practices on BLM lands.

XI. BLM attempting to avoid the National Environmental Policy Act ("NEPA").

The proposed rule states, at 81 FR 9724, the BLM "…does not believe this rule would constitute a major Federal action significantly affecting the quality of the human environment…because, as proposed, it would be a regulation entirely procedural in nature." If this were true, the proposed Rule would be categorically excluded from analysis under NEPA—meaning the significant practices, policies, and strategic directions described above would have no true analysis of environmental or socioeconomic impacts before being codified into law and regulation.

Gunnison County respectfully suggests that it is unreasonable and a suspension of common and legal sense to assert that the proposed rule will have no significant effect on the human environment.

A full environmental and socioeconomic impact analysis should be conducted for a full range of planning process alternatives prior to enacting a final rule.

XII. Conclusion

Gunnison County appreciates that BLM is taking the initiative to improve its resource management planning process. However, the concerns identified above must be addressed for the proposal to be viable.

Respectfully,

Paula Swenson, Chairperson	Phil Chamberland, Commissioner	Jonathan Houck, Commissioner