

Testimony of
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House Natural Resources Subcommittee on Oversight and Investigations
Hearing on “Examining Impacts of Federal Natural Resources Laws Gone Astray”
May 24, 2017

Chairman Labrador, Ranking Member McEachin and Members of the subcommittee—thank you for inviting me to testify today. My name is Celeste Maloy. I am a deputy county attorney for Washington County, Utah. My primary focus in the county attorney’s office is public lands law and policy. I regularly interact with federal agencies on the challenges that face a rapidly growing county where half of our land is managed by the Department of the Interior and only 16% is privately owned.

My experience in interacting with land management agencies, particularly the Bureau of Land Management, is that administrative processes overshadow the agency mission given by Congress. We routinely see federal agency employees treat their manuals and handbooks as if they are the ultimate law. When those manuals don’t align with directly relevant statutory guidance, the manuals still prevail. I’ll focus on this problem with the Wilderness Act and the Federal Lands Policy and Management Act, or FLPMA.

First the Wilderness Act.

The Omnibus Public Lands Management Act of 2009 contains a section we refer to as the Washington County Lands Bill.¹ It was the result of years of stakeholder negotiation and compromise. One of the county's motivations for participating was to settle the wilderness question. As a result of Wilderness Act inventories, Utah is full of wilderness study areas, or WSAs, that are managed for non-impairment of wilderness characteristics, but have never been declared wilderness by Congress. For the county, the lands bill was a way to end that uncertainty. In exchange for roughly a quarter of a million acres of declared wilderness within the county², we got an end to the endless inventory process and a Congressional release of WSAs.

We were surprised and upset when the new resource management plans (RMP) still required inventory for wilderness. Our local BLM office insisted that they were following their manuals. I did some research and was even more surprised to find that BLM's wilderness manual says that when Congress releases land from wilderness study, the BLM will "take into serious consideration the Congressional action"³. When Congress speaks, the agencies should act accordingly...not just take it into serious consideration.

Now I'll address FLPMA.

In the same Washington County Lands bill, Congress clearly instructed the Secretary of Interior to consider alternatives for a planned roadway that the county and local municipalities have known for years would be necessary to meet future transportation needs. That road was a major part of the "balancing" quid pro quo that led us to support the bill.

¹ Public Law 111-11, Subtitle O, Washington County, Utah

² The exact total is 256,337 acres of wilderness within Washington County.

³ Manual 6320 Considering Lands With Wilderness Characteristics in the BLM Land Use Planning Process(A)(1)(c)

After the bill was enacted however, the BLM's draft RMP⁴ eliminated the possibility of any road with an "exclusion area", which prohibits new rights of way. Knowing that the travel management plan couldn't contradict the RMP, the county went to BLM to correct the error. Local BLM employees told us that "Congress screwed up"⁵ in writing the bill. The statute says to consider route alternatives in the travel management plan, but that isn't how BLM does things, and they couldn't allow a road in that area. Even with directly relevant statutory language, the agency used their administrative processes to ignore the intent of the law. I am still amazed that an agency, which derives its authority from congressional delegation, dares to use administrative manuals to refuse to faithfully implement the laws Congress passes.

Additionally, FLPMA and other statutes⁶ require land management agencies to cooperate with local governments and consider local land use plans in developing RMPs. The statutory language is good, but it is meaningless if it doesn't create actual partnership. Our experience has been that the BLM planners hold a very few public meetings where information is *given*, but not exchanged. We are briefed, but not invited to participate. Although we are supposed to be "cooperating agencies", local governments can comment after the alternatives are developed. Instead of cooperatively developing alternatives to be evaluated, we get canned language in

⁴This reference is to the draft RMP. In the face of extreme political pressure, the final decision created an avoidance area (meaning roads should be avoided, but they aren't absolutely prohibited) where the road is planned through BLM managed lands. Layered on the avoidance area are several obstacles that still make a road all but impossible. The first layer is a plan to acquire private lands that are also part of the roadway and classifying them as exclusion areas) and prohibiting any take of desert tortoises (which includes picking tortoises up and moving them) or modification of tortoise habitat. The county has an incidental take permit and could mitigate for tortoise take, but the plan forbids rights of way that would result in any take.

⁵ The phrase "Congress screwed up" was used several times, but in one meeting with state, city, county, and delegation staffers, both the NCA manager and the District Manager for BLM said they could not consider a road because Congress screwed up when they drafted the language.

⁶ NEPA requires that EISs describe inconsistencies with local plans and how it will reconcile differences. FLPMA requires BLM to stay apprised of local plans, consider plans that are germane, resolve inconsistencies to the extent practicable (defined as legal), and provide meaningful involvement for local governments. NFMA requires coordination with land planning efforts of state and local governments.

the plans about the requirement to coordinate – no discussion of the local plans and no explanation of inconsistencies with locally developed plans.⁷

Lastly, the multiple use mandate from FLPMA is being eclipsed by the exceptions. FLPMA says that lands are to be managed for multiple use unless otherwise specified by law. Despite that language, WSAs, lands with wilderness characteristics, mineral withdrawals, exclusion areas, visual resource management areas, buffers around rock outcrops, and other restrictions on multiple use activities are more common than multiple use management. The elimination of uses seems to stem from a philosophy that all human impacts are negative impacts. Congress, by including multiple use management in the BLM's organic act, clearly did not espouse the idea that humans should be forced off of public land. Multiple use was intended to be the rule, not the exception.

⁷ The Draft RMPs that came out in 2015 had this canned language: “FLPMA Section 202(b)(9) directs that the BLM provide for involvement of State and local government officials in the land use planning and consider the provisions of tribal, state, and local plans that are relevant to the planning areas. BLM should attempt to resolve inconsistencies between federal and non-federal government plans, in the development of plans for public lands, to the extent those plans are consistent with the purposes, policies, and programs of the federal laws and regulations applicable to public lands and the purposes of FLPMA.” Then two county plans and two state park plans are listed without any discussion at all about how this draft plan was consistent with them. (Draft RMPs p. 899) The language about consistency is there, but no attempt was made to either explain how local plans were implemented or in what way local plans were inconsistent with federal law. After intense political backlash to the draft plans, the final record of decision contains the same language quoted above, but with some additional language about coordination. “As noted in Section 3.2, the cooperating Agencies (Washington County, Mohave County (AZ), and the State of Utah) were provided opportunities to provide input throughout the planning process. Consistency with agency and local and state government plans was primarily accomplished through communications and cooperative efforts (meetings and communications) between the BLM Planning Team and these Cooperating Agencies. The BLM is aware that there are specific county and state plan decisions relevant to aspects of public land management that are discrete from and independent of federal law. FLPMA requires that the development of an RMP for public lands be coordinated and consistent with county plans to the extent possible by law and that inconsistencies between federal and non-federal government plans be resolved to the extent practical (FLPMA, Title II, Section 202(c)(9)). However, the BLM is bound by federal law and, as a consequence, there will be an inconsistency that cannot be resolved or reconciled where state and local plans conflict with federal law. Thus while county and federal planning processes under FLPMA are required to be as integrated and as consistent as practical, the federal agency planning process is not bound by or subject to county plans, planning processes, or planning stipulations. In addition, the relevant goals, objectives, or policies of a county are often equivalent to an activity or implementation-level decision and not an RMP-level decision. The very specific county goals would be addressed in any subsequent BLM activity or implementation-level decision.” In short, they are trying to use the exception to swallow the rule. Local plans are being dismissed as too specific for a plan or somehow, vaguely not consistent with federal law. The language in FLPMA requiring consistency has been rendered all but meaningless by agency interpretation.

Between the broadening of statutory authority through administrative processes and the deference federal courts give to agency decision making, local governments have few effective options for limiting agency overreach. We cannot vote them out of office. We cannot fire them. I am here because we need Congress to stop the expansion of agency authority.