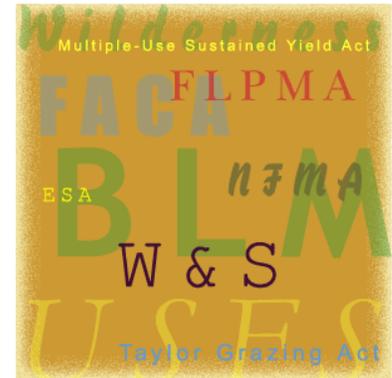


legal basis

Legal Basis for County Resource Management Planning



History of Public Land Management Planning Processes

To know where we're going we need to know where we've been.

1. History of the Forest Reserve System
 - a. Reserves created by the Creative Act of 1891. Later, Congress adopted the Organic Administration Act of 1897 to protect the use of the reserves for local citizens.
 - b. Organic Administration Act declared that forest reserves would be created:
 - i. to protect water resources for local communities and agriculture
 - ii. to provide a continuous supply of timber
 - c. Supreme Court upheld original purposes of Organic Administration Act in 1976 in *US v. New Mexico*
2. History of the Bureau of Land Management Lands
 - a. The General Land Office was formed in 1812 to oversee the settlement of the nation's vast public domain.
 - b. The Taylor Grazing Act of 1934 was one of the most comprehensive conservation programs ever attempted for the Nation's public lands. This Act established the Grazing Service.
 - i. Taylor Grazing Act was adopted to stabilize the livestock industries and indirectly to stabilize local economies.
 - ii. Supreme Court recognized and reinforced purposes of Taylor Grazing Act in *Public Lands Council et al v. Babbitt (2000)*.
 - c. The Bureau of Land Management was created by merging the Grazing Service with the General Land Office.
3. Multiple-Use Sustained Yield Act, 1960
 - a. requires that the National Forests be managed for a wider range of interests, in theory giving resource values such as recreation and wildlife equal standing with timber production.
 - b. Multiple-use was advanced as a concept for balancing tradeoffs between commodity and non-commodity interests.
 - i. In practice, however, exactly what “multiple-use” means remains a much debated topic.
4. Federal Advisory Committee Act (or FACA), 1972
 - a. to help assure that federal agencies would act without bias among competing interests
 - b. three broad goals

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- i. to reduce the influence of special interests in policy and decision making,
 - ii. to provide the public equal access to government, and
 - iii. to control the costs of advisory committees.
 - c. shortly after FACA, Congress specifically called upon multiple-use agencies to seek broad public input into decision-making.
 - i. better and more balanced decisions for management of the public lands,
 - ii. to commit agencies to act in accordance with those decisions, and
 - iii. to ensure that decisions could be politically, legally, and scientifically defended.
- 5. The Federal Land Policy and Management Act (FLPMA), 1976
 - a. required the BLM to develop land use plans with public involvement and in coordination with other federal and state agencies and government.

Current Protection for Local Governments Under the Federal Land Policy and Management Act (FLPMA), and the National Forest Management Act (NFMA)

- 1. Counties have the power to: (Forest Service 36 CFR § 219.7 and 16 U.S.C. § 1604(a); BLM 43 CFR § 1610.3-1 and §1610.3-2 and Section 202(c)(9))
 - a. request a yearly list of all activities that will occur within the county from each Agency
 - i. For example grazing, wilderness management, land exchanges, timber sales, oil and gas consideration, etc
 - b. be involved in land use planning before the general public has the opportunity to be involved
 - c. be involved in land use planning before a preferred alternative is selected
 - d. request that monitoring occur to determine the effects that land and resource management plans have on the local economy
 - e. define community or economic stability
 - i. includes both social and economic consideration
 - 1. both USFS and BLM are charged with protecting local economic stability, however, it is not up to the agencies to define such stability
 - f. write land use plans and monitoring plans discussing counties cultural, customary, economic needs, and environmental desired future conditions on the federal lands
 - i. a local land use plan is not zoning nor does it grant supremacy over the federal lands
 - g. if a local land use plan does not exist, or if one exists but the agencies have not been notified about that plan, the Agencies are not bound to coordinate with local governments

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Wilderness Act, 1964

1. If wilderness study area designated by BLM or USFS, then BLM/USFS land use plan regulations apply
 - a. counties involved before preferred alternative is selected
 - b. monitoring is required
 - c. land use plan can be used to influence management
2. if wilderness already is designated by Congress, federal agency still must prepare land use plan to govern use and management of the wilderness
 - a. counties can be involved in planning
 - b. counties can insist on proper monitoring
 - c. valid existing rights are to be protected in wilderness areas

Endangered Species Act, 1966 *16 USC § 1533*

1. Fish and Wildlife Service (FWS) is charged with responsibility for inventorying and listing species, issuing biological opinions, and implementing the recovery plans.
2. FWS must notify county governments regarding the
 - a. potential listing of species
 - b. change in the listing of a species
 - c. the designation of change in critical habitat
3. local governments then have the opportunity to comment on that information
4. if the FWS rejects those comments, the FWS must notify the county government with the reasons for that rejection
5. FWS must comply with NEPA in developing critical habitat in 10th Circuit states
6. FWS must consider all economic harm in critical habitat designation
 - a. FWS can exclude areas from critical habitat if damage is too great
 - b. 'jeopardy to species' does not equate to 'adverse modification of habitat'
 - i. must prove causation
 - c. county governments can also be involved in the development of protective regulations and recovery plans

claims court has ruled that the devaluation of private property by the ESA is a "takings" under the 5th Amendment (compensation must be paid)

Wild and Scenic Rivers Act, 1968 (*16 USC § 1271 et seq*)

1. congressional policy to protect "...historic, cultural, or other similar values..."
2. county management of designated wild, scenic, or recreational rivers is possible though:
 - a. no federal management if river and land is managed by local zoning, so long as the plan or ordinance conforms with the purposes of the Wild and Scenic Rivers Act §1277(c)

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- b. designations can not effect valid existing rights §1279(b), including grazing leases and permits § 1283(c)
- c. federal plans to manage wild and scenic rivers are to be completed after consultation with state and local government and interested public §1274(d)(1)

Power and Authority of Local Governments

1. Guiding Principles:

- a. ...is a way to plan to consider the resource
- b. ...is a way to force the federal government to follow the federal law
- c. ...not zoning
- d. ...not veto power
- e. ...not a way to throw all federal agency officials in jail
- f. ...not 'jobs vs. environment'
- g. ...is a way to get local solutions to national concerns
- h. ...is a way to enforce your right to participate

Opportunities for Local Government Participation in Federal Decision Making

1. National Environmental Policy Act (NEPA)

- a. NEPA requires that all federal agencies complete environmental impact statements (EIS) or environmental assessments (EA) for “all major federal actions significantly affecting the human environment”
- b. NEPA requires agencies to consider five elements:
 - i. physical environment
 - ii. tax base or economic environment
 - iii. custom and culture
 - 1. NEPA requires all federal agencies to “use all practicable means to ...preserve important historic, cultural, and natural aspects of our national heritage” (42 U.S.C. 4331(a)(4)).
 - 2. culture and custom are defined as a “right granted to a locality”
 - a. ‘custom’ is a usage of practice by the people, which by unvarying habit has become compulsory and has acquired the force of law
 - b. ‘culture’ is the customary beliefs, social forms and material traits of a group; an integrated pattern of human behavior passed to succeeding generations
 - 3. custom and culture cannot be defined by the federal government, but rather must be defined by the local area

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- a. if the local government has not been involved in describing “custom and culture” the federal government is not bound to consider that in NEPA
 - iv. development and review of alternatives
 - v. mitigation
 2. Regulations implementing NEPA from Council of Environmental Quality
 - a. CEQ regulations adopted pursuant to NEPA require joint environmental planning IF a state or local government has an environmental planning process.
 - i. Environmental impact statements must discuss any ‘inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the [EIS] should describe the extent to which the agency would reconcile its proposed action with the plan or law’. 40 C.F.R. § 1506.2(d)
 - b. “Joint environmental planning” means:
 - i. joint lead agencies
 - ii. joint hearings
 - iii. joint environmental research
 - iv. joint consideration of custom, culture, socio-economic stability
 - v. joint consideration of mitigation measures

Components of a land use plan

- definition of community or economic stability
- definition of custom and culture
- discussion of the environment
- join with other counties (coalition)

Credit:

Clayton Chidester, title

BLM person, title

Val Payne, title

John Harja, title

The 2004 Utah State Legislature amended Section 63-38d-401 of the Utah State Code.

This legislation defines Utah’s policies and positions on watershed management.

(5) The state planning coordinator shall take into consideration the following findings in the preparation of any policies, plans, programs, or processes relating to federal lands and natural resources on federal lands pursuant to this section:

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(a) the citizens of the state are best served by the application of multiple-use and sustained-yield principles when making decisions concerning the management and use of the lands administered by the Bureau of Land Management and the U.S. Forest Service;

(b) multiple-use and sustained-yield management means that federal agencies should develop and implement management plans and make other resource-use decisions which facilitate land and natural resource use allocation which would support the specific plans, programs, processes, and policies of state agencies and local governments and which are designed to produce and provide the watersheds, food, fiber, and minerals necessary to meet future economic growth needs, and community expansion, and meet the recreational needs of the citizens of the state without permanent impairment of the productivity of the land;

(c) the waters of the state are the property of the citizens of the state, subject to appropriation for beneficial use, and are essential to the future prosperity of the state and the quality of life within the state;

(d) the state has the right to develop and use its entitlement to interstate rivers;

(e) all water rights desired by the federal government must be obtained through the state water appropriation system;

(f) land management and resource-use decisions which affect federal lands should give priority to and support the purposes of the compact between the state and the United States related to school and institutional trust lands;

(g) development of the solid, fluid, and gaseous mineral resources of the state is an important part of the economy of the state, and of local regions within the state;

(h) Utah has outstanding opportunities for outdoor recreation;

(i) wildlife constitutes an important resource and provides recreational and economic opportunities for the state's citizens, and proper stewardship of the land and natural resources is necessary to ensure a viable wildlife population within the state;

(j) forests, rangelands, timber, and other vegetative resources provide forage for livestock, forage and habitat for wildlife, contribute to the state's economic stability and growth, and are important for a wide variety of recreational pursuits;

(k) management programs and initiatives which improve watersheds and increase forage for the mutual benefit of the agricultural industry and wildlife species by utilizing proven techniques and tools are vital to the state's economy and the quality of life in Utah; and

(l) transportation and access routes to and across federal lands, including all rights-of-way vested under R.S. 2477, are vital to the state's economy and to the quality of life in Utah.

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(6) The state planning coordinator shall take into consideration the following findings in the preparation of any policies, plans, programs, or processes relating to federal lands and natural resources on federal lands pursuant to this section:

(a) the state's support for the addition of a river segment to the National Wild and Scenic Rivers System, 16 U.S.C. Sec. 1271 et seq., will be withheld until:

(i) it is clearly demonstrated that water is present and flowing at all times;

(ii) it is clearly demonstrated that the required water-related value is considered outstandingly remarkable within a region of comparison consisting of one of the three physiographic provinces in the state, and that the rationale and justification for the conclusions are disclosed;

(iii) the effects of the addition upon the local and state economies, agricultural and industrial operations and interests, tourism, water rights, water quality, water resource planning, and access to and across river corridors in both upstream and downstream directions from the proposed river segment have been evaluated in detail by the relevant federal agency;

(iv) it is clearly demonstrated that the provisions and terms of the process for review of potential additions have been applied in a consistent manner by all federal agencies; and

(v) the rationale and justification for the proposed addition, including a comparison with protections offered by other management tools, is clearly analyzed within the multiple-use mandate, and the results disclosed;

(b) the conclusions of all studies related to potential additions to the National Wild and Scenic River System, 16 U.S.C. Sec. 1271 et seq., are submitted to the state for review and action by the Legislature and governor, and the results, in support of or in opposition to, are included in any planning documents or other proposals for addition and are forwarded to the United States Congress;

(c) the state's support for designation of an Area of Critical Environmental Concern (ACEC), as defined in 43 U.S.C. Sec. 1702, within federal land management plans will be withheld until:

(i) it is clearly demonstrated that the proposed area contains historic, cultural or scenic values, fish or wildlife resources, or natural processes which are unique or substantially significant on a regional basis, or contain natural hazards which significantly threaten human life or safety;

(ii) the regional values, resources, processes, or hazards have been analyzed by the federal agency for impacts resulting from potential actions which are consistent with the multiple-use, sustained-yield principles, and that this analysis describes the rationale for any

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special management attention required to protect, or prevent irreparable damage to the values, resources, processes, or hazards;

(iii) the difference between special management attention required for an ACEC and normal multiple-use management has been identified and justified, and that any determination of irreparable damage has been analyzed and justified for short and long-term horizons;

(iv) it is clearly demonstrated that the proposed designation is not a substitute for a wilderness suitability recommendation; and

(v) the conclusions of all studies are submitted to the state for review, and the results, in support of or in opposition to, are included in all planning documents;

(d) sufficient federal lands are made available for government-to-government exchanges of school and institutional trust lands and federal lands without regard for a resource-to-resource correspondence between the surface or mineral characteristics of the offered trust lands and the offered federal lands;

(e) federal agencies should support government-to-government exchanges of land with the state based on a fair process of valuation which meets the fiduciary obligations of both the state and federal governments toward trust lands management, and which assures that revenue authorized by federal statute to the state from mineral or timber production, present or future, is not diminished in any manner during valuation, negotiation, or implementation processes;

(f) prime agricultural lands should continue to produce the food and fiber needed by the citizens of the state and the nation, and the rural character and open landscape of rural Utah should be preserved through a healthy and active agricultural industry, consistent with private property rights and state fiduciary duties;

(g) the resources of the forests and rangelands of the state should be integrated as part of viable, robust, and sustainable state and local economies, and available forage should be evaluated for the full complement of herbivores the rangelands can support in a sustainable manner, and forests should contain a diversity of timber species, and disease or insect infestations in forests should be controlled using logging or other best management practices;

(h) the invasion of noxious weeds and undesirable invasive plant species into Utah should be reversed, their presence eliminated, and their return prevented;

(i) management and resource-use decisions by federal land management and regulatory agencies concerning the vegetative resources within the state should reflect serious consideration of the optimization of the yield of water within the watersheds of Utah;

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(j) the development of the solid, fluid, and gaseous mineral resources of the state should be encouraged, the waste of fluid and gaseous minerals within developed areas should be prohibited, and requirements to mitigate or reclaim mineral development projects should be based on credible evidence of significant impacts to natural or cultural resources;

(k) motorized, human, and animal-powered outdoor recreation should be integrated into a fair and balanced allocation of resources within the historical and cultural framework of multiple-uses in rural Utah, and outdoor recreation should be supported as part of a balanced plan of state and local economic support and growth;

(l) off-highway vehicles should be used responsibly, and the management of off-highway vehicles should be uniform across all jurisdictions, and laws related to the use of off-highway vehicles should be uniformly applied across all jurisdictions;

(m) rights-of-way granted under the provisions of R.S. 2477 should be preserved and acknowledged;

(n) transportation and access provisions for all other existing routes, roads, and trails across federal, state, and school trust lands within the state should be determined and identified, and agreements executed and implemented, as necessary to fully authorize and determine responsibility for maintenance of all routes, roads, and trails;

(o) the reasonable development of new routes and trails for motorized, human, and animal-powered recreation should be implemented; and

(p) (i) forests, rangelands, and watersheds, in a healthy condition, are necessary and beneficial for wildlife, livestock grazing, and other multiple-uses;

(ii) that management programs and initiatives which are implemented to increase forage for the mutual benefit of the agricultural industry, livestock operations, and wildlife species should utilize all proven techniques and tools;

(iii) that the continued viability of livestock operations and the livestock industry should be supported on the federal lands within Utah by management of the lands and forage resources, by the optimization of animal unit months for livestock, in accordance with the multiple-use provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 et seq., the provisions of the Taylor Grazing Act of 1934, 43 U.S.C. 315 et seq., and the provisions of the Public Rangelands Improvement Act of 1978, 43 U.S.C. 1901 et seq.;

(iv) that provisions for predator control initiatives or programs under the direction of state and local authorities should be implemented; and

(v) that resource-use and management decisions by federal land management and regulatory agencies should support state-

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sponsored initiatives or programs designed to stabilize wildlife populations that may be experiencing a scientifically-demonstrated decline in those populations.