

Pitt Law Offices

31429 McGrew Lane, Polson, MT 59860

TO: TRAVIS McADAM,
DIRECTOR,
MONTANA HUMAN RIGHTS NETWORK

FROM: KENNETH P. PITT
ATTORNEY AT LAW

SUBJECT: LEGAL ANALYSIS OF MONTANA SENATE BILL - SB117, ENTITLED
"THE MONTANA CORDINATION ACT OF 2011."

DATE: JUNE 26, 2012

SHORT ANSWER:

If enacted, SB117 will have no legal effect on federal land management. There has been no proffered evidence, or other indication, that SB117 will actually induce unemployment or create jobs.¹ The following claims are paraphrased for your convenience.

I. DISCUSSION:

- A. **Claim:** "Federal law requires the USDA Forest Service ("FS") and the USDOI-Bureau of Land Management ("BLM") to coordinate with county governments, in its decision making process."²

Short Answer: This claim is incorrect and misleading.

¹ Some legislative comments indicated that SB117 would increase the financial burden on county governments in two primary ways. First SB117 would establish a way for a county to be sued by an unhappy citizenry for alleged failure to comply with SB117's procedural and legal requirements for failing to engage in "coordination." The second involves the legal cost associated with a county that attempts to sue the United States for failing to "coordinate" as it is described in SB117. This memorandum does not discuss these somewhat speculative comments. However, if a county wished to sue the FS for "failing to coordinate," it would have had to fully participate in the FS' regulatory decision making and appeal processes. See, 7 U.S.C. § 6912(e), and 36 C.F.R. §§ 215 and 251. Further, such lawsuit could only be brought at the end of the FS' decision making process, and then it would have to be brought under the federal Administrative Procedures Act ("APA"), wherein a federal court sits basically as an appeals court and reviews the record compiled by the FS to ascertain whether or not it acted arbitrarily or capriciously. 5 U.S.C. § 706.

² See *e.g.*, *The Missoulian*, May 25, 2012, Page B1, "Commission wants role in management," Reporter Perry Backus."

1. Forest Service Coordination:

Section 6(a) of the “Forest and Rangeland Renewable Resources Planning Act of 1974,³ 16 U.S.C. § 1604(a), states in pertinent part:

As part of the Program provided by section 1602⁴ of this title, the Secretary of Agriculture *shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies. (Emphasis added)*

16 U.S.C. § 1604(d) states:

The Secretary [of USDA] shall provide for public participation *in the development, review, and revision of land management plans* including but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of least three months before final adoption, during which period the Secretary⁵ shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions. *(Emphasis added)*

16 U.S.C. § 1613 states:

In exercising his authorities under this subchapter and other laws applicable to the Forest Service, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments, and the public adequate notice and an opportunity to comment upon the formation of standards, criteria, and guidelines applicable to Forest Service programs.

Through formal federal Administrative Procedure Act (“APA”), 5 U.S.C. § 553, notice and comment rulemaking,⁶ the FS has just promulgated new planning regulations to implement these statutory requirements. Title 36 of the Code of Federal Regulations, section 219.4 (2012), (36 C.F.R. § 219.4), states in pertinent part:

§ 219.4 Requirements for public participation.

(a) *Providing opportunities for participation.* The responsible official shall provide opportunities to the public for participating in the assessment process; developing a plan proposal, including the monitoring program; commenting on

³ Also known as the National Forest Management Act (“NFMA”).

⁴ Requiring a report by USDA’s Secretary to the President.

⁵ These responsibilities have been regulatorily delegated to the Chief of the Forest Service, see, 7 C.F.R. §§ 2.20 and 2.60.

⁶ See, 77 Federal Register, No 68, Page 21002, May 9, 2012, and 16 U.S.C. §1613.

the proposal and the disclosure of its environmental impacts in accompanying NEPA documents; and reviewing the results of monitoring information. When developing opportunities for public participation, the responsible official shall take into account the discrete and diverse roles, jurisdictions, responsibilities, and skills of interested and affected parties; the accessibility of the process, opportunities, and information; and the cost, time, and available staffing. The responsible official should be proactive and use contemporary tools, such as the Internet, to engage the public, and should share information in an open way with interested parties. Subject to the notification requirements in §219.16, the responsible official has the discretion to determine the scope, methods, forum, and timing of those opportunities. *The Forest Service retains decision making authority and responsibility for all decisions throughout the process.*

(1) *Outreach.* The responsible official shall engage the public—including Tribes and Alaska Native Corporations, other Federal agencies, State and local governments, individuals, and public and private organizations or entities—early and throughout the planning process as required by this part, using collaborative processes *where feasible and appropriate*. In providing opportunities for engagement, the responsible official shall encourage participation by:

(i) Interested individuals and entities, including those interested at the local, regional, and national levels.

(ii) Youth, low-income populations, and minority populations.

(iii) Private landowners whose lands are in, adjacent to, or otherwise affected by, or whose actions may impact, future management actions in the plan area.

(iv) Federal agencies, States, counties, and local governments, including State fish and wildlife agencies, State foresters and other relevant State agencies. *Where appropriate, the responsible official shall encourage States, counties, and other local governments to seek cooperating agency status in the NEPA process for development, amendment, or revision of a plan.* The responsible official may participate in planning efforts of States, counties, local governments, and other Federal agencies, where practicable and appropriate.

(v) Interested or affected federally recognized Indian Tribes or Alaska Native Corporations. Where appropriate, the responsible official shall encourage federally recognized Tribes to seek cooperating agency status in the NEPA process for development, amendment, or revision of a plan. The responsible official may

participate in planning efforts of federally recognized Indian Tribes and Alaska Native Corporations, where practicable and appropriate....

(b) *Coordination with other public planning efforts.* (1) The responsible official shall *coordinate land management planning* with the equivalent and *related planning efforts* of federally recognized Indian Tribes, Alaska Native Corporations, other Federal agencies, and *State and local governments*.

(2) For plan development or revision, the responsible official shall review the planning and land use policies of federally recognized Indian Tribes (43 U.S.C. 1712(b)), Alaska Native Corporations, other Federal agencies, and *State and local governments*, where relevant to the plan area. The results of this review shall be displayed in the environmental impact statement (EIS) for the plan (40 CFR 1502.16(c), 1506.2). The review shall include *consideration* of:

(i) The objectives of federally recognized Indian Tribes, Alaska Native Corporations, other Federal agencies, and *State and local governments*, as expressed in their plans and policies;

(ii) The compatibility and interrelated impacts of these plans and policies;

(iii) Opportunities for the plan to address the impacts identified or contribute to joint objectives; and

(iv) Opportunities to resolve or reduce conflicts, within the context of developing the plan's desired conditions or objectives.

(3) Nothing in this section should be read to indicate that the responsible official will seek to direct or control management of lands outside of the plan area, *nor will the responsible official conform management to meet non-Forest Service objectives or policies. (Emphasis added throughout section)*

During rule making, comments were made regarding coordination and consistency.⁷

Comment: “Some respondents felt the proposed rule downplayed requirements to coordinate with State and local governments and that public participation is elevated over coordination.”

Response: Many of the coordination requirements of the 1982 planning rule have been carried forward into Sec.219.4(b)(1) and (2) of the final rule. Section 219.4(b)(3) clarifies requirements for coordination efforts.... It was made to make

⁷ These comments and responses can be found in 77 Fed. Reg. Pages 21196 through 21198 (May 9, 2012).

clear that the requirements for coordination with other public planning efforts have not been reduced from previous rules. . . . The final rule recognizes that participants have different roles, responsibilities, and jurisdictions, which the responsible official will take into account in designing opportunities for participation. The final rule does not adopt the requirement of the 1982 rule to meet with a designated State official and representatives of Federal agencies and local governments because people can often collaborate together without a face-to-face conference. The Department expects responsible officials to effectively engage States, Tribes, and local officials and other representatives in collaborative planning processes (*Emphasis added*).

Comment: “Commitments to and consistency with local plans. Some respondents felt the rule needs a stronger commitment to local government plans, including statewide forest assessments and resource strategies.”

Response: [*P*]ans are not required to be consistent with State forest assessments or strategies or plans of State and local governments under the final rule. The Forest Service must develop its own assessment and plans related to the conditions of the specific planning unit and make decisions based on Federal laws and considerations that may be broader than the State or local plans. Requiring land management plans to be consistent with local government plans would not allow the flexibility needed to address the diverse management needs on NFS lands and could hamper the Agency's ability to address *regional and national* interests on Federal lands. In the event of conflict with Agency planning objectives, consideration of alternatives for resolution within the context of achieving NFS goals or objectives for the unit would be explored. . . . (*Emphasis added*)

From the above, it is apparent that “coordination” is only required in the land planning process, and not across the board in the FS’ general decision making processes. It is also clear from the above statutory and regulatory provisions that although FS “coordination” is required by federal law in the Forest planning process, the FS has promulgated binding federal regulations to interpret how that coordination will be conducted, and courts will defer to this interpretation. Were a federal court to review the FS’ regulatory interpretations under the *Chevron* (see *Chevron* discussion *infra*), and under the APA’s “arbitrary and capricious” standard, it will look to whether they comply with NFMA, not to whether a county has an arguably more compelling interpretation. If a reviewing court reviews a FS management decision, it will look to see whether the FS complied with its own authorizing statutes and regulations, not whether it complied with a unilaterally enacted county interpretation. Nor, under the APA, should a reviewing court impose on the FS a new programmatic administrative and/or management requirement not authorized by Congress. Accordingly, that counties may differently define “coordination” is neither legally relevant nor binding on the FS. Therefore, even if enacted, SB117 will not have any legal effect on the FS’ planning process, nor on its general decision making process.⁸

⁸ It should be noted that NFMA section 16 U.S.C. § 1604(i) requires that implementation decisions occurring on NFS lands be consistent with Forest Plans. Accordingly, if the Forest Service complies with the public participation

2. Bureau of Land Management Coordination:

As with the FS, a careful reading of BLM's authorizing statute, and its implementing regulations, leads to the same result - there is no "coordination" requirement applicable to BLM's general decision making process.

Section 201(c) of the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §1712(c) states in pertinent part:

In the development and revision of land use plans the Secretary shall-- . . . (9) to the extent consistent with the laws governing of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning programs of other Federal departments and agencies and of States and local governments within which lands are located. . . .

In implementing this directive, the Secretary shall, *to the extent he finds practical*, keep apprised of State, local and tribal land use plans; assure that consideration is given to those State, local and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, *to the extent practical*, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use plans, land use regulations, and *land use decisions* for public lands including early public notice of proposed decisions which may have a significant impact on non-Federal lands.

Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters *as may be referred to them by [the Secretary]*.

Land use plans of the Secretary⁹ under this section shall be consistent with State and local plans to the maximum extent he finds *consistent with Federal law and the purposes of this Act. (Emphasis added)*.

BLM has also promulgated regulations to implement FLPMA's requirements. 43 C.F.R. § 1610 (2012) states in pertinent part:

43 C.F.R. §1612.2 Public participation.

(a) The public shall be provided opportunities to meaningfully participate in and comment on the preparation of plans, amendments and related guidance and be given early notice of planning activities. Public involvement in the resource management

process required by the 36 C.F.R. § 219.4 (2012) forest planning process, any implementation actions would arguably already have coordinated with State and local governments.

⁹ This refers to the Secretary of Interior, 43 U.S.C. § 1702(g)

planning process shall conform to the requirements of the National Environmental Policy Act and associated implementing regulations.

(b) The Director shall, early in each fiscal year, publish a planning schedule advising the public of the status of each plan in process of preparation or to be started during that fiscal year, the major action on each plan during that fiscal year and projected new planning starts for the 3 succeeding fiscal years. The notice shall call for public comments on projected new planning starts so that such comments can be considered in refining priorities for those years.

(c) When BLM starts to prepare, amend, or revise resource management plans we will begin the process by publishing a notice in the Federal Register and appropriate local media, including newspapers of general circulation in the state and field office area. The Field Manager may also decide if it is appropriate to publish a notice in media in adjoining States. This notice may also constitute the scoping notice required by regulation for the National Environmental Policy Act (40 CFR 1501.7). This notice shall include the following:

- (1) Description of the proposed planning action;
- (2) Identification of the geographic area for which the plan is to be prepared;
- (3) The general types of issues anticipated;
- (4) The disciplines to be represented and used to prepare the plan;
- (5) The kind and extent of public participation opportunities to be provided;
- (6) The times, dates and locations scheduled or anticipated for any public meetings, hearings, conferences or other gatherings, as known at the time;
- (7) The name, title, address and telephone number of the Bureau of Land Management official who may be contacted for further information; and
- (8) The location and availability of documents relevant to the planning process.

(d) A list of individuals and groups known to be interested in or affected by a resource management plan shall be maintained by the Field Manager and those on the list shall be notified of public participation activities. Individuals or groups may ask to be placed on this list. Public participation activities conducted by the Bureau of Land Management shall be documented by a record or summary of the principal issues discussed and comments made.

The documentation together with a list of attendees shall be available to the public and open for 30 days to any participant who wishes to clarify the views he/she expressed.

(e) At least 15 days' public notice shall be given for public participation activities where the public is invited to attend. Any notice requesting written comments shall provide for at least 30 calendar days for response. Ninety days shall be provided for review of the draft plan and draft environmental impact statement. The 90-day period shall begin when the Environmental Protection Agency publishes a notice of the filing of the draft environmental impact statement in the Federal Register.

(f) Public notice and opportunity for participation in resource management plan preparation shall be appropriate to the areas and people involved and shall be provided at the following specific points in the planning process:

(1) General notice at the outset of the process inviting participation in the identification of issues (See §§1610.2(c) and 1610.4-1);

(2) Review of the proposed planning criteria (See §1610.4-2);

(3) Publication of the draft resource management plan and draft environmental impact statement (See §1610.4-7);

(4) Publication of the proposed resource management plan and final environmental impact statement which triggers the opportunity for protest (See §§1610.4-8 and 1610.5-1(b)); and

(5) Public notice and comment on any significant change made to the plan as a result of action on a protest (See §1610.5-1(b)).

43 C.F.R. § 1610.3-1 Coordination of planning efforts.

(a) In addition to the public involvement prescribed by §1610.2, the following coordination is to be accomplished with other Federal agencies, state and local governments, and federally recognized Indian tribes. The objectives of the coordination are for the State Directors and Field Managers to:

(1) Keep apprised of non-Bureau of Land Management plans;

(2) Assure that BLM considers those plans that are germane in the development of resource management plans for public lands;

(3) Assist in resolving, *to the extent practicable*, inconsistencies between Federal and non-Federal government plans;

(4) Provide for meaningful public involvement of other Federal agencies, State and *local government officials*, both elected and appointed, and federally recognized Indian tribes, in the development of resource management plans, including early public notice of final decisions that may have a significant impact on non-Federal lands; and

(5) *Where possible and appropriate*, develop resource management plans collaboratively with cooperating agencies.

(b) When developing or revising resource management plans, BLM State Directors and Field Managers will invite eligible Federal agencies, state and *local governments*, and federally recognized Indian tribes to participate as cooperating agencies. The same requirement applies when BLM amends resource management plans through an environmental impact statement. State Directors and Field Managers will consider any requests of other Federal agencies, state and local governments, and federally recognized Indian tribes for cooperating agency status. Field Managers who deny such requests will inform the State Director of the denial. The State Director will determine if the denial is appropriate.

(c) State Directors and Field Managers shall provide other Federal agencies, State and *local governments*, and Indian tribes opportunity for review, advice, and suggestion on issues and topics which may affect or influence other agency or other government programs. To facilitate coordination with State governments, State Directors should seek the policy advice of the Governor(s) on the timing, scope and coordination of plan components; definition of planning areas; scheduling of public involvement activities; and the multiple use opportunities and constraints on public lands. State Directors may seek written agreements with Governors or their designated representatives on processes and procedural topics such as exchanging information, providing advice and participation, and timeframes for receiving State government participation and review in a timely fashion. If an agreement is not reached, the State Director shall provide opportunity for Governor and State agency review, advice and suggestions on issues and topics that the State Director has reason to believe could affect or influence State government programs.

(d) In developing guidance to Field Manager, in compliance with section 1611 of this title, the State Director shall:

(1) *Ensure that it is as consistent as possible* with existing officially adopted and approved resource related plans, policies or programs of other Federal agencies, State agencies, Indian tribes and local governments that may be affected, as prescribed by §1610.3–2 of this title;

(2) Identify areas where the proposed guidance is inconsistent with such policies, plans or programs and *provide reasons why the inconsistencies exist and cannot be remedied*; and

(3) Notify the other Federal agencies, State agencies, Indian tribes or *local governments* with whom consistency is not achieved and indicate any appropriate methods, procedures, actions and/or programs which the State Director believes may lead to resolution of such inconsistencies.

(e) A notice of intent to prepare, amend, or revise a resource management plan shall be submitted, consistent with State procedures for coordination of Federal activities, for circulation among State agencies. This notice shall also be submitted to Federal agencies, *the heads of county boards, other local government units* and Tribal Chairmen or Alaska Native Leaders that have requested such notices or that the responsible line manager has reason to believe would be concerned with the plan or amendment. These notices shall be issued simultaneously with the public notices required under § 1610.2(b) of this title.

(f) Federal agencies, State and local governments and Indian tribes shall have the time period prescribed under § 1610.2 of this title for review and comment on resource management plan proposals. Should they notify the Field Manager, in writing, of what they believe to be specific inconsistencies between the Bureau of Land Management resource management plan and their officially approved and adopted resources related plans, *the resource management plan documentation shall show how those inconsistencies were addressed and, if possible, resolved (Emphasis added throughout section).*

43 C.F.R. § 1610.3-2 Consistency requirements.

(a) *Guidance and resource management plans and amendments to management framework plans shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments and Indian tribes, so long as the guidance and resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands, including Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise, and other pollution standards or implementation plans.*

(b) In the absence of officially approved or adopted resource-related plans of other Federal agencies, State and local governments and Indian tribes, guidance and resource management plans shall, *to the maximum extent practical*, be consistent with officially approved and adopted resource related *policies and programs* of other Federal agencies, State and *local governments* and Indian tribes. *Such consistency will be accomplished so long as the guidance and resource management plans are consistent with the policies, programs and provisions of Federal laws and regulations applicable to public lands*, including, but not limited to, Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise and other pollution standards or implementation plans.

(c) State Directors and Field Managers shall, *to the extent practicable*, keep apprised of State and local governmental and Indian tribal policies, plans, and programs, but they shall not be accountable for ensuring consistency if they have not been notified, in writing, by State and local governments or Indian tribes of an apparent inconsistency.

(d) Where State and local government policies, plans, and programs differ, those of the higher authority will normally be followed (*Emphasis added throughout section*).

43 C.F.R. § 1610.4-1 Identification of issues.

At the outset of the planning process, the public, other Federal agencies, State and *local governments* and Indian tribes shall be given an opportunity to suggest concerns, needs, and resource use, development and protection opportunities for consideration in the preparation of the resource management plan. The Field Manager, in collaboration with any cooperating agencies, will analyze those suggestions and other available data, such as records of resource conditions, trends, needs, and problems, and select topics and determine the issues to be addressed during the planning process. Issues may be modified during the planning process to incorporate new information. The identification of issues shall also comply with the scoping process required by regulations implementing the National Environmental Policy Act (40 C.F.R. §1501.7).

43 C.F.R. § 1610.4-2 Development of planning criteria.

(a) The Field Manager will prepare criteria to guide development of the resource management plan or revision, to ensure:

- (1) It is tailored to the issues previously identified; and
- (2) That BLM avoids unnecessary data collection and analyses.

(b) *Planning criteria will generally be based upon applicable law, Director and State Director guidance, the results of public participation, and coordination with any cooperating agencies and other Federal agencies, State and local governments, and federally recognized Indian tribes.*

(c) BLM will make proposed planning criteria, including any significant changes, available for public comment prior to being approved by the Field Manager for use in the planning process.

(d) BLM may change planning criteria as planning proceeds if we determine that public suggestions or study and assessment findings make such changes desirable.¹⁰

As with the earlier Forest Service discussion, it is clear from the above statutes that any BLM “coordination” requirement arises in the land planning process, as opposed to its general decision making process. Indeed, even when this coordination requirement arises it is conditioned by the words “when practical” and “when consistent with [Federal land management

¹⁰ As promulgated at 70 Fed. Reg. 14566, March 23, 2005; 70 Fed. Reg. 29208, May 20, 2005.

statutes].” BLM also has promulgated binding federal regulations to interpret how coordination will be accomplished in its planning process, and courts will also defer to this interpretation. As with the FS, were a federal court to review the BLM’s regulatory interpretations under the *Chevron* (see *Chevron* discussion *infra*), and under the APA’s “arbitrary and capricious” standard, it will look to whether these definitions comply with FLPMA, not whether a county has a more compelling interpretation. If a reviewing court reviews a BLM management decision, it will look to see whether the BLM complied with its own regulations, not whether it complied with a unilaterally enacted county interpretation. Nor, under the APA, should a reviewing court impose on the BLM a new programmatic administrative and/or management requirement not authorized by Congress. Accordingly, that counties may differently define “coordination” is neither legally relevant nor binding on the BLM. Accordingly, even if enacted, SB117 will not have any legal effect on BLM’s planning process, or its general decision making process.¹¹

3. NEPA Coordination:

Claim: The National Environmental Policy Act (“NEPA”) requires the FS and BLM to coordinate with local governments in their general decision making process.

Short Answer: This claim is only partially correct, and is therefore somewhat misleading. NEPA’s implementing regulations, as promulgated by the Council of Environmental Quality (“CEQ” – an Executive Branch agency) require that the FS and BLM coordinate their respective NEPA environmental review processes with comparable State or local government requirements. There is no legal requirement in NEPA, or in its implementing regulations¹², for the FS or BLM to coordinate their respective decision making processes with State and local governments.

The CEQ regulations at 43 C.F.R. § 1506.2 state:

40 C.F.R § 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible *to reduce duplication between NEPA and State and local requirements*, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

- (1) Joint planning processes.
- (2) Joint environmental research and studies.
- (3) Joint public hearings (except where otherwise provided by statute).

¹¹ As with NFMA, FLPMA also has an implementation consistency requirement. See, 43 U.S.C. § 1732(a)

¹² Nor could a Federal Executive Branch agency promulgate such a legal requirement absent Congressional direction.

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to *reduce duplication between NEPA and comparable State and local requirements*, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances *have environmental impact statement requirements* in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall 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 statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.*

In addition, 40 C.F.R. §§ 1501.6 and 1508.5, allow federal agencies to confer “cooperating agency¹³” status on State and local governments in order to assist the federal agency in preparing

¹³ **40 C.F.R. § 1501.6 Cooperating agencies.** The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

- (1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.
- (2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.
- (3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

- (1) Participate in the NEPA process at the earliest possible time.
- (2) Participate in the scoping process (described below in §1501.7).
- (3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.
- (4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.
- (5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

an environmental impact statement. However, it is clear that none of the above referenced regulations require a federal agency to give a State or local government a “coordination” role in the actual final decision.

4. Coordination means an equal role for counties in the management of Federal lands.

- a. **Claim:** Assuming, for the sake of argument, that there was a “coordination” requirement for the FS and BLM, this requirement arguably might give local government “an equal seat at the [decision making] table,” “preferred status at the decision making table,” and federal land management decisions would have to be consistent with local county “plans,” policies, or sometimes local sentiments.
- b. **Claim:** SB117 infers that the Forest Service and/or Bureau of Land Management will have to ensure that their decisions are consistent with county plans, ordinances, and policies.

Short Answer: These claims are again incorrect, misleading, and not based on applicable federal law. Counties have no authority to assume any control of federal lands unless specifically authorized by Congress - which has not occurred in this context. Absent Congress’ affirmative, and clear and unambiguous waiver of the Supremacy Clause, the United States, acting by and through its land management agencies, retains plenary power,¹⁴ under the Property Clause, on all federal lands. This plenary power cannot be waived, nor delegated, by members of the federal Executive branch to State or local governments. The FS and the BLM have promulgated regulations regarding how the respective agencies will coordinate with State, local, and Tribal governments in the land planning process. Federal courts will defer to these regulations.

It is well settled that the United States retains plenary power on National Forest System and federal public lands. *Kleppe v. New Mexico*, 426 U.S. 529,¹⁵ (1976). Further, a State or local government cannot dictate to a federal agency that it take any action, absent an affirmative, and clear and unambiguous waiver of federal Supremacy by Congress¹⁶, *Don't Tear it Down, Inc. v. Pennsylvania Avenue Development Corporation*, 642 F.2d 527 (D.C. Cir. 1980). Finally,

40 C.F.R. § 1508.5 Cooperating agency. Cooperating agency means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in §1501.6. *A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.(emphasis added)*

¹⁴ “Full; complete; absolute.” Webster’s New World Dictionary, College Edition.

¹⁵ The actual language from *Kleppe* was “And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that “[t]he power over the public land thus entrusted to Congress is without limitations.” 426 U.S. at 539.

¹⁶ Congress, at times, has indeed waived Supremacy. See *e.g., inter alia*, RCRA, 42 U.S.C. § 6961 (Solid and Hazardous Wastes), and the McCarran Amendment, 43 U.S.C. § 666 (Water Right Adjudications). I also must respectfully differ slightly with those who label this issue “preemption.” Preemption and its “occupy the field” test, typically occurs when both the federal government and a State are attempting to regulate a private entity on the same issue, as opposed to State or local governments trying to directly regulate a federal agency or federal lands.

again absent Congressional direction, a federal Executive Branch official cannot lawfully delegate any or all management authority on federal lands, *National Parks and Conservation Association v. Stanton*, 54 F.Supp.2d 7 (D.D.C. 1999). Accordingly, despite SB117's supporters' sentiments, FS and/or BLM officials have no authority to concede management authority on federal lands to State or local governments, even if they so wished.

Some commenters have argued that the county simply needs to send a letter "invoking coordination" whereupon the FS or BLM have to so "coordinate." They further argue that "coordination" is a more determinative role than that of a "cooperating agency." First, it might be arguably correct that the concepts of "cooperating agency" (see footnote 11) and "coordinating" may be different. However, as there is no requirement for coordination in either agency's general decision making process, this distinction is meaningless. Further, these arguments have no factual or legal basis in federal law, which governs federal agency actions. Indeed, even if the FS or BLM were to receive such a letter, all they could offer the county would be "cooperating agency" status in any applicable NEPA process, and/or the above discussed regulatory coordination requirements in the agencies' respective land planning processes.

Although it is true that neither FLPMA nor NFMA have statutorily defined "coordination," as discussed above, both the BLM and the FS have defined how they will coordinate with counties in the land planning process. Despite the public and legally binding nature of these regulations, SB117's proponents have offered up several interpretations of what they believe coordination to mean citing, *inter alia*, Webster's¹⁷, and *California Native Plant Society v. City of Rancho Cordova*, 91 Cal.Rptr 3d 571 (3rd App. Dist. 2009), a California state court appellate¹⁸ case, which neither addressed any federal laws or policies, nor to which was the United States a party. These proffered interpretations have no legal merit.¹⁹

The Federal courts have consistently held that an agency charged with implementing a federal statute will be afforded deference in its interpretation of the statute when: 1) Congress has not directly spoken to same; and 2) when the agency's interpretation does not conflict with Congress purpose in promulgating the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984). The *Chevron* standard requires the court to accord great deference to an agency when interpreting ambiguities in statutes within the agency's jurisdiction. "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecommunications Ass'n v. BrandX Internet Services*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 843-44; n. 11). As discussed at length above, the Forest Service has newly promulgated 36 C.F.R. § 219 to regulate how it will coordinate

¹⁷ Webster's New World Dictionary, College Edition defines "coordinate" as: "of the same order or importance; equal in rank. . ."

¹⁸ No opinion on the matter was issued by the California Supreme Court.

¹⁹ Indeed, one legislative commenter testified that all one had to do is call the U.S. Department of Justice, which would simply tell the agency to comply with the law. Without providing a lengthy description of the inner workings of the Executive Branch, suffice it to say that the Justice Department defends the United States in court. It does not function as a legal oversight agency, a role typically delegated to a Department's Office of Inspector General.

with State, local, and Tribal governments in the land planning process, while 43 C.F.R § 1610 regulates how the BLM will coordinate with these governments in the land planning process. Neither the FS nor BLM regulation conflicts with Congress' purpose in promulgating NFMA and FLPMA. Further, as neither NFMA nor FLPMA have statutorily defined "coordination, Congress has not addressed the matter. Accordingly, the FS and BLM "coordination" regulations will be deferred to by the courts. As such, the proffered and self-serving interpretations of "coordination," and its purported impact on federal lands, by SB117's proponents have neither legal merit nor impact.

III. SUMMARY:

If enacted, SB117 will have no legally binding effect on federal land management. Were a federal court to review the agencies' regulatory definitions under the *Chevron*, and the APA's "arbitrary and capricious" standard, it would look to whether these definitions comply with federal law, not to whether a county has a more compelling interpretation. If a reviewing court reviews either agencies' management decision, it would look to see whether the agency complied with its own authorizing statutes and regulations, not whether it complied with a unilaterally enacted county interpretation. Finally, under the APA, a reviewing court should not impose on either agency a new programmatic administrative and/or management requirement not authorized by Congress.