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Rec'd 10-30-17 T. Manzella

October 24, 2017

VIA EMAIL
Theresa@manzellaformontana.com

Representative Theresa Manzella
Post Office Box 1100
Hamilton, MT 59840

Re: Local Government Participation in Federal Agency Decisions

Dear Theresa:

You requested that I look at my schedule to see when I could come to Montana to meet with you to discuss how local governments can be involved in government-to government interactions related to federal agency decisions. I also looked at the Montana statutes 76-1-601(4)(d) and 76-1-607 MCA to determine any limitations on local governments participating in coordination with federal agencies and have determined that there is no limitation. Finally, this letter discusses, in general terms, the legal requirements for "coordination," "consistency review" and "cooperating agency status."

With regard to my schedule, I can fly to Missoula from Denver, arriving at Missoula at 1:46 p.m. on Friday November 17. I could also meet on Saturday November 18 as well. My only other available time is the week of December 18. As I explained, I can expand and/or condense my presentation from 2 hours or longer. I am happy to meet with local governments, elected officials and private citizens who want to understand the legal requirements and process.

I reviewed the language added to §§ 76-1-601 and 607 (MCA) regarding cooperating agencies for local governments. Participating in a National Environmental Policy Act (NEPA) decision as a cooperating agency is one form of "coordination." The Montana statutes authorize cooperating agency status and the use of a Montana "growth policy" in that process. This statute does not eliminate any other forms of "coordination" for Montana local governments, it just clarifies the role for local governments who believe that cooperating agency status is important in a particular decision. I do not see any problem with this statutory language.

Finally, this letter provides some very initial thoughts regarding the process of "coordination." First, "coordination" is a process. While "coordination" is required by the federal statutes as an interaction between the federal agencies and a State government, Indian tribe or "local government," nowhere do the federal statutes define what that process entails. Coordination can be information sharing through either formal or informal meetings; coordination can include the local government being a cooperating agency in the NEPA process; coordination can include requesting a consistency review with a local land use plan or Montana growth plan. The type of federal and local government interaction (i.e., "coordination") that will best work for the local government will be different in each case depending upon the type of federal decision to be analyzed and the federal statutes involved. It is not correct that a local government has to choose among the various types of government-to-government engagement with the federal agencies. It is also not correct that one type of "coordination" should apply in every situation. My opinion is that the local government should not limit its options in the ways it interacts with the federal agencies; the local government should analyze the situation and select the method that works best in that particular situation.

I. THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

NEPA applies to "every major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The courts have interpreted this to mean that every time the federal government spends any amount of money and for almost all federal decisions, NEPA compliance is required.

Although a local land use plan or Montana growth plan is not required for a local government to participate in NEPA, either as an external commenter or as a cooperating agency, having a land use plan provides for an added level of representation. If in the course of writing an environmental impact statement (EIS), a local government makes its land use plan available to the lead federal agency, NEPA commands the lead agency to "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 [federal] agency would reconcile its proposed action with the [local government] plan or law." 40 C.F.R. §§ 1506.2, 1506.2(d).

Additionally, NEPA commands that copies of comments by State or local governments must accompany the EIS or environmental assessment (EA) throughout the review process. 42 U.S.C. § 4332(c).

Separately pursuant to NEPA, an applicant for cooperating agency status must be both (1) a locally elected body such as a conservation district board of supervisors or a county commission and (2) possess "special expertise." A local government's special expertise is defined as the authority granted to a local governing body by state statute.

Counties, by state statute, have authority to govern for the health, safety and welfare of its citizens. Thus, that is the Counties' "special expertise."

II. FEDERAL LAND POLICY AND MANAGEMENT ACT (FLPMA)

FLPMA, which governs the BLM, provides the clearest, strongest, and most detailed requirements for coordination with local land use plans of any federal statute. Aside from the directive that the BLM engage local governments in coordination, FLPMA provides four specific instructions to the BLM as a means to accomplish it. They are:

* To the extent practical, the BLM must stay apprised of local land use plans.

** The BLM must assure that local land use plans germane to the development of BLM land use plans are given consideration.

*** To the extent practical, the BLM must assist in resolving inconsistencies between local and BLM land use plans.

**** The BLM must provide for the meaningful involvement of local governments in the development of BLM land use programs, regulations, and decisions. This includes early notification of proposed decisions that may impact non-federal lands. 43 U.S.C. § 1712(c)(9).

Additionally, FLPMA requires BLM land use plans to be consistent with local land use plans, provided that achieving consistency does not result in a violation of federal law:

> Land use plans of the Secretary 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.

43 U.S.C. § 1712(c)(9). Emphasis added.

In other words, according to FLPMA, if a BLM land use plan is inconsistent with a local land use plan, the BLM owes an explanation of how achieving consistency would have resulted in a violation of federal law.

III. THE NATIONAL FOREST MANAGEMENT ACT (NFMA)

NFMA, which governs the U.S. Forest Service, contains less information about coordination than FLPMA. The NFMA requires:

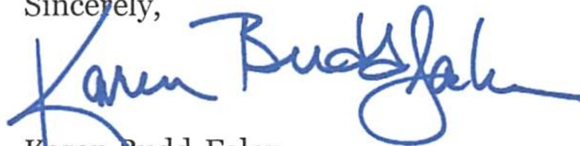
> [T]he Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, *coordinated* with the land and resource management planning processes of State and local governments and other Federal agencies.

16 U.S.C. § 1604(a). Emphasis added.

The fact that the Forest Service is directed to "coordinate" with local governments implies, by its plain meaning, that the Forest Service must engage in a process that involves more than simply "considering" the plans and policies of local governments; they must attempt to achieve compatibility between Forest Service plans and local land use plans.

Let me know if this provides the initial information you need or if there is other information I can provide to you.

Sincerely,



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