BILLINGS COUNTY

COMPREHENSIVE LAND USE PLAN

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Ordinance Establishing the Billings County Environmental Planning & Review Process

Whereas, the Billings County Comprehensive Plan sets forth the general declaration of the County's customs, culture, and factors supporting its economic stability, and specifies the legal framework for land and environmental planning and mandates that an Environmental Planning Ordinance be promulgated, and

Whereas, North Dakota statutes authorize counties to develop ordinances for controlling the use and development of not only private fee property, but also for conservation, development and regulation of uses of federal property, and

Whereas, the National Environmental Policy Act (NEPA), the Council on Environmental Quality (CEQ) and the Presidential Executive Order 12372 provide mechanisms for intergovernmental coordination and joint environmental planning, and

Whereas, NEPA and the CEQ regulations require assessment of the direct, indirect, and cumulative effects of federal agency decisions on the environment (including ecological, aesthetic, historic, cultural, economic, social, and public health factors),

Whereas, the Billings County Board of County Commissioners finds:

1. The Billings County Environmental Planning & Review Process Ordinance (and Land Use Plan) meets the general purpose of creating coordinated and harmonious development of the County as a whole;

2. The Billings County Environmental Planning & Review Process Ordinance promotes the health, safety, prosperity and general welfare of the County's residents, as well as the efficiency and economy in the use of land and its natural resources;

3. The Billings County Environmental Planning & Review Process Ordinance encourages a well balanced, prosperous economy for Billings County;

4. The Billings County Environmental Planning & Review Process Ordinance preserves and enhances Billings County's unique character and protects its natural environment;

5. The Billings County Environmental Planning & Review Process Ordinance is consistent with the Billings County Comprehensive Land Use Plan; and

6. The Billings County Environmental Planning & Review Process Ordinance is necessary to take full advantage of the county's rights to participate in federal agency decision making processes.

NOW, THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF BILLINGS COUNTY:

That this Environmental Planning and Review Process Ordinance is hereby established and implemented to protect the environmental natural resources of Billings County for future generations as well as protect the economic and community (customs and cultures) stability for present and future generations.

CHAPTER 1
Billings County Environmental Planning & Review Process

Section I. Intent

The intent of the Billings County Commission, in adopting this ordinance, is to promote for Billings County the stated purposes and philosophy of the National Environmental Policy Act (NEPA), which are:

> To declare a national policy which will encourage the productive and enjoyable harmony between man and his environment; to promote efforts which will eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation. . . .[1]

The Billings County Commission hereby establishes its environmental planning process to accomplish the following goals:

A. Establish a mutually harmonious and productive planning and review process and a cooperative relationship between the Billings County Commission and state and federal agencies;

B. Ensure that before governmental agencies take actions, those agencies carefully consider the full impacts of the proposed action and alternatives to the proposed action upon the physical environment, but also the customs, culture and economic stability of Billings County;

C. Require that federal agencies abide by existing laws which require them to conduct joint planning with Billings County for proposals on federal land and state lands within the County;

D. Ensure full mitigation of adverse effects of agency actions and decisions to Billings County and its citizens; and

E. Provide conflict resolution processes for the Billings County Commission and state and federal agencies at the lowest administrative level without resort to judicial review.

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[1] 42 U.S.C. § 4321.

Section II. Environmental Policy

It is the policy of the Billings County Commission to ensure that the County fully participate in federal agency proposals and decisions or in any planning activities which may significantly affect the quality of the physical and socioeconomic environment in Billings County. In support of this policy, the Billings County shall henceforth seek compliance with the requirements of:

A. The Billings County Environmental Planning & Review Process Ordinance;

B. The National Environmental Policy Act (NEPA);

C. The Council on Environmental Quality (CEQ) regulations implementing NEPA;

D. The National Forest Management Act (NFMA) and supporting regulations;

E. The Federal Land Policy and Management Act (FLPMA) and supporting regulations;

F. The National Park Service planning requirements; and

G. All other federal, state and county laws, regulations, resolutions and ordinances relating to management of the human and physical environment.

Section III. Objectives

The Billings County Commission has identified the following primary objectives for environmental planning and review within the County:

A. To disclose to federal and state decision makers and the public the significant environmental effects of proposed government actions on the physical environment and the customs, culture, and economic stability of Billings County, and the property rights of the citizens of Billings County;

B. To identify means to mitigate or eliminate adverse impacts to both the physical and socioeconomic environment;

C. To allow intergovernmental coordination and joint planning in the environmental planning and review process in Billings County;

D. To encourage and enhance public education and participation in the environmental review process; and

E. To ultimately prevent injury to both the physical and socioeconomic environment, including the customs, culture and economic stability of the County and the property rights of the citizens of the County, by requiring implementation of feasible alternatives or mitigation measures which fulfill the policies of Billings County and are not repugnant to state or federal law.

Section IV. Joint Planning

Billings County's economy is highly dependent upon economic uses of state and federal lands. The federal and state agency policies and decisions regarding the resource outputs and trade-offs on those lands directly affect the productive uses of the lands, and in turn, Billings County's economy. Although federal and state agencies generally possess discretion to determine the various resource outputs, numerous federal laws require federal agencies to identify conflicts between the objectives of local government land use plans and the federal proposed action and to identify means to mitigate adverse impacts (*e.g.*, 40 C.F.R. § 1502.16(c)), and to describe the extent to which the federal agency would reconcile its proposed action with the local government plan (40 C.F.R. § 1506.2(d)).

The procedures and guidelines of this Billings County Environmental Planning and Review Ordinance shall be consistent with the requirements of federal and state laws and their implementing regulations. In the event that the Billings County Commission requires environmental assessment or environmental impact statement documentation, and federal or state law requires the same types of documentation, the Billings County Commission may seek cooperating agency status pursuant to 40 C.F.R. § 1501.6 or joint lead agency status pursuant to 40 C.F.R. §§ 1501.5(b) and 1506.2. Upon obtaining joint lead agency status, the Billings County Commission may participate in joint environmental planning, joint environmental research, joint public hearings and joint preparation of environmental documents. The Billings County Commission may enter into a Memorandum of Understanding (MOU) with any state or federal agency for the purpose of complying with the NEPA and the CEQ regulations and this Billings County Environmental Planning & Review Ordinance.

A. Joint Environmental Planning

The Billings County Commission policy is to engage in coordinated resource planning for all federal and state projects and plans within the County. The Commission hereby establishes the following procedures for engaging in joint environmental planning with federal and state agencies:

1. The Billings County Comprehensive Land Use Plan and other resolutions set forth the policies and management objectives of the Billings County Commission for: (a) the protection and development of non-urban areas; (b) public safety from fire, flood and other dangers; (c) minimizing governmental expenditures; and (d) conservation and development of natural resources. The ultimate goal of the

Commission in developing the Comprehensive Land Use Plan is to protect the long term community stability of Billings County;

2. The Billings County Commission will implement its policies and management objectives appearing in the Billings County Comprehensive Land Use Plan through the development of Desired Future Conditions (DFCs);

3. The Billings County Commission will evaluate all federal agency action proposals of which it is notified through the federal agency "scoping process" to determine whether the proposal meets the County DFCs;

3. Following the Commission's evaluation of any federal agency proposal, the Commission shall determine whether it has any outstanding concerns and whether it desires to engage in joint environmental planning with the federal agency or otherwise participate in the federal planning and analysis process;

5. If the Commission desires to participate in the project, it shall issue a written response to the federal agency containing the following:

   a. The Commission's issues or concerns, including possible conflicts between the federal agency proposal and the Commission's policies and management objectives and DFCs;

   b. The Commission's desired role (if cooperating or joint lead agency status is desired) in the planning and analysis process; and

   c. The Commission's suggested alternatives to the proposal, and any suggested mitigation measures which would reduce or eliminate conflicts with the Commission's policies, management objectives and DFCs.

B. Environmental Documentation

For any federal or state project or planning activity, the Commission may determine whether to prepare environmental documentation.

1. Environmental documentation includes environmental assessments (EA) and environmental impact statements (EIS), which the Commission may use to determine the expected impacts to the physical and socioeconomic environments within Billings County resulting from the proposed federal action and any alternatives to the proposed action which the Commission deems appropriate for analysis. The Commission may analyze any of its own alternatives or an alternative suggested by a member of the general public; and

2. In the event that the Commission does not seek or does not receive cooperating or joint lead agency status and does not desire to challenge any negative determination by the federal agency, the Commission may participate as an "interested party" or "affected interest" in the federal agency NEPA process by submitting comments and filing appeals as the Commission deems necessary.

C. Environmental Assessment

In the event that a proposed federal agency project or planning activity will have an effect on the environment (physical, social, cultural, property rights or other economic factors), the Commission may determine to prepare environmental documentation for the proposed federal or state project or plan. In order to determine whether an EIS is necessary, the Commission may prepare an EA containing the following information regarding the proposed action or any alternative which the Commission determines merits analysis:

1. Federal project or planning activity description;

2. Environmental setting;

3. Local citizen values and management objectives;

4. Production thresholds necessary for community stability;

5. Potential environmental impacts;

6. Mitigation measures;

7. Comparison of the effects of the proposed action with selected alternatives; and

8. Consistency of the proposal and selected alternatives with the Billings County Comprehensive Plan.

D. Environmental Impact Statement

Based upon the findings documented in an EA, the Commission shall determine whether to require the preparation of a more formal and detailed EIS.

1. If the Commission requires an EIS, the document shall be developed jointly by the federal or state agency and the Billings County Commission as a joint lead agency as provided by the CEQ regulations. The purposes of a Billings County EIS is to:

a. Identify the significant effects of a proposed project or plan on the environment (natural, social, cultural, property rights and economic factors);

b. Identify reasonable alternatives to the proposal when there is a negative effect on the health, safety and livelihood (economic welfare) of Billings County citizens; and

c. Indicate the manner in which the federal agencies and the County Commission can mitigate or avoid those significant effects.

The EIS will document the Commission's and the federal agency's assessment of the cumulative impacts along with the direct effects and their significance and the indirect effects and their significance of proposed actions in accordance with the CEQ regulations. Furthermore, the EIS shall show that the Commission and the federal or state agency have considered all reasonable alternatives to the proposed action with the goal of finding the alternative with the least adverse environmental and socioeconomic impacts in relation to its benefits.

2. The contents of a County EIS shall consist of the following elements:

a. **Purpose and Need for Action:** A brief statement of the underlying purpose and need which has brought about the proposal and the alternatives;

b. **Description of the Proposal:** A summary description of the proposal;

c. **Affected Environment:** The environmental setting, including the physical, socioeconomic and cultural environments, which may be affected or created by the proposed alternatives;

d. **Management Objectives for the Affected Area:** The management objectives for the planning process which take into account people values, socioeconomic needs and production thresholds necessary for realization of the values important to the people of Billings County. These management objectives and production levels will then become the goals and evaluation criteria against which all proposals and alternatives shall be evaluated. The management objectives shall be drawn from reviews of the Billings County Comprehensive Plan and various federal and state land management plans. Because most of these land plans are programmatic and broad in scope, the Commission may need to refine the management objectives to specific affected areas or sites;

e. **Desired Future Conditions (DFC) for the Area:** A description of the vegetative mosaic or landscape that best accomplishes the desired future conditions within the physical capabilities of the natural resources. Because different landscape descriptions will produce different levels of outputs, the Billings County Commission must be involved in designing landscape descriptions to best preserve the customs, culture and economic stability of County citizens set forth in the desired future conditions. The Commission will determine its preferences for landscape descriptions through public involvement. Limitations and/or special preferences for best management practices and management tools to use in achieving the landscape description will also be identified in this section; and

f. **Environmental Impacts:** A concise description showing the effects of the proposal on the physical, socioeconomic and cultural environments, including current and desired future conditions of the area.

(i) **Analysis of Impacts on the Physical Environment:** A description of any effects on the natural resource assets and environmental quality of the land within the County including effects on:

(1) Forest and timber resources;

(2) Range resources;

(3) Dry land crop lands;

(4) Watershed resources;

(5) Private surface and groundwater rights and irrigated cropland;

(6) Environmental quality; air, water, soils, energy, etc;

(7) Multiple use, sustained yield, and range resource laws;

(8) Private investments into public land resources; and

(9) The "productive and enjoyable harmony between man and his environment." The action must "stimulate the health and welfare of man . . . and support diversity and variety of individual choice" in accordance with the NEPA mandate of 42 U.S.C. § 4321.

(ii) **Analysis of Impacts on the Social or Cultural Environment:** A description of any effects on Billings County's culture, governance, schools, customs, culture and other local programs including effects on:

(1) The County population base and the culture of Billings County from changes in population base;

(2) The culture of Billings County from possible limitations and restrictions on cultural beliefs and practices, and maintenance of cultural and community cohesion and kinships;

(3) Cultural and community aesthetic values, including historical sites, natural resource vistas, water courses and landscapes;

(4) The County's ability to protect the health, safety and social well-being of its citizens;

(5) The County's ability to promote its own environmental values;

(6) The County's tax base and any change in the County's ability to finance public programs through bonding, lending, and other financing mechanisms;

(7) Other local government tax bases and the consequent effects on their abilities to finance public programs and services;

(8) Local emergency medical services, law enforcement, fire protection and nuisance abatement; and

(9) The local government infrastructure, including transportation, community water systems (including irrigation and reclamation districts) and landfill services.

(iii) **Analysis of Impacts on the Economic Environment:** A description of any effects on the County's economy, customs, services and businesses, including effects on:

(1) Direct, indirect and cumulative employment levels and opportunities;

(2) The base industries of agriculture, energy and tourism--specifying unit cost effects such as economic value of livestock animal unit months (AUMs), barrels of oil, recreation user days, etc.;

(3) Local businesses directly and indirectly related to the resource decisions or plans;

(4) Housing, and other real estate values;

(5) Thresholds for business demand and markets; and

(6) Local community stability and ability to maintain current and future debt service.

(vi) **Analysis of Impacts on Private Property:** A description of any effects on property rights and protectable interests in the County. In addition to the requirements above, there shall be an evaluation of the impacts on property rights using Presidential Executive Order No. 12630, entitled "Government Actions and Interference with Constitutionally Protected Property Rights" and the Attorney General's guidelines entitled "Evaluation of Risks and Avoidance of Unanticipated Takings."

(v) **Analysis of Cumulative Effects:** An analysis of the effects of project and planning decisions to determine whether there are impacts which by themselves are insignificant, but which when considered with other impacts have significant cumulative effects upon the physical and socioeconomic environments.

(vi) **Alternatives:** A description of the environmental impacts of the proposal and the reasonable alternatives in comparative form which will provide a clear basis for choice among options by the decision makers and the public (in accordance with the CEQ regulations). This section should:

(1) Provide an objective evaluation of all reasonable alternatives and a discussion of why any alternatives were eliminated;

(2) Provide a detailed description of each alternative, including the proposal, so that reviewers may evaluate their comparative merits;

(3) Include reasonable alternatives not within the jurisdiction of the lead agency;

(4) Include the alternative of "no action;"

(5) Identify the preferred alternative or alternatives; and

(6) Include appropriate mitigation measures not already included in the mitigation plan.

(vii) **Mitigation Plan:** A mitigation plan which will provide detailed and realistic alternatives in accordance with the CEQ regulations at 40 C.F.R. § 1508.20. It is the policy of the Billings County Commission to oppose all proposals if feasible alternatives or mitigation measures exist, which if implemented, would reduce or eliminate significant adverse impacts to the physical or socioeconomic environments. The mitigation plan shall:

(1) Identify each impact which the mitigation measure is intended to address;

(2) Identify the party or agency responsible for implementing and monitoring the proposed mitigation measure;

(3) Specify alternatives regarding how impacts may be avoided, minimized, or compensated for by taking no action, limiting the magnitude of the action, rehabilitating or restoring the affected environment or providing substitute resources of equal economic value;

(4) Specify for each mitigation measure the legal authority, technical feasibility, fiscal and economic feasibility, and social, cultural and political feasibility;

(5) Provide a mitigation monitoring plan, which is based upon specific objectives and performance standards, to ensure implementation of mitigation measures during the life of the proposal; and

(6) Provide feedback from the mitigation monitoring process.

(viii) **Public Involvement Requirements:** During the preparation of an analysis for a decision document, or amendment to a proposal, Billings County and the federal and state agencies shall jointly provide opportunities for the involvement of Billings County citizens, local governments, schools, utility companies, civic or other community groups, and all other sectors within Billings County, through public hearings and other means the Commission deems appropriate.

(1) The commission will take action to ensure that federal agencies coordinate joint public involvement planning, programs, and processes with the Billings County Commission, pursuant to this section of the Billings County Environmental Planning & Review Ordinance, and in accordance with the CEQ regulations at 40 C.F.R. § 1506.2(b)(3);

(2) The public involvement program shall include objectives to:

a. Identify the management objectives, affected interests and opportunities of the proposed action;

b. Apprise landowners of regulations and decisions that may affect their property rights;

c. Provide public opportunities to evaluate alternatives and to participate in choosing the preferred alternative; and

d. Create an atmosphere in which conflicting demands for resources and uses can be resolved without destabilizing community economic, social and/or cultural environments.

(ix) **Time Schedules for Completion of the EIS:** Estimated time schedules shall be developed for all phases of the EIS. The time schedules shall be developed early in the process for each phase of the assessment, including issuance of a final decision.

Section V. Implementation of the Environmental Planning & Review Process

In addition to the procedures contained in this ordinance, the Billings County Commission may:

A. Adopt such administrative rules and oversight guidelines deemed necessary to carry out this ordinance;

B. Establish an oversight committee or other organization to assure that the intent and purposes of the procedures established by this ordinance are maintained; and

C. Enter into a Memorandum of Understanding (MOU) with individual federal or state agencies to develop a process for implementing NEPA, the CEQ regulations, federal planning requirements and the Billings County Environmental Planning and Review Ordinance.

CHAPTER 2
The Legal Framework for the Billings County Comprehensive Plan

Section I. Introduction

This chapter presents the legal framework for Billings County land planning authority. The first section outlines the North Dakota enabling act for county jurisdiction. The remainder of the chapter presents the legal framework for Billings County to plan, particularly with regard to federal lands. A full discussion of all the federal laws and administrative rules bearing on local county authority and coordination is presented in Appendix 1, The Legal & Administrative Environment.

Section II. Billings County Planning Authority

The North Dakota legislature has granted to the counties the power to regulate the use, condition of use, or occupancy of lands for residence, recreation, and other purposes. N.D. Cent. Code § 11-33-01. In order to carry out these purposes, counties are authorized to create a county planning commission, the members of which are appointed by the county commission. N.D. Cent. Code § 11-33-04. The county planning commission, after duly conducting investigations to determine the necessity of regulations, must prepare a comprehensive plan, which is submitted to the county commission. N.D. Cent. Code § 11-33-07. Counties are authorized to enact suitable regulations to implement the comprehensive plan. N.D. Cent. Code § 11-33-02. The comprehensive plan must explicitly set forth the goals, objectives, policies and standards of the county to guide public and private development. N.D. Cent. Code § 11-33-03. Among other purposes not enumerated here, these regulations may encompass the following purposes:

A. Protect and guide the development of non-urban areas;

B. Secure safety from fire, flood and other dangers;

C. Lessen governmental expenditures; and

D. Conserve and develop natural resources.

Section III. Dual Sovereignty & Dual Regulation on Federal Lands

A. The Constitution & Federalism

The U.S. Constitution outlines the basic structure and powers of the federal government. The Constitution includes a Bill of Rights that limits the powers of the federal government and allocates most powers to the states and reserves the remaining powers to the American people. This is the basis of federalism. The Tenth Amendment clearly articulates these principles:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

The states were to exist free from external control except for environmental powers specifically granted to the federal government in the Constitution. The federal government's role is largely to guarantee that the states can exist as sovereign governments and to facilitate the coordination of matters affecting the states. Sovereignty is "characterized by equality . . . among states, and self-government within its own territorial limits, and jurisdiction over its citizens beyond its territorial limits."[2] The powers and the rights vested in the states by the U.S. Constitution guaranteed them the basic powers and rights of self-determination.

The State of North Dakota recognizes its rights and obligations in the State Constitution:

> The state of North Dakota is an inseparable part of the American union and the Constitution of the United States is the supreme law of the land.[3]

> All men are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.[4]

> All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have a right to alter or reform the same whenever the public good may require.[5]

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[2] Wesley Gilmore Jr., Cochran's Law Lexicon: A Dictionary of Legal Words And Phrases. Anderson Publishing Co., 1973.

[3] North Dakota Constitution, Article I, § 23.

[4] Constitution of North Dakota, Article I, § 1.

[5] North Dakota Constitution, Article I, § 2.

B. Dual Sovereignty & Concurrent Regulations on Federal Lands

As a landowner in the West, the federal government has enormous political and legal leverage that affects local and state laws and economies. The Property Clause of the Constitution provides the authority of the federal government to administer federal lands.[6] But federalism that evolved from the U.S. Constitution is designed to disperse political power, to avoid "centralization of power."

In relation to the federal government as a landowner, local and state governments are more than political subdivisions. They are political sovereigns that have dual or concurrent authority to plan and enforce their laws on federal lands. In order to exercise this authority, there must be a state (or local) interest. The overriding interest for Billings County as a sovereign, is its responsibility to protect the rights of its citizens.

As a political sovereign, Billings County government has an interest in federal and state lands within the County. Approximately forty-six (46) percent of the land surface in Billings County is managed by federal agencies. The citizens in Billings County rely heavily on federal lands for their livelihoods, their recreation and their way of life. Because the health, safety and welfare of Billings County's citizens is dependent upon their use of federal lands, Billings County, as a sovereign political subdivision, has concurrent jurisdiction on the federal lands.

To exercise concurrent authorities between local/state and federal jurisdiction, three factors must exist:

1. **The Federal Government Has Not Preempted The Field.** Federal preemption of a field of law which expressly precludes any concurrent regulations by state or local governments. The federal government rarely preempts a field of law;

2. **Concurrent State/Local Jurisdiction Must Be Consistent with Federal Law.** When both sovereigns (state and federal government) exercise legal authority ". . . a law that provides to the extent not inconsistent with federal law, a state may regulate . . ." Good examples of this are state game and fish regulations outlining state game and fish management on federal lands. Other examples are the provisions in federal land management statutes specifying federal agency consistency and coordination requirements with local and state government plans and management policies; and

3. **State Authority Over Federal Activities.** ". . . In these cases Congress surrenders some of its constitutional prerogatives in order to establish acceptable working relationships with the states."

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[6] Article IV., § 3, cl. 2 of the U.S. Constitution.

> An example here is the definition and protection of citizen property rights as defined by state law, with which federal agencies must comply or pay just compensation for takings of property.

The key elements for achieving consistency and coordination between the federal government and state and local counterparts trace back to the doctrine of dual sovereignty and concurrent regulation:

- Federal jurisdiction to manage the resources on federal lands.
- Federal statute and regulation mandating joint planning authority.
- Local/state jurisdiction to protect the health, safety, economic welfare and rights of its citizens.

The statutes related to federal-local consistency and coordination in land use planning are highlighted below. For a more in-depth presentation of all the federal and state statutes related to coordination with county governments, see Appendix 1, The Legal and Administrative Environment.

Section IV. Billings County Planning Framework

The federal lands in Billings County make vital contributions to the County economy. See Chapter 4. The National Environmental Policy Act (and other relevant laws discussed later) contain provisions for Billings County to plan on federal land as well as private land to protect its natural environment (consistent with federal laws) and to protect the culture, customs, social and economic well-being of Billings County citizens. Billings County's primary planning mechanism for planning on federal lands is to coordinate with federal land agencies to reach consistency between federal land agency plans and the Billings County Comprehensive Plan.

Federal statutes and regulations require federal agencies to consider and protect from adverse impacts, the economic structure of counties. Furthermore, federal agencies must consider and protect more than just economic structures. For example, the National Environmental Policy Act (NEPA) requires all federal agencies to assure safe, healthful, productive, and aesthetically and culturally pleasing surroundings and to preserve cultural aspects and maintain an environment supporting a variety of individual choices. More significantly, federal agencies must specify mitigation measures defining methods or actions which would reduce or eliminate adverse impacts to local communities.[7]

The U.S. Forest Service and Bureau of Land Management regulations also require the respective agency to consider effects of its actions on communities adjacent to, or near, federal lands, and on employment in affected areas. The spirit and the letter of the statutes and regulations require

[7] 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1508.20.

agencies to protect a community's way of life - the delicate fabric holding families together - as well as a community's economic base before taking actions that may be harmful. This Comprehensive Plan refers to the federal obligation in terms of protecting and preserving the County's economic base and way of life as either "economic stability" or "community stability."

Section V. Billings County & the National Environmental Policy Act

The NEPA is the basic federal law requiring federal agencies to consider impacts to the environment. It establishes policies, set goals, and provides the means for carrying out policies and attaining goals. NEPA is extremely important to county governments. While it is a federal law, each state is expected to assist in implementation of NEPA. Under the "federalism" concept, it means that states and local governments can develop their own environmental plans under NEPA. Billings County environmental planning and review elements are outlined in Appendix 1, the Legal & Administrative Environment.

A. NEPA: Congressional Declaration of Policy

Federal land and resource agencies are required to carry out the mandates of NEPA within Billings County. The NEPA requires federal agencies to consult, coordinate and jointly conduct environmental studies, plans, review and hearings with Billings County.

As the umbrella environmental law, NEPA declares:

> " . . . that it is the continuing policy of the Federal Government, **in cooperation with State and local governments**,"[8] " . . . to use all practicable means, consistent with other essential considerations of national policy, to improve and **coordinate** Federal plans, functions, programs, and resources to the end that the Nation may -"[9] " . . . assure for all Americans safe, healthful, **productive** and aesthetically and **culturally pleasing surroundings**;"[10] and " . . . **preserve** important historic, **cultural**, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice."[11] [Emphasis added]

B. NEPA: Protection of Culture & Custom

NEPA not only requires the federal government to consider the impacts of its actions on the environment, but it also requires federal agencies to preserve culture and heritage. NEPA states that cooperation and coordination will occur with "local governments," and that the culturally

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8 42 U.S.C. § 4331(a).
9 42 U.S.C. § 4331(b).
10 42 U.S.C. § 4331(b)(2).
11 42 U.S.C. § 4331(b)(4).

pleasing surroundings and cultural aspects of community will be preserved so as to support diversity and variety of individual choice.
Each county must determine and define its local custom and culture and then act to protect them. Billings County has defined its custom and culture in Chapter Two. As required by NEPA, Billings County must inform the federal agencies of its desire to participate and request that the federal agencies preserve its environment, custom, culture and community stability as required by NEPA. Billings County will provide the same notice and information to North Dakota state agencies.

C. Mandate to Federal Agencies Under NEPA

NEPA mandates specific performance requirements which are crucial to the Billings County Comprehensive Plan:

> All agencies of the Federal Government shall . . . (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . .
>
> 1. the environmental impact of the proposed action;
>
> 2. any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> 3. alternatives to the proposed action;
>
> 4. the relationship between short-term uses of man's environment and the **maintenance** and **enhancement** of long-term productivity; and
>
> 5. any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[12] [Emphasis added]

A significant element in 1. above relates to the term "cumulative" effects:

> Cumulative impacts can result from individually minor but collectively significant actions taking place over a time period . . .[13] Effects include . . . historic cultural, economic, social or health, whether direct, indirect or cumulative.[14]

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12 42 U.S.C. § 4332(2)(C)(i)-(v).
13 40 C.F.R. § 1508.6.
14 40 C.F.R. § 1508.8.

In addition, means of mitigation (reducing the negative impacts) shall be detailed and provide realistic alternatives.[15] In order to develop realistic mitigation plans and alternatives, it is necessary to coordinate with local government officials to adequately identify, at a minimum, the fiscal relationships between federal agencies and local governments. *Identifying mitigation alternatives in a **coordinated** way between the Billings County Commission and federal agencies is the key element to achieving **consistency** between the Comprehensive Plan and the goals therein and federal agency plans.*

Furthermore, NEPA requires:

> Prior to making any detailed statement, the responsible federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and view of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 and title 5, and shall accompany the proposal through the existing agency review processes;
>
> (G) Make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing and quality of the environment;[16]

Billings County should be alert to federal proposals, plans, legislation, or other major federal actions and request, when necessary, that an environmental impact statement be prepared (if one is not otherwise prepared) by the involved federal agency.

The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive [pertaining to NEPA substance] requirements . . . ."[17] A major objective of the NEPA regulations is:

> Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.[18]

NEPA requires agencies to circulate both the draft and final environmental impact statements, except for certain appendices and unaltered statements, to appropriate Federal, State and local agencies authorized to develop and enforce environmental standards.[19]

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15 40 C.F.R. § 1508.20

16 42 U.S.C. § 4332(2)(C)(i)-(v) and (2)(G).

17 40 C.F.R. § 1500.1(a).

18 40 C.F.R. § 1501.1(b).

D. Joint Environmental Planning Under NEPA

NEPA provides the following guidelines for federal coordination with county governments to integrate federal plans with local planning processes:

> 1. 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:
>
>   a. Joint planning processes;
>
>   b. Joint environmental research and studies;
>
>   c. Joint public hearings (except where otherwise provided by statute); and
>
>   d. Joint environmental assessments.
>
> 2. 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 . . . 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 . . . 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.

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[19] 40 C.F.R. § 1502.19(a).

> 3. 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.[20]

The NEPA process is intended to help public officials make decisions that take into account environmental consequences, and then take actions to protect, restore, and enhance the environment and preserve local custom and culture. NEPA and the implementing CEQ regulations require all federal agencies to coordinate with county governments as outlined above. County governments can always resort to use of the NEPA process regardless of the federal agency, law, program, or action involved. Significantly, pertinent federal agencies (e.g., U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service, and National Park Service) are mandated in numerous laws to comply with NEPA. Accordingly, the Council on Environmental Quality (CEQ) has promulgated regulations to guide federal agencies through the NEPA process. All federal agencies are bound to follow the CEQ regulations. Billings County has enacted ordinances describing its own environmental review, assessment and local public hearings processes.

Section VI. U.S. Forest Service Land & Resource Management Planning

Several laws require the Forest Service to consider Billings County government in its planning processes. For a detailed review of the laws which require the Forest Service to coordinate and seek consistency with county government plans and policies, see Appendix 1. The discussion below highlights the major policies of the laws governing the Forest Service.

The federal lands which the Forest Service manages in Billings County consist of National Grasslands. The National Grasslands were once private lands, but the U.S. government acquired these lands during the 1930s under the authority of the National Industrial Recovery Act of 1933[21], the Emergency Relief Appropriation Act of 1935[22], a 1935 Amendment to the Agricultural Adjustment Act (§ 55)[23], and the Bankhead-Jones Farm Tenant Act of 1937, (BJFTA)[24]. The U.S. Department of Agriculture has managed these lands since 1937 under the provisions of Title III of the BJFTA[25], first by the Bureau of Agricultural Economics until 1938,

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20 40 C.F.R. 1506.2(b)-(d).

21 48 Stat. 195.

22 49 Stat. 115.

23 49 Stat. 781.

24 50 Stat. 522, codified at 7 U.S.C. §§ 1010-1012.

25 The Forest Service is also required to manage these lands for the purposes which they were acquired, primarily agriculture stabilization. Because in the BJFTA Congress did not

then by the Soil Conservation Service until 1954 when the Forest Service acquired jurisdiction. Congress combined the National Grasslands with other lands to form the National Forest System with the passage of the Forest and Rangeland Renewable Resources Planning Act of 1974.[26] However, Congress did not and has not changed the purposes for which the National Grasslands were acquired. The Forest Service has recognized this fact in its regulations pertaining to the designation, administration and development of National Grasslands.[27] In particular, the Forest Service recognized that the National Grasslands would continue to be managed under the provisions and purposes of Title III of the BJFTA.[28]

In the Multiple Use and Sustained Yield Act of 1960, Congress directed the Secretary of Agriculture "to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom."[29] The Act authorizes the Secretary of Agriculture "to cooperate with interested State and local governmental agencies and others in the development and management of the national forests."[30] The Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA) strengthens the opportunity for county input. In Section 3, Congress recognized the importance of renewable forest and range resources, and directed the Secretary of Agriculture to prepare a Renewable Resource Assessment. The RPA elevates the relationship between the Forest Service and county governments from one of cooperation to one of coordination with the following requirement:

> As a part of the Program provided for by section 3 of this Act, 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.[31] [Emphasis added]

Congress extensively amended the RPA with the passage of the National Forest Management Act of 1976. Significantly, Section 6(a) of the RPA, quoted above, was not amended. The National Forest Management Act (NFMA) requires that each plan developed "be revised (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years."[32] It must coordinate land use planning efforts with those of county governments under this Act and through the NEPA process:

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change these purposes, and the purposes have not been changed in any other legislation, the Forest Service must manage these lands for the purposes for which they were acquired. See 16 U.S.C. 459, History; Ancillary Laws & Directives.

[26] 16 U.S.C. §§ 1601, *et seq*. as amended by the National Forest Management Act of 1976.

[27] 36 C.F.R. Part 213.

[28] 36 C.F.R. § 213.1(b).

[29] 16 U.S.C. § 529.

[30] 16 U.S.C. § 530.

[31] 16 U.S.C. §1604(a).

[32] 16 U.S.C. § 1604(f)(5).

The resulting plans shall provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long-term net public benefits in an environmentally sound manner.

(b) Plans guide all natural resource management activities and establish management standards and guidelines for the National Forest System. They determine resource management practices, levels of resource production and management, and the availability and suitability of lands for resource management. Regional and forest planning will be based on the following principles:

(5) **Preservation of** important historic, **cultural,** and natural aspects of our national heritage;

(9) **Coordination with** the land and resource planning efforts of other Federal agencies, **State and local governments**, and Indian tribes;

(13) Management of National Forest System lands in a manner that is sensitive to **economic efficiency;** and

(14) Responsiveness to changing conditions of land and other resources and to changing **social and economic demands of the American people**.[33] [Emphasis added]

Specific requirements for accomplishing the purposes of planning coordination with county governments are provided as follows in 36 C.F.R. § 219.7.

(a) The responsible line officer shall coordinate regional and forest planning with the equivalent and related planning efforts of other Federal agencies, State and local governments, and Indian tribes. [Emphasis added]

(b) The responsible line officer shall give notice of the preparation of a land and resource management plan, along with a general schedule of anticipated planning actions, to the official or agency so designated by the affected State [and] heads of units of government for the counties involved. These notices shall be issued simultaneously with the publication of the notice of intent to prepare an environmental impact statement required by NEPA procedures (40 CFR 1501.7).

[33] 36 C.F.R. § 219.1(a),(b)(5),(9),(13),(14).

(c) The responsible line officer shall review the planning and land use policies of other Federal agencies, State and local governments, and Indian tribes. The results of this review shall be displayed in the environmental impact statement for the plan (40 C.F.R. § 1502.16(c), 1506.2). The review shall include:

(1) Consideration of the objectives of other Federal, State and local governments, and Indians tribes, as expressed in their plans and policies;

(2) An assessment of the interrelated impacts of these plans and policies;

(3) A determination of how each Forest Service plan should deal with the impacts identified; and

(4) Where conflicts with Forest Service planning are identified, consideration of alternatives for their resolution.

(d) In developing land and resource management plans, the responsible line officer shall meet with the designated State official (or designee) and representatives of other Federal agencies, local governments, and Indian tribal governments at the beginning of the planning process to develop procedures for coordination. As a minimum, such conferences shall also be held after public issues and management concerns have been identified and prior to recommending the preferred alternative. Such conferences may be held in conjunction with other public participation activities, if the opportunity for government officials to participate in the planning process is not thereby reduced.

(e) In developing the forest plan, the responsible line officer shall seek input from other Federal, State and local governments, and universities to help resolve management concerns in the planning process and to identify areas where additional research is needed. This input should be included in the discussion of the research needs of the designated forest planning area.

(f) A program of monitoring and evaluation shall be conducted that includes consideration of the effects of National Forest management on land, resources, and communities adjacent to or near the National Forest being planned and the effects upon National Forest management of activities on nearby lands managed by other Federal or other government agencies or under the jurisdiction of local governments.

Thus, the applicable laws and regulations clearly require the Forest Service to coordinate its land management planning duties with those of Billings County.

Section VII. Bureau of Land Management Land and Resource Management Planning

Although the Bureau of Land Management (BLM) has jurisdiction over the surface uses of only 640 acres, it also manages the leasing of all federally-owned minerals underlying federal and private lands. Because the BLM has little surface use jurisdiction, its land use planning process is not discussed here. For further information regarding the BLM's land use planning process, see Appendix 1.

Section VIII. National Park Service Land and Resource Management Planning

In the Act of August 25, 1916, Congress established the National Park Service (NPS), and required the agency to promote and regulate the use of national parks to conform with the fundamental purposes of conserving the scenery, natural and historic objects and to provide for the enjoyment of parks in such a manner as will leave the resources unimpaired for the enjoyment of future generations[34]. In 1970, Congress passed the General Authorities Act, in which Congress directed that each area within the National Park System is to be managed in accordance with the statute specifically applicable to that area. Congress also outlined general authorities for National Park System lands which the NPS must apply so long as the general authorities do not conflict with the specific authority for each area.

Theodore Roosevelt National Park was first authorized as "Theodore Roosevelt National Memorial Park" on April 25, 1947[35]. The following year, on June 10, 1948, Congress added the North Unit to the Memorial Park[36]. Over the years, other congressional action either modified the boundaries or changed specific language pertaining to the Park. On November 10, 1978, Congress adjusted the boundaries of the Park and designated 30,000 acres of the Park as wilderness.[37] This law also changed the name of the Park to the current name "Theodore Roosevelt National Park."

Like other federal agencies, the NPS must comply with numerous federal laws, regulations and policies including NEPA, the National Historic Preservation Act (NHPA), the Wilderness Act of 1964, the Endangered Species Act (ESA), Executive Order 11988 on floodplain management, Executive Order11990 wetlands, the Clean Water Act (CWA), the Clean Air Act and NPS-2 Guideline on Park Planning.

The National Parks and Recreation Act of 1978 directs the NPS to produce general management plans (GMPs) for each unit of the National Park System.[38] The NPS approved the GMP for Theodore Roosevelt National Park on June 3, 1987. The GMP describes measures for resource

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34 16 U.S.C. § 1, *et seq.*
35 61 Stat. 52.
36 62 Stat. 352.
37 16 U.S.C. § 1131, *et seq.*
38 92 Stat. 3467.

protection, the types and general locations of public facilities needed, and serves as a comprehensive foundation for all subsequent management decisions and planning actions.

There are three other NPS management plans tiered to the GMP and with which all planning activities must comply. They are the Land Protection Plan, the Resource Management Plan and the Statement for Management.

A. The Land Protection Plan: Land protection planning and land acquisition are subject to all applicable legislation, congressional guidelines, executive orders, and departmental and NPS policies and guidelines, including the NPS Land Acquisition Policy Implementation Guideline (NPS-25), the Department of the Interior's "Policy for the Federal Portion of the Land and Water Conservation Fund" (47 Fed. Reg. 19784), the NPS "Land Protection Instructions" (48 Fed. Reg. 21121), the Uniform Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C. §§ 4601, et seq.), and Executive Order 12630 governmental actions and interference with constitutionally protected property rights. The NPS approved the current Land Protection Plan for Theodore Roosevelt National Park on June 18, 1990;

B. Resource Management Plan: Several laws, regulations, Department of the Interior and NPS policies govern NPS planning programs affecting natural or cultural resources. The Resource Management Plan is the strategic plan for the long range management of its resources and a tactical plan identifying short term projects. This document provides the context for setting priorities and implementing both ongoing programs and short term projects. The NPS approved the Resource Management Plan for Theodore Roosevelt National Park on May 11, 1995 and updates the Plan annually; and

C. Statement for Management: The Statement for Management (SFM) documents the Park's purpose, significance, management objectives, obstacles to achieving those objectives, owners of the obstacles and actions that need to be taken to overcome the obstacles.

County governments have little recourse regarding administration of relevant areas by the NPS. However, the NPS is authorized to aid the states and political subdivisions in planning such areas for the ". . . purpose of developing coordinated and adequate public park, parkway, and recreational-area facilities . . ."[39]

[39] 16 U.S.C. § 171.

Congress establishes, abolishes, or revises the boundaries of lands of different federal jurisdiction after receiving recommendations from the affected federal agencies. If, for example, a national park boundary is under consideration for expansion, it will first be reviewed by agencies administering the surrounding land, perhaps the Forest Service or the BLM. The NPS also must include in the review process the opportunity for public comment. Billings County has the opportunity to participate in the NEPA process whenever an NPS activity might significantly affect the quality of the human environment.

Section IX. Conclusion

As discussed above, the federal land management agencies which manage lands in Billings County must cooperate and coordinate with the local government to identify conflicts between local government goals and federal agency goals. Once the parties identify those conflicts, the federal agency must examine alternative actions and mitigation measures to reduce or resolve the conflicts. So long as local government goals are not repugnant to federal law, the federal agencies should meet the local government goals. This is the road to federalism.

CHAPTER 3
Billings County Custom and Culture

Federal laws and regulations require federal natural resource management agencies to coordinate their plans, activities, and programs with County land use plans and policies. The Billings County Comprehensive Plan defines the culture, custom, and the economic and community stability of Billings County. The next chapter describes in detail Billings County's custom and culture. Chapter 4 describes the social and economic aspects of the County, the recent impacts of federal decisions on the County, and the amount and type of commodity, recreational, or other industry or land uses that are required to support the tax base for Billings County and maintain community and economic stability of the County.

Section I. Culture & Custom

A. Introduction

The purpose of the custom and culture section of the Billings County Comprehensive Plan is to define its custom and culture so that federal agencies can take it into account in federal decision making as required by the NEPA. Among other things, NEPA requires:

> [I]t is the continuing responsibility of the Federal Government to use all practical means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --
>
> (2) assure for all Americans safe, healthful, productive and aesthetically and culturally pleasing surroundings,...
>
> (4) preserve important historic, cultural and natural aspects of our national heritage and maintain, wherever possible, an environment which supports diversity and variety of individual choice.[40]

[40] 42 U.S.C. § 4331(b)(2), (4).

Culture, as used in NEPA, is defined as:

> The body of "customary beliefs, social forms, and material traits"[41] constituting a distinct complex of tradition "of a racial, religious or social group"[42]--that complex whole that includes knowledge, belief, morals, law, customs, opinions, religion, superstition and art.

As stated in the above definition, culture includes custom.

"Custom" is defined by Black's Law Dictionary as:

> A usage or practice of the people, which by common adoption and acquiescence, and by long and unvarying public habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates. . . .An habitual or customary practice, more or less widespread, which prevails within a geographic or sociological area.[43]

Custom, as used in the Billings County Comprehensive Plan, refers to land usages and practices that have "acquired the force of a tacit and common consent." Such land uses and practices, livestock grazing, oil and gas exploration and production, and recreation, to mention just a few, are well established, readily identifiable, and are the foundation of Billings County's economy.

Common use and everyday experience shows that the words "custom" and "culture" are frequently interchanged. We often rely on just one of the two terms to convey the meanings of both. Yet, in very important ways, the individual meanings of "custom" and "culture" are quite different and are not so easily switched or substituted. Culture pertains more to human activities and practices and the acceptance and adoption of those activities and practices as community norms. Culture is invisible, at least in the sense of not being immediately evident on the surrounding landscape. It pertains to what people believe and value and how they pursue and realize those beliefs and values. Custom, on the other hand, is the way that people implement their culture. It encompasses with the ways that people traditionally use the land and its natural resources, make a living and act toward each other. Custom is the visible and tangible manifestation of the shared beliefs that binds a group of people into a community.

In Billings County, culture comprises the shared values and beliefs that give guidance and meaning to the lives of local residents. The culture of Billings County is a direct result of customary uses of the land by past generations, including five or six generations in some of the families. The traditional means of livelihood throughout the history of Billings County has been the production of raw goods from the land: food from meat and grains; fiber from animal hides and plant material; and energy from coal, oil and natural gas. These shared values and beliefs,

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41 *Webster's Ninth New Collegiate Dictionary,* 1991, p. 314.

42 *Webster's Ninth New Collegiate Dictionary,* 1991, p. 314.

43 *Black's Law Dictionary*, p. 348 (5th ed 1979).

including such traits as independence, equality, self-sufficiency and devotion to family, work, and the land, have their origins in religion, folk traditions and in the shaping influence of environment on the individual and community. Moreover, culture in Billings County includes the array of social standards and social institutions, from family ties, to kindly neighbors, to high school sports, to the county rodeo, that hold together and give common purpose and meaning to community life.

Culture is a people's identity and the foundation upon which political society and an economy are built. The citizens of Billings County are inseparable from their culture. They are, first and foremost, Americans with a deep-seated commitment to democracy, equality and political freedom. They are also unique products of the complex web of land uses and practices, values and beliefs that nurture their communities, sustain their economies, empower their local government and give form and shape to their spiritual and physical environments. Stripped of their land use practices and usages, denied their values and beliefs, they would lose coherence as a people. If stripped and denied of their private property rights, their equitable estates on federal lands, their right to practice self-rule, to pursue equality and to live and practice the challenge of political freedom, they would lose the very essence of what it means to be American: To be sovereign in one's own land; to be fully equal in matters of power; and to be the final beneficiaries of political freedom.

B. The Origin of Billings County

Billings County was organized in 1879 and originally encompassed the southwestern corner of North Dakota. After several border changes, the borders which remain today were established on January 4, 1915, when Slope County was segregated from Billings County. Billings County survived an attempt to dissolve it in 1939 and 1940 following the disastrous years of the Great Depression.

C. Theodore Roosevelt National Park

Theodore Roosevelt came to the Medora area in 1883 and entered the cattle business the same year on the Chimney Butte Ranch, which was later known as the Maltese Cross Ranch. The following year, Mr. Roosevelt began ranching on the Elkhorn Ranch north of Medora. However, in the winter of 1886-87, Roosevelt lost approximately sixty percent of his cattle. Due to his increasingly busy political duties, Roosevelt sold his North Dakota ranching interests in 1898. After Roosevelt's death in 1919, the Badlands were the subject of consideration for various monument and memorial proposals in honor of Roosevelt. Finally, on April 25, 1947, President Truman signed the bill creating Theodore Roosevelt National Memorial Park. In 1978, Congress changed the name to Theodore Roosevelt National Park. The Park contains 46,355 acres within Billings County.

D. Cultural Groups of Billings County

The Billings County area was settled by diverse Caucasian cultural groups following the removal of the Native Americans to Indian Reservations. Included in the Caucasian groups are Anglo-American, which includes residents whose forbearers are from the British Isles and those whose ancestors are third or fourth generation German or French. Also included are Bohemians from Crimea, Germans, Irish, Norwegians, Poles, Russians, and Ukrainians. The settlers brought with them the Catholic, Lutheran (Missouri Synod and Evangelical Synod), Congregational, Ukrainian Orthodox, and Presbyterian Churches of the Christian faith. The settlers' cultures and their churches provided these people with their religious values, family structures and sense of community.

E. The Custom of Oil and Gas Exploration and Development in Billings County

The geology, topography and climate of Billings County make the land conducive to the County's largest industries--oil and gas development and agriculture--industries which are completely dependent upon natural resources. The Williston Basin is one of the nation's most productive oil and gas producing regions. Beginning in 1960, the energy sector constituted 17.9 percent of the County's economic base, rose to as high as 95 percent of the economic base by 1985, and in 1994 still constituted over 77 percent of the County's economic base. Billings County is second in oil production among North Dakota counties, and from 1991 through 1995, the County accounted for 23 percent of the total oil production and 16 percent of the total natural gas production in North Dakota. During 1994, the energy sector generated nearly $100 million of economic base in Billings County. The federal government's mineral leases accounted for approximately 9.5 percent of the oil production and 14 percent of the natural gas production in the County. Consequently, federal minerals are responsible for annually generating several million dollars of economic base for the County. See Chapter 4.

Beginning in 1949, hordes of oil leasing company agents approached Billings County landowners seeking to enter leases. Although the bonuses and rentals were low, many landowners were in need of extra cash and leased their mineral rights. In 1951, an exploration crew discovered oil at the Clarence Iverson #1 at Tioga. Seismograph crews began county-wide exploration in 1952, with as many as twelve companies operating from Belfield. The focus at that time was to determine whether the conditions favored deposition of oil in the southwest quadrant of the Williston Basin. The Fryberg prospect yielded oil at the James Brusik #1. In 1953, Amerada Hess struck oil on the Herman May #1 in the Madison formation, which became North Dakota's fifteenth oil field discovery. Amerada Hess also drilled the Dan Cheadle #1 and encountered oil in the Heath formation, which led to the development of the Scoria and Medora Fields to the west and the Belfield, Dickinson, Zenith and Green River fields to the east.

The Fryburg-Scoria, Heath and Madison units have seen continuous development. Although some of the early producers such as the Herman May #1 were abandoned, companies were drilling successful developments as late as November, 1977. In 1974 and 1975, directional drilling extended the field under Theodore Roosevelt National Memorial Park from locations outside the Park. By mid-1976, the Fryburg-Scoria field yielded 6.8 million barrels of oil from the Madison unit and 8.5 million barrels from the Heath unit.

Several smaller fields were developed in the 1970s, but on Christmas Day, 1976, oil was discovered in the Little Knife Field in Dunn County. In June, 1977, the field extended to Billings County, and by the end of 1977, eight of the producing wells on the Little Knife Field were located in Billings County. In 1978, the Little Knife Field was further extended into Billings County, and the Four-Eyes, T-R, and Big Stick Fields were discovered. Numerous other oil pools were discovered in existing fields.

During the early 1980s, oil production continued to expand as the price of crude oil rose to near $40.00 per barrel. New development resulted in the Tree Top, Buckhorn and Magpie Fields in Billings County and the Scairt Woman Field mostly in McKenzie County, but partially in Billings County. Numerous wildcat wells were also drilled and the limits of each field were found. Oil prices began declining in the early to mid-1980s, which led to a sharp decrease in new exploration. Producers abandoned marginal and poor producing wells and other formerly high-producing wells played out by the 1990s.

The advent of new technology, such as horizontal drilling, has helped new exploration grow at a moderately stable rate. However, on the National Grasslands, the U.S. Forest Service has designated areas in which it bars all surface occupancy, which prohibits mineral development on these lands. As of 1997, the U.S. Forest Service is also attempting to engage in a minerals trade with Burlington Northern Railroad to assemble or "block up" a large area of land in Billings County where all energy development will be excluded. Such a move will negatively impact the Billings County economy.

F. The Custom of Livestock Grazing in Billings County

The early 1880s was a boom period for the open range cattle industry on the Great Plains. A decade earlier, most of the Northern Plains region had been occupied by nomadic Indian tribes. Thousands of bison ranged over this vast territory. The destruction of these herds by hide hunters, together with the relentless campaigns by the army following the battle of the Little Bighorn in 1876, forced the Indians onto greatly reduced reservations. As a result, thousands of acres of land claimed by the federal government were opened to settlement by people of European descent.

The year 1883 witnessed the beginning of a drastic change in the Little Missouri Badlands. Early that year, the last remaining herds of the bison were destroyed. In the same year, the Northern Pacific Railway, completed its track building project, which extended from St. Paul, Minnesota to the Pacific Coast. Simultaneously, cattlemen began the occupation of the Little Missouri region.

Billings County farms and ranches currently constitute the County's second largest industry, generating over $14 million of economic base. Livestock revenues accounted for approximately 72 percent of all agricultural revenues from 1991 through 1994. Crop activities, including government program payments accounted for 28 percent of the agricultural revenues during the same period. Within the livestock sector, cattle dominate by constituting 95 percent of all livestock.

The Medora Grazing Association controls approximately 75 percent of the grazing capacity and approximately 80 percent of the grazing land acreage within the County. The Medora Grazing Association controls 125,332 federal animal unit months (AUMs) and 48,484 private deeded land AUMs. The federal grazing AUMs which the Medora Grazing Association controls are located on the Little Missouri National Grassland, which is an administrative unit formed from lands which the federal government purchased from farmers during the Great Depression under the 1935 Amendment to the Agricultural Adjustment Act.[44] This land acquisition program was supposed to correct "maladjustments" in land use caused by cultivation of sub marginal lands and the Great Depression. These "maladjustments" were brought about in part because of the fact that the homestead laws did not provide large enough homesteads for settlers to make a living raising only livestock. The United States government through the Resettlement Administration,[45] offered to purchase the previously farmed lands for an average of $2.00 per acre with payments ranging from $.50 to $12.68 per acre. In many cases, the federal government condemned lands for various purposes including (1) agricultural adjustment (the largest acreages and appropriations spent); (2) Indian land projects; (3) wildlife refuge projects; and (4) recreation and park projects.[46] These lands were generically termed "Land Utilization Project" lands.[47]

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[44] 49 Stat. 781.

[45] The Resettlement Administration was established through Executive Orders 7027, 7028, 7034, 7035, 7041 and 7200.

[46] Some of the most comprehensive legal research on the National Grasslands of North Dakota is found in the "Comment by the McKenzie County Board of County Commissioners and the McKenzie County Grazing Association on the USDA Forest Service Northern Great Plains Planning Team's Request for Comment on Scope of Land and Resource Management Plans for Planning Units of the Custer, Medicine Bow-Routt, and Nebraska National Forests," July 30, 1997, which has been included as Appendix 2. The information cited in the text was found on page 2 of the comments. Future citations to those comments will be referenced as "McKenzie County Comments, p.___ ."

[47] McKenzie County Comments, pp. 1-4.

The four Land Utilization Projects (LU Projects) in North Dakota were eventually combined for administrative purposes and collectively called the Western North Dakota Project.[48]

In 1937, Congress passed the Bankhead-Jones Farm Tenant Act (BJFTA), in which Congress gave organic authority to the Farm Security Administration. The responsibilities for management of the L.U. Projects were transferred to the Bureau of Agricultural Economics in the U.S. Department of Agriculture. The Bureau of Agricultural Economics was responsible for land conservation and utilization on intermingled private, state, county and federal public domain and acquired lands under the BJFTA Title III.

Many of the farmers who sold their lands to the federal government resettled in the more productive areas of the Red River Valley of North Dakota and Minnesota and the Yellowstone River Basin of Montana. In 1938, the management of the L.U. Project and BJFTA lands was turned over to the Soil Conservation Service (SCS), an agency within the United States Department of Agriculture.[49] The SCS reseeded the farm lands to grass and removed the abandoned homesteads. The federal government then put up the lands for lease to qualified farmers and ranchers for livestock grazing.
On December 17, 1937, the potential qualified lessees on what is now the Little Missouri National Grassland met and formed the Medora Grazing Association. The Association held its first meeting in 1938 and had 76 members. The Association issued grazing permits on a priority basis for a specified number of livestock based upon the following factors[50]:

1. The number and head of livestock run by the member during the seven year period immediately prior to January 1, 1937;

2. The amount of land owned and/or leased by the member in the area during such period;

3. Prior use of the land owned and/or leased by the member in the area during such period;

4. The commensurate property owned and/or leased by the member within the outside boundaries of the area or situated on the border thereof at the time of making application for membership; and

5. The dependency of privately owned or leased property on the grazing area.

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[48] McKenzie County Comments, p. 1.

[49] The SCS is now the Natural Resources Conservation Service (NRCS).

[50] By-Laws of Medora Grazing Association, Article VIII, Apportionment of Grazing Rights.

The Association initially established the stocking rate at three acres per AUM. The stocking rates have since been adjusted to the site specific conditions of each allotment. In order to recognize grazing rights, the Association established grazing unit "preferences" for each allotment in the Association. The preference is attached to the private land owned or controlled by the original member upon which the preference was originally established. This land is "Base Property" because it is the land upon which the right to graze livestock is based. The Association has also established upper limits of 350 animal units for each individual member ranch, which means that except for certain exceptions, no member is granted a permit to graze more than 350 animal units on Association-controlled lands.[51]

In 1954, administration of the Land Utilization Project lands was turned over to the United States Forest Service. Some lands became national forests, while the other lands fell under the new classification of "national grasslands." By 1960, there were a total of 3,822,000 acres of national grasslands. North Dakota contained 1,105,000 acres of national grasslands. The Forest Service initially did not disturb the long-established practices of the SCS in entering agreements with local associations of grazing users. In 1962, the SCS Land Utilization Program policies were formally incorporated into the Forest Service Manual, but these policies applied only to the Bankhead-Jones Act lands.

Today, the federal agency possessing jurisdiction over the Little Missouri National Grassland is the U.S. Forest Service. The Medora Grazing Association and the Forest Service are parties to the Grazing Agreement which is in effect through 1999. The Grazing Agreement outlines the general agreement between the Association and the Forest Service regarding management of the Little Missouri National Grassland and the rules of management for the Forest Service, the Association, and members of the Association.

Livestock grazing is also pursued on lands not under the control of the Association. Those lands are owned and controlled by private landowners who are not members of the Association. These ranchers also greatly contribute to the custom and culture of Billings County.

G. The Custom and Culture of Tourism in Billings County

Tourism has been a part of Billings County since the days of Theodore Roosevelt. Mr. Roosevelt arrived near present day Medora on September 7, 1883. As an avid hunter, he was attracted to the area because of the diverse big game species which inhabited the area at that time: elk, grizzly bears, wolves, bison, deer, pronghorn antelope, and bighorn sheep. Billings County is currently home to elk, bison, deer, pronghorn antelope, bighorn sheep and numerous other species of predators and small game.

[51] Grazing Agreement between USDA Forest Service and Medora Grazing Association, 1989-1999, p. 13.

Residents of North Dakota, including those of Billings County, still pursue the wild game species for both meat and sport. As in the days of Theodore Roosevelt, when persons unfamiliar with the Billings County area desired high quality hunting opportunities, they turned to local people with special knowledge of where to find game. Today, the outfitting industry supports between 15 and 20 outfitting businesses in Billings County. Most of these businesses are small, seasonal ventures which supplement existing ranching businesses.

In addition to hunting activities, many people visit the Billings County area to view the scenery and explore the natural and cultural amenities available. Tour guide and trail ride businesses help provide access to these amenities. There are currently 12 tour guide and trail ride businesses listed with the North Dakota Tourism Department that provide these services in Billings County.

Theodore Roosevelt and the Marquis de Mores have provided a lasting historical legacy to add to the scenic amenities of Billings County. As discussed above, Theodore Roosevelt ranched in the Billings County area in the 1880s and 1890s before selling his interests and moving on to a very successful political career, which included the United States presidency. Due to his presence in this area, the Theodore Roosevelt National Park exists today as a major tourism attraction.

Another tourism attraction resulting from Theodore Roosevelt's legacy is the Medora Musical. The Medora Musical is a professional production featuring a fast paced, western themed variety show providing family entertainment. The venue is the new multi-million dollar Burning Hills Amphitheatre, which seats 2,800 people.

Another person who was responsible for the development of the Medora area was the Marquis de Mores. The Marquis was a French aristocrat who planned to raise cattle for slaughter at Medora and ship dressed meat to the eastern states in refrigerated rail cars. His business would have been an inventive undertaking. However, it collapsed in 1886 due to various factors. Nonetheless, the Marquis made significant contributions to Billings County including the town of Medora, which is named after the Marquis' wife, and the Chateau de Mores, which is now a State Historic Site.

Other tourist attractions include the Peaceful Valley Ranch, the Badlands Museum and the Harold Schafer Heritage Center. The tourism industry has shown steady real growth since the mid-1980s. From 1990 to 1995, tourism sales to final demand have increased an average of 8.6 percent per year. From 1993 to 1995, the total tourism activities have increased 35 percent. Increased tourism activities correlates with increased attendance at the Medora Musical. The Musical has seen attendance increase 7 percent annually since 1991, and total attendance has increased 20 percent from 1993 to 1995. See Chapter 4.

Section II. The Importance of Custom & Culture in Defining Community Stability

The importance of custom and culture resides ultimately in the principle of community stability. Community stability is ultimately equated to economic stability, and it is the condition under which communities can change, adapt, and develop by the dictates of custom and culture rather than by the commands of national groups and governments. Community stability entails an environment where people and their customs and cultures are left to their own democratic means; where every community is the arbiter of its own survival; where people have the right of self-determination in a free market society.

Obviously, community stability depends on the right of people and communities to pursue and protect the custom and culture most essential to their well-being and most suited to their personal visions. Public policies that injure or diminish custom and culture by injecting elements of state and national control (whether intended to be beneficial, e.g. subsidies, or invasive and destructive, e.g. regulations) are ultimately disruptive of community stability. Such policies take away from the local people the degree of independence, political integrity, economic discretion and responsiveness necessary to retain a way of life commensurate with custom and culture. In Billings County, federal and state land laws and regulations have disrupted community stability by denying both local government and local citizens their legal sovereignty in matters of local land use. A people and a land divided by policies and bureaucracies that undermine custom and culture have, by all historic standards, failed to meet the environmental needs of the land and its wildlife.

For these reasons, the people of Billings County have concluded that a proper goal of comprehensive land use planning is to ensure community stability. In an environment where private lands are increasingly subject to federal and state control and where federal and state properties comprise one-half of the county's land base, Billings County can best achieve that goal by empowering its citizens, by protecting the property rights, integrity and independence of every citizen and by making custom and culture an issue of local rather than national consensus. A planning strategy based on these assumptions is attainable only by allowing the people who use and live upon the land to make the crucial decisions that determine their welfare and the welfare of the environment at large. No plan can, or for that matter should, isolate or protect community stability and custom and culture from the force of change in response to the needs and messages of nature and the free market. But this plan should and does insulate Billings County from the vagaries of national public policy and from the actions of those whose residencies lie beyond the County but whose ambitions are directed at denying individual and local self-determination.

There is one last aspect of custom, culture and community stability that is essential to the goal of Billings County in the Comprehensive Plan. A peoples' custom and culture and the economic stability of their community is not only a political and moral issue of great import, but it is also an obligation placed upon the federal government by law and regulation. As the chapters in this plan make clear, the federal government is constrained by specific statutes and associated regulations from adversely impacting custom, culture and community stability in Billings County or in any county in the United States.

In fact, the policy of Congress, from the establishment of the National Grasslands, to the passage of the National Environmental Policy Act of 1969, to the passage of the National Forest Management Act and the Federal Land Policy and Management Act, has repeatedly instructed the federal agencies to acknowledge the rights of local communities, the inviolability of custom and culture, and the key consideration of community stability in the promulgation of land use laws, regulations, and policies. The specifics of these laws, regulations and policies are detailed in Chapter 2. Here, it is only important to emphasize the powerful tool that custom, culture and community stability offer to the Billings County government.

The Comprehensive Plan, by articulating the County's unique custom and culture and by delineating the critical elements of community stability, offers a means by which the citizens of Billings County can be empowered in all matters of land use. It provides the leverage by which local democracy regains power and sovereignty in matters close to home and most relevant to community welfare and happiness. How and when to exercise this powerful tool in service of local democracy and in pursuit of enhanced environmental conditions is the object of the remaining sections.

CHAPTER 4
Billings County Community Stability

Section I. Community Stability & Billings County Economy

This chapter describes economic conditions, trends, and impacts on the private use of resources, especially on federal government lands in Billings County. The purpose is to describe the economic outputs necessary for the stability of the community in economic, social, and cultural terms in Billings County.

The chapter starts with an overview of the Billings County economy followed by a portrait of the base economy; that is, agriculture, energy and tourism conditions, impacts and trends. A summary of negative impacts is also discussed. The concluding portion of the chapter presents the basic production requirements necessary to ensure community stability.

As discussed above, the economic base of the County has been and will continue to be ranching, farming, oil and gas exploration and production, and tourism on both federal lands and private lands. The future market conditions are positive for Billings County livestock and energy production. Yet, actions by the Forest Service which result in reductions in livestock grazing or which increase business costs on the Little Missouri National Grassland, have the potential to cause massive adverse impacts to the livestock industry in the county. Additionally, restrictions on oil and gas exploration and development by the Bureau of Land Management and the Forest Service also have the potential to cause widespread adverse impacts to this industry. Furthermore, the Forest Service is examining whether the segments of the Little Missouri River which pass through the Little Missouri National Grassland should be recommended to Congress for designation as a wild, scenic or recreational river under the federal Wild and Scenic Rivers Act. Such designation would have far reaching impacts upon private property uses and values. These impacts will not only affect private businesses, but also the ability of Billings County to provide basic services such as road maintenance, public education and other services. These regulatory impacts can have dramatic consequences on the economic, social and cultural fabric of Billings County citizens.

Citizens are seriously concerned about these impacts and trends and their options for the future. A comprehensive assessment of Billings County resource conditions, economic uses, impacts, trends and potentials are detailed in a previous study performed by the North Dakota State University, Department of Agricultural Economics in July, 1996.[52] The purpose of this chapter is to highlight impacts and trends on the social and cultural aspects of the population and the economy based upon the 1996 economic study. Unless stated otherwise, the following discussion is based upon the 1996 study.

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[52] Bangsund, Dean A. and Leistritz, F. Larry, *Economic Profile of Billings County*, Department of Agricultural Economics, Agricultural Experiment Station, North Dakota State University, submitted to the Billings County Commission, Medora, North Dakota, July, 1996.

To sum up the economic profile study findings: The traditional economic base of Billings County's economy, energy, livestock grazing and tourism are facing major obstacles because of increased federal government regulations and the resulting restrictions on uses of federal and private property. Consequently, in order to maintain the economic base, the adverse effects of federal government regulations must be mitigated to prevent disruption of the supply of natural resources while maintaining long term sustainable use of the resources.

A. The Economic Situation in Billings County

Approximately 50 percent of Billings County is government land (managed by the Forest Service, State of North Dakota, National Park Service and Bureau of Land Management). A large portion of the economy and employment are directly or indirectly tied to economic uses of federal government land.

The demographic profile for Billings County is somewhat typical of the region (i.e., having a sparse, rural, aging population base). Population in Billings County decreased five percent (60 people) from 1970 to 1980 and decreased about three percent (30 people) from 1980 to 1990. However, recent population estimates (1990 to 1995) show moderate gains in the county's population (4.4 percent or 49 persons). Recent trends show Billings County was the only county in State Planning Region 8 to increase in population since 1980. Billings County has a lower average age and a lower percentage of its population over age 65 than most counties in the region. The portion of the population over age 65 in the county has increased from six percent in 1970 to over 11 percent in 1990. The average age in Billings County has increased from 29 years in 1970 to 33.5 years in 1990. Unlike adjacent counties, the absence of trade centers in the Billings County has likely protected the county from experiencing the rapid population changes associated with the rise and decline of energy activities over the last 15 years.

The fiscal indicators show that from 1990 through 1995, the Billings County unemployment rate was 3.5 percent. In 1994 and 1995 Billings County's unemployment rate exceeded the regional and state rates. Important employment statistics not normally recognizable with unemployment percentages are the size of the labor force and number of jobs. The labor force and overall employment in Billings County has been shrinking since 1980, while the labor force and overall employment in the region and in North Dakota have shown modest increases in recent years.

Although employment in Billings County decreased 43 percent from 1980 to 1993, total employment in agriculture and government has remained mostly steady since 1980. Decreases in employment in private industries (primarily energy and associated activities) are largely responsible for the county's employment losses. However, as total employment within the county decreased, the share of employment for agriculture and government activities has increased. In recent years, dependence on agriculture for employment within the county has surpassed regional and state averages. Agricultural activities accounted for approximately 37 percent of the employment in the county from 1990 through 1993.

From an economic perspective, Billings County has an economic base that relies strongly on natural resources, not unlike surrounding counties in southwest North Dakota. All of the major economic base industries in Billings County rely on activities associated (either directly or indirectly) with some form of natural resource (crop land, grazing land, mineral deposits, or scenic attractions). The economic base in Billings County is dominated by energy activities, which have been decreasing since the mid-1980s. Contributions to employment and economic base dollars from agriculture have remained steady over the last decade, while impacts from tourism and government activities have increased. Overall, the economic base in Billings County has been decreasing due primarily to reductions in the energy sector.

Employment levels have decreased from the levels in the early 1980s, but have stabilized since 1990. Unemployment levels have remained low during the entire period. Despite the employment trends, the population has shown modest gains. Apparently, this phenomenon is caused by increases in the percentage of the population over the age of 65 and between the ages of five to 14. Per capita income and poverty indices indicate a substantial income disparity within the county. County-wide per capita income in Billings County is higher than state and regional averages, but the percent of population (persons and families) below the poverty levels is double the state and regional figures.

B. The Energy Industry

In terms of economic base, the energy industry (oil and gas exploration, development and production) is the most important. In 1994, the energy industry accounted for $100 million of economic base in Billings County, which constituted 77 percent of the total economic base. Although difficult to accurately quantify, in 1993, the energy industry directly employed 44 people, or 5.6 percent of all workers plus an unquantified number of people in support industries. In terms of wages, the energy industry paid $2,375,000 in direct wages, or an average of $53,977 per worker. In addition, numerous other businesses are support industries for the energy industry or are indirectly supported by the workers themselves.

Because energy is the largest component of the county economic base, small changes in the County's energy activities have serious economic consequences for both the area residents and neighboring trade centers. Although the energy industry is primarily reliant upon private mineral leases, federal government lands contribute 9.5 percent of the oil production and 14 percent of the natural gas production. Consequently, over ten percent of the energy industry is derived from federal lands. As the table below shows, even a five percent decrease in energy production could be expected to cause a $9.6 million decrease in gross business volume. Therefore, maintaining the energy industry in Billings County is of utmost importance to the citizens of the County and the County itself.

Alternative Energy Scenarios				
Item	Energy 5	Energy 10	Energy 20	Energy 25

Alternative Energy Scenarios					
Change in Sales to Final Demand					
(000s $)	5,000	10,000		20,000	25,000
Secondary Impacts					
(000s $)	4,626	9,245			23,113
Gross Business					
Volume (000s $)	9,626	19,245		38,490	48,113

State Tax Collections					
Personal Income	20,800	41,700	62,500	83,300	104,200
Corporate Income	24,100	48,200	72,300	96,300	120,400
Sales and Use	42,500	85,100	127,600	170,200	212,700
Total	87,400	175,000	262,400	349,800	437,300

C. The Livestock Industry

Ranching is one of the oldest industries in the Billings County. It sustained the local economy before other industries arose and still exists as one of the mainstays of the economy. Because range forages are a renewable resource, ranching will continue as long there are markets for the products of grazing animals. The ranch families have not only been responsible for much of the history of the area, but for contributing and supporting the schools and other public entities funded by tax revenues.

Livestock marketing's accounted for 72 percent of all agricultural revenues to Billings County farms and ranches from 1990 to 1994. The livestock sector is not only the largest component of agriculture, but also the most vulnerable to shifting policies governing the use of government lands. The livestock industry in Billings County, measured by inventory, is dominated by cattle activities. Cattle constitute 95 percent of the livestock inventories. Federal lands (nearly 100 percent of which are contained within the Little Missouri National Grassland) produce approximately 54 percent of the estimated grazing forage output in the county. All of the grazing on the Little Missouri National Grassland is controlled by the Medora Grazing Association. Much of the private grazing land in the county is located within tracts of federal land. In order to efficiently use their intermingled private lands, ranchers must have access to the federal lands. In the absence of federal land grazing, large tracts of private land would be inaccessible or uneconomical to graze.

According to the Economic Profile study, federal land grazing contributes $5.7 million to the County economic base and generates a total of $25.7 million of gross business volume. Each AUM of grazing equates to $220 in gross business volume and $2.54 in tax revenues. Each head of cattle contributes approximately $1,640 in regional impacts and $18.88 in tax revenues. Finally, federal land grazing contributes between 100 and 120 direct full time jobs in the County and 249 secondary full time jobs. Because federal lands grazing accounts for over one-half of all livestock grazing in the County, continued federal land grazing is of paramount importance to maintain the ranching industry and the custom and culture of ranching in Billings County.

D. The Farming Industry

The farming sector of agriculture accounted for 26 percent of all agricultural sales in Billings County from 1990 through 1994. Accordingly, farming provided approximately $4.15 million to the economic base during the same period. Fluctuations within the farming sector are primarily caused by weather and market factors. Nearly all of the farm lands in the County are privately owned. However, federal agricultural policies can heavily impact the decisions which Billings County farmers make in response to federal incentives or disincentives. Like the livestock sector, farming has contributed greatly to the custom and culture of the County and the farms are an essential part of the rural character of the County as well as a traditional mainstay of the Billings County economic base. Consequently, maintaining the County's farm base is important for both economic and social reasons.

E. Tourism

The tourism industry includes outdoor recreation and services, and other activities associated with events in and around Medora and Theodore Roosevelt National Park. This industry is supported by expenditures by out-of-state visitors for retail items and sales of business and personal services such as tours, lodging, camping and associated goods and services. By 1994, the outdoor recreation and services industry had grown to supply approximately $10.5 million of economic base, or 7.7 percent of the County's total economic base. Much of the tourism activities are driven by attendance at the Medora Musical.

Along with visitors to the Medora Musical and the Theodore Roosevelt National Park, sportsmen engaging in hunting and fishing activities contribute significant amounts for items such as food, lodging, fuel, guides and outfitters, and other related expenditures. Each dollar of tourism activity in Billings County creates $1.24 in regional impacts. Each $70,000 in regional impacts supports one full-time equivalent job. The tourism industry adds a source of new money to the economy and contributes to the diversity of the economic base of the County. Thus, the County supports the continued growth of the tourism industry for its additions to the culture, custom and economic base.

Section II. Impacts on Billings County Community Stability

The community stability of Billings County has been undercut by federal land agency decisions. The following list provides examples of federal land agency decisions, actions or inactions and policies which negatively impact the community stability of the County:

A. Livestock Grazing

1. Forest Service

    a. leafy spurge control

    b. prairie dog control

    c. "wild & scenic designations for the Little Missouri River

    d. designation of wilderness areas

    e. non-use of grazing lands

    f. completion of biological, archeological and other studies required for range improvement projects

    g. completion of allotment management plans (AMPs)

    h. NEPA documentation for all grazing permit and grazing agreement renewals

    i. surveys for development projects

    j. Ash Coulee vegetative study

    k. Ducks Unlimited dam in Billings County

    l. CP Program funds

    m. transfers of CP funds

    n. fire control funds

    o. publication and project notices in the Bismarck Tribune

    p. leasing of private lands to which are attached a grazing permit

B. National Park Service

1. leafy spurge
2. elk & bison
3. visual, noise and air quality standards on private property
4. Elkhorn Ranch site road and bridge

C. Energy Industry

1. Forest Service

    a. oil and gas drilling in the big horn sheep habitat

    b. "No Surface Occupancy" (NSO), and other restrictions

    c. Meridian Oil Land exchange

2. National Park Service

    a. visual, noise and air quality standards on private property.

D. Economic Trends in Billings County

According to the *Economic Profile of Billings County*:[53]

> Economic base data, information measuring the value of goods and services that produce new wealth (basic income) in the region, were used in the study to measure the relative size and health of the area economies. Regionally, the economy (State Planning Region 8) has nearly equal reliance on agriculture, federal activities and energy sector activities, whereas, Billings County is highly reliant on energy activities (the energy sector has accounted for 80 percent of all economic base activity in recent years). The remaining industries, agriculture, tourism, and federal activities, comprise about 11, 6, and 3 percent of [the] county's economic base, respectively. Billings County has no manufacturing industries or retail trade centers.
>
> In terms of the size of its economic base, Billings County has fared worse than the surrounding region. The county's economic base has declined from $235 million in 1990 to $136 million in 1994 (42 percent compared to 9 percent for the region). Declines in the energy sector (50 percent since 1990) are the underlying force in the county's declining economic base. Although agriculture, comprised of 75

[53] *Id.*, p. viii.

percent livestock grazing and 25 percent crop activity, decreased from 1990, recent fluctuations appear typical of historic changes. Real increases since 1990 in tourism (54 percent) and federal activities (7 percent) have had little effect in offsetting decreases in other sectors.

E. Social Impacts on Billings County

The boom in the energy sector during the 1970s and 1980s brought in a transient work force prone to frequent incidents of substance abuse and violence. On the other hand, the recent dramatic decline in employment (bust) in the energy industry also caused noticeable impacts to community stability in Billings County. A number of families moved away from the area when their jobs were discontinued. The main gas plant and its sub-plant were completely closed in the Fairfield area. The Town of Fairfield lost a trailer court composed of ten families along with others who lived in various rented houses. The Little Knife Gas Plant was cut back in size, but it still operates. In general, the boom and bust cycle of the energy sector has resulted in a great deal of social upheaval; from the dramatic influx of a transient labor force followed by people moving away from Billings County leaving vacant rental properties and reduced economic activity as a whole.

F. Cultural Impacts

The customary uses of the land have given rise to the culture of Billings County. Some families have made their living from the land for five or six generations. Their products consist of food, fiber and energy, all produced directly from the land. These raw materials are the source of new wealth to the national, state and local economy. Much of the land from which these products are produced were privately owned prior to the Great Depression, but are now owned by the federal government. Government-imposed regulation of private activities on these lands tends to curtail the abilities of Billings County citizens to pursue their livelihoods, which in turn leads to citizens leaving the County, thus causing loss of the local culture.

Local customs in Billings County result from a long series of actions, repeated over time. These habitual practices represent, in part, customary land uses. County settlement and customary land uses began prior to establishment of the national grasslands. Since settlement, Billings County citizens have used government lands for social and economic purposes. In addition, land resources were sources of heat, lumber and food. Citizens used lignite coal mined from shallow veins for the winter fuel supply. Citizens cut trees to construct homes, outbuildings and for fence posts. The land produces wild berries, cherries and plums and many herbs and plants were traditionally used as medicines. For example, during World War I, citizens harvested henbane and sold it to the federal government for use as medicine.

Customary uses of lands have been the primary means of income generation in Billings County. Traditionally, livelihoods based upon land resource uses are typically dependent upon more than one source of income from the land. In Billings County, as well as many rural areas in the West, households rely on a variety of ways to make a living. A family might be in the cattle ranching

business, but also depend upon outfitting or leasing lands to outfitters and hunters, work in the energy industry full or part time, or own other businesses. The variety in income generation encourages ingenuity and self-determination, positive work ethic values, and is part of the local culture.

Federal government designations of land areas as "wilderness" or "roadless" has resulted in little or no increase in tourism and tourism-dependent businesses, but it has resulted in the curtailment of livestock grazing through limitations in access to range improvements and development and maintenance of new water sources for livestock and wildlife. As a result, ranchers must replace income lost as their livestock herds become smaller or they are forced to sell their ranches and attempt to relocate. The loss of customary land uses is destroying and will destroy the cultural heritage of Billings County.

The customary uses of the land have instilled a land ethic that includes posterity for future generations to use the land resources wisely. Many of the customary uses of government lands have acquired certain protectable interests over time, starting with the prior rights that the original settlers had upon their first occupancy and land use. These interests, investments, and assets are eroding because of increased government regulations.

G. Impacts on Property Rights & Interests

As discussed above, federal land use decisions which reduce the number of livestock ranchers may graze on federal lands, designations of areas as "wilderness" or as "wild & scenic rivers," agency failures to complete surveys in a timely manner, and other actions under federal discretionary control all impact private property rights and interests by generally rendering property less economically productive and thus less valuable. Stipulations in oil and gas leases such as "No Surface Occupancy" or other restrictions limit access or increase the cost of recovering minerals in a manner which inhibits development and depresses the value of the leases.

Within the National Grasslands, many ranches are not fenced separately from the federal lands and the ranches are considered to hold an "Inventory" permit rather than a "Turn In" permit. With an "Inventory" permit, the Forest Service controls the private land in the same manner as it controls the private land, which is generally adverse to the private property owner's recognition of the full economic value of the property.

The State of North Dakota manages the wildlife of Billings County. Wildlife depredation near the South Unit of Theodore Roosevelt National Park is significant. Wildlife overpopulation causes animals and birds to "bunch up" during the winter and severely impact the forage supply. Antelope cause damage to crops in late summer and fall. Wild turkeys have increased to huge flocks that are destructive to grain hay, silage and chopped hay. Elk and bison have escaped from Theodore Roosevelt National Park and damaged crops and hay and the NPS has neither repaired nor paid property owners for the damage caused. Prairie dogs have caused severe

depredation in certain areas and the Forest Service has discontinued management. Coyote depredation is cyclical in nature, but is significant in years when the population is high.

H. Impacts on Billings County Government & Local Schools

The Billings County government derives its funding from several tax sources itemized below. These are the sources of the County's operating revenues. The 1996 revenues are set forth below:

Taxes	$605,105.07
Licenses, permits and fees	29,765.00
Intergovernmental Revenue	163,293.59
Charges for Services	118,220.71
Miscellaneous	38,359.10
Interest	465,572.85
PILT	34,237.00
Land Utilization	459,609.97
Oil & Gas Production Tax	1,035,163.39
Oil & Gas Royalties	372,290.68
Total	$3,321,617.36

The County funds infrastructure such as roads and bridges from Land Utilization payments, PILT, and Oil & Gas Production Tax and Royalties. The sources of school funding include the Oil & Gas Production Tax, property taxes, Land Utilization payments and PILT, tuition and other miscellaneous sources.

Clearly, the funding for Billings County to provide basic governmental services and the schools in the County is heavily dependent upon economic uses of the National Grasslands, both directly and indirectly.

Section III. Billings County Economy & Community Stability

A. Billings County Economy & Economic Diversification

Historically, Billings County has been dependent first upon farming and ranching, and later upon energy and tourism as the primary base industries. This is also true today as indicated in the Economic Profile. That study assessed the primary sources of the County's economic base and concluded that the future of the County's economic base will be greatly affected by changes in energy activities. If the energy sector continues to decline, the relative importance of the remaining industries -- agriculture, tourism, and federal activities -- will increase. The agricultural base is unlikely, based upon historic performance over the last three decades, to expand much beyond current levels. Although tourism is an increasingly important sector in the County, the industry would have to experience an unrealistic level of sustained growth to

compensate for energy industry losses. Federal activities will continue to show modest increases, but are unlikely to show significant increases. Manufacturing is not a base industry due to lack of any significant activity in this sector. Development of a manufacturing sector is remote at this time. Thus, energy will continue to play a dominant role in the County economy.

Even in the absence of the energy industry, the local economy will continue to be based mostly on economic uses of natural resources. Although nonconsumptive uses such as tourism should be encouraged, there are no substitutes for the base industries of energy and cattle production. Consequently, the current uses of natural resources must be maintained in order to keep the custom, culture and economic stability of Billings County intact.

B. Billings County Economic Resource Protection & Development Strategy

Billings County supports the following policies:

1. Increased amount of private land in the County;

2. Protection of existing water rights;

3. No further federal designations of land as "wilderness" or "wild & scenic rivers;"

4. Maintain or increase the level of livestock grazing on federal and state lands;

5. Steadily increase the tourism industry in a manner compatible with private property rights and local self-determination; and

6. Oil and gas exploration, development and production should be carried out at a level sustainable by market conditions.

C. Billings County Desired Future Conditions

Billings County desires a stable economy and population base which allows the citizens to continue their livelihoods. Due to the geographic location and existing resources, the economy will continue to be based upon agriculture, energy production and tourism. These industries are compatible with each other, with the landscape and with the citizens.

The agriculture sector is 11 percent of the County economic base. Agriculture producers need improved market prices and security of land tenure. Although the market prices are beyond the control of any single federal agency, security of land tenure is determined by the Forest Service. Forest Service threats of reduced livestock grazing on the National Grasslands is the single most significant threat to land tenure and economic stability of the agriculture industry in Billings County. However, it is also a threat which is controllable by the Forest Service. Billings County

desires that the Forest Service institute policies and decisions which remove the threats to security of land tenure.

The agriculture sector is also negatively impacted by the Forest Service's failure to attend to the management needs of grazing on the National Grasslands. For example, the Forest Service fails to initiate and finish biological and archeological studies necessary for range improvements. As a result, several Medora Grazing Association permittees are allowed to graze only 80 percent of their preference rights. The Forest Service is also failing to complete allotment management plans, which results in failure to implement necessary range improvement projects. Finally, the Forest Service has made the policy decision that all grazing permit renewals must be subjected to analysis under NEPA even though grazing permit renewals are merely a continuance of an existing activity. As a result, human and financial resources which could be devoted to on the ground range improvements are being diverted for unnecessary NEPA analysis. The Billings County Commission's desired current and future condition for grazing administration is for the Forest Service to devote its resources to on the ground improvements rather than to repetitive, unnecessary analysis under NEPA, and for the Forest Service to promptly complete its analysis duties so that range improvement projects can proceed when needed.

The energy industry contributes 80 percent of the economic base of the County. Again, Forest Service policies and decisions are increasingly reducing access to developed resources and future developments of undeveloped resources. Wildlife concerns are often overemphasized by the Forest Service. For example, the Forest Service has prohibited drilling south of Medora during the bighorn sheep breeding season, yet bighorn sheep often use areas next to pumping wells. The County's desired future condition of the energy industry is continued growth in an "environmentally sound manner." The Billings County Commission desires to assist the Forest Service and other federal agencies by holding local public hearings to determine what is "environmentally sound" for each project or decision to be made.

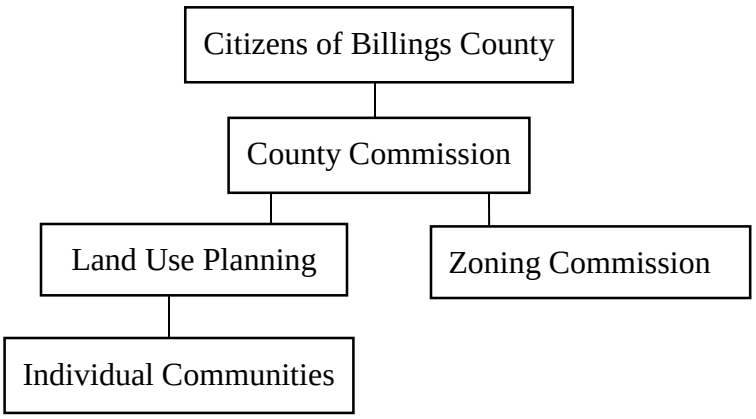
The recreation and tourism industry currently contributes nine percent of the local economy. The Billings County Commission is satisfied that the rate of growth is acceptable and is confident that this industry will continue to provide jobs and revenue to the County. The desired future condition for this industry is to maintain the current level of economic activity and economic growth.

CHAPTER 5
Implementation of Billings County's Comprehensive Plan

This chapter shows the organization and structure of the land planning committees and boards which will work through the Billings County Commission to ensure that the purposes of this Comprehensive Plan are carried out. These boards and committees will be generally responsible for: (1) reviewing federal agency plans and decisions to ensure that agency officials adequately evaluate the effects of those decisions on Billings County's custom, culture and economic stability; (2) informing the Billings County Commission of the potential effects of agency actions; and (3) developing and/or ensuring that the federal agencies consider adequate alternatives and/or mitigation measures for decisions which will adversely affect the County's well-being.

Section I. Organization

The citizens of Billings County adhere to and demand democratic participation in their government. Therefore, the operational structure of the Comprehensive Plan places the citizens at the top, with all the authority vested in them as shown below.



Section II. Structure & Responsibilities of the Commission and Their Appointees

A. The Billings County Commission shall establish, by resolution, the County Planning Commission, in accordance with N.D. Cent. Code § 11-33-04. Initially, the Planning Commission shall consist of the members of the Interim Advisory Committee plus any other persons appointed for the purposes of fulfilling the requirements of N.D. Cent. Code § 11-33-04. The duty of the Planning Commission is to investigate and determine the necessity of establishing the policies contained within this Comprehensive Plan by consulting with the residents of the County and with the federal, state and other agencies which operate within the County. The investigation shall be conducted as required by N.D. Cent. Code § 11-33-06. The

residents of the County have formed committees for the purpose of providing input to the Planning Commission. The following committees have been formed:

1. Tourism, Business & Recreation;

2. Agriculture;

3. Energy;

4. Wilderness, Water & River; and

5. Wildlife & Endangered Species.

The citizens of the County may form other committees as needed to address issues outside of the subject area of the above listed committees.

B. Upon concluding its investigation, the Planning Commission shall prepare a proposed resolution prescribing regulations which establish policies for land management, development and conservation. Following the filing of the proposed resolution, the Planning Commission shall hold a public hearing as prescribed by N.D. Cent. Code § 11-33-08. Upon the conclusion of the public hearing, the County Commission may adopt the proposed resolutions or any amendments or changes it deems advisable in accordance with N.D. Cent. Code § 11-33-09.

The County Commission shall be responsible for the following:

1. Monitoring each committee's action to ensure compliance with the ordinances, the state and federal laws, and the will of the people;

2. Establishing a method to forward citizen inquiry or requested action to the appropriate committee;

3. Establishing a mechanism for conflict resolution (conflicts between committees) through the Planning Committee;

4. Setting a minimum meeting frequency for each committee;

5. Appointing replacement members for each committee and the Planning Commission;

6. Setting the method of alternates to sit in place of regular members of each committee;

7. Setting time lengths for office tenure on the committees;

8. Setting amount of compensation, if any, for members of the committees; and

9. Establishing methods of removal from office for failure to attend meetings or perform duties established by the County Commission.

C. It is also the County Commission's responsibility to ensure that the various committees are organized and directed by, but not limited to, the following responsibilities, obligations and structures:

1. Monitoring federal, state and local governmental agencies' compliance with the Comprehensive Plan and Billings County ordinances and resolutions;

2. Monitoring and advising the Billings County Commission of impacts of federal, state and local legislation and regulatory actions;

3. Preparing alternatives and/or mitigation measures to proposed agency actions and decisions;

4. Monitoring for takings or potential takings of property rights, or infringements on the customs, culture or economic stability of the County;

5. Establishing a non-binding arbitration board to aid in settling disputes in the subject area of the committee. Disputes may be between individual citizens of the county or the committee and the federal, state and local agencies;

6. Keeping (and providing for public inspection) minutes of all meetings and forward said minutes to the County Commission;

7. Reporting regularly to the Billings County Commission on the activities and findings of the committee;

8. Conducting all meetings with laws requiring open meetings. N.D. Cert. Code §§ 44-04-19, et. seq.

9. Keeping (and providing for public review) information, publications and data pertinent to their subject areas;

10. Preparing educational materials for schools and the public on the subject of the committee;

11. Preparing an informational and instructional handbook for citizens on the subject of the committee; and

12. Performing other duties as may be assigned by the County Commission.

Appendix 1

The Legal & Administrative Environment

A. INTRODUCTION

County and local governments in rural America are facing challenges to the viability of their economies and the well-being of their citizens. Western states are especially vulnerable to these challenges because of the presence of large amounts of lands under the ownership and administration of carious federal agencies. County governments and their rural constituents are rapidly losing their sovereignty and tax base. Erosion of the tax base results in less money available for schools, roads, and other locally determined and desired services. Two common reasons for county economic hardships resulting from federal programs and actions are: 1) the transfer of private property ownership from tax-paying citizens to the federal government and tax-exempt organizations, and 2) the loss of industries, jobs, and tax revenues that are dependent on the use of the private and federal lands. Adverse spin-offs of this basic problem include loss of sovereignty and self-determination, loss of civil rights and private property rights, and diminution of democracy. County governments, however, do have options available to address their needs as provided in the U.S. Constitution and through existing federal and state laws and regulations.

The U.S. Constitution was drafted by 55 delegates from the 13 original states. It was signed on September 17, 1787, by 39 of the delegates, but only after agreement that the Constitution would alone did not limit the powers of the federal government to the extent desired. The states ratified the ten amendments of the Bill of Rights which became effective December 15, 1791.

Technically, it is a misnomer to call the first ten amendments to the Constitution a Bill of Rights. They were intended to be a declaration of prohibition against the federal government. "In the minds of the Founders, usurpation and intervention by the federal government in the affairs of the states and the people were the most ominous threats to the happiness and welfare of the American society."[54] The Founders also did not want to have the federal government serve as the watchdog over the states' responsibility to protect the rights of their citizens.[55] Thus, the Founders wrote a Constitution, including a Bill of Rights that strictly limited the powers of the federal government and allocated many powers to the states and clearly articulates these principles:

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[54] Skousen, W. Cleon. 1985. *The Making of America*. The Center for Constitutional Studies. P.O. Box 37110, Washington, D.C. 20013.

[55] ibid.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

The sovereign states were to exist free from external control except for the powers specifically granted to the federal government in the Constitution. The federal government's role was largely to guarantee that the states could exist as sovereign governments, to maintain armed forces for national defense, and to facilitate the coordination of matters affecting the states, collectively.

The powers and rights vested to the states by the U.S. Constitution guaranteed to them the basic powers and rights of self-determination. The state of North Dakota recognizes its rights and its obligation as articulated in the state Constitution.

> The state of North Dakota is an inseparable part of the American union and the Constitution of the United States is the supreme law of the land.[56]

> All men are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursing and obtaining safety and happiness and to keep and bear arms for the defense of their person, family property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.[57]

The states exercise their sovereign rights and powers by establishing political subdivisions within their borders to allow for local self-determination. The political subdivisions in North Dakota are called counties and the counties are granted powers to function. In general, "included in this grant of powers to the counties are those powers necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals order, comfort and convenience of any county or its inhabitants."[58] The citizens in each county elect a county government (board of county commissioners). Collectively, all the counties, acting through their elected county governments, represent all the people to the governing body of the state.

Congress has demonstrated a long history of concern for the protection of custom, culture and economies of those local communities and counties adjacent to or containing federal lands. Federal laws and their implementing agency regulations provide a window of opportunity for county governments.

Although the economic stability of counties is an important consideration in the management of federal lands, neither the Congress, the courts, nor the agencies in charge of federal lands have specifically defined "economic or community stability." These governmental bodies and land

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56 North Dakota Constitution, Article I, § 23.

57 North Dakota Constitution, Article I, § 1.

58 N.D. Cent. Code § 11-33-01.

management agencies cannot define "economic or community stability" because there can be no national definition. Community economic stability must be defined on a county level by those who are dependent on the use of federal natural resources for economic survival.

Pertinent federal laws and regulations require that plans for federal natural resource management that include activities, programs, and efforts be both coordinated and consistent with county land use plans and policies. It is important to remember that the development of a county land use plan is completely different than completion of a county zoning regulation. Zoning entails the description of certain uses that will be allowed on specific parcels of land. Land use plans describe the general industrial basis necessary for economic support of the county. Although zoning may be based upon land use planning, zoning does not have to be completed, or even contemplated, for county government to participate in federal planning processes through the completion of a county land use plan.

In part, the Billings County Comprehensive Land Use Plan describes the amount and type of commodity, recreational, or other industrial or land sues that provide the tax base for Billings County. Accordingly, the comprehensive plan also defines the custom, culture, and the economic and community stability of Billings County.

B. FEDERAL LAWS & REGULATIONS & AFFECTED AGENCIES

The meaning of several terms should be understood when reading federal statutes and regulations. Federal statutes are enacted by Congress. Statutes are relatively permanent because they can only be abolished or amended by Congress in a process which is long and arduous, though not impossible. Regulations are promulgated by various agencies of the federal government to carry out the intent of the statutes. The regulations must be developed and amended through a process that allows and considers public input. The final regulations provide the guidelines and processes used by the agencies to carry out the statutes for which they are responsible. Regulations can be changed more easily than statutes because their content is controlled by the executive branch of government. Nevertheless, once regulations are in effect, the agencies are required to follow them. Sometimes, further guidance is necessary to carry out regulations. Agencies can then develop internal policies for guidance to accomplish their mission.

The following definitions, taken from Black's Law Dictionary, are important to keep in mind when dealing with federal laws and regulations. When used in statues or contracts, the term "shall" is generally imperative or mandatory. It excludes the idea of discretion and imposes a duty which may be enforced when public policy favors this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights that should be exercised or enforced.

When used in statutes and presumably federal rules, the term "may" as opposed to "shall" usually indicates discretion or choice between two or more alternatives. The word "coordinate"

means "equal, of the same rank, order, degree, or importance; not subordinate."[59] Thus, when the term "coordinate" is used in the statutes and regulations, the federal agencies must involve and consider county government land use plans and policies on equal footing.

The concept of "coordination" is important to bear in mind because county insistence on adherence to it by the agencies may be necessary. Although county governments cannot required the federal agencies to make specific decisions or to take action prohibited by federal law, county governmental plans and policies must be equally considered with other land management alternatives. If conflicts occur between the local government and the federal agency, the agency must seriously consider alternative actions to avoid the conflict. Unlike the word coordinate, the terms "cooperate" and "consult" do not require extraordinary efforts by the federal agencies to meet county plans and policies. With these terms, the federal agencies must need to make contact, obtain input, and use the input at their discretion. Congress does not use the word "coordinate" liberally. When the word "coordinate" is used, Congress is according special status to the affected party to be coordinated with -- in this case local government.

Although different terms are used, the statues and regulations require the federal agencies to consider, and protect from adverse impacts when possible, the economic structure of counties. However, wording is also present in the statutes and regulations indicating that the agencies must consider and protect more than just economic structures. For example, the National Environmental Policy Act requires all agencies to assure safe, healthful, productive, and aesthetically and culturally pleasing surroundings and to preserve cultural aspects and maintain an environment supporting a variety of individual choice. Regulations specific to the U.S. Forest Service require the agency to consider effects of its actions on communities adjacent to or near the forest, and on employment in affected areas. Similarly, the Bureau of Land Management regulations require that agency to consider the degree of dependence counties have on resources from public lands. Compliance with the spirit and the letter of the statutes and regulations requires that the agencies must consider, preserve, and protect from adverse impacts both the economic and the social well-being of the county. In other words, the federal agencies must account for a community's way of life -- the delicate fabric holding families together -- as well as a community's economic base before taking actions that might prove harmful. The comprehensive plan refers to this federal obligation in terms of protecting and preserving either "economic stability" or "community stability," depending on the context of the subject under discussion.

B.1 National Environmental Policy Act (NEPA)

The National Environmental Policy Act (NEPA) is the basic national charter requiring federal protection of the environment, as well as customs, cultures and the local tax base. It establishes policies, sets goals, and provides the means for carrying out policies and attaining goals.

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[59] *Black's Law Dictionary*, 1979.

B.1.1 NEPA: Congressional Declaration of Policy

NEPA is extremely important to county governments and local communities. As the umbrella environmental law, NEPA declares:

> . . . that it is the continuing policy of the Federal Government, **in cooperation with State and local governments,**[60] . . . to use all practicable means, consistent with other essential considerations of national policy, to improve and **coordinate** Federal plans, functions, programs, and resources to the end that the Nation may --[61] . . . assure for all Americans safe, healthful, productive, and aesthetically and **culturally pleasing surroundings;"**[62] and ". . . **preserve** important historic, **cultural**, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice."[63] [Emphasis added]

Three major federal statutes, the National Environmental Policy Act, the National Forest Management Act, and the Federal Land Policy and Management Act, mandate that allocation decisions of natural resources and land uses on public lands must be made through a comprehensive public planning process. The complex mixture of data collections, analysis of impacts, review of alternatives, and implementation of strategies includes extensive public review and involvement by county government. A negotiated attempt at planning and agreement between the federal agency and county governments does not solve all problems or satisfy all participants. For this reason, litigation by the county may be necessary if federal agencies fail to meet the mandates stated in the statutes as explained below.

B.1.2 NEPA: Protection of Custom & Culture

NEPA not only requires the federal government to consider the impacts of its actions on the environment, but it also requires federal agencies to preserve culture and heritage. Significantly, Congress' policy regarding NEPA states that cooperation and coordination will occur with "local governments," and that the culturally pleasing surroundings and cultural aspects of community will be preserved so as to support diversity and variety of individual choice. Clearly, this policy can only be carried out at the county level -- through county government that encompasses multiple communities, all possessing a common culture and similar pleasing surroundings that require protection.

To determine what will be "preserved" in a county under NEPA, consideration must be given to the meaning of the work "culture." Culture is the integrated pattern of human knowledge and

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60 42 U.S.C. § 4331(a).
61 42 U.S.C. § 4331(b).
62 42 U.S.C. § 4331(b)(2).
63 42 U.S.C. § 4331(b)(4).

behavior passed to succeeding generations; it is the **customary** beliefs, social forms, and material traits of a social group.[64] A custom is "A usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of law with respect to the place or subject-matter to which it relates.[65]

NEPA provides county governments the opportunity to preserve their local customs and culture. However, each county must determine and define its local custom and culture and then act to protect them. Once a county government has identified and defined its custom and culture, it must inform the federal agencies of the definition and request that custom and culture be preserved under NEPA. State agencies might also be informed and requested to comply accordingly. If numerous counties in a state present a united approach, state governors and state agencies will be under greater pressure to comply.

B.1.3 Compliance of Federal Agencies with NEPA

NEPA "contains 'action-forcing' provisions to make sure that federal agencies act according to the letter and the spirit of the Act."[66] "Federal agency" is defined as "all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office."[67]

Congress clearly intended that federal agencies meet their responsibilities under NEPA. To this end, Congress "created in the Executive Office of the President a Council on Environmental Quality. . . ."[68] The Council on Environmental Quality (CEQ) was designed to be a watchdog over the federal agencies. NEPA states:

> It shall be the duty and function of the Council -- . . . (3) to review and appraise the carious programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto [.][69]

B.1.4 Mandate to Federal Agencies Under NEPA

NEPA mandates specific performance requirements which are crucial to the comprehensive plan:

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64 *Webster's Ninth New Collegiate Dictionary*, 1986.
65 *Black's Law Dictionary*, 1979.
66 40 C.F.R. § 1500.1(a).
67 40 C.F.R. § 1508.12.
68 42 U.S.C. § 4342.
69 42 U.S.C. § 4344(3).

all agencies of the Federal Government shall . . . (C) include in every recommendation or report on proposals for legislation and other Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . .

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which had jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and view of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(G) Make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment.[70]

County governments should be alert to federal proposals, plans, legislation, or other major federal actions and request, when necessary, that an environmental impact statement be prepared (if one is not otherwise prepared) by the involved federal agency.

Although NEPA is explicit in its Congressional mandates to the federal agencies, the CEQ has passed NEPA and agency planning regulations ". . . to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements. . . ."[71]

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70 42 U.S.C. § 4332(2)(C)(i)-(v) and (2)(G).

71 40 C.F.R. 1500.1(a).

A major objective of the NEPA regulations is:

> (b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.[72]

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

> (d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:
>
> (2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.[73]

NEPA requires agencies to circulate both the draft and final environmental impact statements, except for certain appendices and unaltered statements, to appropriate Federal, State, and local agencies authorized to develop and enforce environmental standards.[74] Further, NEPA imposes the following guidelines on federal agencies regarding cooperation with county governments to integrate environmental impact statements with local planning processes and to eliminate duplication:

> (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).
> (4) Joint environmental assessments.

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72 40 C.F.R. 1501.1(b).
73 40 C.F.R. § 1501.2(d)(2).
74 40 C.F.R. § 1502.19(a).

(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.[75]

The NEPA process is intended to help pubic officials make decisions that are based on environmental consequences, and that take actions to protect, restore, and enhance the environment and preserve local custom and culture. NEPA and the implementing CEQ regulations require all federal agencies to coordinate with county governments as outlined above. County governments can always resort to use of the NEPA process regardless of the federal agency, law, program, or action involved. Significantly, pertinent federal agencies (e.g., U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service, and U.S. Park Service) are mandated in a wide range of laws to comply with NEPA. Accordingly, the agencies have promulgated regulations to guide them through the NEPA process. The laws and regulations guiding agency policies and programs vary in their approach to the specific requirements, but they add to the letter and spirit of NEPA and its implementing CEQ regulations.

B.2 U.S. Forest Service Land & Resource Planning/NEPA Processes

Laws requiring the Forest Service (FS) to consider county governments in its planning processes have become more explicit over time. For example, the Multiple Use and Sustained Yield Act of 1960 directed the Secretary of Agriculture "to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and

[75] 40 C.F.R. 1506.2(b), (c), (d).

services obtained therefrom."[76] However, the act merely authorized the Secretary of Agriculture "to cooperated with interested State and local governmental agencies and others in the development and management of the national forests."[77] The Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA) strengthened the opportunity for county input. In Section 3, the RPA recognized the importance of renewable forest and ranger resources, and directed the Secretary of Agriculture to prepare a Renewable Resource Assessment. The RPA elevated the relationship between the FS and the county governments from one of cooperation to one of coordination with the following requirement:

> 6(a) As a part of the Program provided for by section 3 of this Act, 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 resources management planning processes of **State and local governments** and other Federal agencies.[78] [Emphasis added]

The RPA was extensively amended by the National Forest Management Act of 1976. Significantly, Section 6(a) of the RPA, quoted above, was not amended. The National Forest Management Act requires that each plan developed "be revised (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years."[79] The FS must coordinate land use planning efforts with those of county governments under this act or through the NEPA process.

The FS has promulgated regulations for developing, adopting, and revising land and resources management plans for the National Forest System. The regulations prescribe how land and resource management planning will be conducted on National Forest System lands.[80] The purposes and principles involved regarding planning coordination with count governments and preservation of culture and economic and community stability are articulated as follows:

> The resulting plans shall provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public benefits in an environmentally sound manner.
>
> (b) Plans guide all natural resource management activities and establish management standards and guidelines for the National Forest System. They determine resource management practices, levels of resource production and management, and the availability

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76 16 U.S.C. § 529.
77 16 U.S.C. § 530.
78 16 U.S.C. § 1604(a).
79 16 U.S.C. § 1604(f)(5).
80 36 C.F.R. § 219.1(a).

> and suitability of lands for resource management. Regional and forest planning will be based on the following principles:
>
> (5) **Preservation of** important historic, **cultural**, and natural aspects of our national heritage;
>
> (9) **Coordination with** the land and resource planning efforts of other Federal agencies, **State and local governments**, and Indian tribes;
>
> (13) Management of National Forest System lands in a manner that is sensitive to **economic efficiency**; and
>
> (14) Responsiveness to changing conditions of land and other resources and to changing **social and economic demands of the American people**.[81] [Emphasis added]

These regulations apply to the National Forest System, which includes special areas, such as wilderness, wild and scenic rivers, national recreation areas, and national trails. Whenever the special areas require additional consideration by the Forest Service, this planning process applies.[82] The regulations stipulate that each forest supervisor shall develop a forest plan for administrative units of the National Forest System.[83] An administrative unit for this purpose can be a national forest, or all lands for which a forest supervisor has responsibility (e.g., a national forest and one or more special areas), or a combination of national forest within the jurisdiction of a single forest supervisor (see fn. 25).

Specific processes and requirements for accomplishing the purposes and principles of planning coordination with county governments and the protection of culture and community stability are provided as follows:

> (a) The responsible line officer shall **coordinate** regional and forest planning with the equivalent and related planning efforts or other Federal agencies, **State and local governments**, and Indian tribes.
>
> (c) The responsible line officer shall review the planning and land use policies of other Federal agencies, State and local governments, and Indian tribes. The results of this review shall be displayed in

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81 36 C.F.R. § 219.1(a),(b)(5),(9), (13), (14).

82 36 C.F.R. § 219.2.

83 36 C.F.R. § 219.10.

the environmental impact statement for the plan (40 CFR 1502.16(c), 1506.2). The review shall include --

(1) Consideration of the objectives of other Federal, State and local governments, and Indians [sic] tribes, as expressed in their plans and policies;

(2) An assessment of the interrelated impacts of these plans and policies;

(3) A determination of how each Forest Service plan should deal with the impacts identified; and,

(4) Where conflicts with Forest Service planning are identified, consideration of alternatives for their resolution.

(d) In developing land and resource management plans, the responsible line officer **shall meet with** the designated State official (or designee) and representatives of other Federal agencies, **local governments** and Indian tribal governments **at the beginning of the planning process to develop procedures for coordination. As a minimum, such conferences shall also be held after public issues and management concerns have been identified and prior to recommending the preferred alternative.** Such conferences may be held in conjunction with other public participation activities, if the opportunity for government officials to participate in the planning process is not thereby reduced.

(e) In developing the forest plan, the responsible line officer shall seek input from other Federal, State and local governments, and universities to help resolve management concerns in the planning process and to identify areas where additional research is needed. This input should be included in the discussion of the research needs of the designated forest planning area.

(f) A program of monitoring and evaluation shall be conducted that includes **consideration of the effects of National Forest management on land, resources, and communities adjacent to or near the National Forest being planned** and the effects upon National Forest management of activities on nearby lands managed

by other Federal or other government agencies **or under the jurisdiction of local governments**.[84] [Emphasis added]

The agency regulations also reflect the specific requirements to protect the economic and community stability of a county. The preparation, revision, or significant amendment of a forest plan includes the formulation of reasonable alternatives according to NEPA procedures.[85] The alternatives must be in sufficient detail to provide the following information regarding economic and community stability:

> The physical, biological, **economic**, **and social effects** of implementing each alternative considered **in detail** shall be estimated and compared according to NEPA procedures. These effects include those described in NEPA procedures (40 CFR 1502.14 and 1502.16) and at least the following:
>
> (3) Direct and indirect benefits and costs, analyzed in sufficient detail to estimate --
>
> (iii) **the economic effects of** alternatives, including impacts on present net value, total receipts to the Federal Government, direct benefits to users that are not measured in receipts to the Federal Government, **receipt shares to State and local governments, income, and employment in affected areas;**. . .[86] [Emphasis added]
>
> The significant physical, biological, **economic, and social** effects of each management alternative shall be evaluated **in detail.**[87] [Emphasis added]

Further:

> The evaluation shall include a comparative analysis of the aggregate effects of the management alternatives and shall compare present net value, **social and economic impacts**, outputs of goods and services, and overall protection and enhancement of environmental resources (see fn. 29). [Emphasis added]

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84 36 C.F.R. §§ 219.7(a),(c)(1),(2),(3),(4),(d),(e),(f).

85 36 C.F.R. §§ 219.12(a),(b),(c),(d),(e),(f).

86 36 C.F.R. 219.12(g).

87 36 C.F.R. § 219.12(h).

> Upon implementation, the plan shall be evaluated to determine how well objectives have been met and how closely management standards and guidelines have been applied. Necessary changes in management direction, revisions, or amendments to the forest plan as necessary, shall be recommended to the forest supervisor.[88]

B.3 U.S. Bureau of Land Management Land & Resource Planning/NEPA Processes

The guiding statute for the Bureau of Land Management (BLM) to administer public lands is the Federal Land Policy and Management Act of 1976 (FLPMA). The statute defines the term "public lands" as any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except: (1) lands located on the Outer Continental Shelf; and (2) lands held for the benefit of Indians, Aleuts, and Eskimos. FLPMA specifically requires the BLM to prepare land use plans:

> (a) The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.[89]

It is significant to note that FLPMA provides explicit directives for the BLM to coordinate public land use planning with county governments, and to ensure that federal land use plans are consistent with local plans to the maximum extent possible. The statute details the BLM's mandate as follows:

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

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88 36 C.F.R. 219.12(k).

89 43 U.S.C. § 1712(a).

located, including, but not limited to, the statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended, and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. 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 land use plans; assure that consideration is given to those States, 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 programs, 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 him. **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.

(f) The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the

> management of the public lands.[90] [Emphasis added]

FLPMA provides additional requirements regarding the opportunity for county governments to participate in, and to influence BLM land use policies, plans, and programs. Land conveyances are addressed as follows:

> Sec. 210. At least sixty days prior to offering for sale or otherwise conveying public lands under this Act, the Secretary shall notify the Governor of the State within which such lands are located and the head of the zoning or other land use regulatory jurisdiction in the geographical area within which such lands are located, in order to afford the appropriate body the opportunity to zone or otherwise regulate, or change or amend existing zoning or other regulations concerning the use of such lands prior to such conveyance. The Secretary shall also promptly notify such public officials of the issuance of the patent or other document of conveyance for such lands.[91]

FLPMA provides further:

> That the Secretary shall not make conveyances of public lands containing terms and conditions which would, at the time of the conveyance, constitute a violation of any law or regulation pursuant to the State and local land use plans, or programs.[92]

FLPMA is also clear regarding its effect on existing rights as follows:

> (g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or --
>
> > (6) as depriving any State or political subdivision thereof of any rights it may have to exercise civil and criminal jurisdiction on the national resource lands;[93] or as amending, limiting, or infringing the existing laws providing grants of lands to the States.

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90 43 U.S.C. § 1712(c)(9),(f).

91 43 U.S.C. § 1720.

92 43 U.S.C. § 1718.

[93]The term "national resource lands" is synonymous with the term "public lands" according to the Joint Statement of the Committee of Conference regarding the drafting of FLPMA. Legislative History of the Federal Land Policy and Management Act of 1976 (Public Law 94-579). 1978. Pub. No. 95-99; p 927.

(h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.[94]

Regulations have been issued regarding resources and land use planning by the BLM. The regulations are more detailed and specific than those pertaining to the FS in the matters of coordination with county governments and protection of custom, culture, and economic and community stability of counties.

BLM regulations use the terms "consistent" and "local government" which are defined:

(c) *Consistent* means that the Bureau of Land Management plans will adhere to the terms, conditions, and decision of officially approved and adopted resource related plans, or in their absence, with policies and programs, subject to the qualifications in Section 1615.2 of this title.

(e) *Local government* means any political subdivision of the State and any general purpose unit of local government with resource planning, resource management zoning, or land use regulation authority.[95]

Relevant plans of the BLM, which are subject to coordination with county government and county land use plans, are called "resources management plans." However, amendments to older plans such as management framework plans are also subject to coordination requirements.[96] Approval of a resource management plan is considered a major federal action significantly affecting the quality of the human environment. Thus, the NEPA process applies.[97]

BLM regulations are specific in requiring **coordination** and **consistency** between federal land use plans and local plans. If conflicts exist, or local plans do not exist, the regulations require BLM to make every reasonable effort to resolve the conflicts and be consistent with existing local policies and programs. In order to convey the spirit as well as the letter of the regulations, pertinent elements are quoted below:

Section 1610.3-1 Coordination of planning efforts.

(a) In addition to the public involvement prescribed by Section 1610.2 of this title the following **coordination** is to be accomplished **with**

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94 Pub. L. 94-579, Section 701.
95 43 C.F.R. § 1601.0-5(c),(e).
96 43 U.S.C. § 1712(d); 43 C.F.R. 1610.8(a)(3)(ii).
97 43 C.F.R. § 1601.0-6.

other Federal agencies, **State and local government,** and Indian tribes. The objectives of the coordination are for the State Directors an District and Area Managers to keep apprised of non-Bureau of Land Management plans; assure that consideration is given to those plans that are public lands; assist in resolving, to the extent practicable, inconsistencies between Federal and non-Federal government plans; and provide for meaningful public involvement of other Federal agencies, State and local government officials, both elected and appointed, and Indian tribes in the development of resource management plans, including early public notice of proposed decisions which may have a significant impact on non-Federal lands.

(b) State Directors and District and Area Managers shall provide other Federal agencies, State and local governments, and Indian tribe's 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.

(c) In developing guidance to District Managers, 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 Section 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.

(d) 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 Section 1610.2(b) of this title.

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

Section 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 land, 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 resources 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 air, water noise and other pollution standards or implementation plans.

(c) State Directors and District and Area 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.

(e) Prior to the approval of a proposed resource management plan, or amendment to a management framework plan or resource management plan, the State Director shall submit to the Governor of the State(s) involved, the proposed plan or amendment and shall identify any known inconsistencies with State or local plans, policies or programs. The Governor(s) shall have 60 days in which to identify inconsistencies and provide recommendations in writing to the State Director. If the Governor(s) does not respond within the 60-day period, the plan or amendment shall be presumed to be consistent. If the written recommendation(s) of the Governor(s) recommend changes in the proposed plan or amendment which were not raised during the public participation process on that plan or amendment, the State Director shall provide the public with an opportunity to comment on the recommendation(s). If the State Director does not accept the recommendations of the Governor(s), the State Director shall notify the Governor(s) and the Governor(s) shall have 30 days in which to submit a written appeal to the Director of the Bureau of Land Management. The Director shall accept the recommendations of the Governor(s) if he/she determines that they provide for a reasonable balance between the national interest and the State's interest. The Director shall

> communicate to the Governor(s) in writing and publish in the FEDERAL REGISTER the reasons for his/her determination to accept or reject such Governor's recommendations.[98] [Emphasis added]

Significantly, county governments should keep in contact with the Governor to assure the county's needs are considered. However, if the BLM has been informed regarding county's needs, involvement, and plans, the agency should coordinate directly with the county government. The regulations cited above provide for early involvement of local government in BLM planning activities. This requirement for early involvement is reinforced in the next section of the regulations:

> 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.[99]

When the BLM begins the process to amend or develop a resource management plan, the agency is required to consider the ability of the resource area to respond to local needs when formulating reasonable alternatives. The regulations state:

> Factors to be considered may include, but are not limited to:
>
> (e) Specific requirements and constraints to achieve consistency with policies, plans and programs of other Federal agencies, State and local government agencies and Indian tribes;
>
> (g) Degree **of local dependence** on resources from public lands.[100] [Emphasis added]

Clearly, the BLM must consider the impact of its actions on the economies and communities of the counties involved. Further, after alternatives have been developed, the BLM ". . . shall estimate and display the physical, biological, **economic, and social effects** of implementing each alternative considered **in detail**."[101] [Emphasis Added] The completed draft resource management plan and associated environmental impact statement ". . . shall be provided for comment to the Governor of the State involved, and to officials of other Federal agencies, State and local governments and Indian tribes that the State Director has reason to believe would be

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98 43 C.F.R.§ 1610.3-1(a),(b),(c),(d),(e); 1610.3-2(a),(b),(c),(d),(e).
99 43 C.F.R. § 1610.4-1.
100 43 C.F.R. § 1610.4-4(e), (g).
101 43 C.F.R. § 1610.4-6.

concerned."[102] Upon implementation, the plan shall be monitored to determine whether it needs to be amended.[103]

B.4 U.S. Fish & Wildlife Service Planning/NEPA Process

The Fish and Wildlife Service (FWS) was established by the Fish and Wildlife Act of 1956.[104] The FWS has numerous responsibilities, though two of its major programs are of specific concern to county governments. Those programs are the National Wildlife Refuge System established by the Fish and Wildlife Coordination Act[105] and the duty of the FWS to administer the Endangered Species Act. The FWS, however, has no organic act requiring coordination of planning efforts or protection of custom, culture, and economic and community stability of counties. Nevertheless, NEPA does apply and county should remain alert to FWS actions - actions that are subject to the NEPA process. Further, as described below (C.2 Endangered Species Act), local government does have some recourse regarding threatened or endangered species.

B.5 National Park Service & County Government Coordination

The National Park Service (NPS) was created as an agency of the Department of the Interior by what is popularly known as the "National Park Service Organic Act." The NPS was established to promote and regulate the use of national parks, monuments, and reservations to conserve the scenery and the natural and historic objects and wildlife therein and to provide for their use while leaving them unimpaired for future generations.[106] County governments have little recourse regarding administration of relevant areas by the NPS. However, the statute does authorize the NPS to aid the states and political subdivisions in planning such areas for the ". . . developing a plan for coordinated and adequate public park, parkway, and recreational-area facilities. . . ."[107]

Congress establishes, abolishes, or revises the boundaries of lands of different federal jurisdiction after receiving recommendations from the affected federal agencies. If, for example, a national park boundary is under consideration for expansion, it will first be reviewed by the federal agencies administering the surrounding land, perhaps the FS or the BLM. The NPS also must include in the review process the opportunity for the public to comment. County government should press for an environmental impact statement to be prepared under the NEPA process if it believes the proposed action would significantly affect the quality of the human environment. Coordination between the federal government and the county government would then be assured.

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102 43 C.F.R. § 1610.4-7.
103 43 C.F.R. § 1610.4-9.
104 16 U.S.C. § 742b.
105 16 U.S.C. § 668dd(a)(1).
106 16 U.S.C. § 1.
107 16 U.S.C. § 17k.

C. COUNTY GOVERNMENT & MISCELLANEOUS FEDERAL LAWS, DIRECTIVES, & COURT DECISIONS

Various federal laws exist that require the involvement of county governments to ensure protection of their custom, culture, and economic and community stability. The laws sometimes contain language regarding consultation, cooperation, and coordination between the federal and county governments. From the county perspective, the language in some laws is stronger or more favorable than language in other laws. Again, counties should begin to avail themselves of the opportunities available to protect themselves under the NEPA process in regard to federal planning activities and the implementation of programs under any of the pertinent federal statutes and regulations. Several federal statutes of particular concern to county governments, because of their planning implications, include: Clean Water Act; Endangered Species Act; National Trails System Act; Public Rangelands Improvement Act; Wild Free-Roaming Horses and Burros Act; Wild and Scenic Rivers Act; Wilderness Act; and, various acts pertinent to federal wildlife jurisdiction. These acts and the Presidential Executive Order on just compensation for federal "takings" of private property, and a recent Supreme Court decision regarding the prosecution in state or local courts of constitutional or statutory violations by federal agencies, are discussed below.

C.1 Clean Water Act

The federal wetlands protection effort is a composite of provisions in numerous laws. The principal federal program that provides regulatory protection for wetlands is found in Section 404 of the Clean Water Act.[108] Its intent is to protect water and adjacent wetland areas from adverse environmental impacts due to structural work or modification of waterways, including flood control measures. Section 404 requires landowners or developers to obtain permits in order to carry out dredging or filling activities in navigable waters.

The permit program is administered by the U.S. Army Corps of Engineers (Corps), using environmental guidance from the U.S. Environmental Protection Agency (EPA). The Corps has had exclusive regulatory jurisdiction over dredging and filling, first under the River and Harbor Act of 1899 and then under Section 404 of the Clean Water Act. In the 1970s, legal challenges were raised to the Corps' initial regulations to implement Section 404. Judicial decisions in key cases led the Corps to revise its program under Section 404 to incorporate jurisdictional definitions that are broad in terms of both regulated waters and adjacent wetlands. As a result of this judicial and regulatory evolution of the Section 404 program, activities covered by it are now considered to include not only navigable rivers and lakes, but non-navigable streams that flow into navigable waters, wetlands along navigable waters or at the headwaters of interstate waters, and other isolated wetlands. Further complicating the situation is how "wetlands" are defined.

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[108] 33 U.S.C. § 1344.

Regulatory procedures allow for interagency review and comments in the implementation of Section 404, a process which can generate delays, especially for environmentally controversial projects. EPA is the only Federal agency having veto power over a proposed Corps permit, but the U.S. Fish and Wildlife Service and the U.S. Soil Conservation Service have responsibilities regarding wetlands. The agencies review and make recommendations on Section 404 permits. Historically, however, the agencies have often been at odds over interpretation and implementation of the Section 404 program even though they jointly issued a manual in 1989 (Federal Manual for Identifying and Delineating Wetlands) and agreed to use the same definition for determining what is and what is not a wetland.

Although the agencies were attempting to meet President Bush's pledge of "no net loss" of wetlands, the quagmire of conflicting regulations, policies, and interpretations has wreaked havoc with many landowners and developers. Permits often cannot be obtained to pursue projects even though in many instances the area involved is only marginally a wetland. Delays are often caused as the agencies bicker over what constitutes a wetland or whether other environmental concerns should be considered. The delays sometimes lead to expensive contract disputes and similar problems for involved landowners and developers.

Considerable dissatisfaction had led to a broad public backlash. As a result, several comprehensive Section 404 reform bills have been introduced into Congress. However, in an effort to address the situation, and thus forestall action by Congress, the Administration announced (August 1991) a proposed three-part plan to address the problems and still meet the goal of no net loss of wetlands. The plan would:

1. Strengthen wetlands acquisition programs and other efforts to protect wetlands;
2 Revise the interagency manual defining wetlands to ensure that it is workable; and
3. Improve and streamline the current regulatory system.

The outcome of Congressional action and the Administration's plan, including the new definition of wetlands, will be important to county governments. The issuance of permits can be a major source of delay and an economic burden, and can affect how landowners and industrial interests use their property. County government is advised to remain alert to the impact of "wetlands" designations on these permits and land uses and how they impact custom, culture, and economic and community stability. If necessary, county government can seek involvement under the NEPA process.

C.2 Endangered Species Act

The 1988 amendments to the Endangered Species Act (ESA) require the U.S. Fish and Wildlife Service (FWS)[109] to notify state and county governments regarding all proposed listings of threatened or endangered species, all proposed additions or changes in critical habitat designations, and all proposed protective regulations.[110] Once the county government is notified of a proposed species listing, proposed critical habitat designation, or proposed protective regulation, the local government can take action to mitigate the effects of the proposed action or regulation on local economies.

C.2.1 Purpose & Listing Requirements Under the Endangered Species Act[111]

The purposes of the ESA are to 1) provide a means to conserve the ecosystems upon which endangered and threatened species depend, and 2) provide a program for the conservation of such threatened and endangered species.[112] A "threatened" species is a species likely to become endangered throughout all or a significant portion of its range within the foreseeable future.[113] An "endangered" species is a species that is endangered throughout all or a significant portion of its range.[114]

C.2.2 Threatened or Endangered Species Listing

The Listing of a threatened or endangered species by the Secretary is to be based on the best scientific and commercial data available, after taking into account those efforts of a State, or any political subdivision of a state, to protect the species.[115] The listing determination is based solely

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[109] Pursuant to the Endangered Species Act, protection of most species is administered by the Secretary of the Interior through the FWS. However, marine species, including many marine mammals, are the responsibility of the Secretary of Commerce, acting through the National Marine Fisheries Service. The law assigns the major role to the Secretary of the Interior and specifies the relationship of the two secretaries and their respective authorities. Once a species is listed, States and private land owners must comply with the FWS determinations regarding that species' protection.

Federal land managing agencies, the BLM and Forest Service, are required to consult with the FWS regarding species protection, but the FWS does not have a veto power over the actions of another federal agency, even in the name of the ESA. National Wildlife Federation v. Coleman, 529 F.2d 359 (1976), cert. den. 429 US 979 (1977).

[110] 16 U.S.C. § 1533(b)(5)(A).

[111] 16 U.S.C. § 1531 et. seq.

[112] 16 U.S.C. § 1531(b).

[113] 16 U.S.C. § 1532 (20).

[114] 16 U.S.C. § 1532(6).

[115] 16 U.S.C. § 1533(b).

on the basis of best scientific and commercial data available; there is no consideration of the economic impacts of the listing of that species.

C.2.3 Designation of Critical Habitat

Critical habitat is the specific area (within the geographical range of the species) occupied by the species at the time it is listed, containing those physical or biological features essential to the conservation of the species. These features may require special consideration or protection.[116] Critical habitat may also include areas outside the geographical area occupied by the species, at the time it is listed if the Secretary determines that those areas are essential for the conservation of the species.[117] The Secretary shall designate critical habitat concurrently with the process of making a determination that a species is threatened or endangered.[118] Subject to a few exceptions, failure to designate critical habitat in the required timely manner is a violation of the statute.

Critical habitat designations are to be based on the best scientific data available after taking into consideration economic impacts and other relevant concerns.[119] Failure to consider economic impacts is a violation of the statute. The Secretary may exclude an area from critical habitat if he or she determines that the benefits of such exclusion outweigh the benefits of designating the areas as critical habitat. Areas may be excluded as determined by the best scientific and commercial data available unless the failure to designate such an area as critical habitat will result in the extinction of the species.[120] Additionally, the Tenth Circuit Court of Appeals has ruled that NEPA applies to the designation of critical habitat.[121]

C.2.4 Protective Regulations & Recovery Plans

The Secretary is required to issue protective regulations and to develop and implement recovery plans to provide for the conservation and survival of threatened and endangered species unless he or she finds that such a plan will not promote the conservation of the species.[122]

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116 16 U.S.C. § 1532(5)(A)(i).

117 16 U.S.C. § 1532 (5)(A)(ii).

118 16 U.S.C. § 1533(a)(3)(A).

119 16 U.S.C. § 1533(b)(2).

120 16 U.S.C. § 1533(b)(2).

121 Catron County Board of Commissioners, New Mexico, v. U.S.F.W.S., 75 F.3d 1429 (10th Cir. 1996).

122 16 U.S.C. § 1533(d), 1533(f).

C.2.5 Sensitive Species Program

Federal agencies have been notified that they are to give "additional consideration" to those plant and animal species that the FWS may be considering, but does not have adequate date to list as threatened or endangered. Often this is called the "sensitive species" program.[123]

C.2.6 County Government Participation Under the Endangered Species Act

The ESA was amended in October 1988, to allow State and county governments the opportunity to participate in, and to influence, all proposed species listings, proposed designations of critical habitat, and proposed protective regulations.[124]

C.2.7 County Government Participation in the Species Listing & Critical Habitat Designation Process

The 1988 amendments to the ESA require that county governments are to be notified regarding the listing, delisting, or reclassification of a threatened or endangered species or designation or revision or its critical habitat. This notification must be "actual notice."[125] Actual notice means that the county must receive a letter regarding any of the above endangered species actions. General newspaper or Federal Register notice is not enough. Once notified, the county government has the opportunity to comment on the proposed species listing or critical habitat designation. If the county government disagrees with the FWS decisions, the FWS must specifically respond to the comments of local government in writing.[126] The courts have stated that the failure of the federal agency to adequately respond to comments made by the county government (or the public) will void the final decision.[127]

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123 50 C.F.R. Part 17
The sensitive species program requires federal agencies to give special protection to species that are not legally or formally listed as threatened or endangered pursuant to the Endangered Species Act. These species and their habitats may be "protected" even though (1) they may not meet the strict scientific review requirements under the ESA, and (2) the public has had no opportunity to review or comment on the special protection program as required by the ESA, contrary to law.

124 16 U.S.C. § 1533(b)(5).

125 16 U.S.C. § 1533(b)(5)(A)(ii).

126 16 U.S.C. § 1533(i).

127 Natural Resources Defense Council v. Clark, No. 86-0548 (August 13, 1987, E.D. Ca) (setting aside Executive Order for failing to adequately respond to public comments).

C.2.8. County Government Participation in the Development of Recovery Plan

The ESA requires that priority be given to developing recovery plans to protect threatened or endangered species from construction, development, or other forms of economic activity.[128] Direct county government input and involvement in drafting recovery plans under the ESA is minimal. The ESA requires only that pubic notice and an opportunity for public review and comment on recovery plans be provided. The information provided by the public must be considered prior to approval of the plan.[129] Further, other agencies must consider all information presented during the public comment period prior to implementation of a new or revised recovery plan.[130]

Other alternatives under the ESA exist that provide the opportunity for a county to protect its interests. The FWS may obtain the services of appropriate public and private agencies, institutions, and persons in developing and implementing recovery plans.[131] County governments that employ a qualified person may thus arrange to have pertinent input into recovery plans. Further, a county may be able to preclude the FWS from developing and implementing a recovery plan within the county by entering into a cooperative agreement with the FWS whereby the county would have responsibility for recovery plans. The FWS must enter into such cooperative agreements with states that establish and maintain an adequate and active program to conserve threatened or endangered species.[132] Proposals submitted by state agencies must meet requirements specified in the ESA and be approved annually. The term "state agency" is defined as ". . . any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State."[133] [Emphasis added] If it can be established that such authority resides at the county level, "state agency" would include the board of county commissioners, particularly since the County is a political subdivision of the State.

Although expensive and time consuming, counties do have the option of exercising authority in this arena. If a threatened or endangered species occurs in only one county, local assumption of responsibility for a recovery plan might merit the effort, especially considering the fact that the NEPA makes provisions for funding 75% of the cost of implementation of the recovery plan. Additionally, if the involved species occurs in counties across state lines, the ESA makes provisions for funding 90% of the cost of implementing the recovery plan. If such a species occurs in several adjacent counties, perhaps a coalition of counties could cooperatively pursue a common recovery plan, thus thwarting a federal recovery plan with its serious implications and problems for county sovereignty.

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128 16 U.S.C. § 1533(f)(1)(A).
129 16 U.S.C. § 1533(f)(4).
130 16 U.S.C. § 1533(f)(5).
131 16 U.S.C. § 1533(f)(2).
132 16 U.S.C. § 1535(c)(1).
133 16 U.S.C. § 1532(18).

Perhaps a more realistic approach to obtaining meaningful county input is to pursue the heretofore little used (by counties) NEPA process. Designation of critical habitat or preparation of recovery plans should be considered major federal actions significantly affecting the quality of the human environment. County governments can press for an environmental impact statement under the NEPA process to evaluate federal actions regarding critical habitat and recovery plans, thus forcing federal coordination with the county.

C.3 National Trails System Act

The purpose of the National Trails System Act is to provide for outdoor recreation needs and to promote the preservation and use of outdoor areas and historic resources of the Nation.[134] The act does provide specific language important to county governments. If trails meet specified criteria, the Secretary of Agriculture or the Secretary of the Interior ". . . may establish and designate **national recreation trails, with the consent of the** Federal agency, **State, or political subdivision** having jurisdiction over the lands involved . . . .[135] [Emphasis added] Catron County can exercise jurisdiction over affected lands as allowed by New Mexico statutes, if the appropriate county ordinances exist.[136] National **recreation** trails are accorded a different status in the law compared with national **scenic** or national **historic** trails. The latter two can only be authorized and designated by Act of Congress.[137] Studies by the Secretary of Agriculture or the Secretary of the Interior to determine if other trails should be designated as national scenic or national historic trails shall be made in "cooperation with interested . . . State, and local governmental agencies. . . ."[138] Further, the Secretary involved with a particular national scenic or national historic trail "shall, in administering and managing the trail, consult with the heads of all other affected State . . . agencies.[139]

C.4 Public Rangelands Improvement Act

Section 8 of the Public Rangelands Improvement Act of 1978[140] specifically requires the Bureau of Land Management (BLM) and the U.S. Forest Service (FS) to engage in careful and considered consultation, cooperation, and coordination with grazing permittees, lessees, and landowners involved, the district grazing advisory boards, and any state or states having lands within the area (i.e., not merely 'interested parties'), in the development and revision of Allotment Management Plans (AMPs). The words "careful and considered," and the explicit exclusion of 'interested parties' in the legislation, indicate that Congress intended Section 8 to be

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134 16 U.S.C. § 1241(a).
135 16 U.S.C. § 1243(a).
136 4-37-2 NMSA 1978.
137 16 U.S.C. § 1244(a).
138 16 U.S.C. § 1244(b).
139 16 U.S.C. § 1246(a)(1)(A).
140 43 U.S.C. § 1901 et seq..

a very specific and limited process: A process intended to ensure meaningful and productive interchange between the identified parties and the pertinent agency in matters relating to AMPs. Section 8 establishes the obligation of the agencies to engage in good faith cooperation, consultation, and coordination with the specified parties apart from other public participation requirements associated with development or amendment of AMPs. Section 8 also establishes the grazing permittees and lessees as unique parties in regard to the development and revision of AMPs. The term "coordinate," for example, means the state of being "equal, of the same rank, order, degree, or importance; not subordinate."[141] Applied to the development or revision of AMPs, coordination means that the working relationship between agency staff and the specified cooperation. The point to be emphasized is that coordination with county government under this comprehensive plan is not sufficient. Coordination must be effected with the parties specified in Section 8.

C.5 Wild Free-Roaming Horses & Burros Act

Congress passed the Wild Free-Roaming Horses and Burros Act with the stated purpose that these animals "shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands."[142] The act applies to unbranded and unclaimed wild free-roaming horses and burros on public lands of the United States.[143] The Act applies specifically to public lands administered by the Secretary of Agriculture through the Forest Service and the Secretary of the Interior through the BLM.[144] Horses or burros protected under this act which stray from public lands onto privately owned lands remain protected. Landowners, however, can request, and federal officials shall, have the animals removed.[145]

The law does not, in itself, require federal land use plans that deal with wild free-roaming horses and burros to be coordinated with county land use plans. It does authorize the appropriate Secretary to enter into cooperative agreements with the State and governmental agencies.[146] The county can use NEPA to obtain County Environmental Impact Statements and local public hearings.

C.6 Wild & Scenic Rivers Act

Certain selected rivers, and their immediate environments, are protected by the Wild and Scenic Rivers Act.[147] The national wild and scenic rivers system includes only rivers authorized for

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141 *Black's Law Dictionary*, 1979.
142 16 U.S.C. § 1331.
143 16 U.S.C. § 1332(b).
144 16 U.S.C. § 1332(a).
145 16 U.S.C. § 1334.
146 16 U.S.C. § 1336.
147 16 U.S.C. § 1271.

inclusion therein by Act of Congress or by States(s) legislation that meets the approval of the Secretary of the Interior.[148] "A wild, scenic or recreational river area eligible to be included in the system is a free-flowing stream and the related adjacent land area" that possess specified values.[149] The values are "outstanding remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values. . ."[150] The boundaries that comprise "the related adjacent land area" varies depending upon when the river was included as a component in the system. The first rivers included in the system contained boundaries with "an average of not more than 320 acres of land per mile measured from the ordinary high water mark on both sides of the river."[151] The boundaries of rivers included at later dates contained "that area measured within one-quarter mile from the ordinary high water mark on each side of the river."[152] The statutes do not specify boundary requirements for future additions to the system.

Pertinent federal agencies must prepare a comprehensive management plan for rivers designated on or after January 1, 1986. The plan is to be prepared **after** consultation with State and **local governments** within three fiscal years after designation.[153] All boundaries, classifications, and plans for rivers designated prior to January 1, 1986, must be reviewed for conformity with the statutes within 10 years through regular agency planning processes.[154]

Additional opportunity for the involvement of local government is provided in the statutes. The pertinent federal agency administering any component of the national wild and scenic rivers system "may enter into written cooperative agreements with the Governor of a State, the head of any State agency, or the appropriate official of a political subdivision of a State for State or local governmental participation in the administration of the component. The States and their political subdivisions shall be encouraged to cooperate in the planning and administration of components of the system which include or adjoin State- or county-owned lands."[155]

The spirit of the intended cooperation is further evidenced in the statutes with the following mandate by Congress:

> (1) The Secretary of the Interior, the Secretary of Agriculture, or the head of any other Federal agency, shall assist, advise, and cooperate with States or their political subdivision, landowners, private organizations, or individuals to plan, protect, and manage river resources. Such assistance, advice, and cooperation may be through written agreements or otherwise. This authority applies within or

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148 16 U.S.C. § 1273(a).
149 16 U.S.C. § 1273(b).
150 16 U.S.C. § 1271.
151 16 U.S.C. § 1274(b).
152 16 U.S.C. § 1275(d).
153 16 U.S.C. § 1274(d)(1).
154 16 U.S.C. § 1274(d)(2).
155 16 U.S.C. § 1281(e).

> outside a federally administered area and applies to rivers which are components of the National Wild and Scenic Rivers System and to other rivers.[156]

The Secretary of Agriculture and the Secretary of the Interior are directed to study and submit a report to the President "on the suitability or nonsuitability for addition to the national wild and scenic rivers system of rivers which are designated . . . [in the statutes] or hereafter by the Congress as potential additions to such system."[157]

Before submitting any such report to the President and the Congress, copies of the proposed report shall be submitted to the Governor of the State or States in which they are located or to an officer designated by the Governor to receive the same.[158]

Recommendations or comments on the proposal furnished within 90 days, together with the Secretary's or Secretaries' comments, must be included with the transmittal to the President and the Congress.[159]

C.7 Wilderness Act

The National Wilderness Preservation System established by Congress is comprised of the federally owned lands designated as "wilderness areas." The purpose of these lands is to secure the benefits of an enduring resource of wilderness.[160] "Wilderness" is defined in the act as follows:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain

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156 16 U.S.C. § 1282(b)(1).
157 16 U.S.C. § 1275(a).
158 16 U.S.C. § 1275(b).
159 16 U.S.C. § 1275(b).
160 16 U.S.C. § 1131(a).

ecological, geological, or other features of scientific, educational, scenic, or historical value.[161]

The Wilderness Act does not address the issue of federal land use plans being coordinated with county land use plans. Further, when any area is under consideration for preservation as wilderness, or any modification or adjustment of boundaries of any wilderness area is under review, State and county governments may only submit their views on the proposed action as follows:

(d)(1) The Secretary of Agriculture and the Secretary of the Interior shall, prior to submitting any recommendations to the President with respect to the suitability of any area for preservation as wilderness -

(C) at least thirty days before the date of a hearing advise the Governor of each State and the governing board of each county, or in Alaska the borough, in which the lands are located, and Federal departments and agencies concerned, and invite such officials and Federal agencies to submit their views on the proposed action at the hearing or by no later than thirty days following the date of the hearing.

(2) Any views submitted to the appropriate Secretary under the provisions of (1) of this subsection with respect to any area shall be included with any recommendations to the President and to Congress with respect to such area.[162]

(e) Any modification or adjustment of boundaries of any wilderness area shall be recommended by the appropriate Secretary after public notice of such proposed and public hearing or hearings as provided in subsection (d) of this section.[163]

Several special provisions in the Wilderness Act regarding wilderness areas may be pertinent to county land use planning:

Minerals - Subject to valid rights then existing, effective January 1, 1984, the minerals in lands designated by this chapter as wilderness areas are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing and all amendments thereto.[164]

Water - Within wilderness areas in the national forests designated by this chapter, (1) the President may, within a specific area and in accordance with such

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161 16 U.S.C. § 1131(c).
162 16 U.S.C. § 1132(d)(1), (C), (2).
163 16 U.S.C. § 1132(e).
164 16 U.S.C. § 1133(d)(3).

regulations as he may deem desirable, authorize prospecting for water resources, the establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines, and other facilities needed in the public interest, including the road construction and maintenance essential to development and use thereof, upon his determination that such use or uses in the specific area will better serve the interests of the United States and the people thereof than will its denial.[165]

Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government, as to exemption from State water laws.[166]

Livestock grazing - . . . the grazing of livestock, where established prior to September 3, 1964, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture.[167]

Commercial services - Commercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.[168]

State jurisdiction of fish and wildlife - Nothing in this chapter shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests.[169]

The Wilderness Act addresses access to privately owned lands and mining claims, and federal acquisition of privately owned lands within the perimeter of wilderness areas:

(a) In any case where State-owned or privately owned land is completely surrounded by national forest lands within areas designated by this chapter as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State-owned land or privately owned land shall be exchanged for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture: *Provided, however,* that the United States shall not transfer to a State or private owner any mineral interests unless the State or private owner

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165 16 U.S.C. § 1133(d)(4)(1).
166 16 U.S.C. § 11333(d)(6).
167 16 U.S.C. § 1133(d)(4)(2).
168 16 U.S.C. § 1133(d)(5).
169 16 U.S.C. § 1133(d)(7).

relinquishes or causes to be relinquished to the United States the mineral interest in the surrounded land.[170]

(b) In any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.[171]

(c) Subject to the appropriation of funds by Congress, the Secretary of Agriculture is authorized to acquire privately owned land within the perimeter of any area designated by this chapter as wilderness if (1) the owner concurs in such acquisition or (2) the acquisition is specifically authorized by Congress.[172]

County involvement in all federal actions taken under the authority of the Wilderness Act can be pursued and attained through the NEPA process, i.e., by requiring a County Environmental Impact Statement be completed and local hearings.

C.8 Federal Wildlife Jurisdiction

It is difficult to state precisely what constitutes federal wildlife law because of the important doctrine of state ownership of resident wildlife. Limited federal control over wildlife has been justified under several provisions of the U.S. Constitution. Federal wildlife jurisdiction has been constitutionally interpreted to stem from the authority delegated to the Congress to: 1) Create and regulate a federal government, i.e., Congress can create national monuments, national parks, and national refuges, and protect the resources within them; 2) make treaties, i.e., control supervision, and management of migratory species such as ducks and geese can have international implications and are subject to treaty power; 3) regulate foreign and interstate commerce, i.e., can control shipment of carcasses in interstate commerce; and, 4) lay and collect taxes, duties, imposts, and excises, i.e., can enforce federal wildlife laws. The Congress also has the right to make all laws necessary and proper to carry out existing powers.

The first federal wildlife law was passed in 1900 and the body of federal wildlife law is now quite voluminous and complex. One consequence of this situation is that the legislative programs established by federal laws require vast administrative bureaucracies to implement them. Although each state still has its own set of wildlife laws, there are federal laws common to

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170 16 U.S.C. § 1134(a).
171 16 U.S.C. § 1134(b).
172 16 U.S.C. § 1134(c).

all states. County governments are advised to be aware of pertinent federal wildlife laws as necessary and to use NEPA County EIS's where proper.

C.9 Presidential Executive Order on Taking of Private Property Rights

President Reagan issued an Executive Order (E.O.) that requires all federal departments and agencies to avoid actions which infringe on private property rights. Issued March 15, 1988, Executive Order No. 12630 is entitled Governmental Actions and Interference with Constitutionally Protected Property Rights.

> Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

Further, the E.O. includes "undue delays in decision-making during which private property use if interfered with carry a risk of being held to be takings." Takings require financial compensation and due process. In addition, the E.O. establishes an ongoing process within the government for assessing the impact on property rights by all federal actions, policies, regulations, proposed regulations, legislation, proposed legislation, and other policy statements that if implemented or enacted could effect a taking. The E.O. does not, and legally cannot, prohibit takings, but it directs the government to prevent unnecessary takings and it creates a way to eliminate inadvertent takings.

Recent Supreme Court decisions have imposed strict limits on how far government regulations can restrict the owner's use of his or her own private property. Cases like Nollan v. California Coastal Commission[173] and First English Evangelical Lutheran Church of Glendale v. County of Los Angeles[174] and Lucas v. So. Carolina Coastal Council[175] have tightened the standard determining when a restriction on property use becomes a "taking" for which the government has to pay. The two cases determine that even a temporary and/or partial deprivation of the economic use of private property caused by a governmental action could amount to a taking. If a taking occurs, the government must prove that there is a public purpose that warrants the taking and must provide just financial compensation and due process. Undue delays in the government's decision making process, concerning a permit for example, could lead to a takings action according to these landmark cases.

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173 107 S.Ct. 3141 (1987).

174 107 S.Ct. 2378 (1987).

175 No. 91-453, June 29, 1992.

Prompted by these decisions and by his philosophy on limited government, individuals' rights, and reducing federal expenditures, President Reagan issued the E.O. The E.O. rearticulates the Supreme Court's rigorous interpretation of the Fifth Amendment. It reminds government officials that even action taken to protect public health and safety - actions which are usually given wide latitude by the courts - are subject to this E.O.

The E.O. covers all governmental actions that could have a restrictive impact on property use or value. And while the E.O. is not itself a Statute, it is binding within the limits of existing law. Its authority is permanent unless it is amended or repealed by the issuing President.

Specifically, the E.O. establishes a process that requires:

1. Guidelines for the evaluation of Risk and Avoidance of Unanticipated Takings be prepared by the Attorney General to be used by the executive departments and agencies as the yardstick for making what is commonly referred to as a "Taking Implications Assessment" (TIA).

2. Designation of an official in each executive department and agency responsible for compliance with the E.O.

3. Executive departments and agencies to the extent permitted by law, assess the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications in all required submissions made to the Office of Management and Budget.

4. Each executive department and agency must report annually an itemized compilation of all awards of just compensation for takings.

In general, compliance by the federal government with the E.O. and the TIA process has been inadequate. But the E.O. is an important tool which can be exercised by local government.

D. NORTH DAKOTA STATE STATUTES

Several statutes of the State of North Dakota also have relevance to county governments that are attempting to exercise their authorities to influence federal and state agency decisions.

D.1 County Organization, Functions and Duties

Pursuant to North Dakota statutes:

> **County a corporate body - Powers**. Each organized county is a body corporate for civil and political purposes only. As such, the county may sue and be sued, contract and be contracted with . . . [176]

Each county or political subdivision shall have an exercise such powers as provided by law.[177]

As a county, Billings County may also join with other local governments for a common purpose. According to the state statutes:

> **Authorization to organize associations of county governments**
>
> 1. Counties, organized under the Constitution of North Dakota or organized under any form of county government authorized by the statutes of North Dakota, are hereby authorized upon motion of the board of county commissioners to organize and participate in an association of counties.[178]

D.2 Ownership of State Lands

School trust lands in the state of North Dakota are administered by the Board of University and School lands.[179] With regard to those lands, the Board has the authority over:

> 1. Full control of the selection, appraisement, rental, sale, disposal, and management of:
>
> a. Lands donated or granted by or received from the United States or from any other source for the support and maintenance of the common schools.
>
> b. All lands which fall to the state by escheat.
>
> c. All lands donated or granted by or received from the United States or from any other source for the maintenance of the educational, penal or charitable institutions.

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176 N.D. Cert. Code § 11-10-01.
177 North Dakota Constitution Art. VII § 2.
178 N.D. Cert. Code § 11-10-24.
179 N.D. Cert. Code § 15-01-01.

d. All lands acquired by the state through the investment of the permanent school funds of the state as the result of mortgage foreclosure or otherwise.[180]

D.3 Ownership of Wildlife

The ownership of and title to all wildlife within North Dakota is in the name of the state. Thus, the state may regulate the "enjoyment, use, possession, disposition, and conservation thereof and for maintaining action for damages provided herein."[181]

With regard to the acquisition of land for wildlife and fish conservation purposes, the state must submit such proposal to the county, prior to agreement with or approval of the Secretary of the Interior.[182] According to the state statutes, once such notice is given to the county:

2. The board of county commissioners of the county affected, or a designee or designees of the board, shall, within twenty-one days of receipt of an acquisition proposal, physically inspect the proposed acquisition areas. The board shall give public notice of the date, hour, and place where the public may comment on the proposed acquisitions. The notice must be published once each week for two consecutive weeks in the official newspaper of the county or counties in which the land and water areas are located. The notice must set forth the substance of the proposed action, and must include a legal description of the proposed acquisitions. The board of county commissioners shall give its approval or disapproval by certified mail with return receipt within sixty days after receipt of an acquisition proposal.

3. A detailed impact analysis from the state game and fish department shall be included with the acquisition proposal for board of county commissioner consideration in making recommendations. The analysis by the game and fish department shall include, but shall not be limited to, the recreational and wildlife impacts. In addition, the county agent of the affected county or counties shall prepare an impact analysis for board of county commissioner consideration which shall include the fiscal, social, and agricultural impacts of the proposed acquisition. The state game and fish department shall reimburse the county or counties for any expenses incurred by the county agent in preparing the analysis. The analyses shall also be forwarded to the office of intergovernmental assistance which shall furnish copies to all interested state agencies and political subdivisions,

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180 N.D. Cert. Code § 15-01-02.

181 N.D. Cert. Code § 20.1-01-03.

182 N.D. Cert. Code § 20.1-02-17.1.

which agencies and political subdivisions shall have thirty days to review the analyses and return their comments to the office of intergovernmental assistance. Upon expiration of the thirty-day period, all comments received by the office of intergovernmental assistance shall be forwarded to the state game and fish department. The state game and fish department may, after consideration of such comments, file a final impact analysis with the office of intergovernmental assistance and the board of county commissioners.[183]

[183] Id. *See also* N.D. Cert. Code § 20.1-02-18.1.

APPENDIX II

LEGAL & ADMINISTRATIVE SCOPING CONSIDERATIONS

COMMENT BY THE McKenzie COUNTY BOARD OF COUNTY COMMISSIONERS
AND THE
MCKENZIE COUNTY GRAZING ASSOCIATION

ON THE

USDA FOREST SERVICE NORTHERN GREAT PLAINS PLANNING TEAM'S
REQUEST FOR COMMENT ON SCOPE OF LAND AND RESOURCE
MANAGEMENT PLANS FOR PLANNING UNITS OF THE
CUSTER, MEDICINE BOW-ROUTE, AND NEBRASKA NATIONAL FORESTS

July 30, 1997

The McKenzie County Grazing Association (Association) and the Board of County Commissioners for McKenzie County, North Dakota (Commissioners) are pleased to comment on the USDA Forest Service Northern Great Plains Planning Team's March 1997 request for comment on the scope of its "Land and Resource Management Plans" for the planning units of the Custer, Medicine Bow-Route, and Nebraska National Forests. The Association and Commissioners restrict our comments to those portions of the planning units currently classified as National Grasslands (NG).

For the last 20 years, there has been considerable confusion regarding which federal laws and direction should apply to the NG. Many of the changes have come gradually, through changes in agreements between the respective grazing associations and the Forest Service, deletion or changes in agency manuals or handbooks, and finally the land use planning process. Most of these changes have come at the insistence of Forest Service officials without the benefit of legal opinion or historical analysis.

It is fitting that the McKenzie County Grazing Association and Board of County Commissioners have the opportunity to set the record straight regarding both the origin of the appropriate laws and authority which should govern their management in the land use planning process. The Association members have spent months combing the National Archives and its regional archives to uncover the origins and the original documents pursuant to which the private lands were acquired to create agricultural adjustment Land Utilization Projects during the Great Depression, projects that have now been renamed National Grasslands. The following

discussion explains how the purposes of the original land acquisitions must, under valid existing law, continue to govern the planning for and the management of our National Grasslands.
The current NG in the planning unit were, prior to a June 23, 1960 Secretary of Agriculture Executive Order, known as Land Utilization (LU) Projects. Among those LU Projects were the Little Missouri Land Adjustment Project located in McKenzie County (Site I, LU-ND-38-1), the Little Missouri Land Adjustment Project located in Billings County and Golden Valley County (Site I, LU-ND-38-21), and the Missouri Slope Land Adjustment Project located in Billings County (LU-ND-38-23). By the time of the 1960 Secretarial Executive Order, these four LU Projects had for administrative purposes been combined and were collectively called the Western North Dakota Project (ND-24). These various LU Projects had been formed between 1934 and 1943 through a program of land acquisition intended to correct "maladjustments" in land use ostensibly stemming from attempts to cultivate "submarginal" lands better suited for the growth of and consumption by domestic livestock of perennial grasses. These maladjustments were due only in part to dry land farming practices: homestead laws restricting settlers to land units too small to support viable agricultural operations in a semiarid environment were equally responsible for the farm problems of the 1920s and 1930s.

Regardless of their cause, the maladjustments -- or more accurately, the Great Depression -- had created financial distress for both homesteaders and local communities, and in the western Great Plains and elsewhere had destabilized the agricultural industry and created substantial public finance difficulties for local agricultural-dependent communities. This wide-spread destabilization prompted the Franklin D. Roosevelt Administration to institute, within the Agricultural Adjustment Administration, a submarginal land purchase program. To that end, in February 1934, the Federal Emergency Relief Administration provided an initial $25 million in appropriations to begin a land purchase program.

Purchased lands were included in four types of projects, each of which was organized and administered under a Memorandum of Understanding with the appropriate Secretary (either/or of Agriculture and the Interior): (1) agricultural adjustment (by far the largest of the four projects in terms of acreage and appropriations ultimately spent); (2) Indian land projects; (3) wildlife refuge projects; and (4) recreation and park projects. In due course, projects were, for administrative purposes, transferred to the federal agency whose land management and land use responsibilities best matched the character of the purchase projects. Most of the agricultural adjustment projects, for example, ultimately were assigned for administration to the Soil Conservation Service, then in January 1954, were transferred to the Forest Service. The Little Missouri LU Project in western North Dakota followed this administrative assignment path.

Because title to many of purchased properties was to accrue to the United States, eminent domain and "Declaration of Takings" proceedings in federal district courts were used to clear title. The content of these Declaration of Takings documents was specified in P.Law 736, enacted February 26, 1931.

"In any proceeding in any court of the United States . . . [having authority] for the acquisition of any land or easement right of way in land for the public use, the petitioner may file . . . a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto (1) a statement of the authority under which and the public use for which said lands are taken; (2) a description of the lands taken sufficient for the identification thereof; (3) a statement of the estate or interest in said lands taken for said public use; (4) a plan showing the lands taken; and (5) a statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken."

The Association and Commissioners have on file many such Declarations of Takings used by the United States to clarify the public use for lands taken and to clear title for land purchased and added to the various western North Dakota agricultural adjustment, recreation demonstrational area and park, wildlife refuge, and Indian land use projects. In the instance of wildlife refuge, recreation and park, and Indian land acquisitions, the purpose may include demonstrational public livestock grazing. However, in each of these other categories the Declaration of Takings clearly enunciates a scenic beauty, outdoor recreation, migratory waterfowl or other wildlife enhancement, or addition to Indian reservation purpose not found in the agricultural adjustment Declaration of Takings. Thus, it can only be concluded that the type of projects for which lands are purchased and condemned are discretely different, and each serves a separate public purpose.

All eminent domain proceedings for purposes of agricultural adjustment specify that the major active public use for which the lands have been purchased and title cleared (subject to the rights of the counties to a 6.25% perpetual royalty interest in minerals which exist or may be developed on the lands purchased from the counties - as confirmed in *McKenzie County v. Hodel, et. al.*, Fed. Dist. N.D. 1992 (unreported summary judgment) - and also subject to and excepting all existing public roads, public utility easements and rights of way) is "establishment of a demonstrational area for the public grazing of livestock."

The United States authority to condemn or acquire land pursuant to 40 U.S.C. Sec. 257, 258, [the Declaration of Taking Act] is limited by the scope of the authorization first found in the Federal Emergency Relief Administration Act, and later the Bankhead-Jones Farm Tenant Act (BJFTA), 7 U.S.C. Sec. 1010-1012. Thus, the public purposes stated in the Declarations of Takings and resulting final judgments define the public use of the NG, even today. *See, e.g., United States v. 40 Acres of Land Situate in Nenanu, Recording Precinct, Fourth Div., Terr. of Alaska,* 160 F. Supp. 30, 33 (D.Ak 1958) (holding that the National Park Service lacked the authority to condemn homestead for park); *Swan Hunting Club v. United States,* 381 F. 2d, 238, 240 (5th Cir. 1967), *reh. denied* **F 2d (upholding USFWS condemnation of private hunting rights pursuant to the authority stated in the Migratory Bird Treaty Act on the grounds that there was sufficient nexus between refuge and regulation of hunting to support a later acquisition of private hunting rights). *See especially, McKenzie County v. Hodel et. al.,* 467 NW 2nd 701 (N.D. 1991) (holding that a final judgment in an eminent domain proceeding can create or limit title).**

Only Congress could change the purposes for which the NG were acquired. There is no evidence that Congress intended this in either the BJFTA or the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA), as amended in the National Forest Management Act of 1976 (NFMA). The one provision which is the basis for the Forest Service's changes in management direction on the NG is found in Section 10 of NFMA which provides, in part:

> **Congress declares that the National Forest System consists of units of federally owned forest, range, and related lands throughout the United States and its territories, united into a nationally significant system dedicated to the long-term benefit for present and future generations, and that it is the purpose of this section to include all such areas into one integral system. The "National Forest System" shall include all national forest lands reserved or withdrawn from the public domain of the United States, all national forest lands acquired through purchase, exchange, donation, or other means, the national grasslands and land utilization projects administered under title III of the Bankhead-Jones Farm Tenant Act [7 U.S.C.A. *Sec*. 1010 *et. seq.*], and other lands, waters, or interests wherein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system. Notwithstanding the provisions of section 473 of this title, no land now or hereafter reserved or withdrawn from the public domain as national forests pursuant to section 471 of this title, or any act supplementary to and amendatory thereof, shall be returned the public domain except by an act of Congress.**

16 U.S.C. Sec. 1609(a). The above language does not express the intent to manage the NG pursuant to other laws. In fact, Section 10 expressly recognizes that different management authority governs the NG as opposed to other units of the National Forests. Congress did not address NG management at all and repealed a number of laws expressly. If Congress had intended to change management of the NG, it would have specifically stated so in NFMA. Congress did not so state, and thus the guiding authority for land management on the NG is the BJFTA and implementing regulations pursuant thereto.

Conservation measures to accompany sustainable grazing programs specified in the agricultural adjustment Declaration of Takings include prevention and control of soil erosion, conservation and development of water resources, rodent and predator control, and relief of unemployment through such range development activities as reseeding, terracing, fencing, and the construction of related roads and other structural improvements.

The land acquisition and land utilization program occurred in two phases. Prior to passage and enactment of the Bankhead-Jones Farm Tenant Act on June 22, 1937 (P.Law 210), land purchases and projects were managed under the "Old Program," initiated pursuant to Section 202

of the National Industrial Recovery Act of 1933 under which the President gave the Secretary of Agriculture authority to establish a sub marginal land acquisition and population resettlement program. The "Old Program" continued, and types of LU Projects were more precisely defined, after enactment of the Emergency Relief Appropriation Act in April 1935, the organization by Executive Order of the Resettlement Administration, and the creation within that Administration of the Land Utilization Division.

The Land Utilization Division guided the transfer of Recreation Demonstration Projects to the Park Service, of Wildlife Projects to the Biological Survey (later renamed the U.S. Fish and Wildlife Service), and of other lands to the Office of Indian Affairs. The Division also was instrumental in forging a Memorandum of Understanding with the Department of the Interior allowing public domain lands located within LU Projects to be administered through the Department of Agriculture as an integral part of those LU Projects (together with intermingled state, county, and private lands).

Over 80 percent of all 11.3 million acres of lands ultimately purchased were attributed to the "Old Program" and virtually all of the lands acquired in western North Dakota were purchases finalized or options issued during the three years of the "Old Program." The "New Program" was initiated following passage of the Bankhead-Jones Farm Tenant Act (BJFTA) in 1937 which gave organic authority to the successor to the Resettlement Administration - the Farm Security Administration. Three months after the BJFTA was enacted, the Land Utilization Division was transferred to the Bureau of Agricultural Economics in the Department of Agriculture, and that Division assumed responsibility for the land conservation (soil erosion control, natural resource preservation, flood mitigation, watershed protection, etc.) and utilization (regulated domestic livestock grazing on intermingled private, state, county, public domain, and acquired lands) program established in Title III of the BJFTA.

Since most of the lands now contained in the NG were acquired prior to passage of BJFTA, enactment of BJFTA could not change the original purposes for which the lands were to be acquired and managed. Nowhere in BJFTA did Congress modify the stated public uses for which the lands were acquired via Declaration of Takings.

The general public policy served by the BJFTA is stated in its preamble: "To create the Farmer's Home Corporation, to promote more secure occupancy of farms and farm homes, to correct the economic instability resulting from some present forms of farm tenancy, and for other purposes." The specific language appearing in Section 31 of the BJFTA deals largely with conservation objectives and that language is necessarily broad since it encompasses all four classes of primary uses for which the lands were taken.

Thus, the agricultural adjustment LU Projects administered by the Land Utilization Division before, and after, the Division's transfer to the Bureau of Agricultural Economics had, as their public purpose, to improve occupancy of farms and farm homes and to stabilize local economies - and thereby to achieve various soil and water conservation objectives. For the Little Missouri

LU Project in western North Dakota, all Declarations of Takings stated that the form of agriculture to be practiced on the purchased LU Project lands was domestic livestock grazing.

Citing the RPA, as amended by NFMA, 16 U.S.C. Sec. 1609(a), the Forest Service has contended that the NG must be managed pursuant to the Multiple-Use Sustained-Yield Act of 1960 (MUSY) together with NFMA, and therefore that it can terminate livestock grazing on the NG at its discretion. Examination of both the BJFTA and the NFMA and their respective legislative histories fails to provide any support whatsoever for the Forest Service's interpretation of its statutory authority for termination of livestock grazing as a dominant public use of the NG. Perhaps Forest Service officials have been unaware of these facts and this information -- evidence that has been and will continue to be highly relevant to planning for and management of the NG.

These public policy purposes were repeatedly clarified in the annual reports to the Secretary of Agriculture submitted by the Project Manager for the western North Dakota LU Grazing Projects after the lands were again transferred for administrative purposes to the Soil Conservation Service in October 1938. Examples include the intermittent "Memorandum for the Secretary" and other reports.

In a June 11, 1940 report by western North Dakota LU Project Manager M.B. Johnson, Mr. Johnson said: "Purchases of privately owned sub marginal lands have been made by the Government in western North Dakota for the purpose of withdrawing such lands from grain production and to convert them to a grazing use . . . Previous to the inauguration of the program the average operator in the area had permanent control through ownership or long term leases of approximately 35 percent of the land actually used. Through the medium of grazing associations organized in the purchase area they now have a minimum of five years control of all lands used and at more favorable rates than formerly prevailed . . . In the allocation of grazing privileges and hay land to the various livestock growers care has been exercised to determine that each operator has a proper balance between grazing and hay land . . . Everything considered the Government land purchase program has resulted in a stabilization of the range livestock industry in this area never previously enjoyed by the ranchman."

The allocation of grazing privileges and hay land referenced by Project Manager Johnson was an adjudication process similar to that occurring during the last half of the 1930s on Taylor Grazing Act grazing districts administered by the Grazing Service in the Department of the Interior (this process is summarized in the federal court order in *Public Lands Council, et. al. v. Babbitt*, 929 F. Supp. (D. Wyo. 1996).[184] In the instance of the National Grasslands, the Land Utilization

[184] The grazing adjudication process adopted for the public domain pursuant to the Taylor Grazing Act of 1934 (TGA) and the NG was derived from the original grazing adjudication conducted by the Forest Service pursuant to the its Organic Administration Act (16 U.S.C. Sec. 475) in order, *inter alia*, to issue grazing permits. Congress was well aware of how the Forest Service determined who was qualified to graze livestock on the Forest Preserves,

Division organized grazing associations often, as in North Dakota, in conformance with state grazing association laws, e.g., the 1935 North Dakota statute entitled Incorporation Cooperative Grazing Associations S.B. No. 225, Ch. 106 authorizing only one such association per county for the purpose, among others, of establishing the "rules applicable to all members by which the property and grazing rights and interests, respectively, of each member, may and shall be determined and fixed."

The McKenzie County Grazing Association was organized in 1936, and the adjudication of grazing rights and interests occurred over the next two years based on grazing patterns (areas, subsequently named pastures) and numbers of cattle, horses, and sheep grazed on the McKenzie County LU Grazing Project lands by each member of the Grazing Association in each year from 1930 through 1935. Each operator initially was authorized to graze an adjudicated number of animal units on private and common Grazing Association pastures, and the McKenzie County Grazing Association established a rule crating an upper limit of 350 animal units to be grazed on LU Project lands by any single member of the Association. Under the North Dakota State Cooperative Grazing Association statute, in contrast, the upper limit was set at 500 animal units. Allotment boundaries were finalized, and fencing and water developments along with reseeding projects accelerated, after the Soil Conservation Service assumed administrative responsibility for the McKenzie County LU Grazing Project in 1938.

The SCS entered into a long term cooperative grazing lease with the McKenzie County Grazing Association, and the Association in turn assigned a grazing permit to each Association member, assuming police and enforcement powers vis-a-vis the individual grazing permits consistent with the North Dakota Grazing Association statute providing that grazing associations establish internal rules guiding the allocation of grazing rights and interests to Association members. In the 1970s, the Forest Service renamed the adjudicated grazing right or interest, calling it a grazing preference and similarly renamed the long term grazing lease, calling it a grazing agreement. There is no legal basis for these agency designations however.

The organic authority under which the original agricultural adjustment LU Projects, now called National Grasslands, are administered was, and remains, the Bankhead-Jones Farm Tenant Act of 1937. Although a clause in the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1609(a)), incorporates those lands into the National Forest System, the unrepealed Title III of the BJFTA remains the controlling statutory authority. Such acquired lands "remain in class of lands acquired for special uses, such as parks, national monuments, and the like" (*Rawson v. United States*, 225 F.2d. 855 (9th Cir. 1955)).

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renamed National Forests in 1907, and established in Section 3 of the TGA a statutory basis for a similar adjudication of grazing rights on the public domain some 27 years later. Logically, the Land Utilization Division and subsequently the Soil Conservation Service employed much the same process to authorize grazing preferences, or forage adjudications, among the qualified applicants on the LU Grazing Projects, today's National Grasslands.

The special use for which the agricultural adjustment LU Project lands, today's National Grasslands, were acquired was, as noted, demonstrational domestic livestock grazing. This is the primary or dominant use to which the land is to be put as explained by the federal courts, e.g. *New Mexico v. United States*, 438 U.S. 696 (1978). In 1976 and again in 1978, Congress exempted the National Grasslands from certain provisions of the Federal Land Policy and Management Act (43 U.S.C.A. 1701 *et. seq.*) and the Public Rangelands Improvement Act (43 U.S.C.A. 1901 *et. seq.*), accentuating the different status of the acquired LU lands in contrast with the withdrawn and reserved National Forests.

Therefore, it is not appropriate to apply special use designations such as wilderness, wild and scenic river, and natural research areas to any portion of the NG. When eminent domain was exercised, McKenzie County (and other counties within which LU Project lands were located) retained title of rights-of-way and easements acres acquired and consolidated project lands and those retained rights are inconsistent with special use designations such as those specified above. Similarly, as noted earlier, the counties retained a 6.25 percent perpetual royalty interest in subsurface minerals, and development of oil, gas, and other mining facilities is in most cases inconsistent with special use designations. Further, the filed Declaration of Takings do not state that any of the lands were acquired for these special use purposed, and in fact state that they were in the instance of the LU Grazing Projects taken for a public use (demonstrational livestock grazing) that may be inconsistent with certain special use designations. Finally, the LU Grazing Projects lands (NG) contain intermingled state school lands which, under North Dakota's constitution, are to be used only for pasture and meadow purposes supporting livestock grazing.

The Office of General Counsel (OGC) confirmed the unique nature of land utilization (livestock grazing) and land conservation for which the LU Grazing Project lands were acquired. In an earlier memorandum opinion for the Regional Forester the OGC stated, *inter alia*, that there is nothing in the BJFTA to imply that either Congress, or the Secretary of Agriculture in his regulations implementing the BJFTA, intended Title III acquired lands to be managed for any purposed not complementary to demonstrational domestic livestock grazing or for uses exclusive of livestock grazing.

The scoping process must be bounded by Alternatives that included continued domestic livestock grazing as a dominant land use on the National Grasslands. "The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion . . But the need for an overhaul of basic legislation certainly bears on the requirements of the Act." (*NRDC v. Morton*, 458 F.2d. 827, 837, D.C. Cir. 1972). "We review an agency's range of alternatives under a 'rule of reason' standard that 'requires an agency to set forth only those alternatives necessary to permit a reasoned choice'." (*Headwaters v. BLM*, 914 F.2d. 1174, 1181, 9th Cir. 1990). "The range of alternatives that must be considered need not exceed beyond those reasonably related to the purposes of the project." (*Trout Unlimited v. Morton*, 509 F.2d. 1276, 1286, 9th Cir. 1974).

As the Northern Great Plains planning team put it in their March 1997 issue of the Revision Reporter, "the traps of irrelevant information and needless analysis" can be avoided only if the dominant and primary land use on the National Grasslands, domestic livestock grazing, is recognized in all phases of the NEPA process.

For these and related reasons, the Association and the Commissioners request that all Alternatives provide for continued domestic livestock grazing and correctly reflect the statutory intent that the NG be managed for agricultural purposes, specifically domestic livestock grazing. It is equally important that all Alternatives provided for continued domestic livestock grazing on all pastures in the Little Missouri and other National Grasslands at levels sufficient to sustain the economic viability of all existing National Grassland ranching operations and thereby to promote the stable economic growth of nearby rural communities, assuring their economic viability and an adequate standard of living for the residents of these communities. Maintenance, and indeed enlargement, of grazing rights and interests is consistent with the underlying statutory authority and court decisions guiding the administration and cooperative management through local grazing associations of member's livestock grazing operations.

By the Order of the Executive Board of the
McKenzie County Grazing Association

Keith D. Winter
President

By the Order of the
McKenzie County Board of Commissioners

Francis Olson
Auditor