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### "Coordinating" with the Federal Government: Assessing County Efforts to Control Decisionmaking on Public Lands

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**“Coordinating” with the Federal Government:  
Assessing County Efforts to Control Decisionmaking on Public  
Lands**

**Michael C. Blumm\***

**James A. Fraser\*\***

*Resentment of the federal government’s management of public lands runs deep in the arid West, where grazing, mining, and timber once predominated and remain important to rural communities. This resentment bubbled over in 2016 with the armed occupation of the Malheur National Wildlife Refuge in eastern Oregon and the ensuing acquittal of the occupants of criminal wrongdoing. Less violent manifestations of dissatisfaction in the rural West are playing out in the enactment of county land use ordinances that attempt to gain control over federal land management. These ordinances, encouraged by interest groups such as the American Legislative Exchange Council and the American Stewards of Liberty, raise serious questions about the relationship between federal and local government in federal land planning.*

*In this article, we examine an archetypical county ordinance from Baker County, Oregon and explain that most of its provisions are preempted by federal law and, therefore, unenforceable. Although statutes like the Federal Land Policy and Management Act and the National Forest Management Act encourage cooperation between local governments and federal land planners, they do not authorize local land-use control on public lands. Thirty years ago, in the leading decision of *Granite Rock v. California Coastal Commission*, the United States Supreme Court drew a sharp distinction between permissible state and local environmental regulation and impermissible land use planning, a distinction that lower courts have maintained over the years.*

*Ordinances like Baker County’s, which are proliferating throughout the rural West, fail to observe the distinction drawn by the Court, and consequently include numerous local land use directives that are preempted by federal law. Although we believe that local involvement can*

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*help to improve federal land planning, we show how and why local ordinances attempting to prescribe land uses on federal public lands conflict with federal law, and mislead their supporters into believing the plans are enforceable.*

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## I. INTRODUCTION

In the arid West, many politicians and local governments resent the federal government for its public land ownership and management. The Sagebrush Rebellion in the 1970s<sup>1</sup> and the County Supremacy movement in the 1990s<sup>2</sup> reflected this hostility towards federal agencies.

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1. The Sagebrush Rebellion was largely a reaction to the enactment of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-576, 90 Stat. 2728 (codified at 43 U.S.C. §§ 1701–1787 (2012)). During the rebellion, several states—including Nevada, Arizona, New Mexico, and Utah—enacted laws asserting state control over public lands. See Robert Fischman & Jeremiah Williamson, *The Story of Kleppe v. New Mexico: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 U. COLO. L. REV. 123, 158 (2011) (“The Sagebrush Rebellion began as narrowly focused rancher frustration with the [Wild Free-Roaming Horses and Burros Act of 1971], and in less than half a decade grew to encompass a wide array of public land conflicts. Nevada . . . led the movement for greater state control of public lands, advancing a regional political agenda.”). The rebellion came shortly after the U.S. Supreme Court ruled in *Kleppe v. New Mexico* that Congress may preempt state laws to protect wildlife on public lands. 426 U.S. 529, 546 (1976).

2. The County Supremacy movement was a period in the early 1990s when “approximately thirty-five counties adopted ordinances asserting authority over federal lands.” Elizabeth Osenbaugh & Nancy Stoner, *The County Supremacy Movement*, 28 URB. LAW. 497, 498 (1996); see also *Boundary Backpackers v. Boundary Cnty.*, 913 P.2d 1141, 1143 (Idaho 1995) (county ordinance that required federal government to comply with county land use plan was preempted and therefore

On January 2, 2016, the issue grabbed national news headlines when militants took control of the Malheur National Wildlife Refuge in southeastern Oregon.<sup>3</sup> These radicals—heavily armed and wearing cowboy hats—seized the U.S. Fish & Wildlife Service-managed land in protest of federal regulation of grazing permits for environmental purposes, as well as the prosecution, conviction, and sentencing of two Oregon ranchers for setting fire to federal public lands.<sup>4</sup>

Although much national attention concerning local control over public lands focused on the “Malheur Occupation,” western counties are quietly passing ordinances that assert a government-to-government role in managing public lands alongside federal agencies.<sup>5</sup> The counties rely on provisions in the Federal Land Policy and Management Act of 1976 (“FLPMA”)<sup>6</sup> and the National Forest Management Act of 1976 (“NFMA”)<sup>7</sup> that direct federal agencies to “coordinate” with state and

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invalid); Scott Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. 525, 527 (1994) (“The county supremacy movement is a new version of the Sagebrush Rebellion, which in turn was simply another spin on how to place the public lands under control of the private commercial users.”).

3. See, e.g., Les Zaitz, *Militia Takes Over Malheur National Wildlife Refuge Headquarters*, THE OREGONIAN (Jan. 2, 2016), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/drama\\_in\\_burns\\_ends\\_with\\_quiet.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/drama_in_burns_ends_with_quiet.html); Kirk Johnson & Jack Healy, *Armed Group Vows to Continue Occupation at Oregon Refuge*, N.Y. TIMES (Jan. 3, 2016), <http://www.nytimes.com/2016/01/04/us/armed-group-vows-to-hold-federal-wildlife-office-in-oregon-for-years.html>.

4. See Kirk Johnson & Jack Healy, *Protestors in Oregon Seek to End Policy That Shaped West*, N.Y. TIMES (Jan. 5, 2016), <http://www.nytimes.com/2016/01/06/us/protesters-seek-to-end-policy-that-shaped-west.html>; see also Greg Walden, Congressman, 2nd District of Oregon, Address to the U.S. House of Representatives (Jan. 5, 2016), transcript available at <https://walden.house.gov/speech> (reviewing the prosecution of ranchers Dwight and Steve Hammond and discussing the rancor between livestock producers and the federal government in eastern Oregon).

5. See Amanda Peacher, *Counties Turn to Little-Known Policy to Boost Say in Federal Land Management*, OREGON PUBLIC BROADCASTING (Apr. 4, 2016), <http://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/federal-land-management-oregon-counties/>.

6. 43 U.S.C. § 1712(c)(9) (2012) (in developing and revising federal land plans, the Secretary shall “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 States and local governments within which the lands are located.”) (emphasis added).

7. 16 U.S.C. § 1604(a) (2012) (“[T]he Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, *coordinated* with the land and resource management planning processes of State and local governments and other Federal agencies.”) (emphasis added).

local governments in the land planning process.<sup>8</sup> These local “coordination” ordinances, usually in the form of a “natural resources plan,” aim to impose county policies on federal land managers by demanding they conform to county positions.<sup>9</sup> This Article examines the authority of such ordinances and contends that in most instances county directives are preempted by federal law and unenforceable under the Supremacy Clause of the United States Constitution,<sup>10</sup> and case law including *California Coastal Commission v. Granite Rock Co.*<sup>11</sup>

Rural western communities have been dissatisfied with federal land management decisions, blaming environmental regulation, litigious advocacy groups, and recreational users of public lands for stifling local economies long dependent on ranching, logging, and mining. In 2012, the Utah legislature passed the Utah Transfer of Public Lands Act, demanding that the federal government cede public lands in Utah to the State by 2014,<sup>12</sup> notwithstanding the fact that studies have consistently shown state

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8. See Peacher, *supra* note 5 (“Baker and Malheur Counties [Oregon] already adopted natural resource plans under the coordination premise. Efforts are underway in at least four other [Oregon] counties to do the same. Their idea is that if local governments set out their priorities and vision for public lands, then federal agencies have to adjust management practices to align with their plan.”).

9. See, e.g., BAKER COUNTY, OREGON, NATURAL RESOURCES PLAN 23 (July 20, 2016) [hereinafter BAKER COUNTY PLAN] (“Federal and State agencies shall not encourage the relinquishment of, nor allow the retirement of, grazing permits on designated grazing lands (i.e. grazing districts) for uses that exclude substantive livestock grazing.”); *id.* at 27 (“On public lands, all tree mortality caused by forest fire and pests shall be harvested before additional loss of economic value occurs, in coordination with the Baker County Board of Commissioners.”).

10. U.S. CONST. art. VI, cl. 2.

11. *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 594 (1987) (deciding that states may require environmental protection measures for uses of federal public lands, but federal land planning preempts state and local planning).

12. H.R. 148, 59th Leg., Reg. Sess. (Utah 2012); see Nick Lawton, *Utah’s Transfer of Public Lands Act: Demanding a Gift of Federal Lands*, 16 VT. J. ENVTL. L. 1, 15 (2014) (“Although the TPLA requires the U.S. to convey lands to Utah, it does not require the state to pay fair market value—or any value at all. The TPLA simply requires Congress to ‘extinguish title’ to the lands and ‘transfer title’ to the state.”); see also PETER MICHAEL ET AL., REPORT OF THE PUBLIC LANDS SUBCOMMITTEE (Conference of Western Attorneys General, 2016) (examining legal issues of federal land ownership in the West, and adopting by 11-1 vote the Paper’s conclusions that states have scant legal authority to demand transfer of public lands); ROBERT B. KEITER & JOHN C. RUPLE, A LEGAL ANALYSIS OF THE TRANSFER OF PUBLIC LANDS ACT 6 (Univ. of Utah, Wallace Stegner Ctr. for Land, Resources & Env’t, 2014) (“Statutes authorizing Western states to join the Union required those same states to disclaim the right to additional lands and that disclaimer cannot be spun into a federal duty to dispose. Statehood enabling acts’ guarantee of equal political rights also cannot be spun into a promise of equal land ownership. Furthermore, though

governments do not have the budgetary or administrative resources to manage the public land acreage.<sup>13</sup> At the federal level, Utah’s representatives support legislation that would limit the federal government’s ability to manage public lands in Utah.<sup>14</sup> Unsurprisingly, many public lands users, like hunters and anglers, are vehemently opposed to proposals that would “defederalize” public lands or “transfer” public lands to the states.<sup>15</sup>

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statehood enabling acts guarantee states a share of the proceeds resulting from federal land sales, that guarantee is not an obligation to sell.”).

13. *See, e.g.*, ELISE STAMBRO ET AL., AN ANALYSIS OF A TRANSFER OF FEDERAL LANDS TO THE STATE OF UTAH 123 (Univ. of Utah, Bureau of Econ. & Bus. Research 2014), *available at* <http://publiclands.utah.gov/wp-content/uploads/2014/11/1.%20Land%20Transfer%20Analysis%20Final%20Report.pdf> (estimating that Utah would have to generate \$280 million annually to cover the management costs of transferred public lands); JAY O’LAUGHLIN, WOULD A TRANSFER OF FEDERAL LANDS TO THE STATE OF IDAHO MAKE OR LOSE MONEY? (Univ. of Idaho, Policy Analysis Group, 2014), *available at* [http://posting.boiseweekly.com/media/pdf/pag-ib16\\_federal-land-transfer\\_\\_1\\_.pdf](http://posting.boiseweekly.com/media/pdf/pag-ib16_federal-land-transfer__1_.pdf) (estimating that transfer would cost Idaho up to \$111 million annually); CTR. FOR WESTERN PRIORITIES, THE MINING BURDEN: STATES WOULD SHOULDER SIGNIFICANT COSTS OF CLEANING UP ABANDONED MINES IF THEY TAKE OVER AMERICAN LANDS 2 (2015) (“We estimate that should state land takeover efforts move forward, 13 Western states would be saddled with between \$9.6 and \$21 billion in costs of cleaning up the approximately 100,000 abandoned mines that exist on public lands today.”) (emphasis omitted).

14. *See, e.g.*, Utah National Monument Parity Act, S. 3317, 114th Cong. (2016) (proposing to prohibit Presidents from designating national monuments in Utah); Local Enforcement for Local Lands Act of 2016, H.R. 4751, 114th Cong. (2016) (proposing to terminate the Forest Service and BLM’s law enforcement functions on public lands); Greater Sage Grouse Protection and Recovery Act, H.R. 4739, 114th Cong. (2016) (proposing to require that federal sage grouse recovery plans be consistent with state plans).

15. According to knowledgeable commentators, state ownership of federal lands—and the concomitant obligations requiring maximized revenue generation on state lands—would adversely affect:

access to the transferred lands. Increased mineral development would displace other users, and land managers would likely increase access fees. In Montana, Nevada, New Mexico, Utah, and Wyoming, upwards of 75-percent of hunters utilize public lands. In Colorado, Idaho, and Oregon, the figure is 54-, 66-, and 67-percent, respectively. Access to state trust land is already costly, and it foreshadows additional costs if the transferred lands are managed with an eye towards market efficiency. During 2014, the Utah Division of Wildlife Resources paid \$703,550 to [The Utah School and Institutional Trust Lands Administration] ‘to provide compensation to Utah’s school and institutional trust beneficiaries for public access to school and institutional trust lands for hunting, fishing, trapping, and viewing of wildlife.’ In addition to Utah,

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state trust land managers in Colorado, Montana, Nebraska, New Mexico, Oklahoma, and Texas all required some form of payment to hunt, fish, or camp on state trust lands. Arizona, Washington State, Louisiana, and Minnesota also impose recreation user fees.

ROBERT B. KEITER & JOHN C. RUPLE, *THE TRANSFER OF PUBLIC LANDS MOVEMENT: TAKING THE 'PUBLIC' OUT OF PUBLIC LANDS 5* (Univ. of Utah, Wallace Stegner Ctr. for Land, Resources & Env't, 2015); *see also* Jason Blevins, *Sportsmen, Conservationists Want Answers From Candidates on Public Land Transfers*, THE DENVER POST (Sept. 21, 2016), <http://www.denverpost.com/2016/09/21/sportsmen-conservationists-candidates-reject-public-lands-transfer/> (“Sportsmen tend to think that a large-scale transfer of federal lands to states would throttle their access to prime playgrounds.”); Jamie Williams, *You Can't 'Take Back' Public Lands. They Already Belong to All of Us*, THE WASHINGTON POST (Jan. 25, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/01/25/you-cant-take-back-public-lands-they-already-belong-to-all-of-us/> (president of the Wilderness Society arguing for retained federal ownership of public lands); COLORADO COLLEGE, 2016 CONSERVATION IN THE WEST POLL (State of The Rockies Project, 2016), *available at* <https://www.coloradocollege.edu/other/stateoftherockies/conservationinthewest/> (majority of voters in Arizona, Colorado, Montana, Nevada, New Mexico, Utah, and Wyoming oppose disposal of public lands); Trout Unlimited, *Our Public Lands Are Not For Sale*, TU.ORG, <http://www.tu.org/public-lands-action> (last visited May 4, 2017) (“Sportsmen and women know that public lands provide access to some of the best hunting and fishing in their states—and these wild lands also help ensure the health of fisheries and wildlife habitat downstream.”).

As the push for transfer of public lands plays out at the state and federal levels, several organizations have encouraged county governments to pass ordinances or plans that invoke coordination with the federal government. For example, the American Legislative Exchange Council (“ALEC”), a group backed by the Charles and David Koch,<sup>16</sup> hosts a website with model legislation including “An Ordinance for Local Coordination on Federal Regulations.”<sup>17</sup> The American Stewards of Liberty (“American Stewards”), is a Texas-based<sup>18</sup> organization directed by the daughter of late Nevada rancher, Wayne Hage.<sup>19</sup> The group provides guidance on coordination including in-person courses on the coordination process<sup>20</sup> and free lessons on how county commissioners might use coordination to incorporate their demands into federal land plans.<sup>21</sup> Similarly, the Public Lands Council urges county governments to invoke coordination, describing the process in its “Beginner’s Guide to Coordination” as “a negotiation on a government-to-government basis that seeks to ensure officially approved local plans and policies are accommodated by planning and management decisions on federal lands.”<sup>22</sup> These groups encourage county commissioners to adopt statutory interpretations of their authority to influence federal land management that have little basis in federal law.

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16. See Lisa Graves, *ALEC Exposed: The Koch Connection*, THE NATION (July 12, 2011), <https://www.thenation.com/article/alec-exposed-koch-connection/> (“Hundreds of ALEC’s model bills and resolutions bear traces of Koch DNA: raw ideas that were once at the fringes but that have been carved into ‘mainstream’ policy through the wealth and will of Charles and David Koch.”); Nancy Scola, *Exposing ALEC: How Conservative-Backed State Laws Are All Connected*, THE ATLANTIC (Apr. 14, 2012), <http://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/>.

17. American Legislative Exchange Council, *An Ordinance for Local Coordination on Federal Regulations*, ALEC.ORG, <https://www.alec.org/model-policy/an-ordinance-for-local-coordination-on-federal-regulations/> (last visited Sept. 24, 2016). One might reasonably suspect that ALEC hopes to make coordination ordinances more common in effort to make coordination and transfer policies more mainstream. See Scola, *supra* note 16 (“Adopted first in the states, by the time these laws bubble up to the national level, they’re the conventional wisdom on policy.”).

18. The federal government owns only 1.8% of the land in Texas. CAROL VINCENT ET AL., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA (Congressional Research Service 2014), available at <https://www.fas.org/sgp/crs/misc/R42346.pdf>. The fact that American Stewards of Liberty is based in Texas suggests the organization’s hostility to the notion of any federal land ownership at all. American Stewards of Liberty, AMERICANSTEWARDS.US, <https://www.americanstewards.us/about/> (last visited Sept. 24, 2016).

19. The Executive Director of American Stewards of Liberty, Margaret Byfield, “became actively involved in the property rights movement after her parents, Wayne and Jean Hage, filed *Hage v. United States* in the Federal Court of Claims—a court battle that began in 1991 resulting in the most significant Fifth Amendment



County governments asserting novel interpretations of their role in federal land management face a steep uphill legal battle because the Property Clause of the United States Constitution gives the federal government plenary authority in managing its land.<sup>23</sup> As long ago as 1840, the Supreme Court of the United States declared that Congress's power to manage public lands under the Property Clause is "without limitation."<sup>24</sup> Numerous ensuing decisions consistently reaffirmed that federal land agencies have enormous discretion in making federal land management decisions.<sup>25</sup>

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victory for property owners in the past two decades." American Stewards of Liberty, AMERICANSTEWARDS.US, <https://www.americanstewards.us/about/directors/> (last visited Sept. 24, 2016). Indeed, the Court of Federal Claims ruled that the federal government had taken Hage's water rights on federal land without just compensation in *Estate of Hage v. United States*, 82 Fed. Cl. 202, 211–13 (2008). However, the Federal Circuit reversed that ruling in 2012. *Estate of Hage v. United States*, 687 F.3d 1281, 1287–91 (2012). Moreover, in related litigation the Ninth Circuit recently ruled that the Hage family held no federal easement for their cattle to cross federal lands and that their water rights do not include an appurtenant right to graze public lands. *United States v. Hage*, 810 F.3d 712, 718–20 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 332 (2016). The Ninth Circuit took the additional, extraordinary step of removing federal district Judge Robert C. Jones from the *Hage* case due to his bias and prejudice in favor of the Hage family. *Id.* at 723. On remand, the Nevada district court ordered the Hage family to pay \$587,294.28 for their illegal grazing, and "forever enjoined and restrained" them from ever placing cattle on public lands in Nevada without authorization. *United States v. Hage*, No. 2:07-cv-01154, 2017 WL 752832, at \*7 (D. Nev. Feb. 27, 2017), *appeal filed*, Mar. 9, 2017. These rulings quash the premise in Wayne Hage's book, where he argued that grazing permittees hold property interests in the form of "range rights." See generally WAYNE HAGE, STORM OVER RANGELANDS: PRIVATE RIGHTS IN FEDERAL LANDS 1–23 (1994).

20. American Stewards of Liberty, *Training*, AMERICANSTEWARDS.US, <https://www.americanstewards.us/programs/training/> (last visited Sept. 25, 2016).

21. American Stewards of Liberty, *Coordination*, AMERICANSTEWARDS.US, <https://www.americanstewards.us/programs/coordination/> (last visited Sept. 25, 2016).

22. ANDREA RIEBER, A BEGINNER'S GUIDE TO COORDINATION 5 (Public Lands Council 2012).

23. U.S. CONST. art. IV, § 3, cl. 2.

24. *United States v. Gratiot*, 39 U.S. 526, 537 (1840).

25. See, e.g., *United States v. Gardner*, 107 F.3d 1314, 1318 (1997) ("The United States . . . was not required to hold the public lands in Nevada in trust for the establishment of future states. Rather, under the Property Clause, the United States can administer its federal lands any way it chooses."); *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) ("Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause."); *Hunt v. United States*, 278 U.S. 96, 100 (1928) (federal government may kill wildlife on public lands to reduce grazing pressure, notwithstanding state hunting laws to the contrary); *Utah Power & Light v. United States*, 243 U.S. 389, 389–90 (1917) ("[T]he

Historically, states and local governments rarely passed coordination laws.<sup>26</sup> But like targets in a “whack-a-mole” game, these ordinances are now emerging across the West, with counties in Oregon,<sup>27</sup> Washington,<sup>28</sup> and Wyoming<sup>29</sup> considering such legislation. For example, the county board of commissioners in Baker County, Oregon adopted a “Natural Resources Plan” in 2015, which attempts to require federal agencies to coordinate with the county government on nearly every aspect of public land use, including road closures, grazing permit changes, wilderness area designations, fire suppression, and designation of national monuments.<sup>30</sup> Other rural Oregon counties are in various stages of enacting substantially similar coordination ordinances.<sup>31</sup> Many of these ordinances share the presumption that federal agencies must maximize resource production on federal land to stimulate local economies and value

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inclusion within a state of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power.”); *Light v. United States*, 220 U.S. 523, 536 (1911) (“The United States can prohibit absolutely or fix the terms on which its property may be used.”); *Camfield v. United States*, 167 U.S. 518, 524–26 (1897) (the federal government may act as both a proprietor and a sovereign in protecting its property).

26. *See, e.g.*, S. 117, 62nd Leg. (Mont. 2011) (statute that would have required local governments to demand coordination from federal agencies before agencies implemented federal plans within county boundaries).

27. *See* Peacher, *supra* note 5.

28. *See* Pend Oreille County, *Natural Resources Committee*, PENDORILLECO.ORG, <http://pendoreilleco.org/your-government/community-development/natural-resource-committee/#tab-id-1> (last visited May 4, 2017) (website hosting meeting minutes and draft documents for advisory group working on coordination ordinance).

29. *See* Karla Pomeroy, *County Advances Natural Resources Plan*, GREYBULL STANDARD (Mar. 12, 2015), <http://smalltownnews.com/article.php?catname=Local%20Government&pub=Greybull%20Standard&pid=13&aid=315504> (explaining that Big Horn County, Wyoming, is working with American Stewards of Liberty on a coordination ordinance).

30. BAKER COUNTY PLAN, *supra* note 9. *See infra* Part IV (discussing the Baker County Plan).

31. *See* Peacher, *supra* note 5. Crook and Grant Counties, Oregon, are working on—but have yet to enact—coordination ordinances. *See, e.g.*, Amanda Peacher, *Crook County Leaders Unexpectedly Table Natural Resources Plan*, OREGON PUBLIC BROADCASTING (July 20, 2016), <http://www.opb.org/news/article/crook-county-leaders-table-natural-resource-plan/>; George Plaven, *Grant County Sheriff Demands Coordination With Forest Service*, EAST OREGONIAN (Oct. 9, 2015), <http://www.eastoregonian.com/eo/local-news/20151009/grant-county-sheriff-demands-coordination-with-forest-service> (Grant County commissioners refused to adopt Natural Resources Plan drafted by deputized county residents).

for local residents.<sup>32</sup> The legal literature has yet to address the phenomena of coordination ordinances and assess their validity. However, with the beginning of President Donald J. Trump's administration, these ordinances could signal profound changes in public land management.

This Article explores the new wave of county coordination ordinances and examines their consistency with congressional statutes, agency regulations, and the Constitution's Property and Supremacy Clauses. Part II provides background on the Property Clause and the tension between federal and local control of public lands. Part III explains the statutory provisions in NFMA and FLPMA that counties rely on in arguing the federal government must conform to local government policies concerning land use decisions. Part IV explores the origins of the coordination movement and explains the contents of a recent coordination ordinance, the Baker County Natural Resources Plan. Part V discusses the Supreme Court's decision in *Granite Rock* and its legacy,<sup>33</sup> using the Baker County plan as an illustrative coordination ordinance to evaluate whether counties may impose their version of coordination on the federal government. Part VI explains the role counties might play under current law to work with the federal government in managing public lands, and considers the uncertainties now posed by the Trump Administration. The Article concludes that county governments have an important—and perhaps underused—role in working collaboratively with federal agencies to make responsible land management decisions. But local governments seeking coordination must understand the limits of their authority and not mislead their constituents by enacting natural resource plans that are preempted by federal law.

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32. See, e.g., BAKER COUNTY PLAN, *supra* note 9, at 15–17 (requiring federal land planners to evaluate economic effects of land planning to local economy, and proposing federal payments to mitigate and compensate for management decisions with detrimental effects to local economy).

33. See *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581–82 (1987) (state may require environmental permit for mining on national forests); see also *S.D. Mining Ass'n v. Lawrence Cnty.*, 155 F.3d 1005, 1011 (8th Cir. 1998) (county environmental protection ordinance that effectively banned the only profitable mining technique on federal land was preempted); *Bohmker v. State*, 172 F. Supp. 3d 1155, 1164–65 (D. Or. 2016) (state moratorium on motorized instream-mining not preempted because law is a reasonable environmental regulation), *appeal docketed*, No. 16-35262; *People v. Rinehart*, 377 P.3d 818, 829–30 (Cal. 2016) (state may restrict certain mining techniques on public lands to protect other resources); *Boundary Backpackers v. Boundary Cnty.*, 913 P.2d 1141, 1143 (Idaho 1995) (county cannot require federal government to comply with county land use plan).

## II. BACKGROUND: THE TENSION BETWEEN LOCAL AND FEDERAL CONTROL

The federal government’s land management policies varied widely over the past 200 years. In the nineteenth century, the federal government purchased what is now the American West from Indian tribes<sup>34</sup> and foreign governments.<sup>35</sup> Throughout the following century, Congress enacted public land laws that largely facilitated disposal of these lands from the public domain to private ownership.<sup>36</sup> During this era, the Supreme Court ruled that westerners had an implied license to use the public lands as a grazing commons.<sup>37</sup> Livestock owners used this implied license to overgraze western public lands, resulting in reduced forage and erosion that eventually contributed materially to the Dust Bowl in the 1920s and 1930s.<sup>38</sup>

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34. See *Johnson v. M’Intosh*, 21 U.S. 543, 603–605 (1823) (establishing that only the U.S. government may purchase land from Native Americans); see also Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 33–34 (1947) (“[E]xcept for a few tracts of land in the Southwest, practically all of the public domain of the continental United States (excluding Alaska) has been purchased from the Indians.”).

35. In 1803, President Jefferson doubled the size of the United States through the Louisiana Purchase, which included most land west of the Mississippi River and the northern Rocky Mountains. See GEORGE C. COGGINS, CHARLES F. WILKINSON, JOHN D. LESHY & ROBERT L. FISCHMAN, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 48 (7th ed. 2014). In 1845, the U.S. annexed Texas from Mexico. See *id.* at 50. The following year, the U.S. and Great Britain entered the Oregon Treaty, which added the Pacific Northwest to the federal government’s ownership. See *id.* at 51. In 1848, as a result of the war with Mexico, Mexico granted the American Southwest to the U.S. in the Treaty of Guadalupe Hidalgo. See *id.* The United States purchased Alaska from Russia in 1867. See *id.*

36. E.g., General Preemption Act of 1841, ch. 16, 5 Stat. 453 (granting squatters on public land the option of purchasing the property from the federal government); Graduation Act of 1854, ch. 244, 10 Stat. 574 (setting purchase prices of public land per acre, with price discounts for undesirable lands); Homestead Act of 1862, ch. 75, 12 Stat. 392 (granting 160 acres of public land to settlers who improved land and lived there five years); Pacific Railroad Act of 1862, ch. 120, 12 Stat. 489 (granting railroads ten square miles of public land for every mile of rail built); General Mining Act of 1872, ch. 152, 17 Stat. 91 (establishing system for miners to acquire patents to discoveries of valuable mineral deposits); Desert Land Act of 1877, ch. 107, 19 Stat. 377 (granting settlers 640 acres of public land for a small fee and proof of irrigation); Stock-Raising Homestead Act of 1916, Pub. L. No. 290, 39 Stat. 862 (granting 640 acres of public land for grazing but reserving mineral estate to the U.S.).

37. *Buford v. Houtz*, 133 U.S. 320, 326 (1890).

38. See DEBRA L. DONAHUE, *THE WESTERN RANGE REVISITED* 33–36 (Gordon Bakken ed., 1999).

In 1906, Gifford Pinchot's regulations ended this grazing free-for-all in national forests.<sup>39</sup> On the high desert, free grazing ended in 1934, when Congress passed the Taylor Grazing Act ("Taylor Act").<sup>40</sup> The Taylor Act placed virtually all unreserved federal western lands into grazing districts<sup>41</sup> and established a permit and fee system for grazing public lands.<sup>42</sup> Congress and the Department of Interior granted existing ranchers favorable terms: low fees, permission for established ranchers to continue existing levels of grazing, and largely local control over range management in the form of "grazing advisory councils."<sup>43</sup> Nevertheless, the statute marked a major change in public lands policy by closing open grazing commons on non-forest federal lands, helping end the homestead era.<sup>44</sup>

In 1976, Congress expressly declared—in the first provision of FLPMA—that it was "the policy of the United States that the public lands be retained in Federal ownership, unless . . . disposal of a particular parcel will serve the national interest."<sup>45</sup> Under the Taylor Act and FLPMA, the amount of land under federal control remained fairly static for the past eighty years, except for relatively small parcels that Congress bought, sold,

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39. In 1897, Congress granted the Secretary of Interior authority to make rules and regulations for forest reserves. *Surveying the Public Lands*, ch. 2, § 300, 30 Stat. 32, 35. In 1905, Congress transferred this authority to the Department of Agriculture. Pub. L. No. 34, 33 Stat. 628 (1905). Gifford Pinchot, the first Chief of the Forest Service, proceeded to institute grazing regulations for federally-owned forests in 1906. *United States v. Grimaud*, 220 U.S. 506, 509 (1911). The Supreme Court upheld Pinchot's authority to set grazing rules for national forests in 1911, *id.* at 521–22; *Light v. United States*, 220 U.S. 523, 536–37 (1911), thereby revoking the public license to graze those areas the Court recognized in 1890. *Buford*, 133 U.S. at 326.

40. Taylor Grazing Act, Pub. L. No. 73-482, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. § 315 (2012)); see George C. Coggins & Margaret Lindbergh-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 48 (1982) ("The major Taylor Act goals were improvement of range condition and stabilization of the western livestock industry.").

41. 43 U.S.C. § 315.

42. *Id.* § 315(b) (requiring the Department of Interior to collect "reasonable fees" and give preference in issuing permits to "those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights").

43. See Coggins & Lindbergh-Johnson, *supra* note 40, at 60–63.

44. See COGGINS ET AL., *supra* note 35, at 96 ("The [Taylor Grazing Act] ushered in the end of the homesteading era. While President Franklin Roosevelt closed most of the public domain to disposition by making sweeping executive withdrawals in 1935 and 1936, homesteading remained possible, if barely so, until it was officially ended in [FLPMA].").

45. 43 U.S.C. § 1701(a)(1) (2012).

and exchanged with states and private parties.<sup>46</sup> In 2014, the federal government owned 46.9% of the land in the eleven coterminous western states, totaling 353 million acres.<sup>47</sup>

The Property Clause gives the federal government plenary authority to act as both a proprietor and sovereign of its lands.<sup>48</sup> For example, in *Light v. United States*, the Supreme Court ruled that its Property Clause authority enables Congress to withdraw lands in federal ownership from settlement without a state’s consent, and to regulate those lands contrary to state law.<sup>49</sup> In *United States v. Gettysburg Electric Railway Co.*, the Court ruled that the Property Clause authorized federal condemnation of lands for a national battlefield.<sup>50</sup>

The Property Clause power extends extra-territorially beyond the bounds of public lands, allowing the federal government to extinguish fires on private lands that threaten public lands<sup>51</sup> and to protect wildlife on federal lands contrary to state law.<sup>52</sup> In *United States v. Gratiot*, the Supreme Court rejected the argument that the term “dispose” in the Property Clause gave the federal government only the authority to convey its land by sale, upholding leasing of lead mines.<sup>53</sup> Recognizing

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46. Between the years 1781 and 2013, the federal government transferred 816 million acres of federal land to private ownership. See VINCENT, *supra* note 18, at 2 (explaining that 97% of these transfers were before 1940).

47. See *id.* at 20. The eleven contiguous western states are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

48. The federal government may act as proprietor by bringing trespass or nuisance claims, giving permission to use public lands, or by selling use-rights on federal land. *Camfield v. United States*, 167 U.S. 518, 524 (1897). The government may act as a sovereign by, for example, prohibiting actions on private parcels adjoining federal lands that would frustrate the federal government’s intentions for uses of public land. See *id.* at 525–26 (“The general government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found to be necessary, for the protection of the public or of intending settlers, to forbid all inclosures of public lands, the government may do so.”).

49. 220 U.S. 523, 536–37 (1911).

50. 160 U.S. 668, 683 (1896).

51. *United States v. Alford*, 274 U.S. 264, 267 (1927) (“Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests.”) (Holmes, J.).

52. *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976).

53. 39 U.S. 526, 537–38 (1840).

Congress's discretion in managing federal lands, the Court ruled that "disposal" does not mean "selling."<sup>54</sup>

The Supreme Court has invariably upheld Congress's authority under the Property Clause.<sup>55</sup> Yet, westerners have periodically challenged federal authority to own public land. In the 1970s and 1980s, advocates for state ownership of western public lands mounted the Sagebrush Rebellion.<sup>56</sup> The rebels unsuccessfully challenged the federal government's discretion to withhold public land from sale in *Nevada ex rel. Nevada State Board of Agriculture v. United States*.<sup>57</sup> On the basis of the plenary congressional authority to manage public lands, the federal district court dismissed the action for failure to state a claim,<sup>58</sup> and the United States Court of Appeals for the Ninth Circuit expressly rejected the

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54. *Id.* at 538–39 (“[T]he words ‘dispose of,’ cannot receive the construction contended for at the bar; that they vest in Congress the power only to sell, and not to lease such lands. The disposal must be left to the discretion of Congress.”).

55. *See* *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) (“This Court has ‘repeatedly observed’ that ‘[t]he power over the public land thus entrusted to Congress is without limitations.’”); *Kleppe*, 426 U.S. at 539 (“[W]e have repeatedly observed that ‘[t]he power over the public land thus entrusted to Congress is without limitations.’”); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294–95 (1958) (same); *Alabama v. Texas*, 347 U.S. 272, 273 (1954) (“The power of Congress to dispose of any kind of property belonging to the United States ‘is vested in Congress without limitation.’”); *Fed. Power Comm’n v. Idaho Power Co.*, 344 U.S. 17, 21 (1952) (“The power of Congress over public lands, conferred by [the Property Clause], is ‘without limitations.’”); *United States v. California*, 332 U.S. 19, 27 (1947) (“We have said that the [Property Clause] is without limitation.”); *United States v. San Francisco*, 310 U.S. 16, 29 (1940) (“The power over the public land thus entrusted to Congress is without limitations.”); *Gibson v. Chouteau*, 80 U.S. 92, 99 (1871) (“With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations.”); *Gratiot*, 39 U.S. at 537 (“Congress has the same power over [territories] as over any other property belonging to the United States; and this power is vested in Congress without limitation.”); *see also* *United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997) (reviewing the history of Property Clause cases, and concluding “under the Property Clause, the United States can administer its federal lands any way it chooses”).

56. *See* Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847, 848 (1982) (“The management of public lands and natural resources in the West has been the subject of growing controversy. While many issues are at stake, the battle has coalesced around the movement known as the Sagebrush Rebellion. The rebels offer a simple proposition: title to the vast public domain in the twelve western states should be deeded to the states—lock, stock, and barrel.”).

57. 512 F. Supp. 166, 168 (D. Nev. 1981), *aff’d*, 699 F.2d 486, 487 (9th Cir. 1983) (affirming dismissal of Nevada’s case on mootness grounds because the Department of Interior rescinded its moratorium on land disposal).

58. *Id.* at 172.

rebellion’s constitutional argument that states are entitled to ownership of public lands.<sup>59</sup>

In the early 1990s, the Sagebrush Rebellion reformulated as the County Supremacy movement, and more than thirty western counties enacted ordinances asserting authority over federal lands.<sup>60</sup> For example, in 1994, county commissioners in Nye County, Nevada, adopted resolutions declaring that Nevada owned all public lands within its state boundary and claiming county ownership of all “travel corridors” across public lands in Nye County.<sup>61</sup> After a county commissioner began bulldozing roads on federal lands, the federal government filed suit against the county.<sup>62</sup> In *United States v. Nye County, Nevada*, a federal district court declared the federal government had sufficient authority to own and manage public lands within Nye County, and that federal law preempted county resolutions claiming new county rights-of-way across federal land.<sup>63</sup>

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59. *Gardner*, 107 F.3d at 1318–20 (holding that: (1) the Property Clause allows the federal government to own land and establish forest reserves within states; (2) the equal footing doctrine does not require the federal government to give Nevada title to public lands; and (3) federal land holdings within Nevada’s borders are consistent with the Nevada Statehood Act and the Tenth Amendment).

60. See OSENBAUGH & STONER, *supra* note 2, at 498. Counties do not have federal constitutional status because the United States Constitution is only about federal versus state relations. See U.S. CONST. amend. X (“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.”).

61. *United States v. Nye Cnty, Nev.*, 920 F. Supp. 1108, 1111 (D. Nev. 1996).

62. *Id.* at 1111–12.

63. *Id.* at 1120; see also Robert Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KAN. L. REV. 647, 659 (1996) (“*Nye County* and *Gardner* remove whatever slim doubts may have remained about the legality of federal land ownership in the western states. These two cases confirm the obvious: claims that the federal land management agencies are powerless to own and manage activities on the lands under their jurisdiction are ‘legally frivolous.’ More broadly, as one commentator aptly remarked, ‘the county supremacy ordinances have the durability of cow chips.’”).



Self-styled “constitutionalists,” including Ammon Bundy and the Malheur occupiers,<sup>64</sup> state politicians,<sup>65</sup> and county elected officials<sup>66</sup> continue to challenge the federal government’s authority to own and manage public lands. But reversing 200 years of Property Clause jurisprudence would require an unlikely rejection of bedrock principles in

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64. See Tay Wiles & Nathan Thompson, *Who’s Who Inside and On the Outskirts of the Malheur Occupation*, HIGH COUNTRY NEWS (Jan. 11, 2016), <http://www.hcn.org/articles/whos-who-at-the-oregon-standoff-malhuer-bundy> (“The occupiers, led by Ammon Bundy, have demanded that the federal government hand over the refuge to the citizens of Harney County . . . . Many of Bundy’s fellow occupiers at Malheur are members of militia groups who are new to the [Sagebrush Rebellion arguments], but who share a constitutionalist, right-wing ideology.”).

65. See Jack Healy & Kirk Johnson, *The Larger, But Quieter Than Bundy, Push to Take Over Federal Land*, THE NEW YORK TIMES (Jan. 10, 2016), <http://www.nytimes.com/2016/01/11/us/the-larger-but-quieter-than-bundy-push-to-take-over-federal-land.html> (“Ken Ivory, a Republican state representative from Utah, has been roaming the West with an alluring pitch to cattle ranchers, farmers and conservatives upset with how Washington controls the wide-open public spaces out here: This land is your land, he says, and not the federal government’s.”); Joshua Zaffos, *New Leader Steps Up for the American Lands Council*, HIGH COUNTRY NEWS (Feb 10, 2016), <http://www.hcn.org/articles/new-leader-steps-up-for-the-american-lands-council> (noting that Montana state senator Jennifer Fielder would take Ken Ivory’s place as CEO of the American Lands Council, and explaining “Fielder is vice chair of the Montana Republican Party and has served as a board member of the Sanders Natural Resources Council, a county natural resources advisory committee that has backed county ‘coordination’ and local authority over federal lands. John Trochmann, founder of the anti-government Militia of Montana, which has ties to white-supremacist groups, started the council in 2006, according to a 2012 Montana Human Rights Network report. Fielder also has connections with the Oath Keepers, a constitutionalist militia group.”).

66. See Les Zaitz, *Grant County Sheriff, Deputy Botched Arrest in ‘Egregious Abuse of Power,’* THE OREGONIAN (June 12, 2016), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/06/egregious\\_abuse\\_seen\\_in\\_grant.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/06/egregious_abuse_seen_in_grant.html) (“[Grant County, Oregon, Sheriff Glenn Palmer] gained national notice earlier this year for his sympathy for militants who took over the Malheur National Wildlife Refuge. He considers himself a ‘constitutional sheriff’ and vows to protect citizens from abusive government.”).

American government, including judicial review<sup>67</sup> and the doctrine of implied powers.<sup>68</sup>

### III. STATUTORY AND REGULATORY CONTEXT: NFMA AND FLPMA

The federal agencies managing much of the western public lands—the United States Forest Service (“Forest Service”) and Bureau of Land Management (“BLM”)—operate under different statutory mandates,

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67. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”). On the other hand, self-proclaimed constitutional educator and talk show personality KrisAnne Hall—quite popular among the Bundy crowd—claims judicial review is unconstitutional:

The Bureau of Land Management, the federal government, controlling our land, is a law that is lawless. It is outside the Constitution. Do not tell me ‘the Supreme Court said this or that’ because the Supreme Court does not have the constitutional authority to expand the power of the federal government or create new powers. That is not the role of the Supreme Court. They don’t even have the authority to be the ultimate arbiters of the Constitution. James Madison—the father of the Constitution—tells us in 1798 as he’s arguing before the ratification of the Constitution, ‘Hey, the Supreme Court of the United States is not above the states. The Supreme Court of the United States cannot make law. The Supreme Court of the United States is not the ultimate arbiter of the Constitution.’ James Madison so very clearly explains that the ultimate arbiters of the Constitution are the states themselves. They are the creators of the contract, they are the drafters of the contract, they are the ones who actually ratified the contract creating the federal government. The states are the creators of the federal government, they are the controllers of the federal government. It is time for us to understand the proper role and function of our government. Do not tell me ‘*Marbury v. Madison*.’ That is circular logic. The Supreme Court cannot create an opinion that expands its own power.

KrisAnne Hall, *What’s Really Going On in Oregon! Taking Back the Narrative!* 3:52–5:23 (KrisAnne Hall YouTube Channel, Jan. 5, 2016), <https://www.youtube.com/watch?v=T424sWq1SkE>.

68. See *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819) (“[W]here the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.”).

which include “coordination” requirements.<sup>69</sup> The Forest Service generally manages mountainous forestlands, while BLM administers largely arid rangelands.<sup>70</sup> Both agencies manage federal land within counties that have enacted coordination ordinances.<sup>71</sup> This Part considers the Forest Service and BLM statutes and regulations that counties rely on to invoke coordination rights.<sup>72</sup>

The Forest Service’s chief governing statute, NFMA,<sup>73</sup> requires all management actions on national forest lands to be consistent with the applicable Forest Service land and resource management plan.<sup>74</sup> NFMA also requires the agency to “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.”<sup>75</sup> Although NFMA does not define the term “coordinated,” the Forest Service’s regulations interpret the coordination language to require that in developing or revising plans, the agency must “review the planning and land use policies” of local governments and disclose the results of that

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69. Most of the country’s public lands are managed by five federal agencies: the U.S. Forest Service, the Bureau of Land Management (BLM), the U.S. Fish and Wildlife Service, the National Park Service, and the Department of Defense. VINCENT, *supra* note 18, at 1, 6. The Forest Service and BLM manage a large majority of western public lands. *Id.* at 6 (map).

70. *Id.* at 8; COGGINS ET AL., *supra* note 35, at 25–26.

71. See, e.g., BAKER COUNTY PLAN, *supra* note 9, at 4 (the Forest Service manages 33% of the land in Baker County, and BLM manages 18.5%).

72. The U.S. Fish and Wildlife Service’s (FWS) management of the National Wildlife Refuge System is governed by the National Wildlife Refuge Administration Act, as amended by the National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (codified at 16 U.S.C. §§ 668dd-ee (2012)). Unlike the Forest Service and BLM governing statutes (described below), the FWS statutory mandate does not require the FWS to coordinate with local governments. Instead, the Refuge System Improvement Act requires the FWS only to “coordinate” with states in developing refuge conservation plans. 16 U.S.C. § 668dd(e)(3)(B). In managing the refuge system, the agency must “ensure effective coordination, interaction, and cooperation with owners of land adjoining refuges and the fish and wildlife agency of the States in which the units of the System are located[.]” *Id.* § 668dd(a)(4)(E). The county coordination ordinances do not address these provisions governing FWS land management.

73. National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949. See also Forest Service Organic Administration Act of 1897, ch. 2 ch. 300, 30 Stat. 34, 36 (codified at 16 U.S.C. §§ 473-478, 479-482, 551 (2012)).

74. 16 U.S.C. § 1604(i) (2012). See, e.g., *Sierra Club v. Martin*, 168 F.3d 1, 4–5 (11th Cir. 1999) (holding a Forest Service decision to issue a timber sale was arbitrary and capricious where forest plan committed the agency to collect population data on certain species before issuing timber sales, and the agency failed to do so).

75. 16 U.S.C. § 1604(a) (emphasis added).

review in the agency’s analysis under the National Environmental Policy Act (“NEPA”).<sup>76</sup> The regulations make clear the section should not be read “to indicate that the responsible official will . . . conform management to meet non–Forest Service objectives or policies.”<sup>77</sup> Neither NFMA nor agency regulations require the Forest Service to conduct land planning via government-to-government consultation with counties.

FLPMA is BLM’s statutory mandate for public land management.<sup>78</sup> Like NFMA, FLPMA requires BLM to develop and maintain land use plans.<sup>79</sup> FLPMA directs the Secretary of Interior “to the extent consistent with the laws governing the administration of the public lands, *coordinate* the land use inventory, planning, and management activities . . . with the land use planning and management programs . . . of the States and local governments within which the lands are located.”<sup>80</sup> FLPMA grants BLM considerable discretion in coordinating with local governments, requiring the Secretary’s land use plans only to “be consistent with State and local plans to the maximum extent he finds

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76. 36 C.F.R. § 219.4(b)(2) (2017). The review must consider local government objectives, the “compatibility” of planning documents, and “opportunities for the plan to address the impacts defined or to contribute to joint objectives,” as well as “opportunities to resolve or reduce conflicts.” *Id.* § 219.4(b)(2)(i)–(iv). The Forest Service’s 1982 planning regulations included the same requirement that the agency “review the planning and land use policies” of local governments and disclose those results in the agency’s NEPA analysis. *See id.* § 219.7(c).

77. *Id.* § 219.4(b)(3).

78. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-576, 90 Stat. 2728.

79. 43 U.S.C. § 1712(a) (2012).

80. *Id.* § 1712(c)(9) (emphasis added). The statute continues:

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

*Id.* (emphasis added).

consistent with Federal law and the purposes of this Act.”<sup>81</sup> BLM regulations in effect through December 2016 interpreted the objectives of coordination to include considering and “keep[ing] apprised” of local plans,<sup>82</sup> “resolving, to the extent practicable, inconsistencies between Federal and non-Federal government plans,”<sup>83</sup> and providing “meaningful public involvement” to local government officials.<sup>84</sup> In December 2016, BLM promulgated its “Planning 2.0” process, revising portions of the FLPMA regulations, but those regulations were rescinded in March 2017 under the terms of the Congressional Review Act.<sup>85</sup> Like FLPMA, both

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81. *Id.* Professor Coggins expounded on FLPMA’s coordination provision in a 1983 law review article, calling it “as curious as it is lengthy.” See George C. Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1, 96 (1983) (“[43 U.S.C. § 1712(c)(9)] is as curious as it is lengthy. Congress basically required the Secretary to coordinate planning with every other governmental entity in the area and to try to make the federal land use plan compatible with state or local plans. The section also makes clear that the federal plan is dominant; the Secretary need not fully comply with local requirements. Unlike the other subsections of section 1712(c), this provision is peppered with ‘to-the-extent-thats.’ The Secretary can disregard local advice if impractical or inconsistent with federal law or purposes. Section 1712(f) requires even broader public participation, ‘including public hearings where appropriate.’”).

82. 43 C.F.R. § 1610.3–1(a)(1), (2) (2016). BLM revised these regulations in 2016, *see* below note 85, but the new rule maintained this language. 43 C.F.R. § 1610.3–2(a)(1), (2) (2017).

83. 43 C.F.R. § 1610.3–1(a)(3) (2016). BLM revised these regulations in 2016, *see* below note 85, but the new rule maintained similar language. 43 C.F.R. § 1610.3–2(a)(3) (2017) (replacing “practicable” in the regulation with “practical”).

84. *Id.* § 1610.3–2(a)(4). BLM revised these regulations in 2016, *see infra* note 85, but the new rule maintained this language. 43 C.F.R. § 1610.3–2(a)(4) (2017).

85. On March 27, 2017, President Trump signed a resolution rescinding the Planning 2.0 regulations. See Pub. Law. No. 115-12, H.J. Res. 44 (March 27, 2017) (nullifying the Planning 2.0 FLPMA regulations). Nevertheless, we provide a discussion of the Planning 2.0 changes here because we believe the 2017 regulations required substantially similar coordination and consistency obligations as the previous rules, and did not provide any new deference or planning authority to local governments.

The “Planning 2.0” regulations altered the language of 43 C.F.R. § 1610.3–1 and 1610.3–2, and added a provision at 43 C.F.R. § 1610.3–3. 81 Fed. Reg. 89,580, 89,614–22 (Dec. 12, 2016). Under the previous rule, § 1610.3–1 addressed coordination of planning efforts, and § 1610.3–2 addressed consistency requirements between federal and non-federal plans. The “Planning 2.0” regulations inserted a new provision at § 1610.3–1 titled “Consultation with Indian Tribes,” and the “Coordination of Planning Efforts” and “Consistency Requirements” provisions were redesignated, respectively, as § 1610.3–2, and § 1610.3–3. 81 Fed. Reg. at 89,614–22.

The Planning 2.0 regulations concerning coordination and consistency between federal and local plans would not have differed significantly from the

versions of the regulations acknowledge the agency’s broad discretion in reaching consistency with local plans.<sup>86</sup> FLPMA and its regulations

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previous, 2016 version. *See id.* at 89,614–22 (explaining the differences between 2016 FLPMA regulations at 43 C.F.R. § 1610.3 and the new Planning 2.0 regulations). The Planning 2.0 “Coordination of Planning Efforts” regulation included a new sentence stating that BLM is to coordinate with state and local governments “to the extent consistent with federal laws and regulations applicable to public lands.” *Compare* 43 C.F.R. § 1610.3–1(a) (2016) (“In addition to the public involvement prescribed by § 1610.2, the following coordination is to be accomplished with other Federal agencies, state and local governments, and federally recognized Indian tribes.”), *with* 43 C.F.R. § 1610.3–2(a) (2017) (“In addition to the public involvement prescribed by § 1610.2, and to the extent consistent with Federal laws and regulations applicable to public lands, coordination is to be accomplished with other Federal agencies, State and local governments, and Indian tribes.”) (emphasis added). BLM explained this revision in the Federal Register as a clarification of the meaning of coordination in FLPMA, not a change in policy. *See* 81 Fed. Reg. at 89,615 (“Final § 1610.3–2(a) does not represent a change from current practice or policy.”); 81 Fed. Reg. 9,674, 9,702 (Feb. 25, 2016) (“[The new language in 43 C.F.R. § 1610.3–2(a)] would be no change from current practice or policy. The BLM only wishes to clarify that BLM must comply with Federal laws and regulations.”).

The Planning 2.0 regulations clearly outlined “coordination requirements,” requiring only that BLM provide local governments “opportunity for review, advice, and suggestions on issues and topics which may affect or influence other agency or other government programs.” 43 C.F.R. § 1610.3–2(c) (2017). Under this regulation, local governments were entitled to notice of proposed changes to BLM plans where the local government has requested such notice or where the BLM has reason to believe the local government would be interested in opportunities for public involvement. *Id.* § 1610.3–2(c)(3); *see also id.* § 1610.3–2(c)(5) (requiring BLM to provide 30 days notice to local governments of opportunities for review and comment on land planning).

86. FLPMA regulations require consistency with local plans only “so long as the . . . resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands.” 43 C.F.R. 1610.3–2(a) (2016).

The Planning 2.0 version of the “Consistency Requirements” regulation was quite similar to the 2016 version of the regulation. 43 C.F.R. § 1610.3–3(a) (2017) (“Resource management plans *shall be consistent* with officially approved and adopted plans of other Federal agencies, State and local governments, and Indian tribes *to the maximum extent the BLM finds consistent with the purposes of FLPMA and other Federal laws* and regulations applicable to public lands, and the purposes, policies and programs implementing such laws and regulations.”) (emphasis added); *see also* 81 Fed. Reg. at 89,618–22 (explaining the differences between the 2016 consistency regulations and the new Planning 2.0 version).

BLM received comments during the Planning 2.0 process objecting to the requirement in 43 C.F.R. 1610.3–2(a) (2016) that BLM plans be consistent with local plans only so long as those plans were consistent with the purposes and requirements of federal law and regulation, *see* 81 Fed. Reg. at 89,618, but the new Planning 2.0 consistency regulations maintained this requirement in slightly different language.

require BLM to listen to local sentiments on public land management but do not require the agency to ensure compatibility with local government resource plans.<sup>87</sup>

No federal court has interpreted the “coordination” provisions in either NFMA or FLPMA. Under the deferential judicial review of the Administrative Procedure Act of 1946 (“APA”),<sup>88</sup> federal courts will likely uphold reasonable agency regulatory interpretations of “coordination.”<sup>89</sup> Counties lack authority to interpret the coordination

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*See* 43 C.F.R. § 1610.3–3(a) (2017) (quoted above). BLM explained its decision not to require more consistency between BLM and local plans:

The BLM received public comments in opposition to [43 C.F.R. § 1610.3–2(a) (2016)], noting that under FLPMA the obligation for consistency with local plans does not hinge on whether or not they are consistent with Federal purposes, policies and programs, only whether they do not contradict Federal Laws. The BLM disagrees with these comments. The BLM does not interpret FLPMA to require resource management plans to be consistent with the described non-BLM plans if those plans are simply lawful under Federal law and FLPMA. Rather, and particularly given 1712(c)(9)'s explicit reference to the purposes of FLPMA, and BLM's and the Secretary's ultimate responsibility as the manager of the public lands, BLM interprets FLPMA to authorize it to evaluate whether those non-BLM plans are consistent with the policies underlying BLM management of the public lands.

81 Fed. Reg. at 89,618–19.

87. BLM's “Desk Guide to Coordination” addresses situations where local plans are inconsistent with federal law and policy, explaining:

In such cases, the BLM does not have an obligation to seek consistency. For example, in preparing [resource management plans] the BLM is required to designate and protect areas of critical environmental concern (ACECs). The BLM could not honor a request from a county government that only ACECs consistent with the county's general plan be designated in the [resource management plan], if this would prevent the BLM from complying with its statutory obligation.

BUREAU OF LAND MANAGEMENT, A DESK GUIDE TO COOPERATING AGENCY RELATIONSHIPS AND COORDINATION WITH INTERGOVERNMENTAL PARTNERS 33 (2012).

88. 5 U.S.C. § 706(2)(A) (2012).

89. *See Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is

provisions in NFMA or FLPMA to create binding obligations on federal agencies.<sup>90</sup> NFMA and FLPMA require the Forest Service and BLM to consider the views of and attempt to collaborate with local governments in agency planning. But neither the statutes nor agency regulations require the Forest Service or BLM to conduct government-to-government consultation with county governments on public land management.

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the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.*

90. As one attorney advised after reviewing a coordination bill in Montana, when “a reviewing court reviews [an agency] management decision, it will look to see whether the [agency] complied with its own authorizing statutes and regulations, not whether it complied with a unilaterally enacted county interpretation.” Memorandum from Kenneth P. Pitt, Attorney, to Travis McAdam, Dir., Montana Human Rights Network (June 26, 2012), *available at* <http://www.mhrn.org/publications/fact%20sheets%20and%20advisories/Final%20Legal%20Memo%20on%20Coordination.pdf>.



## IV. THE COORDINATION ORDINANCES

Some western counties have approved coordination ordinances,<sup>91</sup> while other counties are in various stages of preparing their own plans.<sup>92</sup>

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91. See, e.g., BAKER COUNTY PLAN, *supra* note 9, at 10 (“Baker County expects . . . federal agencies to engage in coordination with the County, upon the County’s request, for land use planning efforts and on an ongoing basis—as mandated by applicable statute, regulations, policy, and case law.”); KANE CNTY., UTAH, RESOURCE MANAGEMENT PLAN 7 (Mar. 23, 2015) [hereinafter KANE COUNTY PLAN] (“Federal land management planning processes shall include Kane County as an active, coordinating, on-going partner, consistent with federal mandates involving coordination. Federal land management plans shall be consistent with county goals and policies[.]”); RAVALLI CNTY., MONT., RESOLUTION NO. 2978 1 (Nov. 21, 2012) [hereinafter RAVALLI COUNTY RESOLUTION] (“It is the policy of Ravalli County to invoke coordination with any and all appropriate agencies at the beginning of the scoping process and throughout the process for all areas of natural resource management and use.”); MONTEZUMA CNTY., COLO., RESOLUTION #08-2010 2 (Aug. 30, 2010) (Board of County Commissioners “calls upon all federal agencies and state agencies linked with them in implementing plans, projects, policies, and management actions in Montezuma County to coordinate with the Board of County Commissioners or their designee as they are required to do by federal laws[.]”); HARNEY CNTY., OR., COMPREHENSIVE PLAN 29 (Nov. 2009) (“Harney County will keep an open line of communication with all government entities and Non Government Organizations (NGO’s) to exchange ideas, views and plans with the intent that these bodies will attempt to coordinate with and abide by the Harney County Comprehensive Plan.”); MALHEUR CNTY., OR., MALHEUR COUNTY PLAN, 2-4-3 (Dec. 5, 2001) [hereinafter MALHEUR COUNTY PLAN] (requiring federal agencies to “[c]oordinate procedures to the fullest extent possible with the county, on an equal basis and not with the county as subordinate, prior to and during the taking of any federal . . . action”); WAYNE CNTY., UTAH, RESOURCE MANAGEMENT PLAN 1 (“Wayne County asserts planning authority over all lands and natural resources within its geographical boundaries even though the United States owns the vast majority of those lands and resources. Like any other landowner in the County, the United States is subject to Wayne County’s land and natural resource plans and policies to the maximum extent, provided such plans and policies of Wayne County are consistent with federal law.”).

92. See BIG HORN CNTY., WYO., [DRAFT] NATURAL RESOURCE MANAGEMENT PLAN FOR STATE AND FEDERAL LANDS A-4 (Sept. 10, 2016) [hereinafter BIG HORN COUNTY PLAN] (“Coordination recognizes that the responsibilities of local governments are ‘equal, not subordinate’ to the duties of federal and state governments, and that the needs of the local governments must be incorporated into the federal and state planning processes. . . . The County recognizes that federal law supersedes state and local law, and that it is federal law that requires agencies to coordinate and reach consistency with Big Horn County plans and policies.”); George Plaven, *Grant County Sheriff Demands Coordination with Forest Service*, EAST OREGONIAN (Oct. 9, 2015), <http://www.eastoregonian.com/eo/local-news/20151009/grant-county-sheriff-demands-coordination-with-forest-service> (Grant County, Oregon, commissioners refused to adopt Natural Resources Plan drafted by deputized county residents); Amanda Peacher, *Crook County Rejects Controversial Natural Resources Plan*, THE OREGONIAN (Aug. 30, 2016),

This Part explains the origins of the coordination movement, then discusses the contents of the Baker County, Oregon Natural Resources Plan.

#### A. Origins of the Coordination Movement

For several years, the Public Lands Council<sup>93</sup> and American Stewards<sup>94</sup> have provided materials urging counties to enact coordination ordinances.<sup>95</sup> Due to their influence, many of the county coordination ordinances are quite similar. For example, the Baker County ordinance duplicates the language (and the font) describing coordination in the Public Lands Council’s 2012 “Beginner’s Guide to Coordination.”<sup>96</sup> The Grant County, Oregon, draft ordinance copied the text (and the font) of the Baker County ordinance.<sup>97</sup> But the most conspicuous similarity between

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<http://www.opb.org/news/article/crook-county-rejects-natural-resource-plan/> (Crook County, Oregon, government voted against adopting current draft of coordination ordinance after county attorney “said the submitted plan didn’t pass legal muster.”); Pend Oreille County, Wash., *Natural Resources Committee*, *supra* note 28 (website hosting meeting minutes and draft documents for advisory group working on coordination ordinance).

93. See RIEBER, *supra* note 22.

94. See *supra* notes 18–21.

95. See *supra* notes 17–22.

96. Compare RIEBER, *supra* note 22, at 5 (“Coordination is a federally mandated process that requires the BLM and Forest Service to work with local governments to seek consistency between federal land use planning and local land use plans and policies. Coordination requires federal agencies do more than just *inform* local governments of their future management plans and decisions, and it requires that they do more than merely *solicit comment* from local government entities. Coordination calls for something beyond that: a negotiation on a government-to-government basis that seeks to ensure officially approved local plans and policies are accommodated by planning and management decisions on federal lands.”), with BAKER COUNTY PLAN, *supra* note 9, at 10 (“Coordination is a federally mandated process that requires all state and federal agencies including the BLM and Forest Service to work with local governments to seek consistency between state and federal land use planning and management and local land use plans and policies. Coordination, by its plain meaning, requires state and federal agencies do more than just *inform* local governments of their future management plans and decisions and it requires that they do more than merely *solicit comments* from local government entities. Coordination calls for something beyond that: a negotiation on a government-to-government basis that seeks to ensure officially approved local plans and policies are included in the public lands planning and management decisions of state and federal agencies.”).

97. See GRANT CNTY., OR., PUBLIC LANDS NATURAL RESOURCES PLAN 10 (Sept. 30, 2015), available at <https://www.documentcloud.org/documents/2852061-Natural-Resources-Plan.html> [hereinafter GRANT COUNTY PLAN] (proposed coordination ordinance quoting the BAKER COUNTY PLAN, *supra* note 9, verbatim).

all coordination ordinances is their shared, flawed understanding of what “coordination” means under federal law.

American Stewards is a major source of this misunderstanding. In its materials urging county governments to seek coordination, American Stewards relies on a plain meaning approach to define “coordination” in NFMA and FLPMA.<sup>98</sup> Relying on dictionaries<sup>99</sup> and irrelevant court

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98. See American Stewards of Liberty, *Coordination: A Strategy for Local Control* at \*6–7, AMERICANSTEWARDS.US, <https://www.americanstewards.us/programs/coordination/coordination-overview/>. (last visited May 4, 2017) [hereinafter *Coordination: A Strategy for Local Control*] (construing “coordination” in federal law by arguing “when a legislative body uses a word of common, everyday usage without specific definition it is presumed that the legislative intent was to use the word as it is commonly defined[,]” reviewing various dictionary and state court definitions of “coordinate,” and concluding “[i]t is patently obvious that when a legislature uses the word ‘coordinate’ or ‘coordination’ it means more than ‘cooperate’ or ‘consult’”); see also American Stewards of Liberty, *Coordination Overview*, AMERICANSTEWARDS.US, <https://www.americanstewards.us/programs/coordination/coordination-overview/> (last visited May 4, 2017) [hereinafter *Coordination Overview*] (“Given the dictionary definition of the term and concept of ‘coordination’ and, given the actions which the agencies must take under FLPMA, it is apparent that Congress intended to require equal base negotiations to reach consistency.”).

99. See *Coordination Overview*, *supra* note 98 (“The common dictionary definition of ‘coordinate’ shows that a person or party operating in ‘coordinate’ fashion is operating as a party ‘of equal importance, rank or degree, not subordinate.’ (Webster’s New International Dictionary)[.] The American Heritage Dictionary defines ‘coordinate’ as ‘one that is equal in importance, rank, or degree.’”); *Coordination: A Strategy for Local Control*, *supra* note 98, at \*6 (same); see also REIBER, *supra* note 22, at 12 (“The fact that the Forest Service is directed to ‘coordinate’ with local governments implies by its plain meaning that the Forest Service must engage in a process that involves more than simply ‘considering’ the plans and policies of local governments.”).

opinions<sup>100</sup>—eschewing the usual means of statutory interpretation<sup>101</sup>—the group proclaims coordination means “government-to-government”<sup>102</sup> consultation. American Stewards urges county governments to invoke this aggressive interpretation of local authority by enacting coordination ordinances.<sup>103</sup>

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100. American Stewards’ materials cited two state court opinions—both unrelated to federal land use planning—for the proposition that the plain meaning of “coordinate” in NFMA and FLPMA is “government-to-government” consultation. First, the American Stewards website cites *California Native Plant Soc’y v. City of Rancho Cordova*, 91 Cal. Rptr. 3d 571 (Cal. Ct. App. 2009), for its construction of the term “coordinate” in a city plan by relying on the Merriam-Webster’s Collegiate Dictionary and New Oxford Dictionary. See *Coordination Overview*, *supra* note 98. Ironically, the court ruled in *California Native Plant Society* that a city cannot unilaterally approve a development project over the objections of the U.S. Fish & Wildlife Service where the city’s general plan commits to “coordinating” mitigation for threatened and endangered species with the federal agency. See *California Native Plant Soc’y*, 91 Cal. Rptr. 3d at 641–43. Public Lands Council cites the same portions of *California Native Plant Society* in its *Beginners Guide to Coordination*. See RIEBER, *supra* note 22, at 12–13.

Second, American Stewards’ website and materials cite *Empire Ins. Co. of Tex. v. Cooper*, 138 S.W.2d 159 (Tex. Civ. App. 1940), for that court’s reliance on a dictionary definition of “coordinate.” *Coordination Overview*, *supra* note 98; *Coordination: A Strategy for Local Control*, *supra* note 98. In *Empire Insurance*, the Texas state court decided the issue whether semicolons in a life insurance policy separated equal or subordinate clauses. 138 S.W.2d at 163–64. The case was entirely unrelated to federal land planning, but the court recited a definition of “semicolon” from Webster’s Dictionary and Black’s Law Dictionary that included the word “coordinate.” *Id.* at 163. The Texas court’s opinion included a definition for “coordinate,” *id.* at 163, which—according to American Stewards—demonstrates that “coordination” in NFMA and FLPMA is subject to its plain meaning, dictionary definition. See *Coordination Overview*, *supra* note 98.

American Stewards selectively cited the statutes and regulations in its discussion of what coordination means under federal law. See *id.* (citing and rephrasing FLPMA, then concluding “[g]iven the dictionary definition of the term and concept of ‘coordination’ and, given the actions which the agencies must take under FLPMA, it is apparent that Congress intended to require equal base negotiations to reach consistency”). However, the group’s materials neglect to mention language in FLPMA and the NFMA regulations granting deference to the agency. See *supra* notes 77 (agency discretion in land planning under FLPMA), 81 (agency discretion in land planning under NFMA).

101. See *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (where statutory language is ambiguous, courts will defer to reasonable agency regulations interpreting the statute).

102. See *Coordination Overview*, *supra* note 98 (“The statutes create a process through which local government has an equal position at the negotiating table with federal and state government agencies. They create a process which mandates agencies to work with local government on a government-to-government basis.”).

103. See *Coordination: A Strategy for Local Control*, *supra* note 98, at \*5 (“When Congress . . . orders agencies to coordinate their activities with local

County commissioners may be unaware the coordination American Stewards describes is inconsistent with federal law. American Stewards sells annual subscriptions to counties for its advice and materials on the coordination process, and county governments across the West pay \$1,500 fees to the group for these resources.<sup>104</sup> Some counties have spent more than \$20,000 for the group's materials.<sup>105</sup> For example, Big Horn

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government, they [sic] require the agencies to go to the negotiating table on an equal footing with local government. The word 'coordinate' is a word of common usage, a word of daily usage in general public communication. It is not a term of art or a term of scientific and special meaning.”)

104. See Joshua Zaffos, *Counties Use a 'Coordination' Clause to Fight the Feds*, HIGH COUNTRY NEWS (May 11, 2015), <http://www.hcn.org/issues/47.8/counties-use-a-coordination-clause-to-fight-the-feds> (“Counties typically pay American Stewards \$1,500 for an initial daylong training, plus travel expenses.”); see, e.g., Fee Agreement between Dan Byfield, American Stewards of Liberty, and J.R. Iman, Ravalli Cnty. (Mont.) Comm’r (May 25, 2011) [hereinafter Fee Agreement] (agreeing to pay \$1,500 for American Steward’s services in drafting and editing coordination ordinance, drafting or editing policy statements or letters, and preparing county commissioners for coordination with federal government, with optional legal services from American Stewards for \$150/hour). When the Ravalli Republic newspaper published a story about the county commissioner’s contract with American Stewards, commenters to the online story expressed concern that American Stewards is “an extreme right wing anti-government organization” and pointed to the group’s “overtly religious” views. See Whitney Bermes, *County Commission Signs Contract with Coordination Consultants*, RAVALLI REPUBLIC (Apr. 4, 2011), [http://ravalli-republic.com/news/local/govt-and-politics/article\\_5d4005ac-5f33-11e0-8ffe-001cc4-c03286.html](http://ravalli-republic.com/news/local/govt-and-politics/article_5d4005ac-5f33-11e0-8ffe-001cc4-c03286.html); see also American Stewards of Liberty, *About Our Name*, AMERICANSTEWARDS.US <https://www.americanstewards.us/about/our-name/> (last visited May 4, 2017) (explaining the group’s name: “Through the divine hand of our Creator, our founding fathers established a government and guarantee of personal rights that give American citizens the ability to control our government . . . Stewardship is a distinct concept with its roots in biblical principles where man was given dominion over land and animals”). Voters in Garfield County, Colorado were similarly concerned about the county working with American Stewards. See John Stroud, *Garfield County Contract with Property Rights Group Gets Criticism*, GLENWOOD SPRINGS POST INDEPENDENT (July 17, 2012), <http://www.post-independent.com/news/garfield-county-contract-with-property-rights-group-gets-criticism/> (noting local concerns about county contract with American Stewards because of the group’s “ties to the oil and gas industry” and “alleged ties to the corporate-backed conservative lobbying group American Legislative Exchange Council (ALEC)”).

105. See Zaffos, *supra* note 104 (“Custer County, Idaho, had paid American Stewards more than \$23,000 as of August 2014, an HCN open-records request revealed, and Garfield County, Colorado, has paid the group more than \$26,000 since 2012.”). In September 2016, commissioners in Garfield County, Colorado, approved up to \$40,000 for American Stewards’ services in opposing the BLM’s Planning 2.0 process. See Garfield County, *Garfield County Board of Commissioners Meeting*, GARFIELD-COUNTY.GRANICUS.COM (Sept. 6, 2016)

County, Wyoming, used the group’s services<sup>106</sup> to help formulate a draft of the county’s coordination ordinance, which acknowledged that it “is the latest draft of the [Plan] following a review and recommended modifications provided by the American Stewards of Liberty, a consulting firm hired by Big Horn County to assist with the development of draft policy statements.”<sup>107</sup> In 2011, American Stewards sent a memorandum to county commissioners in Ravalli County, Montana, encouraging enactment of a coordination ordinance to address wolf management issues.<sup>108</sup> The memorandum was drafted by then-president of American Stewards, attorney Fred Kelly Grant,<sup>109</sup> whom Baker County

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[http://garfield-county.granicus.com/MediaPlayer.php?view\\_id=3&clip\\_id=1137](http://garfield-county.granicus.com/MediaPlayer.php?view_id=3&clip_id=1137) (video of county approving sole source contract with American Stewards of Liberty, at 2:45:00). See *supra* note 85 (describing the BLM’s Planning 2.0 process).

106. See Pomeroy, *supra* note 29 (“One of the organizations [Big Horn County] has used in developing the Natural Resource Plan is American Stewards of Liberty (ASL).”).

107. BIG HORN COUNTY PLAN, *supra* note 92, at \*1. In fact, American Stewards is a 501(c)(3) non-profit, American Stewards of Liberty, *About*, AMERICANSTEWARDS.US, <https://www.americanstewards.us/about/> (last visited May 4, 2017), which we point out to correct the Big Horn County’s statement that the group is a “consulting firm.” We do not address whether American Stewards might be unlawfully acting as an action organization by influencing legislation. See I.R.C. § 501(c)(3) (2016) (requiring that organizations with tax-exempt status not attempt to influence legislation as a substantial part of the group’s activities); see also Internal Revenue Service, *Lobbying*, IRS.GOV, <https://www.irs.gov/charities-non-profits/lobbying> (last visited May 4, 2017) (“An organization will be regarded as attempting to influence legislation if it contacts, or urges the public to contact, members or employees of a legislative body for the purpose of proposing, supporting, or opposing legislation, or if the organization advocates the adoption or rejection of legislation.”). American Stewards noted in its Fee Agreement with Ravalli County, Mont., that “[w]e do not advocate any particular policy nor will we assist or get involved in any local political issues or situations. We provide the education and the tools by which you can either utilize them for your benefit or not.” Fee Agreement, *supra* note 104, at 1.

108. Memorandum from Dan and Margaret Byfield, American Stewards of Liberty, to Ravalli Cnty. Comm’rs (Feb. 9, 2011) (reviewing county commissioner’s question “whether or not there was a way to resolve the negative impact the endangered listing and management of the wolves” was having in Ravalli County, and responding “of all counties impacted [by wolf recovery] across the west, Ravalli may be in the best position to assert, through coordination, a management plan that would be accepted.”).

109. *Id.* Fred Kelly Grant assisted the Hage/Byfield family in their long-running grazing rights case, see *supra* note 19, against the federal government. Jason Dearen ‘Sagebrush Rebellion’ Case Suffers Defeat, THE SEATTLE TIMES (Sept. 1, 2012), <http://www.seattletimes.com/nation-world/sagebrush-rebellion-case-suffers-defeat/>. Grant is a former president of American Stewards of Liberty, and he claims responsibility for ALEC’s decision to provide model coordination legislation on their website. See Stand & Fight Club, *About Fred Kelly Grant*,

commissioners placed on retainer several months before enacting the Baker County coordination ordinance.<sup>110</sup>

American Stewards misled county commissioners by suggesting commissioners have authority to require government-to-government consultation under the coordination provisions of federal law.<sup>111</sup> By heralding coordination as a potent—yet unrealized—brake on federal land

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STANDANDFIGHTCLUB.COM, <http://www.standandfightclub.com/about-fred-kelly-grant/> (last visited May 4, 2017). He is an outspoken conspiracy theorist on “Agenda 21,” arguing that a non-binding United Nations resolution to conserve natural resources is actually an international plot against rural America. See Ryan Sabalow, *Controversial Lawyer Defends Property Rights*, REDDING RECORD SEARCHLIGHT (Jan. 23, 2012), <http://www.redding.com/news/fred-kelly-grant-talks-agenda-21-coordination-with-local-activists-ep-375305599-354531551.html>; see also Leslie Kaufman & Kate Zernike, *Activists Fight Green Projects, Seeing U.N. Plot*, THE NEW YORK TIMES (Feb. 3, 2012), [http://www.nytimes.com/2012/02/04/us/activists-fight-green-projects-seeing-un-plot.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/02/04/us/activists-fight-green-projects-seeing-un-plot.html?pagewanted=all&_r=0) (“Across the country, activists with ties to the Tea Party are railing against all sorts of local and state efforts to control sprawl and conserve energy. [Agenda 21 activists] brand government action for things like expanding public transportation routes and preserving open space as part of a United Nations-led conspiracy to deny property rights and herd citizens toward cities.”); Zaffos, *supra* note 104 (current executive director of American Stewards of Liberty, Margaret Byfield, says she “learned the [coordination] strategy from Fred Kelly Grant, the Hages’ litigation chairman, who was president of American Stewards in 2006. Grant has promoted coordination in speeches to local governments while railing against the United Nations’ Agenda 21, a sustainable-development initiative some conservatives view as an international conspiracy against private property rights.”).

110. Brian Addison, *Baker County Working With Fred Kelly Grant to Protect Local Lands*, BAKER COUNTY PRESS (July 10, 2015), <http://oregonnews.uoregon.edu/lccn/2015260133/2015-07-10/ed-1/seq-3/>; see also Aaron West, *Political Group Turns to Obscure Clause to Protect Land*, BEND BULLETIN (Mar. 6, 2016), <http://www.bendbulletin.com/localstate/4071793-151/political-group-turns-to-obscure-clause-to-protect> (“According to Baker County Board of Commissioner meeting documents, Grant came and spoke in 2010 and also assisted the county in 2015 with creating its local natural resource plan, which now serves as a model for the Crook County [Oregon] Natural Resources PAC’s plan.”).

111. In addition to the American Stewards’ flawed legal analysis of what “coordination” means in federal statutes, see *supra* notes 98–103, the group’s website seems to declare coordination as the supreme law of the land. American Stewards of Liberty, *Coordination, the 4 “C’s”, and Supremacy*, AMERICANSTEWARDS.US, <https://www.americanstewards.us/programs/coordination/coordination-the-4-cs-and-supremacy/> (last visited May 4, 2017) (“Congress does have exclusive power over the federal lands. In the exercise of that exclusive power, Congress has mandated that the Bureau of Land Management and the Forest Service ‘coordinate’ their planning and management processes with local government. The coordination mandate is found in the Federal Land Policy Management Act and the National Forest Management Act. Both are federal statutes passed in accordance with Congress’ constitutional power, thus they are the supreme law of the land.”).

management, American Stewards has lured western counties into expending public funds for its services. County governments, in turn, are responding by enacting ordinances grounded on a misinterpretation of federal law.

*B. Case Study: The Baker County Natural Resources Plan*

The 2015 Baker County, Oregon, Natural Resources Plan is a prime example of a coordination ordinance. The well-publicized plan<sup>112</sup> was adopted by the county board of commissioners in September 2015 and amended in July 2016.<sup>113</sup> This Part explains the county’s position on a variety of issues, including land planning, roads, grazing, logging, mining, and special management area designations.

The county plan described the county’s “custom and culture,” including a brief history of the Oregon Trail, the region’s reliance on the mining and timber industries, and current county demographics.<sup>114</sup> During the County Supremacy movement,<sup>115</sup> the National Federal Lands Council assured westerners NEPA<sup>116</sup> required federal agencies to consider and protect a county’s codified “custom and culture.”<sup>117</sup> Evidently, Baker County continues to follow that advice, requiring in the plan that “[a]ny proposed change in land use must evaluate, mitigate, and minimize impacts to the customs and culture” of Baker County.<sup>118</sup> Other county coordination ordinances begin with similar “custom and culture”

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112. See, e.g., *supra* notes 5, 110.

113. BAKER COUNTY PLAN, *supra* note 9; BAKER COUNTY, OREGON, NATURAL RESOURCES PLAN (September 24, 2015) (original version).

114. BAKER COUNTY PLAN, *supra* note 9, at 7–8.

115. See *supra* notes 60–63.

116. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321–4337 (2012)).

117. See Florence Williams, *Sagebrush Rebellion II*, HIGH COUNTRY NEWS (Feb. 24, 1992), <http://www.hcn.org/issues/24.3/sagebrush-rebellion-ii-some-rural-countie-seek-to-influence-federal-land-use> (quoting the drafter of “custom and culture” ordinances, attorney Karen Budd, as explaining “NEPA . . . says the government must use all practicable means to protect our national heritage . . . Most people think of Indian bones and dinosaurs, but it could be just any use that’s occurred over long periods of time. Wouldn’t five generations of ranching be a form of custom and culture?”). The “national heritage” language in NEPA is in §101(b)(4) of the statute. 42 U.S.C. § 4331(b)(4) (“[I]t is the continuing responsibility of the Federal Government 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 . . . preserve important historic, cultural, and natural aspects of our national heritage.”).

118. BAKER COUNTY PLAN, *supra* note 9, at 15.



sections.<sup>119</sup> These “custom and culture” provisions are vestiges of the County Supremacy movement.<sup>120</sup>

The county plan announced its “requirements, needs, and expectations of federal and state agencies with land-use planning and decision-making powers within the boundaries of Baker County.”<sup>121</sup> These specifications included the county’s expectation that federal agencies will coordinate with the county on “all agency planning efforts and subsequent management decisions.”<sup>122</sup> Moreover, the county required federal agencies to use “on-the-ground monitoring and trend data (as opposed to computer modeling and other remotely-collected data)” to justify changes in federal land use planning.<sup>123</sup> The county also “direct[ed] that all decisions be based on current, relevant, peer reviewed science and data[.]”<sup>124</sup> For federal agencies undertaking NEPA reviews in Baker

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119. See, e.g., BIG HORN COUNTY PLAN, *supra* note 92, at A-14–15; GRANT COUNTY PLAN, *supra* note 97, at 5–8; KANE COUNTY PLAN, *supra* note 91, at 1–4; MALHEUR COUNTY PLAN, *supra* note 91, at 2-4-4; Pend Oreille Plan, *supra* note 28, at 6–7; RAVALLI COUNTY RESOLUTION, *supra* note 91, at 6–7.

120. See Reed, *supra* note 2, at 550.

The ‘custom and culture’ theory teeters upon the slenderest of reeds. The National Environmental Policy Act, relied upon by Ms. Budd as authority, contains in some 350 words of the introductory declaration of policy, the following as one of six broad general policy directions: ‘(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.’ From this paragraph Ms. Budd has first condensed to ‘historic, cultural, and natural aspects,’ then gone to *Webster’s Dictionary* to find that ‘culture’ is defined as including ‘customary beliefs’ and then gone to *Bouvier’s Law Dictionary* (1867 Edition!) to find a definition of ‘custom.’ The Budd syllogism is to take ‘cultural’ out of context, alter the word to ‘culture,’ find an outdated dictionary that includes ‘customary’ within a definition of ‘culture’ and then transmute ‘customary’ to ‘custom.’ Voila! ‘Custom and Culture.’ The result is not statutory construction but creative distortion.

*Id.*

121. BAKER COUNTY PLAN, *supra* note 9, at 9.

122. *Id.* at 11 (the plan stated “it is the express expectation of the County that federal and state agencies will give the County early notification of forthcoming decision-making and extend an early invitation to the County to participate in joint planning and consultation.”).

123. *Id.* at 14 (the county demanded that “federal and state agencies shall routinely solicit input and data from authoritative regional sources including Baker County.”).

124. *Id.* at 2.

County, the county plan required them to make “all practicable efforts . . . to reconcile inconsistencies of proposed actions” with the county plan.<sup>125</sup> No federal law, however, requires federal land planning to be consistent with local planning.<sup>126</sup>

Roads are the first land use addressed in the county plan.<sup>127</sup> The plan required federal agencies to ensure “there will be no net loss” to public land access in the county, and “[w]here there is no clear and overriding reason to close a particular road, it shall remain open.”<sup>128</sup> Further, the county plan declared that “Revised Statute (RS) 2477 rights-of-way, will be enacted at appropriate areas.”<sup>129</sup> The county plan required that “roads accessing grazing allotments, water developments, mining claims, foraging sites and other authorized land uses shall remain open.”<sup>130</sup> These provisions suggest that the county has complete authority to regulate travel routes across public lands.

The county plan addressed public lands grazing by proclaiming that “grazing on federal and state allotments and leases shall continue at historical stocking rates.”<sup>131</sup> The plan dictated a three-part test, which it claimed to impose on federal agencies before reducing grazing intensity to address range health.<sup>132</sup> These provisions are almost certainly

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125. *Id.* at 12 (where consistency is not possible, “Baker County expects that the federal agency shall engage with the County in conflict resolution and work with the County to mitigate any residual impacts to the County and its citizens.”).

126. *See supra* notes 77 (Forest Service regulations), 81, 86 (FLPMA regulations).

127. BAKER COUNTY PLAN, *supra* note 9, at 18.

128. *Id.* at 18.

129. *Id.* R.S. 2477 is the common term for an 1866 law that gave a broad grant of right-of-ways “for the construction of highways over public lands.” Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251 (codified at R.S. 2477, recodified at 43 U.S.C. § 932 (2012)). FLPMA repealed the law in 1976, subject to “valid existing rights.” Pub. L. No. 94-579, § 706(a), 90 Stat. 2793 (1976). Therefore, a county bears the burden of proving to a court that contemporary R.S. 2477 right-of-ways were constructed before 1976 and have been used in the same way—without abandonment—since 1976. *See, e.g.*, *S. Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 768–84 (10th Cir. 2005) (the burden of proof is on party asserting the right-of-way, describing factors that inform validity of claimed road and ruling that courts must decide validity of right-of-way, not agencies).

130. BAKER COUNTY PLAN, *supra* note 9, at 19.

131. *Id.* at 21.

132. *See id.* at 21–22 (“In the event that range health standards on a permit or lease are not being met, stocking rates will be reduced only in the event that: 1) failure to meet range health standards is established on the basis of current, on-the-ground monitoring data; 2) failure to meet range health standards is shown to be caused by current, as opposed to historic, livestock management practices; and 3) all adaptive management approaches have been exhausted.”). The county’s plan would give federal range managers the discretion to reduce grazing levels only if current

unconstitutional under conflict preemption principles.<sup>133</sup>

The county plan sought to dictate increased logging on public lands,<sup>134</sup> stipulating that “[o]n public lands, all tree mortality caused by forest fire and pests shall be harvested before additional loss of economic value occurs, in coordination with the Baker County Board of Commissioners.”<sup>135</sup> According to the county plan, the “County’s forest resources must be governed in the best interests of local citizens while promoting the health of the forests.”<sup>136</sup> These provisions suggest that local needs are superior to the needs of other public land users, when in fact, all Americans hold an equal claim of ownership to federal land.

The county plan claimed that all public lands traditionally open to mineral exploration must remain open to mining.<sup>137</sup> The county plan also required federal land plans to include discussion of the “economic importance” of mining to Baker County.<sup>138</sup> Further, the Baker County plan announced that “mineral development and production are not subject to unreasonable stipulations, Best Management Practices, mitigation measures, or reclamation bonds.”<sup>139</sup> Before federal agencies may withdraw public lands from mining, the plan required federal agencies to consider and disclose the economic effects of mineral withdrawal to Baker

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livestock management is harming the range. *See id.* at 22 (“[I]f failure to meet rangeland health standards is not due to *current* livestock management, stocking rates shall not be diminished and season of use will not be curtailed.”) (emphasis added). The plan would also require the agency to allow the harmful amount of grazing to resume as soon as the range health rebounds. *See id.* (“When range health returns to acceptable levels, suspended [animal unit months] shall be returned to active use by the next grazing season.”).

133. *See infra* notes 232–235 (explaining these provisions are conflict preempted).

134. *See* BAKER COUNTY PLAN, *supra* note 9, at 25 (“Forest management practices on public land within Baker County shall include a stable timber-harvesting program, which is essential to maintain healthy forest ecosystems and to provide employment and economic security to individuals and businesses in Baker County.”).

135. *Id.* at 27.

136. *Id.* at 25.

137. *Id.* at 30 (“Federal lands historically open for mineral access in Baker County shall remain open and all proposed road closures shall be coordinated with Baker County.”).

138. *Id.* at 30 (“The economic importance of exploration, development and production of locatable mineral resources shall be incorporated into all federal management agencies land and resource management plans.”).

139. *Id.* at 31 (emphasis omitted).

County’s economy.<sup>140</sup> Like the timber resource provisions,<sup>141</sup> the county’s stance on mining assumes that federal agencies must maximize natural resource production on public lands to benefit local residents.

Baker County’s plan opposed a variety of federal land management designations, including wilderness designation,<sup>142</sup> and required that “[m]anagement of lands with wilderness characteristics shall be coordinated with Baker County.”<sup>143</sup> Likewise, the county opposed federal Wild and Scenic river designations within the county and appeared to require federal agencies to co-manage those rivers with the county board of commissioners.<sup>144</sup> The county is similarly opposed to national monuments<sup>145</sup> as well as a multitude of other special land use designations.<sup>146</sup>

The county assumed an imperious stance on some issues, declaring, for example, that “*Baker County shall direct* the US Forest Service, Bureau of Land Management, [sic] other relevant public agencies to manage the watershed, including the municipal watersheds, to meet the multiple needs of residents and promote healthy forests.”<sup>147</sup> The plan discouraged establishing instream flows meant to improve water quality and wildlife habitat.<sup>148</sup> It also required federal agencies to incorporate local fire association plans into federal fire control plans<sup>149</sup> and asserted that whenever “grazing on public lands is temporarily suspended due to fire, *grazing shall recommence* on the basis of case-by-case monitoring and site-specific rangeland health determinations, as opposed to fixed

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140. *See id.* at 31 (“Prior to initiating the administrative withdrawal of public lands from mineral entry, the agency shall carefully take into account and document for the record; 1) the impacts to rural communities affected by the withdrawal; 2) the economic value of the mineral resources foregone; 3) the economic value of the resources being protected, and; 4) an evaluation of the risk that the renewable resources within the minerals surface use [sic] regulations.”).

141. *See supra* notes 134–136.

142. BAKER COUNTY PLAN, *supra* note 9, at 34.

143. *Id.* at 34.

144. *See id.* at 35 (“Any existing or established Wild and Scenic River occurring within Baker County shall be managed by the designating federal agency in coordination with Baker County.”).

145. *See id.* (“Baker County oppose [sic] the use of the Antiquities Act for designation of National Monuments.”).

146. *See id.* (expressing county opposition to “National Conservation Areas, National Research Areas, National Recreation Areas, Outstanding Forest Areas, Outstanding Natural Areas, Cooperative Management and Protection Areas, Headwaters Forest Reserves, National Historic Trails and National Scenic Trails”).

147. *Id.* at 44 (emphasis added).

148. *Id.* at 40 (“It is Baker County policy that in-stream transfers will be discouraged through conserved water transfers, instream leases and/or purchases if the upstream users are negatively impacted from the historic beneficial use.”).

149. *Id.* at 46.

timelines.”<sup>150</sup> The county plan seemed to assume that the county government has plenary authority to control land use decision-making on federal public lands.

The Baker County Natural Resources Plan aimed to affect nearly every aspect of federal land planning. The plan employed mandatory language at length, suggesting to its constituents that the coordination provisions of FLPMA and NFMA give the county board of commissioners great power over federal land planning and management decisions. These suggestions are erroneous interpretations of the county’s role in federal law.<sup>151</sup>

## V. ANALYZING THE COORDINATION ORDINANCES

Federal law allows some local regulation on federal land. In 1987, the Supreme Court issued a landmark opinion on federal preemption, land planning, and environmental regulation in *California Coastal Commission v. Granite Rock Co.*, which upheld state environmental regulation of miners on national forests.<sup>152</sup> This Part examines the *Granite Rock* decision and subsequent case law<sup>153</sup> to consider the extent of permissible local control over land use on federal land. Using the Baker County, Oregon Natural Resources Plan as an archetypical coordination ordinance, it addresses the county plan under the preemption analysis outlined in *Granite Rock*.<sup>154</sup>

[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given *field*, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it *actually conflicts* with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle

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150. *Id.* (emphasis added).

151. *See infra* Section V (addressing the constitutionality of the Baker County plan under field preemption and conflict preemption analyses).

152. 480 U.S. 572, 594 (1987).

153. *See, e.g.*, *Bohmker v. State*, 172 F. Supp. 3d 1155, 1164 (D. Or. 2016), *appeal docketed*, No. 16-35262 (state moratorium on motorized instream-mining not preempted because the law was a reasonable environmental regulation); *People v. Rinehart*, 377 P.3d 818, 829–30 (Cal. 2016) (state may restrict certain mining techniques on public lands to protect other resources).

154. The county plan is not expressly preempted because neither NFMA, FLPMA, nor agency regulations explicitly state that federal land plans preempt state plans.

to the accomplishment of the full purposes and objectives of Congress[.]<sup>155</sup>

This Part demonstrates that federal law preempts the Baker County plan.

#### A. County Plans and Field Preemption

In *Granite Rock*, the Supreme Court presumed that the federal government has exclusive authority to conduct land use planning on federal lands.<sup>156</sup> The Court distinguished environmental regulation from land use planning,<sup>157</sup> and in the years following *Granite Rock*, courts have upheld state and local authority over public lands where the state and local bodies exercised environmental regulation authority.<sup>158</sup> The county coordination ordinances, however, are not framed as environmental regulations. Instead, they operate as land planning directives, which the Supreme Court would consider unenforceable under field preemption.<sup>159</sup>

In *Granite Rock*, the California legislature enacted environmental regulations for mining operations in the coastal zone.<sup>160</sup> At the time California adopted the law, the Granite Rock mining company already operated under a federally-approved plan of operations in the Los Padres National Forest.<sup>161</sup> When the state instructed the company to apply for a

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155. *Granite Rock*, 480 U.S. at 581 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)) (internal citations omitted) (emphasis added). This same preemption analysis applies to county ordinances. *Hillsborough Cnty., Fla. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985) (“[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of state laws.”).

156. *See infra* notes 169–170 and accompanying text.

157. *See infra* notes 163–165 and accompanying text.

158. *See infra* notes 184–199 and accompanying text.

159. *See Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983) (“Absent explicit preemptive language, Congress’ intent to supersede state law altogether may be found from a ‘scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it,’ ‘because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’”).

160. *Granite Rock*, 480 U.S. at 576.

161. *Id.* Granite Rock submitted its five-year plan of operations to the Forest Service in 1980. *Id.* In 1981, the Forest Service completed its NEPA analysis and approved the company’s plan of operations, and Granite Rock began mining. *Id.* In 1983, the California law requiring a state environmental permit went into effect, and Granite Rock filed suit against the state. *Id.* at 576–77. Granite Rock did not apply for a state permit, and continued its operations. *Id.* at 578. By the time the Supreme Court issued its opinion in 1987, Granite Rock’s plan of operations had expired. *Id.* at 577–78.

state resource protection permit, Granite Rock filed for an injunction in federal court, arguing the Mining Act of 1872 preempted state environmental regulations on public land.<sup>162</sup>

In *Granite Rock*, the Supreme Court distinguished Congress's authority over land use planning from its environmental regulatory powers on public land.<sup>163</sup> The Court reasoned that land use planning and environmental regulation are distinct,<sup>164</sup> explaining, "[l]and use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits."<sup>165</sup> The Supreme Court viewed the California permit requirement as a permissible environmental regulation,<sup>166</sup> ruling on conflict preemption grounds that federal law did not preempt the state's resource protection permit requirements because (1) neither the Mining Act of 1872 nor Forest Service regulations demonstrated congressional intent to preempt state environmental laws; (2) the state environmental

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162. *Id.* at 577. The plaintiffs in *Granite Rock* relied on the Ninth Circuit's holding in *Ventura County v. Gulf Oil Corp.* for the rule that states do not hold "veto power" over federally authorized activities. *See Granite Rock Co. v. Cal. Coastal Comm'n*, 590 F. Supp. 1361, 1372–73 (N.D. Cal. 1984). In *Ventura County*, the Ninth Circuit considered a county ordinance prohibiting oil exploration without a county permit in open space zoning areas. 601 F.2d 1080, 1082 (9th Cir. 1979), *aff'd without opinion*, 445 U.S. 947 (1980). The court ruled that the Mineral Lands Leasing Act of 1920 conflict-preempted the county ordinance, *id.* at 1083, explaining "[t]he federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress." *Id.* at 1084 (emphasis added).

Professor Leschy pondered why the Supreme Court never cited *Ventura County* in its *Granite Rock* analysis, declaring "*Ventura's* continuing viability remains at best a puzzle." John D. Leschy, *Granite Rock and the States' Influence Over Federal Land Use*, 18 ENVTL. L. 99, 109–11 (1987). Leschy suggested the Court's decision in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), "seriously undermined if not destroyed *Ventura County's* precedential value." Leschy, *supra* note 162, at 118. Today, Professors Coggins and Glicksman believe the *Ventura County* opinion "probably is no longer good law." GEORGE C. COGGINS & ROBERT D. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW 5-32 n.3 (Thomson/West 2d ed., 2007).

163. *See Granite Rock*, 480 U.S. at 581 ("We agree with *Granite Rock* that the Property Clause gives Congress plenary power to legislate the use of the federal land on which *Granite Rock* holds its unpatented mining claim. The question in this case, however, is whether Congress has enacted legislation respecting this federal land that would pre-empt any requirement that *Granite Rock* obtain a California Coastal Commission permit." (emphasis added)).

164. *See id.* at 588 ("Congress'[s] treatment of environmental regulation and land use planning as generally distinguishable calls for this Court to treat them as distinct, until an actual overlap between the two is demonstrated in a particular case.").

165. *Id.* at 587.

166. *Id.* at 585–89.

regulation did not ban land uses allowed by the federal government; and (3) the federal Coastal Zone Management Act<sup>167</sup> of 1972 authorized state regulatory authority in the geographic area of Granite Rock’s mine.<sup>168</sup>

The *Granite Rock* decision presumed federal law preempted state land planning for federal lands.<sup>169</sup> Indeed, every Justice on the *Granite Rock* Court—which split 5-4 on the validity of the state’s permit requirement—would have ruled that federal law preempted state land use planning for federal lands.<sup>170</sup> Where the Justices disagreed was on the issue of whether California’s permit requiring environmental protection measures infringed on federal land planning.<sup>171</sup> The Baker County plan evinced no intent to serve as an environmental regulation. Instead, it was framed entirely as a strategy for public land management in Baker County.<sup>172</sup> In NFMA and FLPMA, Congress granted land planning authority to federal agencies,<sup>173</sup> and the coordination ordinances infringe on this field of federal regulatory authority.<sup>174</sup>

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167. Pub L. No. 109-58, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451–1465 (2012)).

168. *Granite Rock*, 480 U.S. at 589–93.

169. *Id.* at 585 (“For purposes of this discussion and without deciding this issue, we may assume that the combination of the NFMA and the FLPMA pre-empt the extension of state land use plans onto unpatented mining claims in national forest lands.”); *Id.* at 593 (remarking that “federal land use statutes and regulations [arguably express] an intent to pre-empt state land use planning”).

170. *See id.* at 585 (O’Connor, J. writing for the majority) (“[W]e may assume that the combination of the NFMA and the FLPMA pre-empt the extension of state land use plans onto unpatented mining claims in national forest lands.”); *Id.* at 600–01 (Powell & Stevens, JJ., concurring in part and dissenting in part) (Justice Powell’s dissent from the majority’s distinction between land use planning and environmental regulation, arguing that both are preempted by federal authority over public lands); *Id.* at 607–08 (Scalia & White, JJ., dissenting) (Justice Scalia’s dissent, arguing the California law “is plainly a land use statute, and the permit that statute requires Granite Rock to obtain is a land use control device. . . . Since, as the Court’s opinion quite correctly assumes. . . . state exercise of land use authority over federal lands is pre-empted by federal law, California’s permit requirement must be invalid.”).

171. *See id.*; *see also id.* at 596 (Powell & Stevens, JJ., concurring in part and dissenting in part) (“FLPMA only requires the Secretary to listen to the States, not obey them.”).

172. *See, e.g., supra* notes 128 (road management generally), 130 (roads accessing economically productive areas), 131 (grazing rates), 135 (timber harvest), 139 (mineral development), 150 (post-fire range management).

173. *See supra* Section III (discussing federal land use planning under NFMA and FLPMA).

174. *See Granite Rock*, 480 U.S. at 589 (“If the Federal Government occupied the field of environmental regulation of unpatented mining claims in national forests . . . state environmental regulation of Granite Rock’s mining activity would be pre-empted.”).



After *Granite Rock*, lower courts refined the extent to which state environmental regulation could burden Congress's discretion to regulate public land uses. In these cases, the courts uniformly viewed the state or local law in question as environmental regulations, which raised conflict (but not field) preemption issues.<sup>175</sup> Thus, cases following *Granite Rock* have yet to explore the Supreme Court's suggestion in *Granite Rock* that federal law occupies the field of federal land planning, thereby preempting all state or local land planning for public lands.

A good example of a court following *Granite Rock* is *South Dakota Mining Association v. Lawrence County*, involving a county-enacted ordinance that prohibited new permits for surface metal mining in much of the Black Hills National Forest.<sup>176</sup> Because surface mining was the only profitable technique for local miners, the ordinance functioned as a de facto ban on all mining in the area.<sup>177</sup> When mining companies sued the county, claiming federal law preempted the mining ban,<sup>178</sup> the county argued the ordinance was "a reasonable environmental regulation of mining on federal lands."<sup>179</sup> Like the Supreme Court in *Granite Rock*, the United States Court of Appeals for the Eighth Circuit suggested that federal land use planning occupied the field of authority to manage public lands.<sup>180</sup> But because the county law interfered with only one federal statute, the Eighth Circuit applied the conflict preemption analysis from *Granite Rock*,<sup>181</sup> reasoning that "[t]he ordinance's de facto ban on mining on federal land acts as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act."<sup>182</sup> Consequently, the Eighth Circuit affirmed the district court's ruling that the county law was unenforceable under conflict preemption.<sup>183</sup>

The decisions in *Granite Rock* and *South Dakota Mining Association* led a federal district court to decide that federal law did not

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175. See *infra* notes 181, 189, 190, 198, and 208.

176. 155 F.3d 1005, 1007 (8th Cir. 1998).

177. *Id.* at 1007.

178. *Id.*

179. *Id.* at 1009.

180. See *id.* at 1011 ("A local government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution."); *Id.* (acknowledging that in *Granite Rock*, "the Court first assumed without deciding that state land use regulations, which [the Court] defined as laws 'that in essence choose[] particular uses of land,' were preempted.").

181. *Id.* at 1009–12.

182. *Id.* at 1011.

183. *S.D. Mining Ass'n v. Lawrence Cnty.*, 997 F. Supp. 1396, 1405–06 (D.S.D. 1997) ("[T]his Court holds that federal law, specifically the Mining Act of 1872 preempts local law."), *aff'd*, 155 F.3d at 1011 ("The district court correctly ruled that the ordinance was preempted.").

preempt a state moratorium on motorized mining in riparian areas.<sup>184</sup> In *Bohmker v. State*, the Oregon legislature passed a seven-year ban on using motorized equipment to mine riverbeds and banks to protect water quality and salmon habitat.<sup>185</sup> However, unlike the ordinance in *South Dakota Mining Association*, the Oregon law allowed miners to continue using restricted mechanized equipment outside of protected stream areas, as well as non-motorized techniques inside the regulated river corridors.<sup>186</sup> Like *Granite Rock* and *South Dakota Mining Association*,<sup>187</sup> the *Bohmker* court distinguished land planning from environmental regulation.<sup>188</sup> Relying on *Granite Rock*, the court held that the moratorium was “a reasonable environmental regulation” because the measure aimed to protect fish, wildlife, water quality, and tribal use.<sup>189</sup> Under *Bohmker*, a narrowly tailored, temporally limited restriction of one mining technique in specific areas—intended to protect the environment—is not a “land use law” preempted by NFMA or FLPMA.<sup>190</sup>

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184. *Bohmker v. State*, 172 F. Supp. 3d 1155, 1164–65 (D. Or. 2016).

185. *Id.* at 1159–60.

186. *Id.* at 1164–65.

187. *See supra* notes 163–165, 180.

188. *See Bohmker*, 172 F. Supp. 3d at 1164.

[T]he [*Granite Rock*] Court found that land use planning and environmental regulation, while theoretically could overlap in some cases, are distinct activities, capable of differentiation. ‘Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.’ Because the [*Granite Rock*] Court found that the stated purpose of the California permitting scheme was to regulate environmental effects, not regulate land use, the Court did not reach a decision on the merits of federal land use preemption. Similarly, the stated purpose of [the mining ban in *Bohmker*] is to regulate the environmental impacts of the prohibited activity—in this case, motorized instream mining.

*Id.* (citations omitted).

189. *Id.* at 1163–64.

190. *Id.* at 1163–64 (reviewing the Supreme Court’s language in *Granite Rock* that state land plans for national forest lands would be preempted by federal regulations and holding that federal regulations did not preempt the Oregon moratorium because the state law “does not mandate particular uses of the land, nor does it prohibit all mining altogether.”). Similarly, in *Pringle v. Oregon*, a federal district court upheld Oregon’s ban on recreational suction dredge mining within scenic waterways because the state allowed all other methods of recreational mining in the protected areas. No. 2:3-CV-00309, 2014 WL 795328, at \*7–8 (D. Or. 2014)

Under *Granite Rock*, states may influence which activities are allowable on public land by imposing environmental protection conditions not required by the Forest Service or BLM.<sup>191</sup> A recent decision by the Supreme Court of California concerning suction dredge mining is illustrative. In *People v. Rinehart*, the court unanimously held that the state could prohibit suction dredge mining on public lands to protect other natural resources.<sup>192</sup> The defendant miner argued that the banned mining technique was the only profitable method of mining.<sup>193</sup> Citing *South Dakota Mining Association*,<sup>194</sup> the defendant asserted the state law amounted to a de facto ban on mining and was therefore preempted by the Mining Law of 1872.<sup>195</sup> But the California court distinguished the Eighth Circuit's opinion in *South Dakota Mining Association*, explaining, "Congress could have made express that it viewed mining as the highest and best use of federal land wherever minerals were found or could have delegated to federal agencies exclusive authority to issue permits and make accommodations between mining and other purposes."<sup>196</sup> However, it did neither, so the court reasoned that federal mining law required miners to comply with state law,<sup>197</sup> ruling that the state's ban on suction dredge mining was not preempted because federal law did not guarantee miners

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(rejecting a miner's argument that the Oregon law operated like the de facto ban on mining struck down in *South Dakota Mining Association*).

191. *Granite Rock* and subsequent cases have not determined what state or local laws constitute an impermissible land plan because in all of these cases the courts considered the validity of the contested state laws as environmental regulations. See *supra* notes 166, 179, 189, and *infra* note 206. However, in *Granite Rock* the Supreme Court provided some guidance as to the difference between permissible environmental regulations and impermissible land use laws:

The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. *Land use planning in essence chooses particular uses for the land*; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 587 (1987) (emphasis added).

192. 377 P.3d 818, 829–30 (Cal. 2016).

193. *Id.* at 820.

194. *Id.* at 829–30.

195. *Id.* at 823–24.

196. *Id.* at 830.

197. *Id.*

“a right to mine immunized from exercises of the states’ police powers.”<sup>198</sup> Like the cases before it, *Rinehart* recognized a state’s authority to regulate lawful uses of public lands in order to protect the environment.<sup>199</sup>

Taken together, these cases demonstrate that states and counties have sufficient authority to require environmental protection measures for public land users. But with the exception provisions in the Baker County plan encouraging efforts to combat invasive species on public lands and address erosion issues,<sup>200</sup> the county plan makes no effort to operate as an environmental regulation. Indeed, every other provision in the county plan is less environmentally protective than the federal agency’s requirements.<sup>201</sup> Unlike the laws in *Granite Rock* and subsequent cases, the Baker County plan functions as a public land management plan, not a reasonable environmental regulation. Therefore, the county plan is field preempted by the federal government’s authority to regulate public lands under NFMA and FLPMA, and serves only as an unenforceable policy statement.

### B. County Plans and Conflict Preemption

In *Granite Rock* and ensuing cases, courts applied a conflict preemption analysis to state and county regulations that burdened legal uses of public land. The Supreme Court has repeatedly explained that “[i]f Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it *actually conflicts* with federal law[.]”<sup>202</sup> Thus, even if the Baker County plan and other

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198. *Id.* at 820.

199. *See id.* at 829 (“The federal statutory scheme does not prevent states from restricting the use of particular mining techniques based on their assessment of the collateral consequences for other resources.”).

200. *See* BAKER COUNTY PLAN, *supra* note 9, at 28–29 (encouraging “early detection, rapid response and follow-up monitoring” to combat invasive and noxious species in Baker County); *Id.* at 41 (“Federal agencies shall work in partnership with permittees and other land managers on riparian management to ensure that monitoring data are current, and potential issues regarding stream bank erosion, channel depth, etc. are addressed early through adaptive management approaches.”).

201. *See supra* Section IV.B. (describing county demands and positions on public land management issues), Section V.B. (discussing conflicts between the county plan and federal statutes).

202. *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)) (citations omitted) (emphasis added). This same preemption analysis applies to county ordinances. *Hillsborough Cnty, Fla. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985) (“[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of state laws.”).

coordination ordinances were not field preempted by NFMA and FLPMA, the coordination ordinances are still unconstitutional under the Supremacy Clause if the county plans conflict with federal law.

Several conflict preemption cases are illustrative. In *Kleppe v. New Mexico*, the Supreme Court unanimously ruled that a federal law protecting wild horses and burros preempted a state's traditional authority to manage wildlife on public lands.<sup>203</sup> The Court affirmed state authority to regulate civil and criminal issues on public lands but explained that when Congress enacts public lands legislation, "the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause."<sup>204</sup> Consequently, in *Granite Rock*, the Supreme Court found no conflict between federal environmental laws and the state environmental permit requirement.<sup>205</sup>

None of the *Granite Rock* line of cases decided whether counties (as opposed to states) may require environmental protection measures on federal lands.<sup>206</sup> However, in *Boundary Backpackers v. Boundary County*, the Idaho Supreme Court considered the validity of a county ordinance that required all federal and state land use planning to conform to a county land use plan.<sup>207</sup> The court ruled the entire plan unconstitutional under conflict preemption.<sup>208</sup>

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203. 426 U.S. 529, 545–46 (1976).

204. *Id.* at 543. The Court continued:

The Federal Government does not assert exclusive jurisdiction over the public lands in New Mexico, and the State is free to enforce its criminal and civil laws on those lands. But where those state laws conflict with the Wild Free-roaming Horses and Burros Act, or with other legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede.

*Id.*

205. *See supra* notes 166–168.

206. In *South Dakota Mining Association*, Lawrence County argued its ban on new mining permits was a reasonable environmental regulation, permissible under *Granite Rock*. *S.D. Mining Ass'n v. Lawrence Cnty.*, 155 F.3d 1005, 1009 (8th Cir. 1998). The Eighth Circuit, however, refused to view the law as a reasonable environmental regulation. *See id.* at 1011 ("[U]nlike *Granite Rock*, we are not faced with a local permit law that sets out reasonable environmental regulations governing mining activities on federal lands. The ordinance's de facto ban on mining on federal land acts as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act."). Thus, although the court ruled that the Lawrence County ordinance was not a valid environmental regulation, the court did not suggest that counties cannot require environmental regulation on public lands.

207. *Boundary Backpackers v. Boundary Cnty.*, 913 P.2d 1141, 1143–44 (Idaho 1995).

208. *Id.* at 1147–48.

The county plan in *Boundary Backpackers* was quite similar to the Baker County plan, purporting to require federal agencies to obtain county permission before designating federal wild and scenic rivers, adjusting federal land boundaries, or revising federal land plans within the county.<sup>209</sup> The ordinance also required federal and state agencies to coordinate with the county board of commissioners prior to taking action that might affect the county’s plan.<sup>210</sup> Similarly, the Baker County plan requires federal agencies to partner with Baker County commissioners in harvesting timber<sup>211</sup> or managing wild and scenic rivers.<sup>212</sup>

The Idaho Supreme Court surveyed numerous federal statutes that conflicted with the local plan’s requirements for federal land management.<sup>213</sup> For example, the county plan prohibited federal agencies from acquiring property rights in the county without ensuring “parity in land ownership,” but the court explained that requirement conflicted with provisions in the Wild and Scenic Rivers Act and FLPMA authorizing federal land acquisitions.<sup>214</sup> The court noted conflicts between the Endangered Species Act (“ESA”) and provisions in the county plan requiring federal agencies to receive county concurrence on changes to land use plans and wildlife habitat designations.<sup>215</sup> The county plan also conflicted with procedures in the Wilderness Act for the designation of federal wilderness areas.<sup>216</sup> Consequently, the court declared the ordinance unenforceable under conflict preemption, citing *Granite Rock*,<sup>217</sup> explaining “[n]one of the federal land laws give local

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209. *Id.* at 1144.

210. *Id.* at 1143–44. The Boundary County plan appears to have defined “coordination” as compliance with the county plan. *See id.* at 1143 (quoting from the plan: “Federal and state agencies proposing actions that will impact [the plan] shall prepare and submit in writing, and in a timely manner, report(s) on the purposes, objectives and estimated impacts of such actions, including economic, to [the board]. These report(s) shall be provided to [the board] for review and *coordination* prior to federal or state initiation of action.”) (emphasis added); *see also id.* at 1144 (quoting from the plan: “Any federally proposed designation of Wild and Scenic Rivers and all federal policies regarding riparian management in Boundary County *shall be coordinated with [the board] and shall comply with any County water use plan.*”) (emphasis added).

211. *See supra* note 135.

212. *See supra* note 144.

213. *Boundary Backpackers*, 913 P.2d at 1147–48 (reasoning that various provisions of the county plan conflicted with the Multiple-Use Sustained-Yield Act of 1960, the Wilderness Act, the Wild and Scenic Rivers Act, the Forest and Rangeland Renewable Resources Planning Act of 1976, the Endangered Species Act, and FLPMA).

214. *Id.* at 1147.

215. *Id.*

216. *Id.*

217. *Id.* at 1146.

governmental units . . . veto power over decisions by federal agencies charged with managing federal land.”<sup>218</sup> Even though the county ordinance in *Boundary Backpackers* contained a severability clause<sup>219</sup> similar to the Baker County plan,<sup>220</sup> the court ruled that the plan was unconstitutional in its entirety.<sup>221</sup>

Like the ordinance in *Boundary Backpackers*, the Baker County plan is permeated with provisions that conflict with federal land laws. For instance, the plan requires federal agencies to not acquire or condemn private property.<sup>222</sup> This provision conflicts with FLPMA and the Fifth Amendment of the United States Constitution, which allow the federal government to acquire interests in private property by purchase, exchange, or eminent domain.<sup>223</sup> The Baker County plan also requires federal agencies to consider Baker County’s “custom and culture” and local economy in developing recovery efforts under the Endangered Species Act,<sup>224</sup> and to mitigate the effects of ESA listings on Baker County’s economy.<sup>225</sup> Congress did not require either of these considerations in the ESA; actually, the statute requires the government’s recovery plans to give priority to aiding species that are imperiled by economic activity like development.<sup>226</sup>

The Baker County plan would allow seemingly unregulated

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218. *Id.* at 1147.

219. *Id.* at 1148.

220. BAKER COUNTY PLAN, *supra* note 9, at 3 (“Should a court declare any part of these policies void, unenforceable, or invalid, the remaining provisions shall remain in full force and effect.”).

221. *See Boundary Backpackers*, 913 P.2d at 1148 (“Despite the obvious intent of the board to preserve the remainder of the ordinance if portions are declared unconstitutional, the portions of the ordinance that are preempted by federal law are so integral and indispensable to the ordinance, we conclude the entire ordinance must fall.”).

222. BAKER COUNTY PLAN, *supra* note 9, at 13 (“Baker County is dedicated to preserving [private property interests on public lands], and expects that federal agencies shall not attempt to terminate, or otherwise demand the transfer or relinquishment of, such holdings in whole or in part from private individuals.”). The ordinance struck down in *Boundary Backpackers* contained a similar provision. *See supra* note 214.

223. *See* 43 U.S.C. § 1715(a) (2012) (“[T]he Secretary, with respect to the public lands and the Secretary of Agriculture, with respect to the acquisition of access over non-Federal lands to units of the National Forest System, are authorized to acquire pursuant to this Act by purchase, exchange, donation, or eminent domain, lands or interests therein.”); U.S. CONST. amend. V (recognizing the sovereign power of the federal government to take private property for public use if it provides just compensation).

224. BAKER COUNTY PLAN, *supra* note 9, at 36.

225. *Id.* at 37.

226. *See* 16 U.S.C. § 1533(f)(1)(A) (2012).

mining on federal lands. The county plan announced that “[i]t is the policy of Baker County that mineral development and production are not subject to unreasonable stipulations, Best Management Practices, mitigation measures or reclamation bonds.”<sup>227</sup> However, federal law grants the Forest Service and BLM considerable authority to approve or disapprove mining plans and to require bonds or mitigation measures.<sup>228</sup> Thus, the county ordinance clashes with Congress’s directives to the Forest Service and BLM about managing mineral lands as well as the agencies’ interpretation of this authority to regulate mining.

The county plan also conflicts with federal law on national monuments, grazing regulation, and alternative energy siting. The Antiquities Act authorizes the President to establish national monuments on federal lands,<sup>229</sup> but the Baker County plan “opposes the designation of any National Monument within its borders unless the proposal is coordinated with the County and is strongly supported by the local community.”<sup>230</sup> In FLPMA, Congress granted the Forest Service and BLM the authority to decide grazing closures,<sup>231</sup> but the Baker County plan requires land managers to satisfy a three-part test before reducing grazing pressure to improve range health.<sup>232</sup> FLPMA allows the Secretaries of Interior and Agriculture to grant rights-of-way for energy production on public land,<sup>233</sup> but the county plan proclaims “[e]xcept for geothermal development, there will be no development of any alternative energy sources on forestland.”<sup>234</sup> The county’s position on all of these

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227. BAKER COUNTY PLAN, *supra* note 9, at 31 (emphasis omitted).

228. *See* 43 U.S.C. § 1732(b) (“In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”); 43 C.F.R. § 3809.1–900 (2017) (requiring bonds, plans of operations, reclamation plans, mitigation, and other criteria for mining on BLM lands); 16 U.S.C. § 478 (2012) (“[Miners] must comply with the rules and regulations covering such national forests.”); 16 U.S.C. § 551 (2012) (granting the Secretary of Agriculture authority to regulate the occupancy and use of national forests, and to protect them from destruction); 36 C.F.R. § 228.1–15 (2017) (requiring bonds, plans of operations, reclamation plans, mitigation, and other criteria for mining on Forest Service lands).

229. 54 U.S.C. § 320301 (2012); *see, e.g.*, Santa Rosa and San Jacinto Mountains National Monument Act of 2000, Pub. L. No. 106-351, 114 Stat. 1362 (2000) (codified at 16 U.S.C. 431 (2012)); *Tulare County v. Bush*, 306 F.3d 1138, 1144 (D.C. Cir. 2002) (affirming district court’s dismissal of challenge to President’s authority to designate monuments).

230. BAKER COUNTY PLAN, *supra* note 9, at 35.

231. 43 U.S.C. § 1752(a) (2012).

232. *See supra* note 132.

233. 43 U.S.C. §§ 1761–1770.

234. BAKER COUNTY PLAN, *supra* note 9, at 24. The plan explains the county’s position as “due to the site disturbance and road building for most types of energy projects.” *Id.*



public land management issues frustrates the purpose of federal law by attempting to establish public land policies different than Congress requires. Therefore, under *Granite Rock*, the Supreme Court would likely find the Baker County Natural Resources Plan unenforceable under conflict preemption.<sup>235</sup>

Under *Granite Rock* and conflict preemption principles, neither states nor counties may impose management directives conflicting with federal law. In *South Dakota Mining Association*, the Eighth Circuit ruled that a county ordinance was void under conflict preemption where the ordinance conflicted with one federal statute.<sup>236</sup> Here, the Baker County plan conflicts with numerous federal statutes, much like the county ordinance the Idaho Supreme Court ruled unenforceable in *Boundary Backpackers*.<sup>237</sup> Thus, even supposing NFMA, FLPMA, and *Granite Rock* do not field-preempt coordination ordinances like the Baker County plan,<sup>238</sup> federal law preempts the Baker County plan under conflict-preemption. On most public lands issues, the Baker County plan is singularly pro-development, and therefore contrary to agency regulations, land plans, and statutory directives.

## VI. WHAT CAN COUNTIES ACTUALLY DO?

Under NFMA, FLPMA, and agency regulations, county governments can play an important role in federal land management decisions. In the existing legal framework, the federal government encourages local governments to share local perspectives and partner with agencies in finding solutions to land management issues.<sup>239</sup> Coordination ordinances announcing local sentiment on public lands management may serve this purpose.

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235. See *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) ("If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it *actually conflicts* with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.") (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)) (internal citations omitted) (emphasis added). This same preemption analysis applies to county ordinances. *Hillsborough Cnty., Fla. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985) ("[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of state laws.").

236. See *supra* notes 181–183.

237. See *supra* notes 207–221.

238. See *supra* Section V.A.

239. See *supra* Section IV.

The problem with coordination ordinances like the Baker County plan is that county commissioners seem to believe their ordinances lay the foundation for negotiation with federal agencies. Although federal law invites county governments to come to the table ready to teach, learn, or explore management options,<sup>240</sup> the Baker County plan is rigid and inflexible on virtually every aspect of federal land use. Counties have the opportunity to help shape land management decisions because federal land managers often have discretion in land planning.<sup>241</sup> Unfortunately, coordination ordinances like the Baker County plan squander the opportunity to effectively influence public land planning by taking positions directly contrary to what Congress has required in natural resources statutes.

Federal law encourages counties to be proactive in engaging their local land managers on public lands issues. Nearly twenty-five years ago, an attorney for Harney County, Oregon<sup>242</sup> advised the county government, “[i]f the counties intend to play an effective role in public land management then we recommend that they become involved early in the planning process, raise consistency issues early, understand their own statutory limitations, and provide the federal agencies with clear statements as to priorities.”<sup>243</sup> This advice remains true today. The best way for counties to influence federal land planning and management

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240. See *supra* Section III (describing the statutory and regulatory meaning of “coordination” under NFMA and FLPMA).

241. In 1993, Judge Dale White of Harney County, Oregon, requested attorney Ronald S. Yockim to review a Harney County ordinance that asserted authority to manage federal lands. See Memorandum from Ronald S. Yockim, Attorney, to Judge Dale White, Harney Cnty. Court (Dec. 31, 1993). Yockim advised:

[A] local government drafting regulations with respect to federal lands should give careful attention to whether preemption has occurred and to what degree the land manager still retains any discretion to act. It is in those areas where the action has been left to the discretion of the land manager that the county would have the most ability to influence federal land management practices.

*Id.*

242. Harney County is home to the Malheur National Wildlife Refuge, which the Bundy occupiers seized in January 2016. See *supra* notes 3–4; see also Michael C. Blumm & Olivier Jamin, *The Property Clause and Its Discontents: Lessons From the Malheur Refuge Occupation*, 43 *ECOLOGICAL L.Q.* at 16–18 (reviewing the Bundy occupation of the Malheur refuge and the group’s constitutional arguments) (forthcoming 2017), available at <https://ssrn.com/abstract=2817205>.

243. *Id.*

decisions is, as Professor Michelle Bryan has argued, to learn about the relevant processes and get involved early.<sup>244</sup>

For example, the Malheur Wildlife Refuge Comprehensive Conservation Plan (“CCP”)<sup>245</sup> was the result of highly collaborative planning efforts between federal and local parties.<sup>246</sup> In October 2016, participants in the planning effort for the Malheur refuge—including ranchers, birdwatchers, and federal land managers—convened at a conference in Bend, Oregon, to describe their unique partnership.<sup>247</sup> Participants described the importance of building personal relationships with other stakeholders, getting involved in the planning process early, and encouraging federal employees like refuge managers to remain in the community long-term.<sup>248</sup> The process used to formulate the Malheur Refuge plan deserves emulation. If the counties with coordination ordinances seek a “bottom-up” approach to land management decisions, they must engage in the sometimes-tedious federal land planning processes and prepare to adapt to changing situations, economies, and pressures on public land resources.

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244. See Michelle Bryan, *Learning Both Directions: How Better Federal-Local Land Use Collaboration Can Quiet the Call for Federal Land Transfers*, 76 MONT. L. REV. 147, 153–54 (2015) (calling for federal agencies and local governments to “establish ongoing relationships that operate outside of any short-term planning process.”); Michelle Bryan, *Cause for Rebellion? Examining How Federal Land Management Agencies & Local Governments Collaborate on Land Use Planning*, 6 J. ENERGY & ENVTL. L. 1, 16 (2015) (local government officials “must become well educated about federal planning to take full advantage of the process.”).

245. The U.S. Fish & Wildlife Service administers National Wildlife Refuges, *see supra* note 72, but the principle of early local involvement in the planning process applies to all federal land management agencies.

246. See Jane Braxton Little, *Irony of Malheur Refuge Occupation Seen in Collaboration Over Federal Land*, SACRAMENTO BEE (Dec. 4, 2016), <http://www.sacbee.com/opinion/california-forum/article118385208.html> (“The site the Bundy brothers and their cowboy cohorts chose to showcase government abuse is home to the High Desert Partnership, a diverse group of ranchers, federal agency scientists and environmentalists representing more than 30 organizations. The partnership, which began with familiar exasperation over federal management, has evolved beyond the refuge in eastern Oregon.”); Les Zaitz, *\$6 Million Will Go to Restore Malheur Refuge, Cover Other Costs of Standoff*, THE OREGONIAN (Mar. 23, 2016), [http://www.oregonlive.com/oregon-standoff/2016/03/repairs\\_to\\_malheur\\_refuge\\_will.html](http://www.oregonlive.com/oregon-standoff/2016/03/repairs_to_malheur_refuge_will.html) (“Gary Marshall, a longtime local rancher and chairman of the High Desert Partnership, said years of work by diverse groups arrived at a plan for the refuge that accounts for all needs, from environmental to economic.”).

247. Oregon Natural Desert Association, *Desert Conference: Public Lands, Common Ground Brings Diverse Voices to Bend October 14*, ONDA.ORG (Sept. 16, 2016), <https://onda.org/pressroom/press-releases/desert-conference-public-lands-common-ground-brings-diverse-voices-to-bend-october-14>.

248. *Id.*

The authority counties claim to possess in their coordination ordinances is, under federal law, reserved for Indian tribes, which possess a special trust relationship with the federal government.<sup>249</sup> Whereas tribes are expressly mentioned in the Constitution,<sup>250</sup> counties are constitutionally insignificant. Executive orders and presidential memorandums have required federal agencies to grant special consultation and government-to-government negotiations to tribes.<sup>251</sup> Under BLM’s short-lived Planning 2.0 regulations,<sup>252</sup> BLM committed to “initiate consultation with Indian tribes on a government-to-government basis during the preparation and amendment of resource management plans.”<sup>253</sup> Many tribes have treaties with the United States, but county governments have no authority to demand government-to-government negotiations with the federal government.

Counties have no special standing under federal law. For example, under FLPMA’s regulations, BLM retains great discretion in achieving consistency between federal plans and county plans,<sup>254</sup> explaining the objectives of coordination as paying attention to and considering local plans, suggestions, and public involvement.<sup>255</sup> FLPMA contains no requirement of “government-to-government” consultation

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249. See *Worcester v. Georgia*, 31 U.S. 515, 554–61 (1832) (elaborating the special trust relationship between federal government and Indian tribes); see, e.g., Leigh Paterson, *Tribal Consultation at Heart of Pipeline Fight*, INSIDE ENERGY (Sept. 23, 2016), <http://insideenergy.org/2016/09/23/tribal-consultation-at-heart-of-pipeline-fight/> (explaining federal agencies’ consultation with tribes in the Standing Rock and Dakota Access pipeline controversy).

250. U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause).

251. See Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881, 57,881 (Nov. 5, 2009) (charging federal agencies “with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and . . . strengthening the government-to-government relationship between the United States and Indian tribes.”); Exec. Order 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249, 67,249–50 (Nov. 6, 2000) (granting tribes opportunities for consultation, “government-to-government” collaboration, and administrative discretion).

252. See *supra* note 85 (reviewing changes to BLM’s FLPMA regulations that went into effect January 2017, but were rescinded in March 2017).

253. 43 C.F.R. § 1610.3–1 (2017). This provision in FLPMA regulations is new in 2017, as the previous version 43 C.F.R. § 1610.3 did not require government-to-government consultation with tribes. See *supra* note 85 (discussing the revised FLPMA regulations and new provision regarding consultation with Indian tribes).

254. See 81 Fed. Reg. 89,580, 89,618–19 (Dec. 12, 2016) (quoting the 2016 and Planning 2.0 “Consistency requirements” FLPMA regulations and explaining the differences therein).

255. See *supra* notes 82–85 and accompanying text.

with counties. Nor does the statute require federal decisions to be consistent with local plans.<sup>256</sup>

Even if federal government had the resources to grant "government-to-government" status to local governments—hardly clear—why should it? Doing so would promote monopolization of resource use by giving special status to local plans, thereby elevating those controlling local government—no doubt local economic leaders—great control over public lands at the expense of all the other owners of federal public lands.<sup>257</sup> The vast majority of American citizens do not live close to lands they own that would be effectively monopolized by local control. Indeed, many Americans live so far away from western public lands that their ability to exercise their ownership share is materially diminished by that distance. The “public” in public land law has generally implicitly favored the local as opposed to the regional or national publics.<sup>258</sup> Giving government-to-governmental special status to local county plans would exacerbate this already unbalanced view of the relevant public in public land law.

Changes to the FLPMA planning regulations may occur despite the terms of the Congressional Review Act (“CRA”), which Congress invoked to rescind BLM’s 2.0 planning regulations,<sup>259</sup> include a provision ostensibly prohibiting agencies from drafting new regulations on the same topic as regulations rescinded under the CRA.<sup>260</sup> Nonetheless, on March 27, 2017, Secretary of the Interior Ryan Zinke directed BLM’s Acting Director to “immediately begin a focused effort to identify and implement results-oriented improvements to [the agency’s] land use planning and

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256. See OWYHEE CNTY., IDAHO, 179 IBLA 18, 28–33 (2010) (FLPMA does not require BLM’s travel management plans to be consistent with county ordinances or resolutions on off-highway vehicle use, and BLM fulfilled its obligation to coordinate by maintaining communication with county government).

257. For an argument that public participation in public land planning requires the land manager to bring together representatives of all legitimate interests to work out acceptable compromises, see Owen Olpin, *Toward Jeffersonian Governance of Public Lands*, 27 LOY. L.A. L. REV. 959 (1994). Giving special status to local governments would not be consistent with this paradigm.

258. See, e.g., Joseph M. Feller, *Ride ‘Em Cowboy: A Critical Look at BLM’s Proposed Grazing Regulations*, 34 ENVTL. L. 1123, 1140–42 (2004) (describing one way BLM proposed changing grazing regulations to “exclude non-ranchers from management decisions and stall implementation of environmental standards.”).

259. See *supra* note 85.

260. See 5 U.S.C. § 801(b)(2) (2012) (“A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.”).

NEPA processes.”<sup>261</sup> Secretary Zinke’s memorandum directed BLM to evaluate how “a new rulemaking”<sup>262</sup> could address numerous criteria, including “the needs of state and local governments.”<sup>263</sup> In early May 2017, Secretary Zinke suspended meetings of BLM’s resource advisory councils as part of a review of advisory councils throughout the Interior Department,<sup>264</sup> suggesting that any new planning rules may take some time, particularly in light of the fact that Secretary Zinke is also reviewing the propriety of the designation of some twenty-seven national monuments proclaimed over the past twenty years.<sup>265</sup>

## VII. CONCLUSION

County governments and people living near public lands hold legitimate and useful perspectives on federal lands management. NFMA and FLPMA require federal agencies to consider these viewpoints. On some issues, federal law grants local residents special authority to inform management decisions on public lands.<sup>266</sup> However, the coordination provisions in NFMA and FLPMA do not require the federal government to engage in government-to-government consultation or negotiations with counties in making public land management decisions. Special interest groups like ALEC, the Public Lands Council, and American Stewards of

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261. Memorandum from Ryan Zinke, Sec’y, Department of the Interior, to Acting Dir., BLM, (Mar. 27, 2017), *available at* [https://www.eenews.net/assets/2017/04/18/document\\_pm\\_01.pdf](https://www.eenews.net/assets/2017/04/18/document_pm_01.pdf).

262. *Id.*

263. *Id.*

264. See Scott Streater, *Agency suspends advisory panels even as decisions loom*, GREENWIRE (E & E News) (May 5, 2017), *available at* <https://www.eenews.net/stories/1060054139>.

265. See Jennifer Yacknin, *National Monuments: Final review list includes Maine, Colo. Sites*, GREENWIRE (E & E News) (May 8, 2017), *available at* <https://www.eenews.net/greenwire/2017/05/08/stories/1060054205>.

266. In *NRDC v. Hodel*, a federal district court rejected BLM regulations that gave ranchers the authority to make range management decisions because the Taylor Grazing Act, FLPMA, and Public Rangelands Improvement Act required federal agencies to manage public lands. 618 F. Supp. 848, 868–71 (E.D. Cal. 1985). The agency proceeded to revise its regulations to allow local participation through “resource advisory councils,” which require representation by local communities. See 43 C.F.R. § 1784.6-1 (2017); 60 Fed. Reg. 9,958, 9,896 (Feb 22, 1995) (explaining the three groups from which RAC members are selected, including representatives of grazing interests and local governments). However, the unlawful delegation doctrine limits agency authority to grant decision-making authority to local entities. See, e.g., *Nat’l Park & Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 18–21 (D.D.C. 1999) (the National Park Service violated the unlawful delegation doctrine by conveying its management and decision-making responsibilities for wild and scenic river to local council).

Liberty have misled county governments into asserting an authority that does not exist in federal law. Coordination ordinances like the Baker County Natural Resources Plan are preempted and unenforceable under the Supremacy Clause.

Under the Supreme Court's *Granite Rock* decision, states and counties may enact reasonable environmental regulations regarding uses of public land allowed by the federal government. As a representative coordination ordinance, the Baker County plan is—at most—an unenforceable policy statement. Although counties lack authority to usurp or control federal land planning, county governments can play a valuable role if they work collaboratively with federal land managers to help make informed decisions.<sup>267</sup> If county plans operate as starting points from which county governments work towards cooperative land management solutions, the plans may become useful components of federal public land planning.<sup>268</sup> But county plans have no constitutional authority to control management of federal lands that are owned by all of the American public, not just local county residents.

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267. See *supra* note 244.

268. Reflecting on the Sagebrush Rebellion in 1982, Governor of Arizona Bruce Babbitt opined:

Both the states and the federal government share a common trust: the public good. They ought to be collaborators rather than adversaries. By working toward a truly cooperative regime of public land management, they may improve both the public welfare and the health of the intergovernmental system.

See Babbitt, *supra* note 56, at 861.