



United States Department of Agriculture
Office of the General Counsel

Pacific Region - Portland Office
1220 S.W. Third Avenue, Room 1734
Portland, Oregon 97204-2823

Telephone: 503-326-3959
Facsimile: 503-326-3807
E-mail: rebecca.harrison@ogc.usda.gov

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MEMORANDUM FOR: Shawne Mohoric
Acting Director, Resource Planning and Monitoring

FROM: Rebecca Harrison *RSH*
Attorney, Office of the General Counsel

SUBJECT: County Coordination Ordinances

You have asked for an opinion regarding the validity of county land use ordinances that purport to restrict the Forest Service's authority to regulate federal land that the agency administers. What follows is a general opinion. You should seek additional guidance from this office if questions arise about specific county coordination ordinances.

A. County Coordination Ordinances¹

County coordination ordinances generally require federal agencies to consult and coordinate with counties before taking actions that affect federal lands and resources.² In many cases, these ordinances also require that federal agencies obtain county approval before acting. For example, an ordinance that Boundary County, Idaho enacted in 1992 required federal agencies to obtain county concurrence before implementing land adjustments, and to adopt mitigation measures with which the county concurred before changing land use allocations. *Boundary Backpackers v. Boundary Co.*, 913 P.2d 1141, 1144 (Idaho 1996) (holding that the ordinance was invalid).

¹ These ordinances are also known as Catron County style ordinances after the New Mexico county that passed the first one in 1991.

² Counties have also passed a second type of ordinance modeled after one that Nye County, Nevada enacted in 1993. In general, these ordinances assert that because the original thirteen states contain little federal land, the western states, which contain large tracts of federal land, did not enter the Union on "equal footing." Counties contend that, to account for this inequality, federal land passed to the western states upon their admission to the Union pursuant to the Equal Footing Doctrine. The Ninth Circuit has rejected this theory. See *United States v. Gardner*, 107 F.3d 1314, 1319 (9th Cir. 1997) (noting that the Equal Footing Doctrine would not give Nevada title to public land within the state because the doctrine "applies to political rights and sovereignty, not to economic or physical characteristics of the states" and "applies primarily to the shores of and lands beneath navigable waters, not to fast dry lands."); see also *United States v. Nye County, Nevada*, 920 F.Supp. 1108, 1117 (D. Nev. 1996) ("[T]he entire weight of the Supreme Court's decisions requires a finding that title to the federal public lands within Nye County did not pass to the State of Nevada upon its admission pursuant to the equal footing doctrine.").

B. Federal Preemption of State and Local Government Actions

Federal agencies' authority to manage federal lands stems from the Property Clause of the Constitution. The Property Clause provides that "Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., art. IV, § 3, cl. 2. The Supreme Court has interpreted the power granted to the federal government under this clause broadly, noting "that the power over the public land thus entrusted to Congress is without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

Although the federal government maintains broad powers to regulate federal land, a state may enforce its laws on federal land if they are not preempted by federal law. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987). In general, there are two ways in which federal law can preempt a state law. *Id.* First, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted." *Id.* Second, and more relevant to the current question, if a state or local law conflicts with federal law, the Supremacy Clause of the Constitution requires that the federal legislation prevail.³ *See Kleppe*, 426 U.S. at 543 (noting that "[a] different rule would place the public domain of the United States completely at the mercy of state legislation."). Moreover, a state or local law that imposes obligations on the federal government is presumptively invalid unless the local entity enacted it pursuant to a clear and express congressional grant of authority. *Hancock v. Train*, 426 U.S. 167, 178 (1976); *see also Mayo v. United States*, 319 U.S. 441, 445, 448 (1943).

C. Validity of County Cooperation Ordinances

In light of this legal framework, a county ordinance would be valid and enforceable against the federal government only if it was consistent with federal law and enacted pursuant to explicit congressional authorization.⁴ County cooperation ordinances that purport to mandate the way in which the Forest Service conducts forest planning, project planning and management, do not meet these requirements and therefore are invalid. First, these ordinances are inconsistent with NFMA, which provides local governments with only an advisory role in the Forest Service's land management decisions. 16 U.S.C. § 1604(a)(requiring the Forest Service 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.");⁵ *see also Cal. Coastal*

³ The Supremacy Clause provides: "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const., art. VI, cl. 2. The phrase "Laws of the United States" includes properly adopted federal regulations, as well as federal statutes. *New York v. FCC*, 486 U.S. 57, 63 (1988).

⁴ The Attorneys General of Oregon and Washington have issued opinions reaching the same conclusion. 1998 Op. Att'y Gen. Or. 8262; 1994 Op. Att'y Gen. Wash. 10.

⁵ The implementing regulations for NFMA similarly require that the responsible official "provide opportunities for the public to collaborate and participate openly and meaningfully in the planning process . . ." 36 C.F.R. § 219.9(a). To do so, the responsible official "must provide opportunities for the coordination of Forest Service

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Comm'n, 107 U.S. at 585. Second, in NFMA, Congress did not authorize counties to impose restrictions on the Forest Service's planning activities. Rather, as mentioned, Congress merely acknowledged that local planning processes exist and directed the Forest Service to take these efforts into account. Accordingly, although the Forest Service must coordinate its planning efforts with those of local governments, the agency is not required either to incorporate the tenets of county ordinances into forest plans, or to comply with procedural obligations included in these ordinances.

County ordinances that seek to restrict actions that the Forest Service takes beyond forest planning are also likely to be invalid. *Boundary Backpackers v. Boundary County*, 913 P.2d 1141 (Idaho 1996), provides an example of how courts are likely to address such ordinances. In *Boundary Backpackers*, the court held that the provisions in the county ordinance that limited federal agencies' acquisition of land were invalid because they conflicted with federal laws that authorize the acquisition of land.⁶ 913 P.2d at 1147. The court also concluded that a provision requiring that the county concur with federal land agencies' decisions to dispose of or exchange land, or to change land uses, conflicted with the Endangered Species Act's provisions that authorize federal agencies to acquire land and implement recovery plans for listed species. *Id.* Citing conflicts with the Wild and Scenic Rivers Act, the court invalidated the ordinance's provisions that required the designation of wild and scenic rivers to comply with county water use plans, and mandated that federal agencies comply with the "acceptance and enforcement of" wild and scenic rivers designations by the county. *Id.* at 1148. Finally, the court concluded that the ordinance's provision prohibiting the designation of wilderness areas in Boundary County was invalid because it conflicted with the Wilderness Act's process for the establishment of wilderness areas. *Id.*

D. Summary

In light of the Property Clause and the Supremacy Clause, a county ordinance is valid and enforceable against the federal government only if it is consistent with federal law and enacted pursuant to explicit congressional authorization. It is unlikely that county ordinances will meet these requirements. Each ordinance is crafted differently, so please consider seeking additional review from this office if questions arise about ordinances specific to a county and national forest.

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planning efforts . . . with those of other resource management agencies. The responsible official also must meet with and provide early opportunities for other government agencies to be involved, to collaborate, and to participate in planning for NFS lands." *Id.* § 219.9(a)(2).

⁶ These laws include 16 U.S.C. § 1277, which authorizes the Secretary of Agriculture and the Secretary of the Interior to acquire land within the boundaries of the wild and scenic rivers system, 7 U.S.C. § 428a, which authorizes the Department of Agriculture to "acquire land, or interest therein, by purchase, exchange or otherwise, as may be necessary to carry out its authorized work," and 43 U.S.C. § 1715(a), which authorizes the Secretary of the Interior to acquire land pursuant to FLPMA.