

## Planning Nuts and Bolts: Legal Framework for BLM Planning

Hi, we're going to be talking about the legal framework for BLM planning, based on the legal requirements from the Federal Land Policy and Management Act, from the National Environmental Policy Act, as well as some other laws. We'll also be talking about how these laws can be integrated into the planning process.

As we start out and you think about why you're doing planning, you're thinking about why you're doing planning from a number of different perspectives. But you also want to think about it from the legal perspective because a lot of what the federal government is going to be doing is based, in part, on the law.

We're going to be describing the major laws and regulations that influence BLM planning and we're going to be talking about how to understand those laws, resources related to those laws and getting more information and also possibly how to explain those laws to the folks that you're working with through the planning process.

For BLM planning, there are a number of different resources available to understand how the Resource Management Plans are required to go through a certain process in order to make sure you're complying with each one of these laws. You have first the Federal Land Policy and Management Act. You also have BLM's planning regulations as well as BLM planning handbook.

Now understanding laws, not to go through a long and detailed process about how a bill becomes a law, but just talking in terms of congress passes legislation signed by, of course, the president; that goes into the U.S. codes. You then get the direction from this legislation that an agency needs to promulgate certain regulations to interpret those laws. And so, therefore, we have FLPMA in the U.S. codes and then we have the BLM regulations, the planning regulations, which are in the CFRs, or Code of Federal Regulations. Then you also have, typically, planning manuals or other kinds of handbooks which go to the next level of detail in how you are to interpret the laws. And of course, for BLM we have the planning handbook, which was just reissued in 2005.

As you're going through and understanding BLM's planning requirements, there are other federal requirements that are very important. And as you're developing the Resource Management Plan, one of the components in the development of the plan is also preparing what's called Environment Impact Statement. The Environmental Impact Statement is required by the National Environmental Policy Act, or NEPA. NEPA, like FLPMA, is the law, in the U.S. codes. But then you have regulations, a number of different regulations on how to implement NEPA. You have first the Council on Environmental Qualities, NEPA regulations. Then you also have the Department of Interiors, NEPA regulations and guidelines. And then you also have, of course, BLM's NEPA regulations and guidelines. In addition, there's a NEPA handbook that BLM has issued and that was just revised this year, in 2008. So you have a number of different resources available to you as you're working through, again, developing the Resource Management Plan, understanding that Environmental Impact Statement needs to be prepared as part of that.

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When looking at FLPMA and looking at NEPA, you have these two laws, one which focuses on the planning process and the concepts that you need to consider as you're developing a plan. But then you also have this other law, the NEPA requirement in the EIS, which says consider alternatives related to how you're developing the plan, consider the impacts to the human environment as you're developing this plan and consider ways to off-set or avoid certain impacts to the human environment. And with this, the BLM planning process goes through a draft stage, a final stage, and then eventually the selection and approval of a plan. And as we go through this process you're going to be learning about the different elements of both the FLPMA requirements and also the NEPA requirements in the development of the plan process.

Now, before you came to this element in the presentation, you were to go through a couple of exercises. If you were in a group setting, you did this, hopefully as a group. If you were by yourself, maybe you were talking to your cat or maybe you were talking to yourself and trying to figure out the different, common understanding of the law and the regulations. I find this very helpful to go back to the, literally, the Organic Act for BLM, FLPMA, and understanding the language that congress used and how that translates and what you do on a daily basis. So you read the sections related to FLPMA's directive to the Secretary of the Interior, passing down of course to BLM. In section 202(a) you had that first directive saying for public lands, the use of public lands, the plan needs to be developed on how they're used and the considerations related to the effects on and, of course, the next section relates to, multiple use and sustained yield.

So, you start with 202(a) as that understanding of what FLPMA is basically directing BLM to do. And then the considerations in 202(c) relate to those elements, multiple use, sustained yield. You have this consideration of the interdisciplines for biology, for economics, social issues, physical issues, all of the different sciences. That's to come into play in the planning process. Right at the very beginning there should be priority and some understanding of ACECs, the Areas of Critical Environmental Concern. As well as considerations related to the inventories of land. So you have those elements within your, right within what Congress has directed BLM to do.

Also, in talking about uses, think about the potential present uses as well as the scarcity of the values for the land. And the long term benefits versus short term benefits. Those should all be a part of the consideration that Congress has directed BLM to do within the land use planning process

And then don't forget, and that's what we're talking about, is the applicable laws. There are laws related to other federal requirements and we'll talk about those. As well as many state and local requirements that might be a part of the consideration as you're going through the plan process. So all of those elements should be brought into the planning process according to Congress and, of course, we're going to be talking about how they have been woven into the planning handbook as well as the NEPA handbook for BLM to be developing a Resource Management Plan.

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The last element that you are asked to read in FLPMA acknowledges the fact that this is not done in a vacuum. Planning is not done in a vacuum. When you are working with the BLM field office, you are working also with your collaborators that we'll be talking about in other sections on how to get those folks involved. But, here in FLPMA there's an acknowledgment that those other agencies really need to be brought into the process. You need to be talking to the federal agencies. You need to be talking to the state agency. You need to be talking to local agencies and you need to be also talking to the federally recognized tribes. The concept of consistency with these other policies is an important element in FLPMA directing that when you're doing this plan process, you should be acknowledging those things. So hopefully you got that when you were FLPMA and maybe you hadn't read FLPMA in a while, maybe you've never read FLPMA. But it starts there and if you were ever wondering, "Hey, why do we do some of this stuff? Why is it laid out this way?" Well, again, basically it goes back to the 1970's when FLPMA was promulgated. It's right in there, related to involvement of the other governments, but also involvement of the public, you also read about in FLPMA.

The second component of the exercise had to do with reading the regulations. And the regulations, again, if you think about this, you have congress setting up the broad directives. And then you have the agency interpreting those broad directives for more on-the-ground implementation. So you have the various sections of the CFR, again that's the Code of Federal Regulations and the 43 in the front, is Title 43 of the Code of Federal Regulations, and it directs a number of different elements that need to be part of the plan process. Again, starting with 1601.01 you have the purpose of these regulations relate to this process of developing the plan, considering all these elements. And then again, these regulations go into a lot more detail on what are the important elements that need to be woven into the plan process consistent with what Congress is directed BLM to do. So starting with the objectives and thinking about multiple use and sustained yield and coordinating with the public and the public use of these lands and with other governments. Looking at it from the national level, the state level, and also, of course the field office manager level, where the plans are to be developed. So you have all of those elements in there.

In the definition section and pointing to definition subsection (N) and the actual definition of what a Resource Management Plan is. And the different factors related to Resource Management Plan, related to, of course, the uses, the allowable uses, the withdrawal areas, whatever it is. The goals and objectives that you've set up for the land uses, all of those elements are defined in this Resource Management Plan. And then, again, if you go to the planning handbook, you have a lot more detail on how to consider those different elements as you're working through the plan process. But again, it starts right here. And it's important, I think very helpful, for agency staff to go back and just as a reminder, see the regulations, see how it's written to get a better handle on, okay, that's why I'm moving forward in the planning process considering these kind of things. Whether it be developing the plan for public participation and how you're going to involve the public and again the other governments into your plan

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process. It starts right here in 1610.02. And weaving that in, also a reminder here in the regulations is don't forget your NEPA requirements and we'll talk about that again in just a little bit. How the National Environmental Policy Act also requires that you reach out to the public and other agencies to understand and get input from them on their concerns.

And then you have the coordination aspects, and again, being consistent with the policies within the state, within local governments, within the tribal interests. So all of those elements come into play as you're looking through the guidelines and hopefully you got that as you read the guideline sections and hopefully talked to your other folks in your office on how you're doing this. And the last element relates to the ACEC designation, so there's a lot more detail in your regulations on the considerations as you're deciding whether something really is an area of critical environmental concern and how you're going to go about doing that designation.

So, maybe you found it fun. I think it's one of the more exciting elements - - okay, maybe it's not the most exciting element, reading the laws and regulations. But again, I think it gives you a basis for understanding why are we doing this, why was the planning handbook written this way.

Moving on a little bit more to NEPA, the National Environmental Policy Act was signed into law January 1, 1970 by President Nixon. He declared the 70's as the decade of the environment. And as part of that, the president signed a law which basically directed all federal agencies to not just focus on one resource, don't just focus on clean air. Don't just focus on clean water; don't just focus on endangered species. The president directed federal agencies to consider the significant impacts of major federal actions. So basically all their discretionary decisions and how that would affect what is called the human environment. So it was a very broad, sweeping directive to federal agencies to consider these underlying issues that were never quite studied previously for federal agency processes. So with that, you have this section, section 101, if you go and read the National Environmental Policy Act, it's not a very long law. And you really get the sense that congress and the president were saying, you know, federal agencies take a step back and before you decide to do something, consider what the environmental effects are going to be. Disclose those, get the public involved, get other agencies involved, and then make a better decision related to approving a certain action.

Section 102 of NEPA is more of the directive that you need to prepare an Environmental Impact Statement when you do have the possibility of certain significant impacts. For all major federal actions significantly affecting the quality of the human environment, the federal agency is to prepare a statement, an Environmental Impact Statement and that's written right into the NEPA requirements. So you have that start with the NEPA. Of course, NEPA and the CEQ regulations, part of what NEPA did is it set up what's called the Council on Environmental Quality and that's within the president's office. And the Council on Environment Quality developed regulations for all federal agencies to follow. Within this process you have this concept of categorical

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exclusions. Another concept of environmental assessments possibly leading to support the finding of no significant impact or possibly helping develop what needs to go into the Environmental Impact Statement.

Now, as you're doing your Resource Management Plan, you are preparing an Environmental Impact Statement. That's written into BLM's NEPA regulations that for when they develop Resource Management Plans, they specifically will do EISs. So you have that element. And within BLM's regulations, both for the implementation of FLPMA, the planning regulations, as well as the NEPA regulations, there's this concept of integration. There's this concept of trying to blend the environmental review process with the consideration of how you're going to develop the land use plan. And so, with this graphic that you see on the slide, you have those considerations that hopefully are coming together at the end of the process for the approval of the plan. At the beginning, from a NEPA perspective you're developing what's called the purpose and need. In the beginning of the plan you're developing your goals and objectives. And they really are consistent in the process of how you're developing these plan elements; how you're considering environmental impacts and ways to avoid them and how eventually you go from your plan in the draft EIS to the one that's going to, eventually, be approved after the final EIS. And going through that process, you're considering those elements and weaving them in together. As well as weaving in together NEPA's requirements for public participation and outreach to governments as well as the planning requirements. So you have those two elements that go into BLM's planning process.

Now we're going to be talking about how there are other considerations as you're developing your plan that you need to be thinking about, these sideboards if you will, in thinking there are certain legal requirements that I need to stay within as I'm doing my plan. First, we're going to be talking about the very general ones related to how you get input from non-governmental entities, and that's the Federal Advisory Committee Act. As well as how you might be sharing information with other governments or with the public and that's the Freedom of Information Act. And then, the process you go about in developing your plan and doing your notices, the Administrative Procedures Act.

In the second portion of this presentation then, we'll discuss how other laws integrate into the plan process. How you should be considering things like clean air, clean water, endangered species, historic resources. Those other elements are an important component in developing your plan, complying with NEPA, complying with FLPMA. But first we'll talk about the general ones. So first, FACA, the Federal Advisory Committee Act, is this requirement basically that federal agencies keep an open process. They don't want federal agencies, congress didn't want federal agencies, to be accepting information from certain members of the public to the exclusion of other members. It's basically an open process in developing your plan, in developing the environmental analysis that's going to go into the EIS.

So with that, there's certain requirements that BLM needs to follow. If you're working within a certain government to government process, FACA wouldn't apply because there's allowance for federal agencies to get input from state government, local

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government, federally recognized tribes. It's really when you're getting input from the non-governmental entities that there is some concern that you want to create an open process. And if you're going to get that input from those other entities, you need to make sure it's open, that other members of the public might be involved to hear that input or give their own input. So the Federal Advisory Committee Act has a number of different elements. So when does it apply? Well, it really applies when there are groups or individuals who aren't members of the different governments. If there is some kind of structure to it where they have a certain venue to give input. If there is some sort of control by BLM in how they give input or when they meet or how they're going to be involved in the process. And from that, BLM really needs to consider are they keeping this an open process? Is this stuff that is being given to them without any requests or are they really requesting input? And if they are requesting input from these non-governmental entities or individuals, that's okay, but there's a process that BLM should be going through to basically establish what are called Chartered Advisory Groups. Whether they're called Resource Advisory Groups or there's other names, sometimes, for them. But basically what happens is you go through a process to have a formal charter and a designation of a process where these meetings can be noticed; where these meetings can be acknowledged in other processes. And where the public is invited to come, again, listen to what input is being given and possibly give their own input. And it's just, again, a way of creating an open process for BLM's planning on developing the Resource Management Plan and the EIS.

You have a number of different resources that you can check to get more information on it. You have the appendix B of the planning handbook. You also have a number of different websites which you see on your screen, as well as the FACA handbook for BLM specifically. And I will advise through all of this, if you think that there's a concern, somebody's raised a concern, don't try and solve it on your own. Try and get help from the state office, try and get help from the solicitor's office. You have the solicitor for the Department of Interior, you have folks who are designated to help work through these FACA issues, as well as some of these other laws that we're going to be talking about. And don't be afraid to go get that kind of help because I think that's very important to making sure that you're communicating to the public your understanding of the issues. And it helps to get other folks who have, maybe, some more experience on these other issues to help them give that kind of advice.

Moving on to FOIA, or the Freedom of Information Act and you'll hear that acronym sometimes. FOIA is this requirement that congress has set up basically saying federal agencies, you need to be able to produce information that you're using in making your decisions to the public on demand. And there are certain limitations on what needs to be produced and at certain times. But, the basic requirement is that federal agencies need to be able to show the public and, again, keep transparent their process and what they considered, what kind of information they considered, in making their decision. At any point during the development of the plan process, you might get a FOIA request from a member of the public or agency, local agency, asking for certain information. And again, like the reminder before, get help. If you get a FOIA request, try and check with the state office, try and check with the national office and with the

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solicitor how to best respond to that FOIA request. Because some of the calls on some of the information isn't necessarily very clear and so it helps to get the experience of others because you're responding to certain legal requests that are being made through this FOIA process.

But basically, a member of the public could come in and ask for final decisions on final reports that have been done as you're going through the plan process. They can be asking for meeting notes on certain meetings, agendas, things like that; submittals from other agencies, reports that are done by a state agency or a local agency; letters that were sent by other members of the public or other interested entities. All of that information may be accessible through the Freedom of Information Act. Now you don't need to give folks that information up front where you have every piece of information on a website. Some of it is things you're considering but not necessarily, you haven't necessarily decided on how you are going to use that within your plan. But, a member of the public might want to see how the state commented on the initial portions of the plan process and they have a right to see that information. Again, you don't necessarily need to have it as a resource accessible until you get the FOIA request. But once you get the FOIA request, you really should think be thinking about in terms of, okay, this information is available and there may be certain pieces of information that aren't available. Those pieces of information that aren't available relate to, basically, predecisional analyses. Maybe you've got a staff report that hasn't been peer reviewed yet. Maybe you have information that relates to national security. You could have information that relates to how you're enforcing certain other legal requirements. There might be proprietary information related to certain mineral extractors or certain other land uses that have a certain technique that they think should be protected. You could have internal deliberations and discussions that aren't yet applicable to a final decision. All of those pieces of information may be withheld. And again, before you decide I'm going to withhold that from the FOIA request, you really should get input from the state office, as well as the solicitor, to make sure that you're withholding the things that need to be withheld and that you're giving the public the information, the things that you should be giving the public.

When you're doing your FOIA compliance, you're going to, hopefully, work with a member of the public. They might not fully understand the process so you should let them know that there's a certain form they should be filling out as they're asking for certain pieces of information. Again, get the FOIA coordinator from the state office involved if there is one. Make sure that you're responding in a timely manner. Make sure that you're considering, as you're going through this process, there may be portions of the information that aren't available now but they may become part of this broader administrative record that we're going to be talking about in another segment. And so, that is, again, another important element as you're managing this information. You're going to go through a plan process that's going to be a year, maybe two years, maybe longer. You're going to get a lot of information. You're going to have a lot of meetings, you're going to have a lot of discussions with other agencies and with the public and that leads to how you manage all of this information and the questions and the challenges that come with that. And so, the best way is to go through at each point in

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the process and continually decide, okay, this not yet ready for public review, this stuff is ready for public review. Different steps in the process, you're going to be deciding what goes into the administrative record, as well. That ultimate package, if you will, of information that supports the decision. So when you're going through all that, just keep in mind it starts day one through the plan process and notes that you make on formal documents like the formal agenda, on originals of a letter that's submitted, might become part of the information that is accessible to the public. So you, again, want to be considering this FOIA requirement day one as you're going through the process, although, you might not ever get a FOIA request.

The last law that, again, helps create the sideboards, the general process that you follow to develop your Resource Management Plan and your EIS, is the Administrative Procedures Act. That basically contains all of these elements related to FOIA and FACA. The requirement that your meetings be noticed and be open to the public. Your process that you're going to have in developing the plan, the elements of the plan and what elements are appealable, what elements would be something subject to a protest. All of that starts with the Administrative Procedures Act. Again, it's the way that the congress and the president have directed federal agencies. You need to keep a process open and available to the public and notify them at certain points in the process that you're making certain decisions that may have implications that affect their interests. So as you're going through this process, you have the FACA requirement, the FOIA requirement, and the general Administrative Procedures Act requirement which ultimately gives a member of the public or other interested entity certain rights if they participate in the process to challenge the process at the end of the decision making. Ultimately, these laws help shape the considerations that go into the plan process.

In the next section, we're going to be talking about how other laws really should be considered for the different resource impacts that could be affected by decisions within the plan process that you should be looking at and bringing into your plan.