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LEARNING BOTH DIRECTIONS: HOW BETTER FEDERAL-LOCAL LAND USE COLLABORATION CAN QUIET THE CALL FOR FEDERAL LANDS TRANSFERS

Michelle Bryan*

I. INTRODUCTION

Control of federal lands is once again the political issue *du jour*. At its 2014 annual convention, the national Republican Party added a call for state ownership of federal lands to its platform¹—a rallying cry echoed at the state party level.² In Montana, for example, the state Republican Party added the following language to its natural resources plank:

We oppose the federal government and any foreign or international entity, such as the United Nations, exercising authority over land use and natural resource decisions in Montana. . . . We oppose any federal special land designations. . . . We support the granting of federally managed public lands to the state, and development of a transition plan for the timely and orderly transfer.³

Two months prior, the Montana Republican senator who spearheaded this effort joined forces with a Utah house representative to co-sponsor the Legislative Summit on the Transfer of Public Lands, which was attended by 50 state officials from nine western states.⁴ On the opposite side of the

* Professor of Law, Natural Resources & Environmental Law Program, University of Montana School of Law. I wish to thank the *Montana Law Review* for the opportunity to present these ideas at the 2014 Browning Symposium on Federalism: “The Future of Federalism: What Will be Retained, and What Surrendered?”, and my research assistant Katelyn Hepburn for her excellent research on the case study featured in this essay.

1. Republican Nat’l Comm., *Resolution in Support of Western States Taking Back Public Lands* (adopted Jan. 24, 2014) (available at <http://perma.cc/BLA5-KM22> (<http://www.gop.com/wp-content/uploads/2014/01/RESOLUTION-IN-SUPPORT-OF-WESTERN-STATES-TAKING-BACK-PUBLIC-LANDS.pdf>)).

2. See e.g. Am. Lands Council, *Get the Facts*, <http://perma.cc/QBN2-7NFV> (http://www.americanlandscouncil.org/get_the_facts) (accessed Feb. 25, 2015); *Leader of New Sagebrush Rebellion Argues for Local Control of Public Land*, Radio Broad. (Mont. Pub. Radio Dec. 10, 2013) (audio available at <http://perma.cc/WE7L-54GT> (<http://mtrp.org/post/leader-new-sagebrush-rebellion-argues-local-control-public-land>)) (interview with Ken Ivory provides an overview of the movement).

3. Mont. Republican Party, *Platform—Natural Resources*, <http://perma.cc/J9AV-DFNL> (<http://www.mtgop.org/index.php/about/party-platform/214-platform-natural-resources.html>) (accessed Oct. 24, 2014).

4. Kristen Moulton, *Western Lawmakers Gather in Utah to Talk Federal Land Takeover*, Salt Lake Trib. (Apr. 19, 2014) (available at <http://perma.cc/TUP7-HHJB> (<http://www.sltrib.com/sltrib/politics/57836973-90/utah-lands-lawmakers-federal.html.csp>)).

ledger, hunters, anglers, recreationists, and others have actively mounted their own campaigns to keep federal lands under federal control.⁵

In Montana, this debate prompted a legislatively driven “opinion survey” that queried Montana counties on their perception of how federal agencies are managing the federal lands located within each county.⁶ Montana has over 27 million acres of federal lands, which is approximately 29% of its total lands. Each of the state’s 56 counties contain some federal lands, with several containing between 30–70% federal lands, and one as high as 82%.⁷ Thus, federal lands management has the potential to greatly influence the future of Montana counties. While the phrasing of the survey questions was arguably slanted, the results are nonetheless instructive: there is a prevailing (albeit not unanimous) county perception that federal agencies are falling short in managing federal lands.⁸ Whether hard data would support this perception is perhaps another matter; but perception alone can prove a potent obstacle to successful federal-local collaboration.

Suffice it to say, the West is polarized over federal lands management. And while there is ample political rhetoric to go around, beneath it all lie truly important questions about current land management practices and the complementary roles federal agencies and local communities could play in managing shared lands. In this essay, I argue that both federal land agencies and local governments are failing to engage in the type of land use planning necessary for strong federal-local collaboration. Further, if meaningful collaboration became the standard practice, some of the underlying furor over federal lands management could subside.

On the local government side, planning has historically assumed that federal lands are outside the scope of community concern.⁹ Thus, for de-

5. See e.g. Nat’l Pub. Lands Day, *About*, <http://perma.cc/GU35-4YL5> (<http://www.publiclandsday.org/about>) (accessed Feb. 25, 2015); Thom Bridge, *Rally in the Rain: Hunters and Anglers Protest Public Land Transfer*, *Helena Indep. Rec.* (Sept. 27, 2014) (available at <http://perma.cc/W76G-MRK6>) (http://helenair.com/news/local/rally-in-the-rain-hunters-and-anglers-protest-public-land/article_4292d096-38fc-5c17-bf5d-784beb3e940b.html)).

6. Env’l Quality Council, *Evaluating Federal Land Management in Montana* (Draft Rpt. for Final EQC Approval, Sept. 2014) (available at <http://perma.cc/E3Z8-HAR7>) (<http://leg.mt.gov/content/Committees/Interim/2013-2014/EQC/Meetings/September-2014/sj15-final-draft-report.pdf>) [hereinafter *EQC Survey*]. For a related report of federal lands issues in Montana, see Env’l Quality Council, *SJ15 Public Land Management Study* (Mont. Legis. Servs. Div., Sept. 2013) (available at <http://perma.cc/Y5RD-SARS>) (<http://leg.mt.gov/content/Committees/Interim/2013-2014/EQC/Meetings/September-2013/SJ15-primer.pdf>).

7. Paul Lachapelle & Dan Clark, *Montana Public Lands Guide*, at 5 tbl. 3 (Mont. St. U. Extension 2013).

8. *EQC Survey*, *supra* n. 6, at 7–15.

9. Michelle Bryan et al., *Cause for Rebellion? Examining How Federal Land Management Agencies and Local Governments Collaborate on Land Use Planning*, 6 *J. Energy & Envtl. Law* ___, at pt. I.A (forthcoming 2015) (noting an absence of state laws or model ordinances encouraging local governments to engage in collaboration with federal agencies during local planning); e.g. Am. Plan. Ass’n, *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change* 8-

ades there has been a dearth of local vision about how federal lands integrate with a local comprehensive planning. More recently, but equally problematic, local governments have over-corrected, acting as if federal lands management is subservient to parochial land use directives.¹⁰ Both phenomena point to a basic illiteracy about federal land use planning.

On the federal side, planning is so highly discretionary that it has become inexcusably inconsistent from one agency to the next, and experienced as arbitrary by the communities involved. Further, because federal planning occurs within the shadow of the National Environmental Protection Act (NEPA),¹¹ federal agencies appear motivated to downgrade local government land use concerns as “nonsignificant” to avoid more rigorous environmental review procedures.¹² In short, there are learning opportunities in both directions—a point aptly illustrated through a case study of the recent Comprehensive Conservation Plan for the Charles M. Russell National Wildlife Refuge.¹³

II. A MONTANA CASE STUDY

The C.M. Russell Wildlife Refuge, managed by the U.S. Fish & Wildlife Service, is situated in the short grassland prairie of north central Montana. It follows 125 miles of Missouri River corridor and transects six rural Montana counties. Its eastern edge touches the Fort Peck Indian Reservation and its western edge lies below the Fort Belknap Indian Reservation. To the south lie dispersed landholdings of the Turtle Mountain Band of Indians. The Refuge also abuts lands administered by the Bureau of Land Management, National Park Service, and Bureau of Reclamation, and is in close proximity to state and U.S. Forest Service lands.¹⁴ On the private lands surrounding the refuge, traditional agriculture remains the predominant land use.¹⁵ At the same time, the American Prairie Reserve, a relative

38 to 8-39 (Stuart Meck ed., 2002) (available at <http://perma.cc/R6UR-9KCS> (<https://www.planning.org/growingsmart/guidebook/print/pdf/chapter8.pdf>)) (cautioning local governments not to exceed their jurisdiction or risk preemption by planning in ways that “interfere with” federal plans, laws, or authority).

10. Bryan et al., *supra* n. 9, at pt. I.A.

11. 42 U.S.C. §§ 4321–4370 (2012).

12. See e.g. Guidance Regarding NEPA Regulations, Council on Env’l Quality Memo., 48 Fed. Reg. 34263, 34263 (July 28, 1983) (“The scoping process should identify the public and agency concerns; clearly define the environmental issues and alternatives to be examined in the EIS *including the elimination of nonsignificant issues.*”) (emphasis added).

13. U.S. Fish & Wildlife Serv., *Comprehensive Conservation Plan: Charles M. Russell National Wildlife Refuge, UL Bend National Wildlife Refuge* (July 2012) (available at http://www.fws.gov/mountain-prairie/planning/ccp/mt/cmr_ulb/documents/cmr_ulb_ccp_final_all.pdf) [hereinafter *CM Russell Plan*].

14. *Id.* at 3 fig. 2.

15. *Id.* at 119, 121–123 tbls. 12–14.

newcomer on neighboring private lands, is gradually converting many of those agricultural operations back into native prairie, enlarging its bison herd and habitat restoration efforts.¹⁶ It is difficult to imagine a more diverse land ownership pattern or a more complex governance structure than that found in this remote area of Montana.

The potential influence of federal lands on counties adjacent to the Refuge is significant. For example, Phillips County includes approximately 1.37 million acres of federal lands, which is 41% of the total land acreage in the county.¹⁷ The County describes itself as follows:

Our area of north-central Montana is characterized by gently rolling short grass prairies. The Missouri and Milk Rivers flow through from west to east and form rough broken land near the rivers. Phillips County includes . . . public . . . lands mingled with . . . private lands. Land use in the county is mainly farming and ranching with mineral activity in the Little Rocky Mountains.¹⁸

In 2007, the Fish & Wildlife Service provided notice that it would commence planning for the C.M. Russell Wildlife Refuge.¹⁹ Under a NEPA provision that gives federal agencies the discretion to extend “cooperating agency” status to local governments,²⁰ all six affected counties requested cooperating agency status in the planning process.²¹ Five years and 20 public meetings later, the final 323-page plan was approved, to mixed reviews.²²

On the local government side, there were struggles from the outset with the refuge manager who initially oversaw the planning process. After the refuge manager first told the counties they “weren’t eligible” for cooperating agency status,²³ the counties were able to negotiate limited representation—all six counties could serve as “cooperating agencies” in theory, but

16. Am. Prairie Reserve, *Expanding the Reserve*, <http://perma.cc/7S3K-XCZC> (<http://www.americanprairie.org/projectprogress/land/>) (accessed Feb. 25, 2015); Am. Prairie Reserve, *Bison Restoration*, <http://perma.cc/8PHU-HQTV> (<http://www.americanprairie.org/projectprogress/bison-restoration/>) (accessed Feb. 25, 2015).

17. Lachapelle & Clark, *supra* n. 7, at 5 tbl. 3.

18. Malta Area Chamber of Commerce, *Phillips County and Malta, Montana, County Services*, <http://perma.cc/LPM3-WPEU> (<http://www.maltachamber.com/phillco/profile.htm>) (accessed Oct. 27, 2014).

19. *CM Russell Plan*, *supra* n. 13, at 15.

20. 40 C.F.R. §§ 1501.6, 1508.5 (2014) (“A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.”) Cooperating agency status allows local governments to participate in the scoping and notice process, as well as any environmental review, necessitated by the planning process. For a more detailed discussion of this rule and its implications, see Bryan et al., *supra* n. 9, at pt. I.B.

21. *CM Russell Plan*, *supra* n. 13, at 15.

22. *Id.* at 14–15.

23. Telephone Interview by Katelyn Hepburn with Lesley Robinson, Phillips Co. Comm’r, Malta, Mont. (Mar. 11, 2014) [hereinafter *Robinson Interview*]; Telephone Interview by Katelyn Hepburn with Connie Eissing, McCone Co. Comm’r, Circle, Mont. (Jan. 24, 2014) [hereinafter *Eissing Interview*].

they could collectively send only two representatives.²⁴ This approach suggests that the Fish & Wildlife Service viewed all six counties as essentially interchangeable, despite each being a distinct political entity. Needless to say, in counties without designated representatives, people felt excluded from the process.²⁵ This disparate treatment puzzled local officials, because in a prior planning effort with the Bureau of Land Management, the counties had received a more positive reception to their request for cooperating agency status.²⁶

As refuge planners worked through the Environmental Assessment on the project, they categorized county concerns as “not significant” issues that either did not require additional environmental review or fell outside the scope of Fish & Wildlife Service jurisdiction.²⁷ County concerns included cabin leases, private mineral rights, grazing fees, road access, federal water rights, and military overflights.²⁸ While the phrase “not significant” has a very precise legal definition for federal employees (and the term may indeed have legitimately applied to some county concerns), members of the local community predictably applied a common, layperson meaning of “unimportant.”²⁹ This disconnect of meaning left a very bitter taste in the mouths of local officials. In the words of one county commissioner:

One of the regional planners who worked on the project made a comment at our last meeting that the counties’ comments did not include anything substantive and that the planning team couldn’t use them. Basically, she said our comments were worthless. What was even more frustrating about that was that we put hours and hours into our comments. We reviewed the entire CCP book, which was hefty, and we were very active in the elements and issues within the plan, and in the end they told us that they couldn’t use basically all of our comments.

In the end, I was not really sure if anything significant we put on the table was actually taken in to consideration in the final plan. We felt like an inconvenience; like something they had to do but didn’t really want to. It was a 90 mile drive for me to participate in these meetings on issues that I really cared about and after most meetings I left thinking to myself, ‘Why am I doing this?’ and feeling like it was a waste of time because nobody was listening to us anyway.³⁰

On the federal government side, there were also concerns about the quality of local government participation. When the refuge planning pro-

24. *CM Russell Plan*, *supra* n. 13, at 15; *Robinson Interview*, *supra* n. 23; *Eissinger Interview*, *supra* n. 23.

25. *Robinson Interview*, *supra* n. 23; *Eissinger Interview*, *supra* n. 23.

26. *Robinson Interview*, *supra* n. 23.

27. *CM Russell Plan*, *supra* n. 13, at 17.

28. *Id.* at 17–19.

29. *Robinson Interview*, *supra* n. 23.

30. *Id.*

cess began, for example, there was no county land use plan to guide the federal agency. As noted, this absence of local planning in areas of shared natural resources is typical, due to a historic view that federal lands are off-limits to local control.³¹ Belatedly realizing that federal law allows for federal agency consideration of local plans, Phillips County adopted a Land Resource Use Plan³² at about the same time the refuge planning concluded. That county plan purports to require the federal government to follow several local mandates, such as:

It is the unswerving intent of Phillips County Commissioners to ensure that all aspects of the Land Resource Use Plan are understood and complied with consistently by all . . . agencies . . . operating within the County.

GOAL: That the design and development of all federal and state land dispositions and acquisitions, including land adjustments and exchanges, be carried out to the benefit of the residents of Phillips County.³³

Objective 2D: That all government entities investigate and attempt to increase local economic development by increasing the amount of privately-controlled land within the county.³⁴

And this wildlife prohibition:

NOW, THEREFORE, BE IT RESOLVED that the Board of County Commissioners, Phillips County, State of Montana, by the authority vested in us, do hereby prohibit the presence, introduction, or reintroduction of wolves within the boundaries of Phillips County.³⁵

As these planning mandates reveal, the local government created land use objectives that a federal agency, particularly one charged with wildlife protection, may have been unable to achieve in its planning process.³⁶

Ultimately, the counties may have failed to appreciate the mandates that guide refuge planning, and they may have voiced some of their concerns in the wrong forum. For example, it may have been unrealistic to expect certain outcomes, like military overflights conducted under Federal Aviation Administration oversight, to be addressed by the Fish & Wildlife Service. And while the Refuge indeed has water rights to negotiate with the State of Montana, those negotiations are taking place in a separate legal

31. See Bryan et al., *supra* n. 9, at pt. I.A.

32. Phillips Co. Courthouse, Off. of the Comm'rs, *Phillips County Land Resource Use Plan* (July 23, 2012).

33. *Id.* at 20, 42.

34. *Id.* at 20.

35. *Id.* at 67 (referencing Resolution 2003-03 "Wolves Deemed Unacceptable Species").

36. See Bryan et al., *supra* n. 9, at pt. III.B.1; Pub. Lands Council, *A Beginner's Guide to Cooperating Agency Status* 10–11 (Sept. 2012) (available at <http://perma.cc/6RGX-KG8U> (<http://publiclands.council.org/CMDocs/PublicLandsCouncil/Coordination%20-%20CA%20status/PLC%20Cooperating%20Agency%20Handbook%209-26-12.pdf>)).

proceeding unrelated to refuge planning. In the words of the Service: “[T]he [Refuge Plan] is not the tool to resolve many of these issues.”³⁷

Thus, at the end of the day a disconnect remained. The local officials felt they had invested time and clearly communicated county concerns, only to have their perspectives fall on deaf ears. And federal officials struggled over local demands that either ran counter to the Fish & Wildlife Service’s mandate of “wildlife conservation” or were not redressable in the refuge planning process.³⁸ Similar stories of stymied federal-local planning efforts repeat themselves across the western landscape.³⁹

In its final chapter, the C.M. Russell Wildlife Refuge planning process turned more positive. The agency replaced the original refuge manager with an individual who developed more positive relationships with the local community.⁴⁰ This new manager implemented processes that went beyond the bare requirements of NEPA, including holding regular stakeholder meetings to address issues that fall outside of the planning process.⁴¹ The parties are also making use of a local group called the Ranchers Stewardship Alliance to build federal-local connections.⁴² This approach bodes well for future planning efforts in the area. Indeed, federal planning efforts elsewhere that have built on strong personal connections have experienced greater success.⁴³ At the same time, this approach underscores that the small successes in current federal-local collaboration are more a byproduct of human personality and ingenuity than of any existing legal framework.

III. MONTANA LESSONS FOR THE WEST

The C.M. Russell Wildlife Refuge planning process, along with similar federal-local planning efforts in the West, yields many lessons.⁴⁴ Here are three of the most significant: (1) federal agencies should provide a more uniform, holistic approach to local government collaboration; (2) local governments should be proactive and sophisticated in their approach to federal agency collaboration; and (3) both levels of government should establish

37. *CM Russell Plan*, *supra* n. 13, at 19.

38. *Id.*

39. See Bryan et al., *supra* n. 9, at pt. I.

40. *Robinson Interview*, *supra* n. 23.

41. Telephone Interview by Katelyn Hepburn with Richard (Rick) Potts, Project Leader, Charles M. Russell National Wildlife Refuge, Lewistown, Mont. (Jan. 10, 2014).

42. This Alliance is “a community-based conservation group that promotes ‘ecological, social and economic conditions that will sustain the biodiversity and integrity of America’s northern mixed-grass prairie for present and future generations.’” *CM Russell Plan*, *supra* n. 13, at 130 (quoting Ranchers Stewardship Alliance, *Our Mission*, <http://www.ranchersstewardshipalliance.org> (accessed Oct. 27, 2014)).

43. See Bryan et al., *supra* n. 9, at pt. III.C.

44. See *Id.* at pt. III (providing a more comprehensive set of suggestions).

ongoing relationships that operate outside of any short-term planning process.

To the first lesson, while federal employees may readily see the differences among the rules and missions of various agencies, this nuance is lost on local communities, where there is a sense that any bilateral conversations are with “the federal government.” When the C.M. Russell Wildlife Refuge planner commenced the planning process, it would have behooved him to discover how past federal planning efforts on other federal lands had involved those local counties. His decision to exclude four county representatives set the process on a course of non-collaboration from which it did not recover.⁴⁵ Until the various federal planning laws themselves become more uniform in approach, planners from different agencies should design comparable planning processes for communities like those near the C.M. Russell Wildlife Refuge, which are home to a variety of federal lands classifications.

Further, when local governments raise legitimate concerns about a local-federal issue, the planning agency should involve other federal agencies that can address concerns that fall outside of its planning purview. On the C.M. Russell Wildlife Refuge, for example, the lead planner should have involved the appropriate agency representatives in a roundtable where the right people were present to respond to important county concerns. While the Refuge Plan could not encompass all of those concerns, other memoranda or reports could identify next steps and responsible agencies for addressing each non-planning issue. In that way, community officials may have felt their time investment was worthwhile and their concerns “significant.”

To the second lesson, local governments should shed the historic perception that federal lands are outside the scope of local planning.⁴⁶ Such outmoded thinking does not redound in a world of shared landscapes and economies. If Phillips County and other nearby counties had land use plans in place prior to the Refuge Plan, their visions for the area may have shaped federal planning to a greater extent.

At the same time, local officials must undergo the training necessary to be sophisticated about their involvement in federal planning. They need to understand that an agency like the Fish & Wildlife Service has a wildlife protection mandate and planning procedures that vary greatly from the multiple-use mandate and planning procedures of the Bureau of Land Management.⁴⁷ They need to understand the limits of the planning process so their

45. *Eissinger Interview*, *supra* n. 23.

46. Bryan et al., *supra* n. 9, at pt. I.A; *e.g.* Am. Plan. Ass’n, *supra* n. 9, at 8-38 to 8-39.

47. *CM Russell Plan*, *supra* n. 13, at xi (“[T]he refuge is managed for wildlife conservation above all else.”).

expectations are more realistic. And they also need to understand the basic premise that no federal agency is obligated to follow unreasonable political demands, whether made in a local planning document or otherwise.⁴⁸

As to the last lesson, the vast majority of success stories in federal lands planning begin and end with personal relationships between local officials and the federal employees that live and work directly in the community.⁴⁹ Be it formal quarterly stakeholder meetings or informal coffee gatherings, the most successful planning initiatives have been in places with a long-term track record of productive communication. This lesson bears out, again, in the C.M. Russell Wildlife Refuge process:

The original refuge manager . . . was not easy to work with and seemed as if he really didn't want us involved at all. The current refuge manager took over near the end of the creation of the [Refuge Plan] and he was great to work with and continues to be great. . . . But that was the tone that started this planning process. Needless to say we didn't get off on the right foot.⁵⁰

At bottom, communities can tell the difference between an agency official who creates the appearance of collaboration, versus one who genuinely fosters collaboration.

IV. CONCLUSION

The West is filled with places like those around the C.M. Russell Wildlife Refuge—vast and important wildlife habitats that span complex land ownerships and connect with rural communities that work hard to maintain their identities and economies. These places deserve better than what they are getting from the current land use planning regimes employed by federal agencies and local governments. There are legitimate reasons for local governments to want more from the federal land planning process, and a genuine need for those local governments to become more sophisticated about federal planning. There is much learning to be had, in both directions.

48. Bryan et al., *supra* n. 9, at pt. III.B.1.

49. *Id.* at pt. III.C.2.

50. *Robinson Interview*, *supra* n. 23.

