

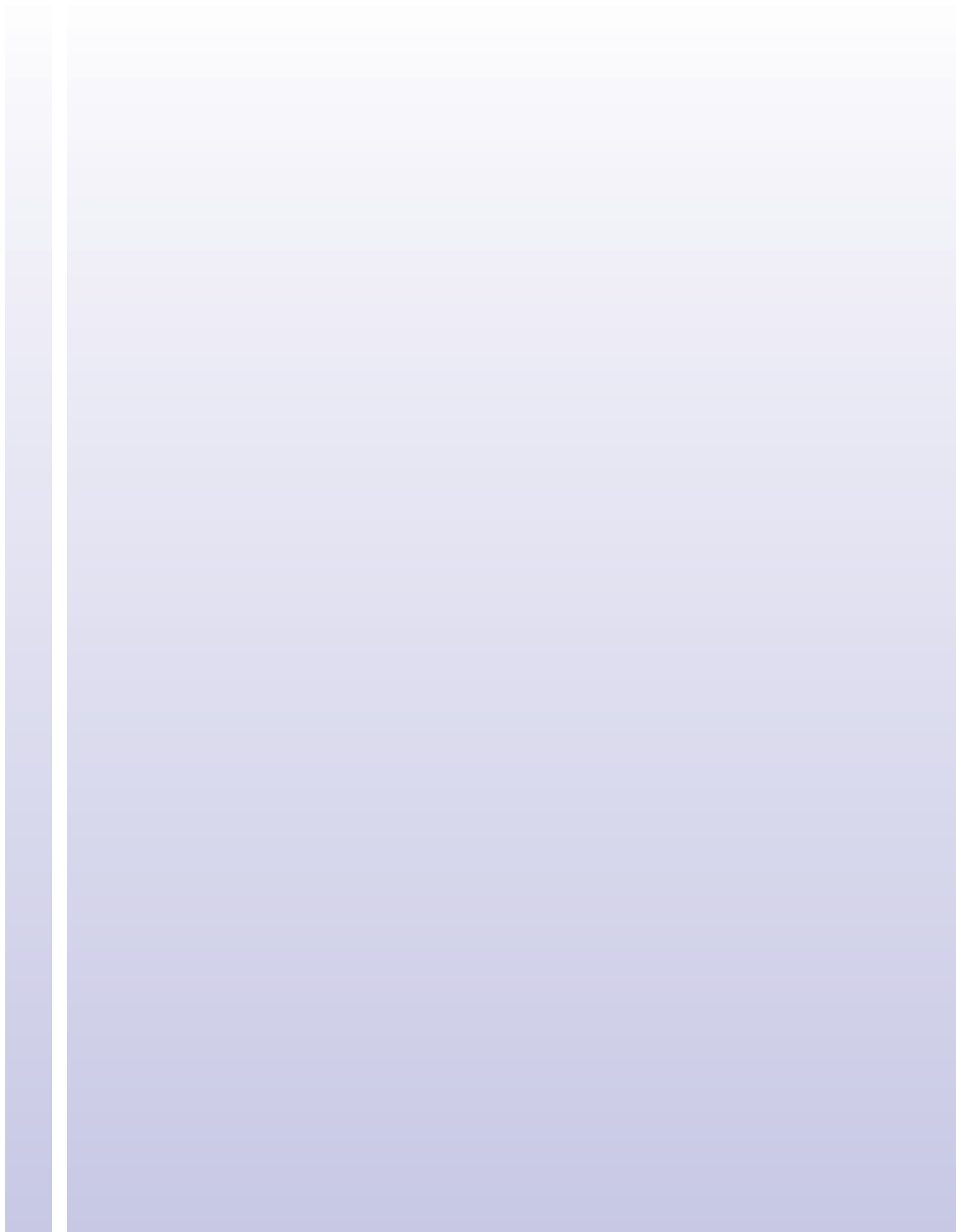
A Desk Guide to Cooperating Agency Relationships



and Coordination with Intergovernmental Partners

2012





Bureau of Land Management

**A Desk Guide to
Cooperating Agency Relationships
and Coordination with
Intergovernmental Partners**

2012

Acronyms

ACEC	Area of Critical Environmental Concern
ADR	Appropriate Dispute Resolution
AMS	Analysis of the Management Situation
AO	Authorized Officer
BLM	Bureau of Land Management
CA	Cooperating Agency
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
DOI	Department of the Interior
EA	Environmental Assessment
EIS	Environmental Impact Statement
FACA	Federal Advisory Committee Act
FLPMA	Federal Land Policy and Management Act
FOIA	Freedom of Information Act
FWS	U.S. Fish and Wildlife Service
ID team	Interdisciplinary Team
MOU	Memorandum of Understanding
NEPA	National Environmental Policy Act
NTC	National Training Center
RMP	Resource Management Plan
ROD	Record of Decision

Contents

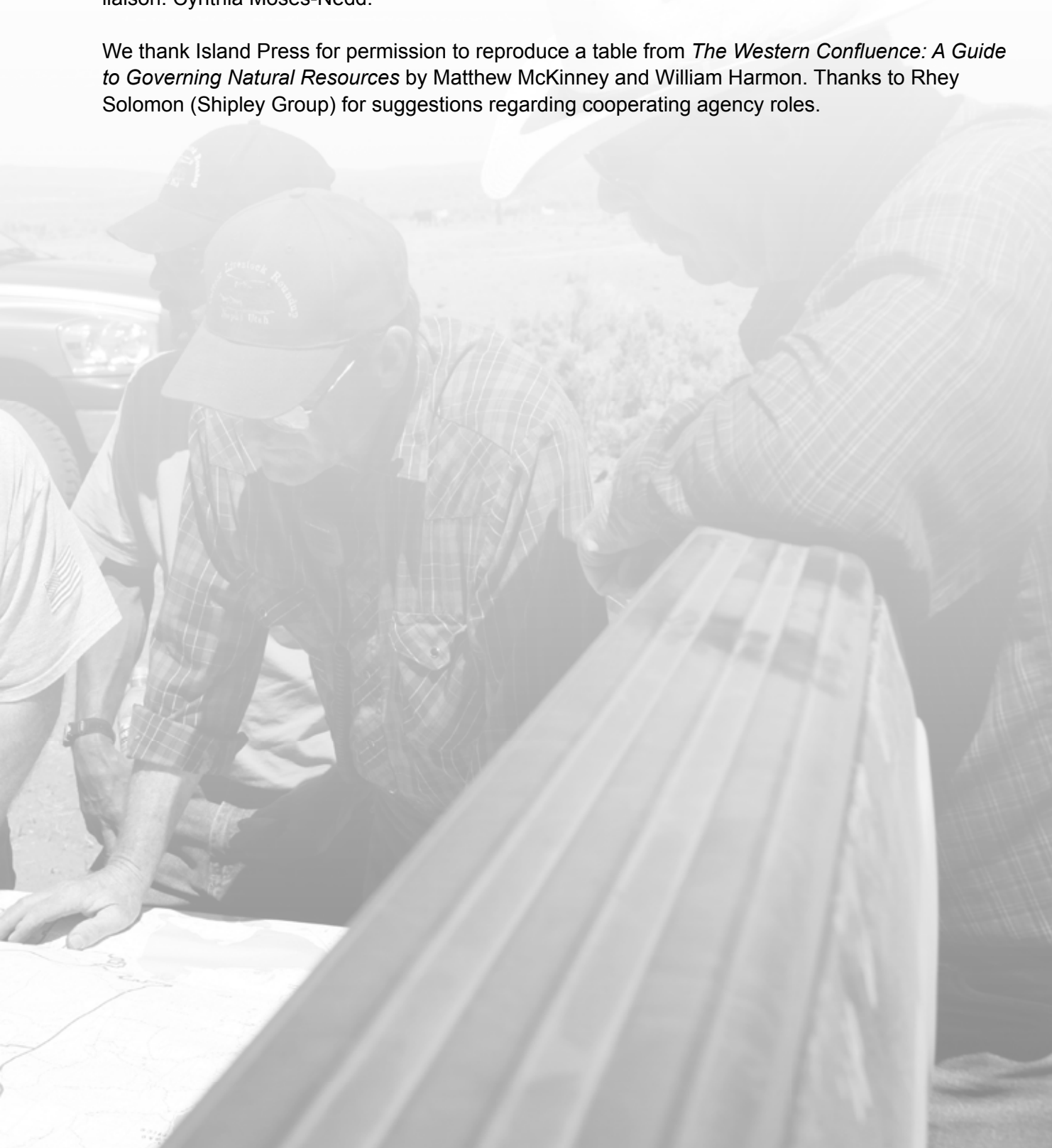
Director's Message _____	vii
Section 1. Introduction _____	1
The BLM's Statutory Responsibilities _____	1
The Challenges of Federal Land Management _____	2
Section 2. Implementation of the Cooperating Agency Relationship _____	7
The Role of CAs _____	7
Eligibility for CA Status _____	8
Eligibility of Tribes _____	9
Invitations To Participate _____	9
How To Establish Participation _____	11
The Role of CAs in the NEPA Process _____	11
The Role of CAs in the Planning Process _____	11
Section 3. Preparation of a Memorandum of Understanding _____	17
Section 4. Cooperating Agency Relationships: Frequently Asked Questions _____	21
Qualifying Organizations _____	21
Criteria for CA eligibility _____	21
Federal agencies _____	22
State agencies _____	23
Local governments _____	23
Tribal governments _____	23
Intergovernmental organizations _____	24
The Establishment of Working Relationships _____	25
Consensus and collaboration in the CA relationship _____	25
CA relationships and schedules _____	26
CA roles in preparing RMPs and EISs _____	27
CAs and multistate projects _____	28
The creation of MOUs _____	28
Informal alternatives to the CA relationship _____	29
The role of a joint lead agency _____	29
Financial support for the CA relationship _____	30
Termination of the CA relationship _____	30
Other Requirements and Challenges _____	31
Meeting coordination and consistency requirements _____	31
Information sharing _____	34
FACA compliance _____	35
CA meetings _____	36
Protests and appeals _____	36
The BLM's role as a CA _____	36
Section 5. Resources and Training _____	43
Resources _____	43
Training _____	43



Acknowledgments

DOI and BLM staff. 2d edition. Project coordinators: Shannon Stewart and Rob Winthrop (Decision Support, Planning, and NEPA). Writers: Cynthia Moses-Nedd (External and Intergovernmental Affairs), Robert Winthrop, and Shannon Stewart. Production and editing: Jacqui Read (Renewable Resources and Planning), Nancy Esworthy and Jennifer Kapus (National Operations Center). Legal support: Laura Damm (Office of the Solicitor). Cooperating agency liaison: Cynthia Moses-Nedd.

We thank Island Press for permission to reproduce a table from *The Western Confluence: A Guide to Governing Natural Resources* by Matthew McKinney and William Harmon. Thanks to Rhey Solomon (Shipley Group) for suggestions regarding cooperating agency roles.



Since the BLM's implementation of the Guide, we have completed more than 60 resource management plans and have engaged more than 300 intergovernmental partners at the Federal, State, local, and tribal levels.

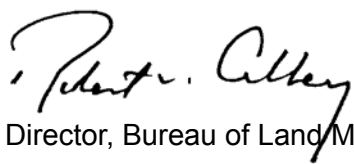


Director's Message

The Bureau of Land Management (BLM) has led the way in establishing a culture of cooperation, collaboration, and partnership in its land use planning process by promulgating regulations that establish a consistent role for cooperating agencies. State and field offices are required to engage their government partners consistently and effectively in the preparation or revision of land use plans. In 2008 the Department of the Interior broadened its regulations to require every Interior agency to offer cooperating agency status to all eligible intergovernmental partners for all environmental impact statements. The Department also indicated that cooperating agency procedures could be used to support efforts conducted under environmental assessments. We believe that by working closely with our State, local, tribal, and Federal government partners, we improve communication and understanding, identify common goals and objectives, and enhance the quality of our management of the public lands. These regulations demonstrate the strong commitment to recognizing the vital role that Federal, State, local, and tribal government partners play in ensuring effective and durable land management decisions.

A Desk Guide to Cooperating Agency Relationships, first published in 2005, is a “how to” publication that all BLM managers and staff have been required to put into practice. The *Guide* has helped to shape our collaborative efforts with State, local, and tribal governments and other Federal agencies to recognize common goals and achieve balanced approaches to multiple use management across the public lands. Since the BLM's implementation of the *Guide* we have completed more than 60 resource management plans and have engaged more than 300 intergovernmental partners at the Federal, State, local, and tribal levels. We have been able to incorporate the sound advice and recommendations of these government partners to create and implement successful land use plans.

We have updated the original *Guide* to reflect policy changes in how we deal with the cooperating agency relationship, to incorporate what we have learned from our cooperating agency experiences, to clarify how cooperating agency status differs from efforts to improve coordination, and to include updated language and references from the Department of the Interior's revised regulations and policies. We have also renamed it “*A Desk Guide to Cooperating Agency Relationships and Coordination with Intergovernmental Partners*.” This name change reflects our commitment to working with Federal, State, local, and tribal government partners and coordinating on a variety of activities on an ongoing basis. Through this expansion of our cooperative efforts, it is my hope that we enter a new era of public land management that furthers our ultimate goal of managing public lands and resources for the greatest good for all Americans.



Director, Bureau of Land Management

The CA relationship is distinctive, moving beyond consultation to engage officials and staff of other agencies and levels of government in working partnerships.



Section 1

Introduction



In the American political system, different spheres of government—Federal, State, local, and tribal—have their respective areas of responsibility, authority, and expertise. As a result, the need for cooperation in the management of public lands and resources is especially critical. This *Guide* describes one tool for creating more effective government partnerships: the lead agency–cooperating agency relationship (referred to in this *Guide* as the “cooperating agency (CA) relationship”) and its application to the planning and environmental analysis responsibilities of the Bureau of Land Management (BLM). While this *Guide* is primarily concerned with implementing formal CA relationships in preparing resource management plans (RMPs) and environmental analyses, collaboration with State, tribal, and local governments—as well as with other Federal agencies—should also be standard practice at the BLM for all land use planning and related implementation activities.

Section 1 of this *Guide* introduces the CA relationship and describes the opportunities and challenges this approach presents for the BLM and its government partners.

Section 2 describes the CA provisions of the BLM’s planning and National Environmental Policy Act (NEPA) regulations and guidance, reviews CA eligibility criteria, and describes the appropriate roles for CAs at various steps in the BLM’s planning and NEPA processes.

Section 3 describes key elements of an effective memorandum of understanding (MOU) establishing a CA relationship.

Section 4 provides answers to frequently asked questions regarding effective working relationships with CAs.

Section 5 describes sources of information and training that can help support effective interactions between the BLM and its CA partners.

The BLM’s Statutory Responsibilities

The CA relationship is distinctive, moving beyond consultation to engage officials and staff of other agencies and levels of government in working partnerships. The CAs share skills and resources to help shape BLM land use plans and environmental analyses that better reflect the policies, needs, and conditions of their jurisdictions and the citizens they represent.

The CA relationship provides a framework for intergovernmental efforts by:

- Gaining early and consistent involvement of CA partners
- Incorporating local knowledge of economic, social, and environmental conditions, as well as Federal, State, local, and tribal land use requirements
- Addressing intergovernmental issues
- Avoiding duplication of effort

- Enhancing local credibility of plans and environmental impact statements (EISs)
- Encouraging CA support for management decisions
- Building relationships of trust and cooperation
- Making better, more informed decisions

The CA role derives from the National Environmental Policy Act of 1969, which calls on Federal, State, and local governments to cooperate with the goal of achieving “productive harmony” between humans and their environment (42 U.S.C. 4321–4347). The regulations of the Council on Environmental Quality (CEQ) that implement NEPA (40 CFR Parts 1500–1508) allow Federal agencies—as lead agencies—to invite State, local, and tribal governments, as well as other Federal agencies, to serve as CAs in the preparation of EISs.

Additionally, in accordance with the Federal Land Policy and Management Act (FLPMA) of 1976, in the development and revision of land use plans, the BLM has an independent responsibility to coordinate with other units of government (43 U.S.C. 1712(c)(9)). As stated, the BLM will, to the extent practicable, seek to maximize consistency with the plans and policies of other government entities, whether or not a CA relationship has been established.

The National Environmental Policy Act

...it is the continuing policy of the Federal Government, *in cooperation with State and local governments*, and other concerned public and private organizations ... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans (42 U.S.C. 4331(a), emphasis added).

A CA relationship, however, provides an excellent opportunity to meet the coordination responsibilities under FLPMA. This *Guide* will clarify the distinctions between a cooperating agency relationship and the coordination that the BLM undertakes in carrying out FLPMA.

The BLM amended its planning regulations in 2005 to ensure that it engages its government partners consistently and effectively through the CA relationship whenever land use plans are prepared or revised. In 2008 the Department of the Interior (DOI) applied this policy to the preparation of all EISs. The CEQ and the DOI have also affirmed that the CA relationship may be used for preparation of environmental assessments (EAs). CEQ Memorandum on Cooperating Agency Reports, May 26, 2006; 43 CFR 46.225(e).

The Challenges of Federal Land Management

The BLM has a large and complex responsibility—managing more than 245 million acres of America’s public lands and roughly 700 million acres of its subsurface mineral estate. More than 140 resource management plans authorize and guide every action and approved use of these lands and resources. The BLM’s plans encompass a highly varied terrain, from Alaska’s North Slope and California’s Mojave Desert, to the open space surrounding many rapidly growing western cities. The agency’s challenge is to manage this portfolio on behalf of all Americans, while recognizing the considerable local and regional consequences its decisions may have. The BLM must act in compliance with Federal laws, regulations, and policies while seeking consistency with local and regional laws, policies, plans, needs, and values. This *Guide* represents a major step toward meeting these challenges by ensuring that the agency’s decisions benefit from the varied skills and knowledge of the BLM’s government partners, including knowledge of local conditions and values.

In any Federal undertaking, harmonizing national, regional, and local governance entails at least three key tasks. As Matthew McKinney and William Harmon noted in *The Western Confluence: A Guide to Governing Natural Resources* (2004), these include integrating the involvement of multiple parties with competing interests and values, removing obstacles to sharing and validating relevant information, and resolving conflicts among institutions and policies.

- **Multiple Parties.** State, local, and tribal government officials are often in a better position than are Federal land managers to engage the communities and interest groups most likely to be affected by a plan or proposed activity.
- **Complex Information.** Effective discussion between Federal agencies and the public is often blocked by deeply incompatible views of the “facts” regarding current environmental and socioeconomic conditions as well as the effects that a proposed plan or activity may have on these conditions. Resolution of these incompatibilities often requires the lead agency and CA partners to engage in joint factfinding and to seek agreement on where to find valid information and how to interpret it.
- **Conflicting Policies and Institutions.** The challenge of managing public lands can reveal significant disagreements in jurisdictions and mandates, not only among Federal, State, local, and tribal governments but also among different Federal or State agencies. The CA relationship offers a forum in which to discuss and, if possible, reconcile divergent policies and plans for the common good.

Although challenging, intergovernmental cooperation in the management of lands and resources can yield great benefits for the public. The CA relationship is one tool among many that can advance collective efforts among government partners. Each party may have some lessons to learn—and some practices to unlearn.

Common Characteristics of Western Resource Disputes

Multiple Parties

- Clash of values
- Competing interests
- Complicated relationships
- Varying types and levels of power

Complex Information

- Lack of information
- Misinformation
- Different views on what information is relevant
- Different procedures to collect and assess data
- Different interpretation of data
- Different levels of comfort with risk and uncertainty

A Briar Patch of Policies and Institutions

- Multiple jurisdictions
- Competing missions and mandates
- Lack of meaningful public participation
- Multiple opportunities for appeal
- A fundamental question of who should decide

From *The Western Confluence: A Guide to Governing Natural Resources*, by Matthew McKinney and William Harmon. Copyright 2004 by the authors. Reproduced by permission of Island Press, Washington, DC.

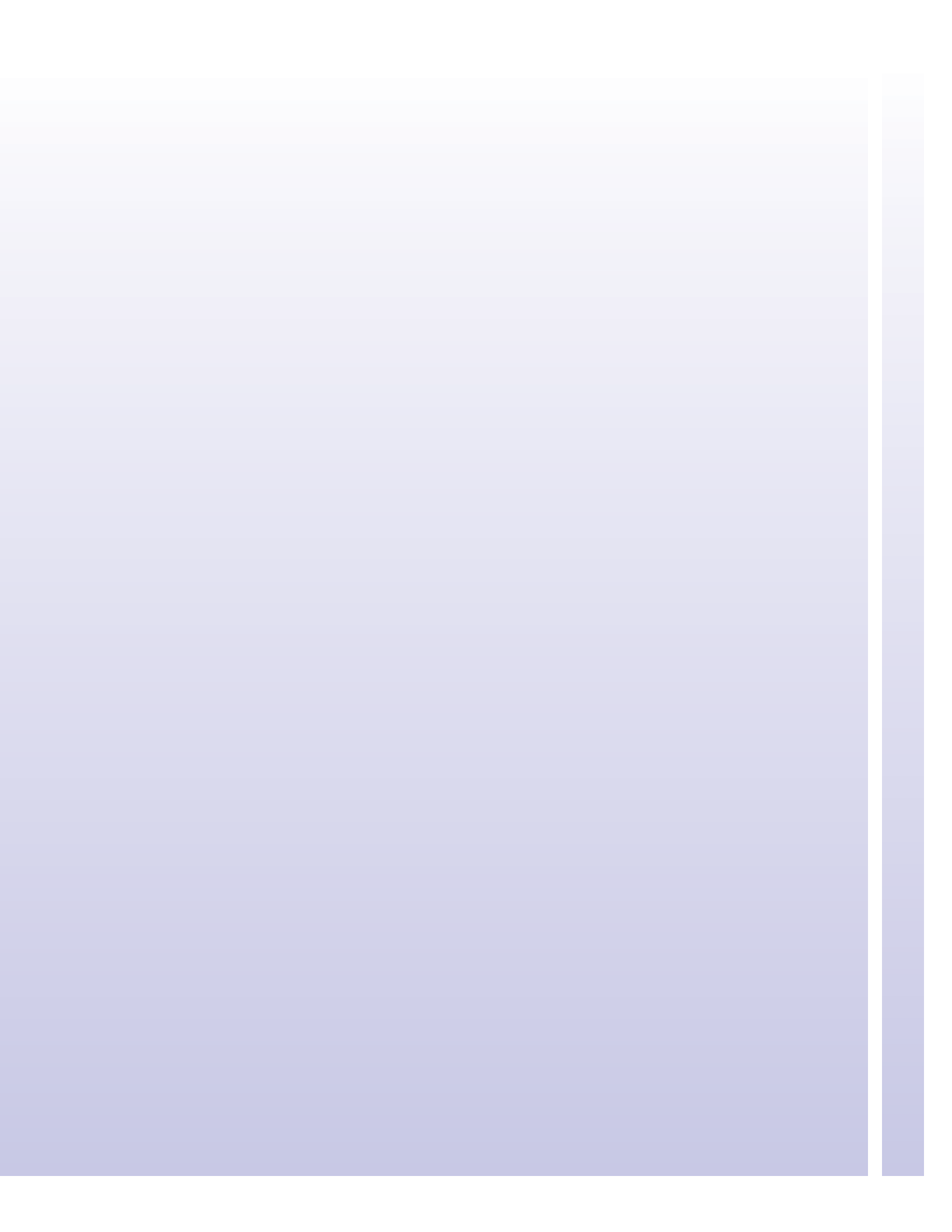
Experience has shown that there are three primary lessons that can lead to success when working across government boundaries. They are:

1. Federal, State, local, and tribal partners need to recognize that the CA relationship is a forum for sharing information and expertise, not for asserting authority. Engaging in a CA relationship neither augments nor diminishes an entity's

jurisdiction and authority. However, mutual respect for each agency's authority and jurisdiction is critical.

2. BLM managers and staff should acknowledge that the CA relationship requires new ways of doing business. Engaging with government partners as CAs is a unique form of consultation. Cooperating agencies expect, and should be given, a significant role (commensurate with available time and knowledge) in shaping plans and environmental analyses—instead of merely commenting on them.
3. All parties will find the CA relationship most productive when they emphasize mutual, rather than individual, gains and seek solutions that meet others' needs as well as their own.

Working with other government officials through the CA relationship makes better outcomes more likely and can establish a foundation for long-term cooperation that benefits all partners.



By adding provisions for the CAs to its planning regulations, the BLM has included the CAs as partners in land use planning.



Section 2

Implementation of the Cooperating Agency Relationship

This section explains the requirements regarding CA relationships established by BLM planning regulations and by guidance from the DOI on implementing NEPA (43 CFR Part 46; DM 516 Chapters 1–15).

The CEQ regulations implementing NEPA govern the CA relationship for all Federal agencies preparing EISs. Only those CEQ regulations specific to the CA relationship are cited here. CAs are typically not treated as advisory committees under the purview of the Federal Advisory Committee Act (FACA, 5 U.S.C. App.). This is because meetings held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees authorized to act on their behalf) acting in their official capacities are generally exempt from the requirements of FACA when the meetings are solely for the purpose of exchanging views, information, or advice related to management or implementation of Federal programs established pursuant to a public law that provides intergovernmental responsibilities or administration (2 U.S.C. 1534(b)).

The Role of CAs

The CEQ regulations call for early and significant involvement by CAs in the preparation of an EIS. Both lead agencies and cooperating agencies assume significant obligations in offering and accepting the CA relationship, meaning:

- As a lead agency, the BLM is expected to use the analyses and proposals of a CA “to the maximum extent possible consistent with its responsibility.”

- CAs accept obligations to contribute staff to the EIS team, develop and review analyses for which they have particular expertise, and fund their own participation.

The BLM land use planning process yields a dual-function document: an RMP and an EIS. The distinction is important. *Planning* (reflected in the RMP) selects the goals and identifies the management actions needed to achieve them. *Environmental analysis* (reflected in the EIS) identifies the consequences of achieving those goals. The CEQ regulations make the CAs partners in environmental analysis. By adding provisions for the CAs to its planning regulations, the BLM has included the CAs as partners in land use planning. (Because this *Guide* discusses both plans and implementation actions and projects, “EIS” will generally refer to implementation and project-level documents, although RMP revisions also involve EISs.)

40 CFR 1501.6 (CEQ)

Roles of lead and cooperating agencies.

- (a) The lead agency shall:
 - (1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.
 - (2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.
 - (3) Meet with a cooperating agency at the latter’s request.
- (b) Each cooperating agency shall:
 - (1) Participate in the NEPA process at the earliest possible time.
 - (2) Participate in the scoping process....
 - (3) Assume on request of the lead

agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

Eligibility for CA Status

State agencies, local governments, tribal governments, and other Federal agencies may serve as CAs. CEQ regulations, apart from the provision for tribes (see subsection Eligibility of Tribes), recognize two criteria for CA status: jurisdiction by law and special expertise. The BLM regulations incorporate these criteria.

40 CFR 1508.5 (CEQ)

Defining eligibility.

Cooperating agency means any federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact.... 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.

Jurisdiction by law offers a very specific basis for CA status: Authority by a Federal, State, tribal, or local government entity to approve, deny, or finance all or part of a proposal. Note that a Federal agency eligible on the basis of jurisdiction by law must serve as a CA when so requested by the lead agency (40 CFR 1501.6).

- The U.S. Fish and Wildlife Service (FWS) could possess jurisdiction by law for

an RMP or EIS through its consultation role under Section 7 of the Endangered Species Act (ESA). Note that the FWS would qualify as a CA not merely because the BLM is obliged to consult with that agency pursuant to Section 7 of the ESA, but because in the Section 7 consultation process the FWS has the authority to impose binding terms and conditions on an agency's action.

- A State's Department of Natural Resources could possess jurisdiction by law for an RMP or EIS through its delegated authority under Section 402 of the Clean Water Act to issue National Pollutant Discharge Elimination System permits.

40 CFR 1508.15 (CEQ)

Jurisdiction by law.

Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal.

Special expertise provides a broader window for CA status, emphasizing the "relevant capabilities or knowledge" that a Federal, State, local, or tribal government entity has with respect to reasonable alternatives or any significant environmental, social, or economic impacts associated with a proposed action. Note that, as compared to a Federal agency with jurisdiction by law, a Federal agency that is eligible on the basis of special expertise is not obligated to serve as a CA when so requested by the lead agency (40 CFR 1501.6).

- State agencies responsible for policies or programs affecting the condition and use of public lands—for example, by regulating water rights or sport hunting—would possess special expertise through relevant statutory responsibility.
- Cities and counties within a planning area would possess special expertise regarding local land use plans and policies relevant to BLM requirements for land use plan coordination and consistency (43 CFR 1610.3-1, 3-2). Local governments

could also possess expertise on the environmental, social, or economic impacts of a proposal and specialized local data and information.

There are two key considerations in determining whether an agency or government possesses special expertise relative to an RMP or EIS. The expertise must be relevant to the decisions to be made, and it must be demonstrated, generally through an appropriate program focus and staff capabilities.

40 CFR 1508.26 (CEQ)

Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

The MOU establishing a CA relationship should identify the basis for eligibility; see Section 3 (Preparation of an MOU). For additional guidance on applying the CA eligibility criteria, see Section 4 (Cooperating Agency Relationships: Frequently Asked Questions).

43 CFR 1601.0-5 (BLM) (also see 43 CFR 46.225(a) (DOI))

Defining eligibility.

(d) *Eligible cooperating agency* means:

(1) A Federal agency other than a lead agency that is qualified to participate in the development of environmental impact statements as provided in 40 CFR 1501.6 and 1508.5 or, as necessary, other environmental documents that BLM prepares, by virtue of its jurisdiction by law as defined in 40 CFR 1508.15, or special expertise as defined in 40 CFR 1508.26; or

(2) A federally recognized Indian tribe, a state agency, or a local government agency with similar qualifications.

(e) *Cooperating agency* means an eligible governmental entity that has entered into a written agreement with the BLM establishing cooperating agency status in the planning and NEPA processes. BLM and the cooperating agency will work together under the terms of the agreement. Cooperating agencies

will participate in the various steps of BLM's planning process as feasible, given the constraints of their resources and expertise.

Eligibility of Tribes

The CEQ regulations differ from the BLM and DOI regulations regarding the eligibility of American Indian tribes for CA status. The CEQ regulations specify that a tribe is eligible "when the effects [of an action] are on a reservation" (40 CFR 1508.5). In contrast, the BLM and DOI regulations apply the same eligibility criteria for Federal, State, local, and tribal government entities: jurisdiction by law or special expertise (43 CFR 1601.0-5(d)(2) and 46.225(a)(3)). The broader BLM and DOI criteria will apply in the preparation of all RMPs and EISs and, when appropriate, EAs.

For more guidance on managing the CA relationship with tribes, see Section 4 (Cooperating Agency Relationships: Frequently Asked Questions).

Invitations To Participate

The CEQ regulations state that a lead agency shall request the participation of eligible agencies and governments as CAs in the NEPA process (40 CFR 1501.6(a)(1)). Further, both BLM planning regulations and DOI NEPA regulations require managers to invite eligible agencies and governments to become CAs on RMPs and EISs. Managers are expected to make a reasonable effort to identify Federal, State, local, and tribal entities possessing jurisdiction by law or special expertise concerning an RMP or EIS. Once these entities are identified, managers must extend invitations to eligible agencies and governments (43 CFR 1610.3-1 and 43 CFR 46.225(b)).

In accordance with DOI regulations (43 CFR 46.225(c)), the Responsible Official for the lead bureau must consider any request by a government entity to participate as a CA.

The request must be evaluated against CA eligibility criteria—jurisdiction by law or special expertise. If the Responsible Official for the lead bureau denies a request, or determines it is inappropriate to extend an invitation, he or she must state the reasons in the EIS.

The BLM's Division of Decision Support, Planning and NEPA (WO-210) conducts an annual CA data call on behalf of the DOI's Office of Environmental Policy and Compliance. This information is subsequently provided to the CEQ. Authorized officers (AOs) should keep records of all CA participation for planning and NEPA activities to support this effort. In addition to the annual data call, CEQ regulations require any CA, in response to the lead agency's request for assistance in preparing the EIS to reply that other program commitments preclude the requested involvement and to provide a copy of said reply to CEQ (40 CFR 1501.6(c)). In accordance, BLM offices are instructed to submit immediately a copy of any correspondence from the BLM declining an invitation to participate as a cooperator to the Division Chief of WO-210; WO-210 will in turn submit this information to the CEQ.

Note that the requirement to invite eligible government and tribal entities to become a CA applies to all RMPs and EISs. This includes implementation actions and projects analyzed in an EIS, and new plans, plan revisions, or plan amendments prepared in conjunction with an EIS. The requirement does not apply to plan amendments or other activities prepared through an EA, although the CEQ and DOI have affirmed that the CA relationship may also be used for preparation of EAs (CEQ Memorandum on Cooperating Agency Reports, May 26, 2006; 43 CFR 46.225(e)).

43 CFR 1610.3-1 (BLM)

Inviting participation.

(a)(5) Where possible and appropriate, develop resource management plans collaboratively with cooperating agencies.

(b) When developing or revising resource management plans, BLM State Directors and Field Managers will invite

eligible Federal agencies, state and local governments, and federally recognized Indian tribes to participate as cooperating agencies. The same requirement applies when BLM amends resource management plans through an environmental impact statement. State Directors and Field Managers will consider any requests of other Federal agencies, state and local governments, and federally recognized Indian tribes for cooperating agency status. Field Managers who deny such requests will inform the State Director of the denial. The State Director will determine if the denial is appropriate.

43 CFR 46.155 (DOI)

Inviting participation.

The Responsible Official must whenever possible consult, coordinate, and cooperate with relevant State, local, and tribal governments and other bureaus and Federal agencies concerning the environmental effects of any Federal action within the jurisdictions or related to the interests of these entities.

43 CFR 46.225 (DOI)

Inviting participation.

(b)...the Responsible Official for the lead bureau must invite eligible governmental entities to participate as cooperating agencies when the bureau is developing an environmental impact statement.

(c) The Responsible Official for the lead bureau must consider any request by an eligible governmental entity to participate in a particular environmental impact statement as a cooperating agency. If the Responsible Official for the lead bureau denies a request, or determines it is inappropriate to extend an invitation, he or she must state the reasons in the environmental impact statement. Denial of a request or not extending an invitation for cooperating agency status is not subject to any internal administrative appeals process, nor is it a final agency action subject to review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

How To Establish Participation

Under DOI regulations at 43 CFR 46.225(d), bureaus should work with CAs to develop and adopt an MOU that describes their respective roles, assignment of issues, schedules, and staff commitments so that the planning and/or NEPA process remains on track and on time. An MOU must be used in the case of non-Federal agencies and must include a commitment to maintain the confidentiality of documents and deliberations to the extent legally permissible during the period before the bureau's public release of any planning and/or NEPA document, including drafts. Again note that under 43 CFR 46.225(e), MOUs may be developed when CAs are involved in preparing an EA. See Section 3 (Preparation of an MOU) for additional information.

It is important that MOUs establishing a CA relationship be completed in a timely manner—preferably before the Notice of Intent (which formally initiates the planning and NEPA processes) is published in the *Federal Register*. This will require a prompt response by the BLM to any requests for CA status. The CA relationship may be established later in the planning or NEPA process, but it then becomes particularly important that the MOU clearly identify expectations and responsibilities within an already established schedule.

The Role of CAs in the NEPA Process

In accordance with CEQ regulations (40 CFR 1501.6) and DOI regulations (43 CFR 46.230), throughout the development of an EIS, the lead bureau will collaborate, to the fullest extent possible, with all CAs concerning those issues relating to their jurisdiction and special expertise. CAs may, by agreement with the lead bureau, assist in doing the following:

- Identifying issues to be addressed
- Arranging for the collection and/or assembly of necessary resource,

environmental, social, economic, and institutional data

- Analyzing data
- Developing alternatives
- Evaluating alternatives and estimating the effects of implementing each alternative
- Carrying out any other tasks necessary for the development of the environmental analysis and documentation

DOI regulations include the requirement to offer CA status to eligible parties on all proposed actions or projects that will be analyzed through an EIS (43 CFR 46.225(b)). While the BLM is not required to offer cooperating agency status on EAs, there must be some like form of public involvement in the preparation of all EAs (BLM Manual Handbook, H-1790-1, Sec. 8.2). Public involvement on EAs should include the participation of Federal, state, and local government and tribal entities. Where the activities to be analyzed under an EA are complex or large in scale, the AO may decide to involve government partners through a formal CA relationship (43 CFR 46.225(e)) and should carefully consider any requests for CA status on such efforts.

Participating as a CA in the NEPA process does not negate an agency's or government's rights to comment, protest, or appeal the analysis or a decision.

The Role of CAs in the Planning Process

The BLM land use planning regulations (43 CFR 1600) provide a role for CAs at most steps of the planning process. The regulations and suggested roles for CAs during each of the steps are summarized here. (Note: Some of these steps take place as part of EISs for implementation actions and projects as well.)

1. The BLM develops a preparation plan.

The RMP's preparation plan should include a list of potential CAs and a preliminary assessment of the role of each entity based on jurisdiction by law or special expertise. The preparation plan establishes the planning schedule and budget within which the CAs must operate. Informal discussions with potential CAs should begin at this time, followed by formal invitations for CA status as appropriate. The BLM works with the potential CAs to prepare an MOU to establish CA relationships.

Suggested roles for CAs:

Identify relevant local and regional organizations and interest groups. Sponsor public forums in conjunction with the lead agency. Identify coordination needs associated with Federal, State, local, and tribal land use plans, policies, and controls. Begin to identify significant issues. Work with the appropriate BLM office to develop an MOU. Participate in the development of the preparation plan, as appropriate. For example, it would be appropriate for CAs to help in identifying data and inventory needs as well as anticipated management issues and concerns. It is expected that CAs would be involved to a lesser extent on some aspects of a preparation plan, such as schedule and budget.

2. The BLM conducts scoping and identifies issues.

This process provides a major opportunity for BLM and CA discussion. The issues selected will guide the planning process. To the extent consistent with other BLM responsibilities, these issues should include matters significant to CAs.

Suggested roles for CAs:

Sponsor public forums in conjunction with the lead agency. Collaborate in assessing scoping comments. Identify coordination needs associated with Federal, State, local, and tribal land use plans, policies, and controls. Identify significant issues. Identify connected, similar, and cumulative actions.

43 CFR 1610.4-1 (BLM)

Identification of issues.

At the outset of the planning process, the public, other Federal agencies, State and local governments and Indian tribes shall be given an opportunity to suggest concerns, needs, and resource use, development and protection opportunities for consideration in the preparation of the resource management plan. The Field Manager, *in collaboration with any cooperating agencies*, will analyze those suggestions and other available data, such as records of resource conditions, trends, needs, and problems, and select topics and determine the issues to be addressed during the planning process. [Here and in other excerpts from 43 CFR 1610.4, emphasis added.]

3. The BLM develops planning criteria.

At the start of the planning process the field office planning team determines the parameters that will guide development of the plan consistent with statutory and regulatory requirements. These planning criteria aid in tailoring plans to identified issues and help eliminate unnecessary data collection and analysis. The BLM has an obligation to seek consistency with Federal, State, local, and tribal plans, but only to the degree that such plans are also consistent with applicable Federal law and regulation.

Suggested roles for CAs:

Provide advice on proposed planning criteria. Identify pertinent elements of Federal, State, local, and tribal plans (such as transportation and environmental regulations). Identify legal requirements that shape Federal, State, local, and tribal CA policies and responsibilities.

43 CFR 1610.4-2 (BLM)

Development of planning criteria.

(a) The Field Manager will prepare criteria to guide development of the resource management plan or revision, to ensure:

(1) It is tailored to the issues previously identified....

(b) Planning criteria will generally be based upon applicable law, Director and State Director guidance, the results of public participation, *and coordination with any cooperating agencies and other Federal agencies, State and local governments, and federally recognized Indian tribes.*

4. The BLM collects inventory data.

The planning team identifies available data that can be used to characterize the physical, biological, social, and economic characteristics of the resource area; assesses the data; and identifies data gaps.

Suggested roles for CAs:

Identify data needs. Provide data and technical analyses within CA's expertise.

43 CFR 1610.4-3 (BLM)

Inventory data and information collection.

The Field Manager, *in collaboration with any cooperating agencies*, will arrange for resource, environmental, social, economic and institutional data and information to be collected, or assembled if already available.

5. The BLM analyzes baseline data and prepares the analysis of the management situation.

The analysis of the management situation (AMS) should describe current conditions and trends of resources, offer a framework for resolving planning issues, and provide a basis for analyzing the no-action alternative. Field office personnel are encouraged to make this document (or a summary) available to the public. A summary of current conditions and trends appears in the plan's "Affected Environment" section.

Suggested roles for CAs:

Provide information (such as local monitoring and baseline data) for the draft AMS and help interpret the AMS to constituents

as appropriate. Identify management opportunities to respond to the gathered data and the planning issues. Review draft AMS.

43 CFR 1610.4-4 (BLM)

Analysis of the management situation.

The Field Manager, *in collaboration with any cooperating agencies*, will analyze the inventory data and other information available to determine the ability of the resource area to respond to identified issues and opportunities.

6. The BLM formulates alternatives.

Each planning alternative consists of desired outcomes (goals and objectives) and the allowable uses and management actions anticipated to achieve those outcomes. Formulating alternatives is a key decision item that determines the range of management choices to be subsequently analyzed and considered for adoption in the plan.

Suggested roles for CAs:

Suggest goals and objectives for potential alternatives. Suggest land allocations or management actions to resolve issues.

43 CFR 1610.4-5 (BLM)

Formulation of alternatives.

At the direction of the Field Manager, *in collaboration with any cooperating agencies*, BLM will consider all reasonable resource management alternatives and develop several complete alternatives for detailed study. Nonetheless, the decision to designate alternatives for further development and analysis remains the exclusive responsibility of the BLM.

7. The BLM estimates effects of alternatives.

The analysis in the plan should provide adequate information for evaluating the physical, biological, social, and economic effects of each proposed planning alternative. The analysis should include direct, indirect, and cumulative effects considered in both short- and long-term perspectives, at various geographic scales.

Suggested roles for CAs:

Suggest models and methods for impact analyses. Develop and review direct, indirect, and cumulative effects analysis within CA's expertise. Suggest mitigation measures for adverse effects.

43 CFR 1610.4-6 (BLM)**Estimating effects of alternatives.**

The Field Manager, *in collaboration with any cooperating agencies*, will estimate and display the physical, biological, economic, and social effects of implementing each alternative considered in detail.

8. The BLM selects preferred alternative and issues the draft RMP.

The various planning alternatives must be evaluated in relation to planning issues and criteria and the analysis of effects. The AO selects a preferred alternative and forwards the resulting draft plan to the State Director for approval and publication. The draft plan must be available for public comment for a minimum of 90 days.

Suggested roles for CAs:

Collaborate with the BLM's AO in evaluating alternatives. Provide information for preliminary (internal) draft RMP. Review the preliminary (internal) draft RMP. After public release of the draft RMP/draft EIS, CAs may provide written comment, if desired, just as non-CAs and members of the public are allowed.

43 CFR 1610.4-7 (BLM)**Selection of preferred alternative.**

The Field Manager, *in collaboration with any cooperating agencies*, will evaluate the alternatives, estimate their effects according to the planning criteria, and identify a preferred alternative that best meets Director and State Director guidance. Nonetheless, the decision to select a preferred alternative remains the exclusive responsibility of the BLM. The resulting draft resource management plan and draft environmental impact statement shall be forwarded to the State Director

for approval, publication, and filing with the Environmental Protection Agency. This draft plan and environmental impact statement shall be provided for comment to the Governor of the State involved, and to officials of other Federal agencies, State and local governments and Indian tribes that the State Director has reason to believe would be concerned.

9. The BLM responds to comments and issues the final RMP.

The BLM is required to respond to substantive comments submitted on a draft RMP/draft EIS that reveal new information, missing information, or flawed analysis that could substantially change the conclusions. The AO then forwards the final plan, revised as needed to reflect comments received, to the State Director for publication. The document is also forwarded to the Governor for a 60-day review to identify any inconsistencies with State or local plans, policies, or programs.

Suggested roles for CAs:

Review comments within CA's expertise and assist the BLM in preparing responses. Review the preliminary (internal) draft of the proposed RMP. State agency CAs may contribute to the Governor's consistency review.

43 CFR 1610.4-8 (BLM)**Selection of resource management plan.**

After publication of the draft resource management plan and draft environmental impact statement, the Field Manager shall evaluate the comments received and select and recommend to the State Director, for supervisory review and publication, a proposed resource management plan and final environmental impact statement. After supervisory review of the proposed resource management plan, the State Director shall publish the plan and file the related environmental impact statement.

See **43 CFR 1610.3-2(e)** for requirements of the Governor's consistency review.

10. The BLM responds to protests and signs the Record of Decision.

The final RMP is subject to a 30-day protest period. Any party (including a CA) that participated in the planning process and that may be adversely affected by approval of the resource management plan may file a protest with the Director of the BLM. On approval of the final RMP, and subject to resolution of any protests, the State Director signs the Record of Decision (ROD).

Suggested roles for CAs:

The CA has a limited role in protest resolution and ROD development. Reviewing protests and signing the ROD are actions reserved to the BLM. The protest procedures provide the Director with an administrative review of the State Director's proposed decision. Where a CA has provided information relevant to a protest, the BLM may ask the cooperator for clarification.

See **43 CFR 1610.5-2** for protest procedures for resource management plans.

11. The BLM implements the RMP.

Formal CA status for a plan ends when the ROD is signed. Federal, State, local, and tribal entities may work with the BLM as the plan is implemented through assistance with on-the-ground projects. Such actions range from the identification of roads and trails within designated open and limited areas, to approval of small projects with few effects (such as improving campgrounds), to large projects with the potential for significant effects (such as establishing a right-of-way for the

Trans-Alaska Pipeline). Implementation actions and projects will receive a level of NEPA analysis commensurate with their potential effects. Those expected to have significant effects require an EIS. Actions and projects that are unlikely to generate significant effects will normally be analyzed through an EA.

Suggested roles for CAs:

Opportunities exist for Federal, State, local, and tribal entities to participate as cooperating agencies in future NEPA efforts for implementation actions. See subsection, The Role of CAs in the NEPA Process. CAs may also assist the BLM in performing implementation tasks such as monitoring, enforcement, or even project work.

12. The BLM monitors the RMP.

Monitoring is the process of collecting data and information to determine whether or not desired outcomes in the RMP (expressed as goals and objectives) are being met as the allowable uses and management actions in the plan are being implemented. A monitoring strategy, developed as part of the plan, identifies indicators of change, acceptable thresholds, methods, protocols, and timeframes that will be used to evaluate and determine whether or not desired outcomes are being achieved.

Suggested roles for CAs:

Federal, State, local, and tribal entities are strongly encouraged to work with the BLM and private partners to develop monitoring strategies and participate in assessing the effectiveness of plan implementation.

The BLM has developed a Model MOU, which provides guidance for developing a comprehensive, mutually respectful framework to guide the CA relationship.



Section 3

Preparation of a Memorandum of Understanding



Key to the CA relationship is the negotiation of an effective MOU that acknowledges the interests, expertise, and jurisdictional responsibilities of both the BLM and its CA partners and that outlines their respective roles and responsibilities in the planning and NEPA processes. DOI policy states that bureaus should develop and adopt an MOU to establish a CA relationship and that an MOU must be used in the case of non-Federal agencies (43 CFR 46.225(d)). An MOU will also provide for continuity despite changes in priorities and personnel within the BLM and its CA partners.

While the framework for a CA relationship is established by an MOU, its utility is limited if open and honest communication does not exist among the cooperating agencies. An MOU may transform a difficult relationship into a productive one, by reducing the chance for friction and misunderstanding by describing in sufficient detail each participant's goals and expectations and how the CAs will work together. Positive results will come from the willingness of all parties to pursue sound resource management on America's public lands.

The BLM should ensure that cooperators are engaged in drafting the MOU. There is no required format for an MOU, but there are certain essential elements that should be included in all MOUs as a basis for an effective CA relationship. The BLM has developed a Model MOU, which provides guidance for developing a comprehensive, mutually respectful framework to guide the CA relationship. A summary of the BLM's Model MOU is included below (a copy of the complete Model MOU can be found on the BLM's Cooperating Agencies webpage

at: http://www.blm.gov/wo/st/en/info/nepa/cooperating_agencies.html.

Please note: The Model MOU is intended to be used only as a guide. The BLM and CAs should work together to ensure that the agreed on MOU reflects their unique working relationship and the tasks at hand.

Introduction

- Describe the planning or NEPA effort and the major statutory and regulatory requirements it fulfills.
- Identify the government entities assuming CA status through the MOU and their qualifications: jurisdiction by law, special expertise, or both.
- If the CA is a tribal entity, specify the government-to-government consultation provision, including applicable laws and directives.

Purpose

- Describe what the MOU will accomplish.
- Designate cooperating agency(ies) in the planning or NEPA process.
- Identify the lead agency that has responsibility for the completion of the planning or NEPA effort.
- Establish a framework for cooperation and coordination between the lead agency and the cooperating agency(ies)

that will ensure successful completion of the planning or NEPA effort in a timely, efficient, and thorough manner.

- Describe the respective responsibilities, jurisdictional authority, and expertise of each of the parties in the planning or NEPA process.

Authorities for the MOU

- Identify the principal statutory authorities that authorize the parties to enter into the MOU (such as the NEPA of 1969 (42 U.S.C. 4321 et seq.); Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.); Council on Environmental Quality regulations on implementing NEPA (40 CFR Part 1501 et seq.); BLM planning regulations (43 CFR 1601 et seq.); and other authorities).

Roles and Responsibilities

- Identify the roles of each party in the planning or NEPA process, and outline the responsibilities each party will assume.
- Describe the BLM's responsibility for the content of the planning or NEPA document, including the BLM's obligation to consider CA input, particularly in those areas where the CA is deemed to possess jurisdiction by law or special expertise.
- Describe those areas where the CA will provide information, comments, and technical expertise to the lead agency regarding those elements of the planning or NEPA effort in which the CA has jurisdiction or special expertise or for which the lead agency requests the CA's assistance.
- Specifically address any matters of compensation (monetary or in-kind) for CAs providing technical analysis or data. The BLM should consult the Department's Office of the Solicitor to determine if any matters of compensation require a more formalized agreement than an MOU.

- Describe the schedule for any tasks assigned through the MOU.

Other Provisions

- Include standard legal stipulations to indicate, for example, that authorities are not altered and that immunities and defenses of all parties are retained.
- Include provisions to address issues such as conflicts of interest, the management and documentation of disagreements, and procedures that will be employed when parties disagree on matters of scientific information, data collection, or analysis.
- Describe procedures for handling confidential and predecisional information, while paying particular attention to state "sunshine" laws, requirements of the Freedom of Information Act (FOIA), and other pertinent laws.
- Include a conflict resolution provision, which may include options for facilitation and joint factfinding. The lead agency and CAs may consider retaining an independent facilitator to foster clear communication among the parties. The parties may stipulate in the MOU that a facilitator be used for a specific period and may agree to review the need for such assistance at designated intervals. A cost-sharing agreement (monetary, or in-kind) to pay for the facilitator should be detailed in the MOU.
- If necessary, include detailed provisions for engaging contractors as representatives for the CAs.

Agency Representatives

- Designate a representative and alternate representative for each party to ensure coordination between the cooperating agency(ies) and the lead agency during the planning or NEPA process.

Administration of the MOU

- Describe MOU approval authority. For the BLM, the MOU shall be signed by the authorized officer in accordance with BLM Manual 1203 and appropriate delegations of authority. For CAs, the MOU shall be signed by a similarly authorized official.
- Describe how the MOU may be amended or modified.
- Describe how and under what circumstances the MOU may be terminated.

*Some expertise is based
on informal rather than
technical knowledge.*



Section 4

Cooperating Agency Relationships: Frequently Asked Questions

Qualifying Organizations

Criteria for CA eligibility

► What types of organizations may serve as CAs?

The CA relationship is limited to government entities: State agencies, local governments, tribal governments, and other Federal agencies.

► Within the interdisciplinary (ID) team, is a CA limited to participating only on the topics on which the BLM has acknowledged its jurisdiction by law or special expertise, as reflected in the MOU?

A CA is entitled to collaborate as part of an RMP or EIS ID team in those areas for which the MOU acknowledges the CA's jurisdiction by law or special expertise. A CA's formal involvement on other issues occurs at the discretion of the BLM's AO. In practical terms, the scope and nature of a CA's participation is a matter for negotiation that takes into account the CA's policy concerns, the staff and resources it can reasonably contribute to the effort, the schedule, and other constraints.

► What discretion does the BLM have to determine the scope of a CA's special expertise?

The criterion of special expertise emphasizes the relevant capabilities or knowledge that a CA may contribute to the planning and NEPA process. Managers are required to offer CA status to potentially eligible government entities, including tribes, when preparing or

revising an RMP or preparing an EIS. It is the AO's responsibility, however, to determine which entities possess special expertise relative to a proposed plan or project and the nature of their expertise, subject to review by the State Director. The claimed expertise should be *demonstrated* (not merely asserted), and it should be *relevant* to the decisions to be made.

40 CFR 1508.26 (CEQ)

Special expertise means statutory responsibility, agency mission, or related program experience.

► How is expertise demonstrated?

In most cases, a government entity's expertise is demonstrated through staff capabilities and an appropriate program focus. For example, a local government that routinely conducts transportation planning and road maintenance may be assumed to have special expertise on these topics whether the work is carried out by permanent staff and/or contractors. There are many small governments that cannot afford to keep full- or part-time staff for every resource area and consequently rely on consultants for help. A government entity without regular programmatic responsibilities for a given resource area, however, cannot establish special expertise for the CA relationship by hiring a consultant or specialist in that area. Note: Some expertise is based on informal rather than technical knowledge. (See the discussion of knowledge of local "custom and culture" by tribal and local government officials below.)

► **What are some considerations in determining whether expertise is relevant?**

Relevance in this context means not only that the topic of the expertise has importance for the plan or project, but that the government entity claiming the expertise can speak to foreseeable effects on the people, property, or resources for which it has responsibility. For example, one county requested CA status on the basis of special expertise in air quality modeling. While air quality was a relevant issue and the county had program responsibility and technical skills on this topic, the county was so distant from the project area that it would not be influenced by any project-generated air quality impacts. For this reason the county's expertise was not relevant to the project, and its request for CA status was denied.

► **Is knowledge of local “custom and culture” a sufficient basis for including local governments as CAs under the special expertise criterion?**

Yes. Leaders of local governments are presumed to possess special expertise concerning the history, institutions, and social and economic conditions of their jurisdictions. This knowledge is often relevant to assessing baseline conditions and potential effects of planning alternatives.

► **How should the criterion of special expertise be applied to tribes?**

Because American Indian tribes have culturally distinctive uses and understandings of land and resources, a tribe's special expertise may be wide-ranging. Examples include the effects of a proposed planning decision on tribal employment and income, the need for access to ceremonial places, and the medicinal value of certain plant species. Sharing tribal knowledge of “custom and culture” through the CA role may create special challenges in managing information appropriately, as public disclosure of certain tribal information may be inappropriate.

Guidelines for Conducting Tribal Consultation, BLM Manual Handbook, H-8120-1, Sec. IV(E)

Native Americans may be reluctant to share sensitive information regarding resource locations and values with agency officials. This is partly because agencies have been hindered, until recently, from effectively protecting Native American cultural information from public disclosure under the Freedom of Information Act.

Federal agencies

► **What discretion do Federal agencies have when requested to serve as CAs?**

A Federal agency eligible on the basis of jurisdiction by law must serve as a CA when so requested. A Federal agency eligible on the basis of special expertise may choose whether or not to serve as a CA when so requested. A State, local, or tribal entity eligible on either basis may choose whether or not to serve as a CA when so requested.

40 CFR 1501.6 (CEQ)

Upon request of the lead agency, any other Federal agency which has jurisdiction by law *shall* be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement *may* be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency [emphasis added].

► **What should the BLM do if a Federal agency with jurisdiction by law refuses/declines an invitation to be a CA?**

It is important to document the request and denial of the request in writing and include it as part of the project file. A copy of the denial letter should also be forwarded immediately to the Washington Office Division of Decision Support, Planning and NEPA and submitted as part of the BLM's annual CA data call. While

a formal CA agreement may not be reached between the parties in some instances, there are other informal methods of engagement that may be pursued. The goal is to work together to the extent practicable to develop analysis acceptable to the lead agency and any agency(ies) with jurisdiction by law.

State agencies

► Can more than one State agency be granted CA status for a given RMP or EIS?

Yes. Because multiple State agencies may have special expertise or jurisdiction by law, there may be instances where more than one State agency assumes CA status. When working with multiple State agencies, it is desirable to have one entity (for example, the Governor's office) coordinate all comments and analyses from State CAs to ensure the BLM benefits from a consistent perspective. This working arrangement should be described as part of the MOU.

Jack Morrow Hills Final Coordinated Activity Plan–Final EIS Chapter 5, Sec. 5.1.2, July 2004 (Green River RMP Amendment)

The Wyoming Office of Federal Land Policy represents the State of Wyoming, with the following agencies designated as members: 1. Wyoming State Geological Survey, 2. Wyoming Game & Fish Commission, 3. Wyoming DEQ [Department of Environmental Quality]–Water, 4. Wyoming Oil and Gas Commission ... [includes 16 agencies].

Local governments

► What is a “local government” for purposes of CA requirements?

A local government is defined in BLM planning regulations as a general purpose unit of government with resource management authority or a political subdivision of a State. Counties (boroughs in Alaska) and incorporated cities clearly qualify.

Special-purpose districts (such as conservation districts) will qualify if State law defines them as political subdivisions.

43 CFR 1601.0-5(h) (BLM)

Local government means any political subdivision of the State and any general purpose unit of local government with resource planning, resource management, zoning, or land use regulation authority.

Wyoming Statutes 16-4-201(a)(iv) (2004)

“Political subdivision” means every county, city and county, city, incorporated and unincorporated town, school district and special district within the state.

Tribal governments

► Does inviting a tribe's participation as a CA satisfy the BLM's obligation to consult on a government-to-government basis regarding land use planning or other actions?

No. Consultation is particularly important in the BLM's government-to-government relationship with tribes. Once formal consultation has been initiated, tribal officials may decide to use the CA role as a convenient way to communicate their views or contribute their expertise. However, this is at the tribe's request, not the BLM's.

Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights. (E.O. 13175, Section 2(b), November 6, 2000.)

► **Must a native group be federally recognized to be eligible to serve as a CA?**

Yes. Only government entities can be cooperating agencies. Under Federal law, only federally recognized tribes qualify as governments (25 U.S.C. 479a).

While Federal agencies must consider the interests of members of the public in general, the agencies' official interactions with tribes, including consultation, are distinguished by unique legal relationships. The sovereign status of Indian tribes and special provisions of their law set Native Americans apart from all other U.S. populations and define a special level of Federal agency responsibilities.

► **Do reservation lands need to be affected for a tribe to serve as a CA?**

No. The CEQ's NEPA regulations allow tribes to serve as CAs "when the effects [of a proposed action] are on a reservation" (40 CFR 1508.5). (In its guidance, the CEQ has supported extending CA status to federally recognized Alaska Native villages and tribes when the proposed action would affect tribal interests.) In contrast, both DOI NEPA regulations and BLM planning regulations use the same eligibility criteria for tribes as for Federal, State, and local government entities: jurisdiction by law or special expertise. Some areas with large native populations, notably Alaska, lack reservations almost entirely. In practice, tribes may have aboriginal or historical ties to lands at a considerable distance from contemporary centers of tribal settlement.

Guidelines for Conducting Tribal Consultation, BLM Manual Handbook, H-8120-1, Sec. V(B)

Tribes and groups with historical ties to the lands in question, including those that are no longer locally resident, should be given the same opportunity as resident tribes and groups to identify...their issues and concerns regarding the public lands.

Intergovernmental organizations

► **May an intergovernmental organization serve as a CA?**

No. Many regional intergovernmental associations exist to provide technical assistance or other services to member governments. The terminology varies: the Rogue Valley Council of Governments, the Uintah Basin Association of Governments, and the Genesee–Finger Lakes Regional Planning Council, are all intergovernmental associations. These organizations are not themselves units of government. An intergovernmental association may not, therefore, serve as a CA. Some regional government bodies, such as regional planning authorities, are defined as political subdivisions in State law and could therefore qualify as CAs.

New Hampshire Revised Statutes, Title 3, 36:49-a

Regional planning commissions are political subdivisions of the state. However, regional planning commissions have only that power and authority expressly provided for in [New Hampshire Revised Statutes] 36.

► **May an intergovernmental organization represent a CA in the BLM's planning process?**

Yes. An intergovernmental organization may represent one or more CAs, provided that all agencies to be represented are members of that organization and all have formally authorized it to act on their behalf. Such authorizations should be identified in the MOU. Please be aware that such representation will likely preclude the use of the Unfunded Mandates Reform Act exemption to FACA (see FACA compliance below for more information).

The Establishment of Working Relationships

Consensus and collaboration in the CA relationship

► Does a CA relationship require the BLM and the cooperators to make decisions by consensus?

No. Consensus may not always be achievable or consistent with the BLM's legal obligations or policy decisions. However, the DOI's NEPA regulations at 43 CFR 46.110(c) require that the Responsible Official must, whenever practicable, use a consensus-based management approach to the NEPA process.

Consensus-based Management

43 CFR 46.110(a)

Consensus-based management incorporates direct community involvement in consideration of DOI bureau activities subject to NEPA analyses, from initial scoping to implementation of the bureau decision. It seeks to achieve agreement from diverse interests on the goals of, purposes of, and needs for bureau plans and activities, as well as the methods anticipated to carry out those plans and activities. . . . Consensus-based management involves outreach to persons, organizations, or communities that may be interested in, or affected by, a proposed action, with an assurance that their input will be given consideration by the Responsible Official in selecting a course of action.

43 CFR 46.110(b)

In incorporating consensus-based management in the NEPA process, the bureaus should consider any consensus-based alternative(s) put forth by those participating persons, organizations or communities who may be interested in or affected by the proposed action. While there is no guarantee that any particular consensus-based alternative will be

considered to be a reasonable alternative or be identified as the bureau's preferred alternative, the bureaus must be able to show that the reasonable consensus-based alternative, if any, is reflected in the evaluation of the proposed action and discussed in the final decision. To be selected for implementation, a consensus-based alternative must be fully consistent with NEPA, the CEQ regulations, and all applicable statutory and regulatory provisions, as well as Departmental and bureau written policies and guidance.

43 CFR 46.110(e)

If the Responsible Official determines that the consensus-based alternative, if any, is not the preferred alternative, he or she must state the reasons for this determination in the environmental document (43 CFR 46.110(d)). When practicing consensus-based management in the NEPA process, bureaus must comply with all applicable laws, including any applicable provisions of the Federal Advisory Committee Act (FACA).

Collaboration mandates methods, not outcomes. It brings diverse parties together to seek broadly acceptable solutions to (what are usually) complex problems. It does not guarantee the parties will achieve consensus, and the BLM remains the final decisionmaker on matters within its jurisdiction.

► How does the involvement of CAs affect the role of the BLM's AO in the development of an RMP or EIS?

CA involvement makes the AO's leadership of the land use planning process essential. In guiding planning efforts, field managers are challenged to reconcile bureau-wide policy objectives with the needs and values of local, regional, and national constituencies. To be successful, the field manager must be committed to collaborative problem solving.

► **In working collaboratively with CAs on a plan, should the AO limit the range of issues and solutions to be considered?**

Since a key reason to involve other units of government is to benefit from their distinctive perspectives and expertise, innovative approaches should be encouraged. Nonetheless, collaboration increases the need to establish practical parameters for the planning process. As the representative of the lead agency, the AO is responsible for clarifying for CAs the general goals of the RMP. The goals include, where appropriate, the range of potential land use allocations as consistent with statutory and regulatory requirements. Such limits are best established through clear planning criteria and a well-developed statement of purpose and need.

► **Does the potential CA partner also have a say in determining the objectives and ground rules of the CA relationship?**

Yes, the MOU establishing the CA relationship should reflect the views of all signatories.

► **What if the parties cannot agree on the terms of an MOU?**

The AO should make a good faith effort to negotiate the terms of an MOU with the potential CA partner, consistent with applicable statutes, regulations, and this *Guide*. If this effort is unsuccessful, the CA relationship has not been established.

► **Is it appropriate to use a third-party facilitator to help CAs and BLM staff collaborate when preparing an RMP or EIS?**

Yes. CAs and BLM staff may differ significantly not only in their policy orientations but also in their knowledge, skills, style of interaction, and experience with NEPA and the BLM planning process. An effective facilitator may help the parties negotiate the MOU, focus efforts productively, and resolve disagreements as

they arise. CAs should participate in the selection of a facilitator. However, using a facilitator does not alter the decisionmaking responsibilities of the BLM or CAs.

► **What should the BLM and CAs do if they cannot agree on substantive elements of an RMP or EIS—for example, the designation of alternatives or the analysis of effects?**

Where the BLM and one or more CAs disagree on substantive elements of an RMP or EIS and these disagreements cannot be resolved, the BLM should include a summary of the CAs' views in the draft and final documents.

CA relationships and schedules

► **Is it appropriate to extend a planning or EIS schedule to accommodate the needs of CAs?**

Normally, no. The preferences of CAs regarding the pace and direction of collaborative efforts do not supersede the need to adhere to established schedules. Those schedules should be included in the MOUs establishing CA relationships. Whenever possible, the AO and CA representatives should develop a mutually agreeable planning or EIS schedule while negotiating their MOUs. It is important to discuss with CAs what acceptable timeframes are for meetings, requests for information, and requests for reviews. Appropriate timelines should be incorporated into the MOU and adhered to throughout the process to the extent practicable by all parties.

► **If effective collaboration with CAs would be compromised by adhering to an established planning or EIS schedule, what are some solutions?**

AOs and their CA partners have a number of options, including:

- Vary the level of a CA's involvement. Both CEQ and BLM regulations make it clear

that the CAs may negotiate a level of involvement consistent with their available staffing and resources. The CAs may vary the time and resources they commit by determining which meetings to attend, whether to offer data or analyses (or both), and at what stage of document preparation to comment.

- Seek ways to reorganize the planning or EIS schedule for greater efficiency, without modifying the deadline for completion.
- Improve the efficiency of collaboration among the CAs and BLM staff. The involvement of an effective facilitator may improve the speed and focus of CA and BLM staff interaction.
- Where none of these approaches is feasible, the Washington Office may consider a change in the planning schedule, or the Responsible Official may change the schedule for completion of a NEPA document.

40 CFR 1501.6(c) (CEQ)

A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement ... reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council [on Environmental Quality].

43 CFR 1601.0-5(e) (BLM)

Cooperating agencies will participate in the various steps of BLM's planning process as feasible, given the constraints of their resources and expertise.

CA roles in preparing RMPs and EISs

► May the CAs use their expertise to prepare (rather than merely review and comment on) sections of an RMP or EIS or the technical analyses on which either is based?

Yes, where appropriate, when the CA possesses expertise and resources to complete the task in a timely manner, the BLM may agree to include the CA's analysis as part of an RMP or EIS. Work developed by the CA becomes the BLM's work, however, and the BLM is responsible for all content within the planning or NEPA document and the supporting materials, which must be included in the administrative record.

40 CFR 1501.6(a) (CEQ)

The lead agency shall...[u]se the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

► May a CA participate in the review of protests to a plan?

No. Protest resolution is an internal review process conducted by the BLM Washington Office, to determine if in preparing a plan applicable laws, regulations, and policies were followed. However, a CA that has provided information relevant to an issue raised in a protest may be asked for clarification.

► What is the role of a CA once the Record of Decision (ROD) is signed?

While formal CA status ends once the ROD is signed, CA expertise may be valuable in implementing plans and projects, as well as in monitoring outcomes and assisting with enforcement. Both the BLM and local communities may benefit from an ongoing relationship. In addition, after the establishment of a new or revised RMP, CA relationships may be formed around the NEPA

processes for subsequent implementation activities.

CAs and multistate projects

► What are some tips for dealing with CAs on multistate projects?

The project manager should take responsibility for drafting key documents, such as letters of invitation and the MOU, to ensure that all agencies and governments receive a consistent message about the nature of the project and their opportunity for signing on as a CA. Correspondence to potential CAs is usually best issued by the appropriate state office over the State Director's signature. Managing the administrative record can be particularly challenging on multistate projects. The project manager should ensure that procedures are in place for maintaining a complete administrative record, including correspondence with potential and actual CAs.

► How does the potential role of a CA differ when participating in an EIS for a multistate project as compared with participation in a localized plan or project?

The CA role involves a significant commitment of time and resources. Local governments may not find it advantageous to participate as cooperators in large projects that encompass issues not specific to their interests. The interest of local governments in a multistate project such as an electric transmission line, for example, may be limited to a few miles of the right-of-way that affects their jurisdiction, but may not include discussions about endangered species in a distant State. This type of concern may be addressed by speaking with project staff or the local field manager in a meeting specifically called to address these issues, rather than requesting CA status.

The creation of MOUs

► Is a single MOU or are multiple, separate MOUs preferable for large projects involving many cooperators?

While a single MOU signed by multiple CAs may be a very efficient approach to establishing CA relationships, it does have limitations. If a single MOU is to be effective, CAs must have similar roles and responsibilities that can be adequately described in the single agreement, and all parties must be willing to sign jointly. In some instances, CAs may have unique or specific circumstances that would be better described in individual MOUs. Some CAs may also be unwilling to sign a joint MOU with other CAs.

► Are variations in the BLM's Model MOU acceptable?

Yes, in fact adapting the Model MOU is encouraged. CAs should be fully engaged in the drafting of an MOU. The BLM's Model MOU is intended to be used only as a guide. The BLM's Model MOU outlines certain essential elements that should be included in all MOUs as a basis for an effective CA relationship. The BLM and CAs should work together to ensure that the agreed on MOU reflects their unique working relationship and the tasks at hand.

► Are there other uses for MOUs besides establishing CA relationships?

Yes. The BLM has used MOUs for many purposes. For example, MOUs have described the relationship between the BLM and other Federal, State, local, or tribal entities on land use plan implementation. Such MOUs outline roles, priorities, and timelines for actions needed to implement land use plan decisions and to monitor the effectiveness of those actions at meeting established goals and objectives. In a few instances, MOUs have also described the coordination between the BLM and other units of government as provided under FLPMA for the BLM's land

use planning process. These MOUs focus on defining a coordination framework that is acceptable to both parties.

Informal alternatives to the CA relationship

► Are there ways to engage agencies and governments other than through formal CA relationships?

Sometimes agencies and governments are unwilling to enter into formal CA agreements due to concerns about conflict of interest, capacity/workload issues, or lack of understanding. When those situations arise, there are many ways to engage potential partners in close working relationships without their becoming a formal cooperator. For example, the AO may maintain informal communication on key issues, relevant information, and the partners' preferred outcomes.

► How should the BLM treat government partners that wish to be closely involved in a plan or project assessment and that are eligible for CA status, but that are unwilling to sign an MOU?

By DOI regulation, an MOU must be used to establish the CA relationship in the case of non-Federal agencies, and this agreement must include a commitment to maintain the confidentiality of documents and deliberations during the period before the bureau's public release of any NEPA document, including drafts to the extent permitted by law (43 CFR 46.225(d)). As noted above, when other agencies or local governments are unwilling to sign an MOU, the AO may maintain informal communication on key issues, relevant information, and the partners' preferred outcomes. In nearly all cases, however, it is inappropriate to provide the same level of involvement in a plan or project analysis for an entity unwilling to formalize its participation as provided to formal CAs. For example, the MOU should specify how the parties will control the dissemination of predecisional

documents, whether prepared by the BLM or one of the CAs. The MOU is intended to protect the interests of all parties and provides a set of mutually agreeable procedures guiding the collaboration.

The role of a joint lead agency

► Under what circumstances should a Federal, State, local, or tribal government entity be invited to serve as a joint lead agency, as opposed to participating as a CA?

The DOI NEPA regulations at 43 CFR 46.220 provide guidance on establishing joint lead agency relationships. In most cases, the Responsible Official should designate one Federal agency as the lead, with the remaining Federal, State, local, and tribal governments assuming roles as CAs. In this manner, the other Federal, State, local, and tribal entities may work to ensure that the NEPA document will meet their needs for adoption and application to their related decision(s).

In some cases, a non-Federal agency (including a tribal government) must comply with State or local requirements that are comparable to the NEPA requirements. In these cases, the Responsible Official may designate the non-Federal agency as a joint lead agency. (See 40 CFR 1501.5 and 1506.2 for a description of the selection of lead agencies, the settlement of lead agency disputes, and the use of joint lead agencies.)

In some cases, the Responsible Official may establish a joint lead relationship among several Federal agencies. If there is a joint lead, then one Federal agency must be identified as the agency responsible for filing the environmental impact statement with the Environmental Protection Agency.

Financial support for the CA relationship

► Will the BLM compensate the CAs for their participation?

The CAs normally assume the costs of their own participation, including salary, travel, and other expenses. A field office should reimburse the costs of any studies it specifically requests from a CA within its expertise.

40 CFR 1501.6(b)(5) (CEQ)

Each cooperating agency shall ... [n]ormally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies.

► Are CAs required to fund, staff, or prepare analyses if requested?

No. CAs are not required to fund, staff, or prepare analyses. CAs may elect to do so, but the decision is theirs.

Termination of the CA relationship

► Under what circumstances may a CA relationship be terminated?

If the BLM and one or more of its CA partners find that they cannot work together toward a common goal and efforts at dispute resolution have been unsuccessful, it is appropriate to terminate the CA relationship. Factors identified by the CEQ as suggesting the need to consider termination include a CA's unwillingness to accept the lead agency's key decisions; deliberate violation of key procedural agreements (such as the restricted release of predecisional documents); and deliberate misrepresentation of the planning and NEPA process or its findings.

Factors Supporting Termination of the CA Relationship

- The cooperating agency cannot accept the lead agency's final decisionmaking

authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action.

- The cooperating agency is not able or willing to provide the data and rationale underlying its analyses or assessment of alternatives.
- The cooperating agency releases predecisional information (including working drafts) in a manner that undermines the agreement to work cooperatively before publishing draft or final analyses.
- The cooperating agency consistently misrepresents the process or the findings presented in the analysis and documentation.

This list of factors is not exhaustive. (Adapted from: Council on Environmental Quality, Memorandum for Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, Attachment 1 (2002))

The MOU should include provisions for termination, as well as other ground rules, such as procedures for dispute resolution.

► Is a disagreement about substantive matters that is raised in the planning or NEPA process a valid basis for terminating the CA relationship?

No. While the BLM remains the decisionmaker for matters within its jurisdiction, the CAs are not required to concur on all findings; for example, the effects anticipated from a particular planning alternative. Working through disagreements within the planning or NEPA team often results in stronger, better justified findings and decisions.

Other Requirements and Challenges

Meeting coordination and consistency requirements

► What is the scope of the BLM's coordination responsibilities in developing and revising RMPs?

The BLM has a responsibility to coordinate with other government units. To the extent practicable, the BLM will seek to maximize consistency with the plans and policies of other government entities. This responsibility applies whether or not a CA relationship has been established.

FLPMA, 43 U.S.C. 1712(c) (BLM)

In the development and revision of land use plans, the Secretary shall...

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located...and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal 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.

43 CFR 1610.3-1 (BLM)

Coordination of planning efforts.

(a) 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....

(1) Keep apprised of non-Bureau of Land Management plans;

(2) Assure that BLM considers those plans that are germane in the development of resource management plans for public lands;

(3) Assist in resolving, to the extent practicable, inconsistencies between Federal and non-Federal government plans;

(4) Provide for meaningful public involvement of other Federal agencies, State and local government officials, both elected and appointed, and Federally recognized Indian tribes, in the development of resource management plans ... and

(5) Where possible and appropriate, develop resource management plans collaboratively with cooperating agencies.

► Is there a “coordinating agency status” designation?

No. There is no such designation as “coordinating agency status.”

► Is an MOU required between a local government and the BLM to define coordination?

No. While there are a few examples where the BLM has used MOUs for this purpose, an MOU is not required. However, a framework is needed to define the coordination and how it will occur. An MOU may be a useful tool to establish these terms. Such an MOU should be negotiated and agreed on by both parties.

► **Can the BLM meet its coordination responsibilities through a CA relationship?**

The BLM has a duty to coordinate even if a formal CA relationship is not established. In accordance with FLPMA, the BLM's coordination responsibilities include maximizing consistency with the plans and policies of other government entities and providing for meaningful public involvement of other Federal, State, local, and tribal government officials in the development of land use decisions (see above). The CA relationship provides an excellent opportunity to meet, and exceed, these coordination responsibilities under FLPMA. The CA relationship goes beyond coordination by facilitating a close collaboration in sponsoring public involvement, reviewing resource data, formulating alternatives, analyzing potential impacts, and sharing internal draft documents. The BLM encourages the establishment of a CA relationship if this type of collaboration is expected.

43 CFR 46.155 (DOI)

Consultation, coordination, and cooperation with other agencies.

The Responsible Official must whenever possible consult, coordinate, and cooperate with relevant State, local, and tribal governments and other bureaus and Federal agencies concerning the environmental effects of any Federal action within the jurisdictions or related to the interests of these entities.

43 CFR 1610.3-1 (BLM)

Coordination of planning efforts.

(b) When developing or revising resource management plans, BLM State Directors and Field Managers will invite eligible Federal agencies, state and local governments, and federally recognized Indian tribes to participate as cooperating agencies.

► **Does coordination under FLPMA require the BLM to share predecisional documents?**

No. FLPMA does not require the sharing of predecisional documents as part of a coordination-based relationship. However, during the planning process, a key element of the cooperating agency relationship includes BLM sharing of predecisional documents with cooperators. Absent extraneous factors such as protection of proprietary or contractual information or ensuring compliance with State public records or public meetings requirements ("sunshine laws"), predecisional documents can be shared with cooperating agencies in accordance with the terms of the MOU that directs the activities within the relationship. Sharing of predecisional documents may occur as part of the BLM's coordination activities at the discretion of the AO. However, if it is deemed critical to the coordination process, sharing of predecisional documents should be guided by a detailed written agreement or MOU between the parties. Such an agreement or MOU should specify that predecisional documents will remain confidential to the extent allowed by law.

► **To what extent is the BLM *obligated* to follow local plans and policies?**

By regulation, the BLM has an obligation to keep apprised of non-BLM plans; assure consideration is given to those plans that are germane to the development of the BLM RMPs; assist in resolving, to the extent practicable, inconsistencies between Federal and non-Federal plans; provide for meaningful public involvement of other Federal agencies, State, local, and tribal government officials in the development of the BLM's RMPs; and where possible and appropriate, develop the BLM's RMPs collaboratively with CAs. Furthermore, the BLM's RMPs must be consistent with officially approved or adopted resource-related plans, and the policies and programs contained therein, of other Federal, State, local, and tribal governments, so long as those plans and policies/programs are also

consistent with the purposes, policies, and programs of Federal laws and regulations.

43 CFR 1610.3-2 (BLM)
Consistency requirements.

(a) Guidance and resource management plans and amendments ... shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments, and Indian tribes, so long as the guidance and resource management plans are also consistent with the purposes, policies, and programs of Federal laws and regulations applicable to public lands.

For example, a county's capital improvement plan might identify a parcel of BLM land for acquisition to build a fire station or a community center. Under the Recreation and Public Purposes Act, such a transfer of land could be consistent with Federal law. In revising its RMP, the local field office would need to consider this request, weighed against other relevant management objectives, such as the need to protect critical habitat for threatened or endangered species or to minimize conflicts with existing uses, such as a nearby shooting range already permitted by the BLM.

Recreation and Public Purposes Act, 43 U.S.C. 869 (a)

The Secretary of the Interior ... may ... dispose of any public lands to a State, Territory, county, municipality, or other State, Territorial, or Federal instrumentality or political subdivision for any public purposes, or to a nonprofit corporation or nonprofit association for any recreational or any public purpose consistent with its articles of incorporation or other creating authority.

► When inconsistencies between a proposed action and a local plan or policy cannot be resolved, should they be acknowledged in the RMP or EIS?

Yes. The CEQ regulations require that inconsistencies between the proposed action and other Federal, State, local, or tribal land use plans and policies be documented in the EIS.

40 CFR 1502.16 (CEQ)

[The environmental consequences section of the EIS] shall include discussions of...

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned.

40 CFR 1506.2 (CEQ)

(d) To better integrate environmental impact statements into state and local planning processes, statements shall discuss any inconsistency of a proposed action with any approved state or local plan or laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

► What if a State or local plan is inconsistent with a Federal law or policy?

In such cases, the BLM does not have an obligation to seek consistency. For example, in preparing RMPs 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 RMP, if this would prevent the BLM from complying with its statutory obligation.

FLPMA, 43 U.S.C. 1712(c) (BLM)

In the development and revision of land use plans, the Secretary shall ...

(3) give priority to the designation and protection of areas of critical environmental concern.

Information sharing

► **May the BLM share predecisional planning documents with the CAs?**

Yes. Unless constrained by other factors, such as a State public records requirement or the need to protect the confidentiality of proprietary or contractual information, predecisional documents should be freely shared with the CAs. If the AO does not intend to make predecisional documents publicly available, the MOU establishing the CA relationship should specify that such documents will remain confidential to the extent allowed by law.

► **Are documents provided by CAs or to CAs subject to disclosure under the Freedom of Information Act (FOIA, 5 U.S.C. 552)?**

It depends on the nature and content of the document. FOIA includes a provision that allows an agency to exempt from release documents involving “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” (FOIA exemption 5, 5 U.S.C. 552(b)(5)). A lead Federal agency could assert this exemption to protect from disclosure those documents prepared by cooperating or joint lead agencies that contributed to the development of an RMP or EIS. Such documents may satisfy both requirements of FOIA exemption 5: they are predecisional and they are part of the lead agency’s deliberative process. Although FOIA exemption 5 may be applicable, in many instances documents that meet this exemption are released. In response to a FOIA request, the BLM should review each document that responds to the request under FOIA and any applicable FOIA policies and guidance to determine whether release is appropriate.

Note that the release of a document by a CA may be considered a waiver of the

lead Federal agency’s deliberative process privilege, potentially precluding withholding documents under FOIA exemption 5. The AO should consult with the FOIA officer or the Department’s Office of the Solicitor if there are questions about whether releasing a sensitive document would waive applicable privileges and subject the document to disclosure under FOIA.

► **Are there exceptions to FOIA exemption 5?**

Yes. Communications from a CA will not qualify as exempt from release under FOIA exemption 5 where that agency is advancing a competitive position that would be detrimental to another party, which will almost always be the case here.

Limitations on FOIA Exemption 5

In some circumstances, [FOIA exemption 5] may also apply to documents generated outside of an agency. Documents prepared by outside consultants at the request of the agency and recommendations or advice from Congress or the States can be protected if those documents played a role in the agency’s deliberative process *and the outside parties are not advocating their own interests in seeking a Government benefit at the expense of others*. This may include Indian tribes under limited circumstances. However, the bureau should conclude that documents generated outside of the Federal Government meet the “intra- or inter-agency” threshold requirement only after consulting with its designated FOIA attorney [emphasis added]. (U.S. Department of the Interior, Freedom of Information Act Handbook, 383 DM 15, Sec. 5.7(A)(2), 2004.)

► **How should the BLM work with a CA whose actions are governed by a State open records (“sunshine”) requirement?**

The BLM can successfully enter and has successfully entered into CA relationships with partners in states that have open records (“sunshine”) requirements. Such requirements

vary from State to State. The AO and the CA must decide on the best ways to work together and describe that approach in the MOU establishing the CA relationship. Keeping predecisional material from public view if permitted under the law may encourage candid discussion among all members of the planning or project team, including CA representatives.

FACA compliance

► Are meetings between the BLM staff and CAs subject to the requirements of the Federal Advisory Committee Act (FACA, 5 U.S.C. App. 2)?

As a general matter many meetings between BLM staff and CAs are exempt from FACA pursuant to the Unfunded Mandates Reform Act. This intergovernmental exemption to FACA applies to meetings between Federal officials and elected State, local, or tribal government officials “or their designated employees with authority to act on their behalf” acting in their official capacity (2 U.S.C. 1534(b)). The criteria below must be met for the intergovernmental exemption to be applicable.

Unfunded Mandates Reform Act, 2 U.S.C. 1534(b)

The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to actions in support of intergovernmental communications where—

- (1) meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and
- (2) such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.

Further, even if the requirements of the Unfunded Mandates Reform Act are not met, FACA will not apply to the group if the sole purpose of the meeting is to “exchange facts or information” (41 CFR 102-3.40(f)). Additionally, FACA will not apply if a group meeting occurs with a Federal official where advice or recommendations are sought from the attendees on an individual basis and not from the group as a whole (41 CFR 102-3.40(e)). These FACA considerations are particularly important at key decision points in a planning or project assessment process, such as the designation of alternatives for analysis or the selection of a preferred alternative.

The BLM’s Collaborative Stakeholder Engagement and Appropriate Dispute Resolution Program has developed guidance on FACA, which is available online at http://www.blm.gov/style/medialib/blm/wo/Planning_and_Renewable_Resources/adr_conflict_prevention.Par.24269.File.dat/facaguide.

► May a CA be represented by a contractor instead of an official or employee of the CA?

Yes, but only if the appropriate relationship between the CA and the contractor is established. Meetings in which a CA is represented by a contractor who is not an official or employee of the CA with authority to act on behalf of the CA acting in its official capacity are generally not covered by the intergovernmental FACA exemption (2 U.S.C. 1534(b)). In some situations, State law may treat the contractor as an employee, and the intergovernmental exception to FACA may apply. See the question on FACA above for more guidance.

It is important to emphasize that the CA relationship is intended to facilitate the exchange of views and expertise between BLM personnel and other government officials and staff. The BLM recognizes that limited local government staff and potentially heavy time demands of the CA role may make it necessary in some instances to designate contractors to participate in some

interdisciplinary team or work group meetings. The use of contractors should be the exception rather than the rule and must be undertaken consistent with the requirements of FACA.

CA meetings

► Should CA meetings be opened or closed to the public?

Decisions about opening or closing CA meetings to the public and the level of public participation at CA meetings are within the AO's discretion. Opening CA meetings to the public is consistent with the general direction of the BLM's public involvement policy, reflected, for example, in the BLM's publication *Collaborative Stakeholder Engagement and Appropriate Dispute Resolution* (2009). In support of these goals, it is recommended that the option of opening CA meetings to the public receive serious consideration. Opening CA meetings to the public does not mean that the public must be allowed to participate in the discussions. The public's role at CA meetings may be limited to that of observer.

There may also be good reason for closing some or all CA meetings to the public. Closed meetings may support a deliberative process where CAs explore and evaluate ideas and options. In making the decision to open or close CA meetings to the public, any applicable Federal or State open meeting ("sunshine") laws should be considered.

If FACA applies, all meetings should be held consistent with the requirements of FACA.

► Is it acceptable for the lead agency to hold meetings with some cooperators but not others?

The lead agency should limit meetings that involve some cooperators but not others on substantive topics to the extent practicable. While it may not always be possible to meet with all cooperators at the same time or in the same location, the lead agency should seek input from all CAs on substantive issues, such as changing the preferred alternative or proposing new special designations.

Protests and appeals

► Does participation as a CA prevent that agency from protesting or appealing the final decision?

No. A CA may protest a final land use planning decision as long as it meets the requirements of BLM protest procedures. Similarly, a CA may appeal a decision as long as it meets the requirements for appeal under applicable laws. By becoming a CA, a government entity does not forfeit any rights otherwise available to it, including the right to protest a land use planning decision or to file an appeal on implementation actions or project level decisions.

43 CFR 1610.5-2(a) (BLM) Protest procedures.

Any person who participated in the planning process and has an interest which is or may be adversely affected by the approval or amendment of a resource management plan may protest such approval or amendment. A protest may raise only those issues that were submitted for the record during the planning process.

Procedures for protest and appeal of implementation actions and project level decisions are explained in **43 CFR Part 4, Subpart B, 4.21 and Subpart E**. Any special provisions regarding the application of the general procedures for protests and appeals are explained in the CFRs for the specific program that applies to the decision.

The BLM's role as a CA

► If requested, must the BLM participate as a CA?

If another agency asks the BLM to be a CA in the preparation of a NEPA document for an action in which the BLM has jurisdiction by law, the BLM *must* accept (40 CFR 1501.6). If on the other hand an agency asks the BLM to be a CA in the preparation of a NEPA document in which the BLM has special expertise, the BLM *may elect* to be a CA.

Unfortunately, requests for the BLM to be a CA are not always made in a timely manner. In some instances, the BLM has received requests to be a CA after the development of an administrative draft of a NEPA document. In these cases, the potential effectiveness of engaging in a CA relationship should be evaluated, and alternative strategies for working together and meeting the requirements of NEPA may need to be considered.

► **What factors should go into the BLM's decision whether or not to become a CA?**

In deciding whether to become a CA, the BLM should consider any BLM decisions to be made and any BLM actions that are separate from, but connected to, the lead agency's proposal. Consideration should be given to the level of BLM expertise with respect to reasonable alternatives or any significant environmental, social, or economic impacts associated with a proposed action. Consideration should also be given to what resources the BLM has to commit to the process and document preparation.

► **What are the benefits to the BLM of participating as a CA?**

Participation as a CA in the preparation of an EIS or EA provides the BLM with many benefits (as described below) and should receive serious consideration.

- The BLM may adopt the EIS without recirculating the document when, after an independent review of the analysis, the agency concludes that its comments and suggestions have been satisfied (40 CFR 1506.3(c)).
- The BLM, and the lead agency, may save staff time and dollars through such cooperation, as compared with each agency preparing its own document.
- The BLM may provide sufficient input so that the NEPA analysis document meets all DOI and BLM requirements or standards.

- Expanding the scope of a NEPA analysis to consider connected and cumulative actions of all CAs into a single document improves overall interagency coordination.
- Agencies working cooperatively help the public to participate effectively and efficiently, with fewer meetings to attend and fewer letters to write. Participation of multiple agencies in a single NEPA process may help the public better understand the entire scope of a proposal, rather than learning a piece of it now and another piece later.
- The BLM may provide sufficient input so that the NEPA analysis specifically addresses the action that the agency must consider before making its decision. This helps to avoid the struggle of adapting another agency's documentation to fit the BLM's proposed action.
- The BLM may benefit from a single NEPA analysis that simultaneously considers actions separate from, but connected to, the lead agency proposal.

► **What are BLM's roles and responsibilities as a cooperator? Where/how should the BLM capture those roles and responsibilities in writing?**

As a CA, the BLM should collaborate to the fullest extent possible concerning those issues relating to its jurisdiction and special expertise. This may include, but is not limited to, helping to identify issues to be addressed; arranging for the collection and/or assembly of necessary resource, environmental, social, economic, and institutional data; analyzing data; developing alternatives; evaluating alternatives and estimating the effects of implementing each alternative; and carrying out any other task necessary for the development of the environmental analysis and documentation.

The BLM is strongly encouraged to enter into an interagency MOU with the lead agency, one that formally acknowledges their respective

interests, expertise, and jurisdictional responsibilities and outlines their roles and responsibilities in the planning and/or NEPA process. The MOU should identify a BLM contact and specify any special resource needs, data requirements, and issues that the analysis must address. The MOU should also describe how conflicts will be communicated and resolved if they arise between the BLM and the lead agency. See Section 3 and the questions and answers on MOUs under “The Establishment of Working Relationships” in Section 4 for additional information.

► **Should the BLM, as a CA, be named in the Notice of Intent for an EIS or the NEPA document itself?**

It is recommended that the Notice of Intent published in the Federal Register identify the BLM as a CA and that the NEPA analysis document also identify the BLM as a CA, preferably on the cover sheet.

► **When the BLM participates as a CA, what role does it play in selecting and approving a NEPA contractor?**

When the BLM is a CA, its role in selecting a NEPA contractor may vary. According to the CEQ regulations (40 CFR 1506.5(c)), the contractor may be chosen by the lead agency solely, by the lead agency in cooperation with CAs, or, when appropriate to avoid any conflict of interest, by a CA. Therefore, as a CA, the BLM may not be involved in the selection of the contractor (lead agency only); may participate in the selection of a contractor; or may be assigned the role of selecting the contractor. This role should be discussed and described as part of the development of an MOU between the lead agency and the BLM (see above). The MOU should also outline the process for selecting a NEPA contractor. No matter the level of its involvement, the BLM should share with the lead agency any relevant knowledge that could contribute to the selection of a NEPA contractor.

► **Must the BLM, as a CA, adopt an EIS before making a decision based on it?**

Yes. The BLM may use another agency’s EIS for decisionmaking, but only after adopting the EIS. If the BLM is a CA in the preparation of an EIS, the BLM may adopt an EIS without recirculating it if the agency concludes that the BLM’s comments and suggestions have been satisfied (40 CFR 1506.3(c)).

► **Must the BLM, as a CA, issue its own decision?**

Yes. After adopting the NEPA document, the BLM must issue its own decision (and a Finding of No Significant Impact for an EA). This may be done in an individual decision document or in a decision document signed by more than one agency, as long as it is clear that only the BLM decisionmaker is making a decision regarding resources under BLM authority.

► **When should the BLM, as a CA, issue its decision?**

The BLM, as a CA, should not sign any decision before the lead agency signs its own decision. A lead agency and a CA may, however, sign their respective decisions at the same time. Such an approach can allow the protest and appeal periods for both agencies to run concurrently. In some cases, it is advisable to allow sufficient time for completion of any administrative review process offered by the lead agency before signing a BLM decision. For example, under Forest Service Handbook 1909.15, the U.S. Forest Service provides a 45-day appeal period between a Record of Decision and implementation of a proposed action. If the BLM is cooperating with the Forest Service on an action, the BLM may defer its decision until the end of the 45-day period if no protests are received, or until resolution of any protests on the Forest Service decision. If the BLM and the Forest Service issued concurrent decisions, there might be two appeals with different timeframes and outcomes.

► **What should the BLM do if it disagrees with the lead agency's selection of a preferred alternative or disagrees with the scope of the issues or impacts analyzed?**

Consensus may not always be achievable on key elements of a NEPA analysis. The CA relationship brings diverse parties together to seek broadly acceptable solutions to what are usually complex problems. It does not imply that the parties will achieve consensus. The BLM should provide its views and input through the CA relationship as described in the MOU.

It is important to keep in mind that engaging in a CA relationship neither augments nor diminishes the BLM's jurisdiction or authority. Even when participating as a CA, the BLM remains the final decisionmaker on any and all matters within its jurisdiction. In addition, by becoming a CA, an agency does not forfeit the right to comment, protest, or appeal the analysis or decision advanced by the lead agency.

Regarding the scope of the NEPA analysis, the BLM will have to determine independently if the NEPA analysis in which it cooperated is appropriate to cover any proposed actions and decisions that the BLM wants or needs to make. If it deems the analysis sufficient, the BLM will need to adopt the lead agency's NEPA document (see above). If it determines that the analysis is not sufficient, the BLM will have to initiate new or supplemental NEPA analysis to support the Bureau's proposed action and decision.

► **To what extent does the lead agency's NEPA document need to analyze impacts to BLM-administered lands?**

The scope of the NEPA analysis should fully consider connected and cumulative actions that may take place on BLM-administered lands.

BLM Manual Handbook, H-1790-1, Sec. 6.5.2.1

Connected actions are those actions that are "closely related" and "should be discussed" in the same NEPA document.... Actions are connected if they automatically trigger other actions that may require an EIS; cannot or will not proceed unless other actions are taken previously or simultaneously; or if the actions are interdependent parts of a larger action and depend upon the larger action for their justification.... Connected actions are limited to actions that are currently proposed (ripe for decision). Actions that are not yet proposed are not connected actions, but may need to be analyzed in cumulative effects analysis if they are reasonably foreseeable.

BLM Manual Handbook, H-1790-1, Sec. 6.5.2.2

Cumulative actions are proposed actions which potentially have a cumulatively significant impact together with other proposed actions and "should be discussed" in the same NEPA document.

► **How does the BLM determine if a NEPA analysis provides a sufficient basis for its decision? When should the BLM pursue a separate EIS or prepare a supplemental EIS?**

Before making a decision based on another agency's NEPA document, the BLM must determine that the NEPA document has adequately analyzed the BLM's proposed action. The BLM must determine if the proposed action is a feature of or essentially similar to an alternative analyzed in the NEPA document. The BLM must consider if the proposed action is located in the same analysis area. The BLM must also determine if the direct, indirect, and cumulative effects that would result from implementation of the BLM's proposed action are covered or are similar (both quantitatively and qualitatively) to those analyzed in the NEPA document.

Active participation as a CA may afford sufficient input so that the NEPA document

contains an appropriate level of analysis to support the BLM's decision. If the analysis is not sufficient to support the BLM's proposed action, additional NEPA analysis will be required. In these cases, tiering and incorporation by reference should be used to the extent practicable to avoid paperwork and redundant analysis.

► **When should the BLM choose to be a joint lead agency rather than a CA?**

The BLM should consider being a joint lead agency when it and another agency have approximately equal pieces of a proposal under consideration. An MOU must be signed by both agencies serving as joint leads, clearly defining the roles and responsibilities of each. Only one agency must be identified as the agency filing the EIS with the Environmental Protection Agency.

Working effectively in the CA relationship requires BLM and CA staff to understand the relevant organization and policies of their partners.



Section 5

Resources and Training



Working effectively in the CA relationship requires BLM and CA staff to understand the relevant organization and policies of their partners. Each can benefit from the lessons learned in other CA relationships (for example, lessons gained from working within the constraints of tight planning schedules, or from resolving a disagreement over methods of impact analysis). The CAs will be more effective participants when armed with a sound grasp of planning and NEPA concepts and procedures. DOI regulations direct the bureaus, including the BLM, to provide, where practicable, any appropriate community-based training to reduce costs, prevent delays, and facilitate and promote efficiency in the NEPA process (43 CFR 46.200(c)).

Here are some sources of information and training that can help—

Resources

The BLM's website on CA status provides links to land use planning and NEPA regulations, BLM handbooks, a Model MOU, and other information useful to BLM staff and their CA colleagues. You can find that information at: http://www.blm.gov/wo/st/en/info/nepa/cooperating_agencies.html.

For those without Internet access, key documents helpful for cooperators are available from any BLM state office or field office. These documents include the following:

- Council on Environmental Quality (CEQ) NEPA Regulations (40 CFR parts 1500–1508)

- Council on Environmental Quality's Forty Most Asked Questions Concerning CEQ's NEPA Regulations (46 FR 18026, 1981, questions 14a–14d)
- BLM Planning Regulations (43 CFR 1600)
- BLM Land Use Planning Handbook (Section I)
- BLM NEPA Handbook (Chapter 9 and 12)
- DOI NEPA Regulations (43 CFR Part 46)

Training

Planning- and NEPA-related Training

The BLM's National Training Center (NTC) provides in-person and online courses on planning and NEPA concepts and procedures, collaboration, and alternative dispute resolution. The in-person course, Kick-start Your RMP (1610-10), and all of the online courses (such as Planning Nuts and Bolts [1610-09], NEPA Concepts [1620-17], and the NEPA Analysis Process for the BLM [1620-02]) are open to Federal, State, local, and tribal government officials and staff. Many of the online courses and other resources may be found through the NTC's Knowledge Resource Center (www.ntc.blm.gov/krc).

CONTACT: The BLM's National Training Center (<http://www.ntc.blm.gov>, 602-906-5536) for further information or a copy of the planning- and NEPA-related courses and other online resources.

BLM Cooperating Agency Training

The BLM's Washington Office provides training on CAs' roles and responsibilities in the planning and NEPA processes. By request, the training is provided in two formats:

- 1- to 2-hour workshop overviews for internal and external audiences
- 1- to 2-day training sessions, offered in various locations for BLM staff and cooperators

CONTACT: The BLM's Communications Directorate (<http://www.blm.gov/wo/st/en/info/directory.html>, 202-208-6913) for further information.

Economic Strategy Workshops

These 1-day workshops bring together community leaders and BLM staff to explore regional social and economic conditions, trends, and opportunities relevant to the BLM's planning process and community development goals. The BLM's *Land Use Planning Handbook* requires that at least one such workshop be conducted at the beginning of each RMP/EIS (Appendix D).

CONTACT: The BLM's Washington Office Division of Decision Support, Planning and NEPA (<http://www.blm.gov/wo/st/en/prog/planning.html>, 202-912-7215).

Collaboration and Appropriate Dispute Resolution (ADR) Training

The BLM's Collaborative Stakeholder Engagement and Appropriate Dispute

Resolution Program and the NTC provide in-person and online training on collaborative stakeholder engagement and ADR for BLM employees and managers. Many of the in-person classes and all of the online courses and resources are open to Federal, State, local, and tribal government officials and staff.

Collaborative stakeholder engagement and ADR encompass a broad spectrum of "upstream" and "downstream" processes for preventing, managing, and resolving disputes outside the conventional arenas of the courts, the legislature, or administrative channels. Upstream collaborative stakeholder engagement processes are designed to prevent a conflict or dispute from arising or to manage conflict at an early stage. Downstream ADR processes involve managing and resolving an existing conflict or dispute, often by use of a third-party neutral.

The acronym "ADR" traditionally has been used to stand for "alternative dispute resolution." The substitution of "appropriate" in more recent literature addresses various differences in connotation, and, in the BLM, reflects Bureau involvement in a broader spectrum of conflict prevention, conflict management, and conflict resolution processes than are included in the traditional definition of ADR. "Appropriate dispute resolution" includes the traditional "alternative dispute resolution" processes.

CONTACT: The BLM's Collaborative Stakeholder Engagement and Appropriate Dispute Resolution Program (<http://www.blm.gov/adr>, 202-912-7215) or the BLM's National Training Center (<http://www.ntc.blm.gov>, 602-906-5536).

BLM/WO/AE-11/008+1780

Bureau of Land Management
Division of Decision Support, Planning and NEPA
20 M Street, SE
Washington, DC 20003

Editing, design, and production services provided by
the BLM National Operations Center,
Information and Publishing Services Section.

