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The Honorable Ben D. Altamirano
New Mexico State Senate
1123 Santa Rita Street
Silver City, New Mexico 88061

Re: Opinion Request

Dear Senator Altamirano:

This letter responds to your opinion request dated June 22, 1994. That request follows up on our Attorney General Opinion No. 94-01, issued on April 18, 1994.

As we understand it, you are seeking elaboration of the earlier opinion insofar as it relates to counties' involvement in environmental regulation and planning for federal lands within the counties. Whereas the earlier request by Representative Coll and the resulting opinion dealt with the specific question of the legality of various county land use plans and ordinances, you ask more generally about state and local powers over federal lands in view of the holding in California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987), the National Environmental Policy Act (NEPA) regulation contained at 40 C.F.R. § 1506.2, and the Comment in the Idaho Law Review entitled "The 'Wise Use' Movement: The Constitutionality of Local Action on Federal Lands Under the Preemption Doctrine." You also ask whether county governments may enter into Memoranda of Understanding with federal agencies "to exercise the joint environmental planning powers granted in" § 1506.2.

Before responding to these questions, we note the only court decision of which we are aware that addresses the legality of a county land use ordinance similar to the ordinances considered in Opinion 94-01. That decision by the Idaho State District Court found the ordinance to be preempted, and followed the same general reasoning set forth in Opinion 94-01. Boundary Backpackers v. Boundary County, No. CV 93-9955 (January 27, 1994 Opinion and Order). We enclose a copy of that court decision for your information.

We also wish to point out that the ordinances considered in Opinion 94-01 did not just address federal lands, they addressed all lands within the county. As that Opinion explained, the analysis used to review the legality of the ordinances varies, depending upon the ownership of the land involved; a different analysis applies to federal, state, and privately owned land. By contrast, the matters cited in your June 22 opinion request relate only to federal lands.

Federal Lands and Federal Agency Actions

To understand the extent of state and local authority over federal lands, it is important to distinguish between local regulation of private activities on federal land and local regulation of federal activities relating to federal land. Unlike the county ordinances considered in Opinion 94-01, the Granite Rock case deals with the former. To the extent that the county ordinances address federal lands, they address the latter by purporting to direct the actions of federal agencies relating to federal lands. The Law Review Comment included with your letter deals with both private and federal activities but does not distinguish between them. There is no indication that the author understood the important differences between the two.

Local regulation of federal activities on federal land can only occur when explicitly approved by Congress. Under the Supremacy Clause of the United States Constitution, absent an express congressional waiver of sovereign immunity, the "activities of the Federal Government are free from regulation by any state." Mayo v. United States, 319 U.S. 441, 445 (1943); see McCulloch v. Maryland, 17 U.S. 316, 426-7 (1819). As the U.S. Supreme Court held in Hancock v. Train, 426 U.S. 167, 179 (1976):

> [b]ecause of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."

In other words, the only time that federal agencies are subject to state or local laws is when Congress very "clearly and unambiguously" says so. Courts have historically interpreted immunity waivers extremely narrowly; if there is any doubt whether Congress expressly authorized a particular type of state or local regulation, courts will not find a waiver. See e.g.,

Hancock v. Train, 426 U.S. 167; Department of Energy v. Ohio, 112 S.Ct. 1627 (1992). Any state or local law purporting to mandate particular action by federal entities will therefore be of no effect unless there is a clear and specific congressional waiver of federal immunity with respect to such a requirement. There has been no such waiver regarding the ordinances reviewed in Opinion 94-01.

A somewhat different analysis applies when reviewing the propriety of state or local regulation of private activities on federal lands. In the environmental arena, the decision in California Coastal Commission v. Granite Rock Co., is the leading decision. In Granite Rock, a mining company claimed that it need not comply with the California statute requiring it to get a permit from the state's Coastal Commission because, it argued, the permit requirement was preempted by federal law. The Court disagreed, applying the normal federal preemption analysis and finding that the state permit requirement was not preempted by the federal statutory scheme governing mining on federal coastal lands. The Court distinguished between state "environmental regulation" and "land use planning," finding the former not to be preempted and the latter preempted. The Court distinguished between the two as follows:

> Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.

480 U.S. at 587.

Opinion 94-01 did not discuss Granite Rock because the ordinances at issue were clearly land use/zoning ordinances, not environmental regulations, and because the ordinances purport to regulate federal, rather than private, activities on federal lands. As discussed above, such regulation was patently impermissible under the Supremacy Clause.

Federal Regulations

Your letter refers to "powers" "granted" to state and local governments by 40 C.F.R. § 1506.2, a NEPA regulation adopted by the Council on Environmental Quality. Section 1506.2 addresses mechanisms to avoid duplication between NEPA procedures and parallel state and local procedures. It provides in relevant part as follows:

§ 1506.2 Elimination of Duplication With State And Local Procedures

* * *

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.
(2) Joint environmental research and studies.
(3) Joint public hearings (except where otherwise provided by statute).
(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and 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.

A review of § 1506.2 reveals that it does not grant any powers to local or state agencies. Nor could a federal regulation, by itself, grant any such powers.

Rather, § 1506.2 requires federal agencies to cooperate "to the fullest extent possible" with state and local agencies to reduce duplication between NEPA and state and local requirements. This cooperation is to occur in the course of federal agencies' compliance with NEPA requirements for "major federal actions." Where the major federal action which is the subject of NEPA analysis is inconsistent with state or local approved plans or laws, an environmental impact statement (EIS) must discuss that inconsistency. The agency retains authority to proceed with the action regardless of the conflict with state or local plans or laws, unless precluded by a law other than NEPA. 46 Fed. Reg. 18026, Council on Environmental Quality Questions and Answers on National Environmental Policy Act Regulations, Answer 23c (March 23, 1981).

Thus, the only hard and fast requirement imposed on federal agencies by section 1506.2 is the requirement that EISs discuss any inconsistencies between the project analyzed in the EIS and state or local plans or laws. All other mandates of the section are qualified by the phrase "to the fullest extent possible," a phrase which as a practical matter limits the enforceability of the section.

The recent court decisions in Douglas County v. Lujan, 810 F.Supp. 1470 (D. Or. 1992), and Board of County Commissioners of the County of Catron v. United States Fish and Wildlife Service, Civ. No. 93-730-HB (October 13, 1994 Memorandum Opinion) (enclosed herewith), confirm that a county, if it meets the normal federal standing requirements, may sue to enforce the requirements of NEPA and the NEPA regulations. Thus, if a county believes that a federal agency has violated 40 C.F.R. § 1506.2, it may, after the final NEPA document is filed or after action requiring NEPA documentation has been taken, file suit alleging violation of NEPA. See 40 C.F.R. § 1500.3. The county may not, however, sue the federal government for violating county requirements. The federal government is not bound by county requirements because nowhere has Congress clearly and unambiguously waived sovereign immunity and subjected the federal government to state or local requirements relating to NEPA or to projects or activities covered by NEPA. To the contrary, the NEPA regulations and guidelines indicate that federal agencies are free to contradict local requirements, as long as any inconsistencies are discussed in the relevant EIS.

Memoranda of Understanding

As a general proposition, county governments may enter into MOUs with federal agencies relating to environmental review

practices. Under NMSA 1978, § 4-37-1 (1992 Repl. Pamp.), counties are granted all powers "necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of" the county or its inhabitants, provided such powers are consistent with statutory and constitutional limitations placed on counties. As discussed above, however, since 40 C.F.R. § 1506.2 does not "grant" any "powers" to counties, such MOUs would not exercise such powers. The legality and enforceability of any specific MOU under federal, state and local law would, of course, depend upon the particular provisions of the MOU.

Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

ALLETTA BELIN
Assistant Attorney General
Director, Environmental Enforcement Division