The Board of Supervisors Should Not Opt In To the Memorandum of Agreement Overriding Federal Coordination Laws

Comes now the California Association of Business, Property, and Resource Owners (CABPRO) who submit the following in support of the general welfare and best interests of the constituents of Nevada County that our Board of Supervisors not opt in to the Memorandum of Agreement (hereinafter "MOA") among USDI Bureau of Land Management (BLM), US Forest Service Pacific Southwest Region (USFS), California State Association of Counties (CSAC) and the Regional Council of Rural Counties (RCRC):

I. FACTUAL BACKGROUND

The CSAC and RCRC are statewide Non-governmental Organizations (NGO). On July 23, 2012 they approved the language of the above-described MOA developed by the USFS and BLM, a copy of which is attached hereto and incorporated herein as Exhibit A. Under the MOA, the natural resource planning for all participating counties approving the MOA will be consolidated into one super NGO. Two NGOs working with the federal government agencies are attempting to create a third NGO from the counties that serves the interests of the federal government. Each participating county will be represented by a single person, through whom all future federal government communications will go instead of through the county superintendents, sheriffs, fire departments, and other elected officials. The MOA as accepted by CSAC and RCRC makes no mention of "coordination" (see *infra*.), but rather supplants it with the concept of "cooperation." (Ex. A, p. 3, Sec. II, par. G)

II. EXTENT OF FEDERAL POWER

A. JURISDICTION

1. Territorial and Public Lands

The first issue to be confronted is the nature of the jurisdictional power of the federal government over national park lands and other claimed federal holdings. One must begin in 1777 with the Articles of Confederation after the colonies declared their independence from the British Crown and established themselves as sovereign and separate nations. The new sovereignty of each colony led to rifts between them when it came to commerce and financing the revolutionary war effort. Nevertheless, after much time the States agreed to the Articles of Confederation but were careful to declare:

> "Each state retains its sovereignty, freedeom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." (Article 2, Articles of Confederation)

The United States Constitution evolved due to weaknesses in the Articles of Confederation. Under our Constitution the vested powers granted by the States to Congress are few and defined. (U.S. Constitution Article I, Section 1, and Art. I, Section 8.) The executive and judicial branches of the federal government were given no lawmaking power. However, a condition of ratification of the Constitution was a "Bill of Rights," which became the first ten Amendments. The Tenth Amendment reaffirmed that any power not explicitly delegated to the federal government are explicitly withheld from the central government. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (U.S. Constitution, 10th Amendment, Bill of

Rights.) It is clear from the above that general legislative power was reserved by the States and not granted to Congress.

2. The "Interposition" of States

Under the administration of our second President, John Adams, Congress passed the Alien and Sedition Acts. It was the opinion of many these acts violated the First Amendment's free speech guarantee. As a result in 1798 Resolutions were passed by the legislatures of Kentucky and Virginia at the urging of Thomas Jefferson and James Madison.

The Virginia Resolutions of 1798 and James Madison's Report on the Virginia Resolutions are attached hereto and incorporated herein as Exhibit B. The Resolutions express a firm resolve to maintain and defend the Constitution of the United States, but also expressed that the federal government's power derives from the plain meaning of the words in the Constitution. Most importantly, the Resolutions express the Constitution was formed by the sanction of sovereign States, and that there can be no tribunal above their authority to determine whether the Constitution was violated. Further, if such violation be found the States are duty-bound to interpose to arrest the evil. This division of power is for the protection of the liberties of our people. Case law thereafter so confirms: "The Constitution divides authority between federal and state governments for the protection of individuals." (New York v. United States (1992) 505 U.S. 144, 181) "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." (Bond v. United States (2011) ___,____(slip op., at 9-10))

3. Land Held in Trust for the States

The federal government, and in particular the USFS and BLM, currently place much stock in Article IV, Section 3 of the U. S. Constitution to support their position of dominance over the States with respect to national forests. That section's first clause focuses on new States coming into the Union. The second clause contemplates those newly admitted States being put on equal footing with previously admitted States of the Union. It provides:

> "The Congress shall have Power *to dispose of* and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . ." (U. S. Constitution, Art. IV, Sect. 3, par.2) (Emphasis added.)

The shortcoming of the present Federal position relying on Article IV, Section 3, clause 2, is ignoring that it contemplates the power to dispose. Clause 2 does not contemplate the power to NOT dispose. In unadulterated plain English, Article IV, Section 3, clause 2 means that when a territory or public land held in trust by the federal government becomes a State, Congress shall have the power to make all needful rules and regulations to dispose of such former lands and other property of the United States in an orderly manner. "Congress has the absolute right to prescribe the times, the conditions and the mode of transferring this property or any part of it, and to designate the person to whom the transfer shall be made." (Van Brocklin v. Anderson (1885) 117 U. S. 151, 167)

However, over the years many of the public lands held in trust seemingly became more desirable for the federal government to retain. New formed federal regulatory agencies worked their way into existence, each taking an increasingly expanding role. By 1976 total disregard for the trust

obligation to dispose of public land was expressed in the Federal Land Policy and Management Act (FLPMA) (43 U.S.C. 1701) which states: ". . . it is the policy of the United States that the public lands be retained in Federal ownership." (Section 102 (a) (1))

4. The Constitution's Limit on Federal Jurisdiction of Lands

As to federal jurisdiction of retained lands, Article I, Section 8, clause 17, of the U.S. Constitution provides, in pertinent part, that Congress has only *exclusive* legislation ". . . (over the District of Columbia and). . .over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Thus, the Constitution delegated to the federal government exclusive legislation over certain small portions of land for the limited purposes of housing the federal government and defending the nation, but even these cases required State consent.

Consistently, early case law held that federal jurisdiction extended only over the areas where the federal government possessed the power of *exclusive* jurisdiction. (United States v. Bevins (1818) 16 U.S. (3Wheat.) 366) As explained in New Orleans v. United States (1836) 35 U. S. (10 Pet.) 662, 737,

> "Special provision is made in the Constitution for the cession of jurisdiction from the States over places where the federal government shall establish forts or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiciton."

Therefore, in the United States there are two separate and distinct jurisdictions. The first is the jurisdiction of the States and their subdivisions within their own state boundaries. The other is federal jurisdiction which is limited to the District of Columbia, the U.S. territories, and federal enclaves within the states. (Engle v. Isaac (1982) 456 U.S. 107,128; Screws v. United

States (1945) 325 U.S. 91, 109.) No agreement between the State and the federal government can alter this allocation:

> "Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials. . . . The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States." (New York v. United States, *supra*, 505 U. S. at 182)

Even the FLPMA recognizes State civil and criminal jurisdiction over national lands. At Section 701(g)(6) it states:

> "(g) Nothing in this Act shall be construed . . . (6) as a limitation upon the police power of the respective States, or as derogating the authority of a local police officer in the performance of his duties, or as depriving any State or political subdivision thereof of any right it may have to exercise civil and criminal jurisdiction on the national resource lands. . ."

Notwithstanding the above, there were many cases between the States and the United States government where the issue of who had jurisdiction was unclear. The reason for this uncertainty was the federal government through its agencies slowly and methodically usurping power to overcome limiting or prohibitive factors, or to fill voids where deemed necessary. As a result, a decade long study was requested by President Dwight D. Eisenhower in the early 1950's. As a result of his efforts, the General Service Administration issued an Inventory Report on Jurisdictional Status of Federal Areas Within the States on June 30, 1962 (Exhibit C attached.). What emerged from this study were four levels of jurisdiction: (1) exclusive, (2) concurrent, (3) partial, and (4) proprietorial. After recognizing the limit on the Federal Government's legislative jurisdiction under Article I, Section 8, clause 17, the Inventory

Report concluded and recommended, in pertinent part, at page 3, paragraph 2, as follows:

> "With respect to the large bulk of federally owned or operated real property in the several States and outside of the District of Columbia it is desirable that the Federal Government not receive, or retain, any measure whatever of legislative jurisdiction, but that it hold the installations and areas in a proprietorial interest status only, with legislative jurisdiction remaining in the several States." (Emphasis added.)

In California, it follows that forest reserves are not federal enclaves subject to the *exclusive* legislative jurisdiction of the United States. The States, not the federal government, have legal authority over 95% of federally owned or operated lands. The inventory disclosed small acreage in California held for the post offices were subject to exclusive legislation, but 5,545.7 acres held by the federal government from the Washoe Project of 1959 were held in "proprietal"-status only. Thus, local peace officers are to exercise civil and criminal process over federally held lands in California. Case law supports the proposition: the US Forest Service has no general grant of law enforcement authority within a sovereign state unless authorized by the State authority. (Kansas v. Colorado (1907) 206 U.S. 46; Congressional Record, October 23, 2000, pg. E1886, Hon. Jim Gibbons of Nevada.)

B. THE FEDERAL COORDINATION PROCESS

Consistent with the above, Congress has long recognized the importance of local authorities in managing the nation's resources and the actions of resource management agencies. Most local authorities are, or should be, aware that federal land management policies often profoundly

impact adjoining and co-mingled lands, civil liberties, local cultures and economies, as well as the rights of private landowners to water rights, timber harvests, grazing allotments, and rights-of-way.

Local authorities should also be aware that Congress has provided for the involvement of local authorities in every federal land use statute passed over the last 35 years by mandating federal land use authorities "coordinate" their policies and management activities with any local government that is *engaged in land use planning*.

The foundation for "coordination" is found in the Federal Land Policy Management Act (FLPMA). (43 U.S.C. Section 1712) This statute requires the Bureau of Land Management (BLM) to coordinate it's "land use inventory, planning, and management activities of (federal) lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments. . ." which are *engaged in land use planning* for the federal lands managed by the federal agencies. (Emphasis added.) (Ibid.) Federal agencies are required to make every practicable effort to make the federal and local positions consistent. As such they are required to give local governments full disclosure of any studies, plans for studies, or actions they may be considering; notice of all management activities the agencies are taking that may affect the local government's jurisdiction; and to make their policies and management activities consistent with local plans! (Ibid.) Coordinated planning also ensures federal agencies keep informed of local planning, policies, and activities, and eliminates duplicated efforts among various levels of government. When a local government notifies the federal agencies that they expect to be coordinated with, *the burden to comply is on the agency*.

(Emphasis added.) Hence, it is ideal for County Boards of Supervisors to unambiguously assert their coordination authority.

In addition to FLPMA, the following are some of the federal statutes requiring coordination:

16 U.S.C. 1604, the National Forest Management Act (Directs the U. S. Forest Service)

42 U.S.C. 4331, the National Environmental Policy Act (Directs Federal plans, functions, programs and resources)

16 U.S.C. 797, the Federal Power Act (Directs the Federal Energy Regulatory Commission)

16 U.S.C. 1533, the Endangered Species Act (Directs the U.S. Fish and Wildlife Service)

16 U.S.C. 1271, the Wild and Scenic River Act (Directs the National Park Service)

42 U.S.C. 7401, the Clean Air Act (Directs the Environmental Protection Agency)

33 U.S.C. 1251, the Clean Water Act (Directs the Environmental Protection Agency)

16 U.S.C. 2003, the Soil and Water Resources Conservation Act (Directs the Soil and Water Conservation Service).

Despite "coordination" provisions in the federal acts, federal regulatory agencies, such as the USFS and BLM, engage in usurping limiting or prohibitive factors or filling voids where deemed necessary to them. They created their own agenda driven rules which often reflect the agendas of special interest groups. An example of this is road and trail closures which have been going on for years in other than "wild lands" defined as 5,000 or more acres of roadless land. (See Revised Statutes 2477)

III. NEVADA COUNTY'S AUTHORITY

A. CALIFORNIA CONSTITUTION

Article II of the California Constitution concerns local government. Section 1, subparagraph (a) provides the State of California is divided into counties "which are legal subdivisions of the State." Subparagraph (b) provides, in part, that:

> "The Legislature shall provide for county powers, an *elected* county sheriff, an *elected* district attorney, an *elected* assessor, and an *elected* governing body in each county."

"A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., Art. XI, Sect. 7)

B. CALIFORNIA GOVERNMENT CODE

Pursuant to California Government Code Section 23003, generally a county Board of Supervisors has only those powers expressly or impliedly granted to it by the Constitution or statute. "A county is but a branch of the state government established to aid the legislature in providing for the wants and welfare of the public within the territory for which it is organized. . ." (City of Santa Monica v. Los Angeles County (1911) 15 Cal. App. 710)

Section 23005 provides a county may exercise its powers only through the Board of Supervisors or through agents and officers under authority of the Board or authority conferred by law. (Ca. Govt. Code, Section 23005) While seemingly broad, the power of the Board of Supervisors was more narrowly defined in Los Angeles County v. Cline (1928) 185 Cal. 299, 197 P. 67, wherein the court held that under Government Code Sections 23005, 23003, 23000 and 23004, it is the non-delegable function of the Board of Supervisors

as the constituted business agents of the county, and not the sheriff, to contract with the federal authorities regarding compensation for federal prisoners held in county jail.

Consistent with the concept that the Board's responsibilities are non-delegable is Government Code Section 24101 which provides,

> "Every county or district officer, *except a supervisor* or judicial officer, may appoint as many deputies as are necessary for the prompt and faithful discharge of the duties of his office." (Ca. Govt. Code, Section 24101.)

On the other hand, the Board may employ such persons as it deems necessary to assist the board in the performance of its duties. (Ca. Govt. Code, Section 25208) Under Section 25208, it is the opinion of the Attorney General that where the powers of a county administrator were limited to the powers of advice, recommendations, and general communication to the Board of Supervisors on internal house-keeping and administrative problems of county government, the Board of Supervisors had authority by ordinance to establish the position of county administrator, since such position constituted an employment rather than an office. (26 Op. Atty. Gen. 2a)

C. SUPERVISOR'S OATH OF OFFICE

Pursuant to Article XX, Section 3 of the California Constitution, in pertinent part, provides that all public officers and employees, executive, legislative and judicial, shall take the following oath:

> "I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the

duties upon which I am about to enter. . . ."

D. CALIFORNIA'S INTERPOSITION

Like Virginia and Kentucky in 1798, California's legislature passed Senate Joint Resolution 44 introduced April 14, 1994. The Resolution affirmed that the States gave only limited powers to the federal government under the Constitution; that in 1994 the States were treated as agents of the federal government by the federal government; that many federal mandates violated the 10th Amendment to the Constitution of the United States; that the United States Supreme Court ruled in New York v. United States (*infra*) Congress may not commandeer the legislative and regulatory processes of the States; and that pending proposals from the federal government may in the future violate the 10th Amendment. Accordingly, the Resolution provided that:

> "the State of California hereby claims sovereignty under the 10th Amendment to the Constitution of the United States over all powers not. . .granted to the federal government by the Constitution. . .and that this measure shall serve as notice and demand to the federal government, as our agent, to cease and desist, effective immediately, mandates that are beyond the scope of its consitutionally delegated powers; . . . (SJR 44, 1994)

F. PUBLIC RIGHTS NEEDING PROTECTION

The estate of ownership in the federal lands is split between a number of parties, both public and private. The USFS and BLM are sharply curtailing private uses and broadening their regulatory power. For example, numerous rights existing and recognized in government lands include water rights, grazing rights, mineral rights, wildlife rights, petroleum exploration rights, and timber harvest rights. Today there is a "war" for control of our greatest storehouse of natural resource wealth—the federal lands. The question is

whether control of these lands be centralized in the hands of federal officials or decentralized to give markets, users and the general public a say in the land's allocation.

Keep in mind that many of the rights mentioned above are recognized and secured by some statute or court decision. For example, in 1866 Congress recognized western water rights previously established under local law and custom on federal lands. In the 1880's and 1890's those rights were extended to apply to nearby land. In 1897 the Organic Act, and 1934 the Taylor Grazing Act created a livestock permit system that recognized private rights to graze specified federal lands. There are also laws protecting mineral rights beneath the surface of federal lands (the Mining Act of 1872), timber rights of loggers to harvest national forest timberlands (National Forest Management Act of 1976), as well as concessioners on National Parks having a possessory interest in building, hotels, service stations and other facilities they construct for public use (Concession Policy Act of 1965).

The point is that the federal lands are split between public and private interests. The private interests need representation from the States and their subdivisions or counties because the federal government lacks exclusive legislative jurisdiction of these lands.

IV. ARGUMENT AGAINST THE MEMORANDUM OF AGREEMENT

Today, it is common knowledge that we have a runaway and overbearing central government. Consistent with such common knowledge is the attempt by federal regulatory agencies to write their own rules, often contrary to federal statutory mandates, and to usurp the powers reserved to the States.

We submit the proposed MOA (Exhibit A) is an attempt by the USFS and BLM to bypass the requirements for "coordination" which places the onus on those federal regulatory agencies to adapt and adopt their rules to local land use plans. At page 3 of the MOA, paragraph II, G, the onus is placed on the County to harmonize its land-use planning with USFS and BLM plans and regulations. Moreover, at page 3, paragraph II, B, the County is required to "make available staff support at the federal managers' request to enhance the agencies' interdisciplinary capability. . ." And, the proposed MOA nowhere mentions the regulatory agencies' burden of "coordination." Clearly, the language of the MOA improperly subordinates the County's sovereignty to that of the federal agency.

Second, the MOA is totally unnecessary. The numerous federal statutes set forth at pages 8 and 9 above recognize State sovereignty and require the agencies of the federal government to harmonize (coordinate) their rules and regulations with local land use planning. Implicit in the "coordination" requirement is the federal government's acknowledgment it does not have exclusive jurisdiction over the national parks, and that local authorities have civil and criminal jurisdiction therein. In addition, the federal statutes do not require the local governments do anything other than have their own local land use planning. Inappropriately, the sovereignty of the State of California and its counties is not respected by the proposed MOA which seeks County "cooperation" by "harmonizing" its plans with the rules and regulations of USFS and BLM. (Exhibit A, p. 3, par. II, subpar. G)

Next, the inconsistency between "cooperation" and "coordination" may lead to confusion should disagreement between the County and federal agencies ensue, especially if litigation results. We believe "coordination" would prevail because the proposed MOA is unnecessary, the federal

government lacks exclusive jurisdiction over national parks, and the Constitutional authority of the federal government cannot be expanded by the consent of local or State authorities. (New York v. United States, *supra*, 505 U. S. at 182) However, the Board of Supervisors should avoid adopting the proposed MOA as it potentially causes conflict and/or confusion at the expense of coordination and County sovereignty.

Fourth, the proposed MOA is objectionable because the County should not be in "partnership" with the federal agencies. It is the responsibility of the elected officials of the Counties to act in the best interests of the public within the County. The County is a legal sub-division of the sovereign State of California. The power of the County is an appropriate and necessary check on the runaway power of our leviathan government.

Last, the MOA creates an unelected county "'position' such as 'County Planner'" at page 2, paragraph A to represent the County. The USFS and BLM each have their own contact or "position" who will meet with the County contact to resolve how the MOA will be implemented and to "resolve issues related to overall land management. . ." (See MOA page 2, paragraphs B – F) These provisions smack of an improper delegation of authority by the Board of Supervisors to a "Planner" with power to "resolve issues." Further, the "planner" is neither elected by nor responsible to the residents and businesses of Nevada County. Such "planner" becomes a member of an NGO outnumbered two to one by the federal regulatory agencies and possibly accountable to no one.

Based on the foregoing, the County of Nevada would be ill advised to approve and adopt the proposed MOA.

V. CONCLUSION

When you live in reaction, you give your power away. Then you get to experience what you gave your power to. Do not agree to the proposed MOA and give your power away.

Respectfully submitted,

By_____
Norman A. Sauer, Jr.

The Board of Directors of CABPRO having reviewed the above, and having voted to approve the same, hereby approve the authorities and arguments set forth above and submit the same to the Board of Supervisors of Nevada County for their consideration prior to ruling on the proposed MOA (Exhibit A).

By_____
CABPRO Chairman of the Board of Directors