

Statement of

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Hearing on:

Examining Impacts of Federal Natural Resources Laws Gone Astray, Part II

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Introduction

Thank you for the opportunity to testify on our natural resources laws.

The United States is fortunate to have abundant natural resources, both on- and offshore. The public owns these resources, and they must be managed for the benefit of all Americans. Congress has delegated that task to a variety of resource management agencies, and those agencies have, in turn, promulgated regulations to implement their management responsibilities. The other witnesses are going to discuss specific natural resources laws and regulations, but I want to take a step back and address the overall premise of this hearing. While laws can always be refined and improved, I strongly disagree that our natural resources laws have gone astray. In fact, our legal framework for managing public resources is one of the most balanced, open, and participatory regimes in the world. I'd like to make five points about that regime.

1. The Obama administration sought to balance the many competing demands on our public land, air, water, wildlife, and mineral resources.

Pressures on the United States' natural resources increase daily, as our population grows (particularly in the west), extraction technologies improve, and droughts, severe storms, and other climate threats increase. We can no longer simply adopt a first-come-first-served approach, as we arguably could in the days of the gold rush. Rather, we must manage for the benefit of all Americans, balancing multiple, often competing natural resource uses, including recreation; grazing; timber production; coal, oil, and gas production; hardrock mining; solar and wind power generation; clean water supply; protection of sacred sites; and wildlife and wilderness preservation.

The Obama administration worked hard to balance these competing demands. To take just a few examples from the Department of the Interior, the Obama administration between 2009-2016 issued oil and gas leases on 10.8 million new acres onshore, and 20.2 million new acres offshore; instituted large scale land planning reforms, to designate areas most suitable for mineral development and thereby resolve conflicts prior to issuance of lease sales; upgraded the automated oil and gas information tracking system, to reduce the processing time for permits to drill; approved 60 new solar, wind, and geothermal energy projects, capable of producing more than 15,000 megawatts of renewable power; protected over 5 million acres of public lands onshore, and even more acreage offshore; and worked with state agencies, oil and gas producers, conservationists, outdoor recreation groups, and others to keep the greater sage grouse from being federally listed as a threatened or endangered species.

2. Because natural resource uses often conflict, resource management agencies cannot allow all uses in every area.

As the Obama administration recognized, each acre of public lands or waters is not suitable for every use. Rather, agencies must manage for multiple uses in the aggregate, across all managed areas, even as they confront very difficult decisions about which uses to prioritize in particular areas. Should grazing be allowed near salmon streams? Should wind turbines be constructed near eagle nests? Should seismic testing occur in marine mammal habitat? Should offroad vehicle use be allowed in areas criss-crossed with hiking and horse trails?

These questions principally illustrate the conflict between conservation interests and development interests, but development interests may also conflict with each other. For example, in Colorado, the Bureau of Land Management (BLM) is collaborating with South Park County to manage oil and gas development so as to protect the water supplies for the burgeoning cities of Denver and Aurora. Similarly, in New Mexico and Utah, the BLM has worked to balance potash development and oil and gas development, which cannot co-exist on the surface of the same lands at the same time.

Questions about which uses to prioritize are difficult and controversial, and they must be answered acre by acre, parcel by parcel, county by county, and state by state. There is no one-size-fits-all answer. Rather, resource management agencies must consider the nature of the resources in the affected area, the potential impacts of the proposed activities, the availability of suitable mitigation, and the desires and concerns of all affected people and entities.

3. Congress has outlined the procedures that agencies must follow to regulate resource use, withdraw lands, or make leasing or permitting decisions.

The Administrative Procedure Act and the various natural resources laws mandate procedures that agencies must follow in making decisions about resource uses. Those procedures vary from statute to statute and resource to resource, but four central tenets cut across all contexts: a sound scientific foundation, openness, transparency, and public involvement. With very few exceptions, the agencies cannot allow, disallow, or restrict a resource use without consulting

with scientists, engineers, and other agency experts; issuing a public proposal; taking comment from affected people and entities; considering all the comments received; revisiting the proposal; and issuing a final decision that is reasonable and takes adequate account of the comments received. In some cases, statutes also require that the agencies hold extensive public meetings with affected parties, including state governments, tribes, and local populations. In short, absolutely nothing happens in secret.

Adherence to these procedures allows for the involvement of all stakeholders. The final decision may still be unpopular with some – that is the nature of balancing competing and conflicting resource uses. But in almost every case, if the agency follows the required procedures, affected parties have an opportunity to learn in advance of the agencies’ plans, and to provide feedback and concrete suggestions on those plans. The procedures ensure that our bureaucracy is responsive to the public will. And if the majority of the public continues to object to the agencies’ choices, the public has a chance to change agencies’ policy direction through presidential elections

4. In my experience during the last 18 months of the Obama administration, the Department of the Interior took openness, transparency, and public involvement quite seriously.

President Obama pledged that his administration would be the “most transparent” administration in U.S. history, and would “create ‘an unprecedented level of openness.’” Reviews of the administration’s overall record on this issue are mixed, but in my experience both the political and the career staff at the Department of the Interior worked diligently to base all final resource management decisions on (1) sound science; (2) input from all affected constituencies, including states, tribes, local governments, industry, NGOs, and the public; and (3) the wise counsel of our solicitor’s office concerning our compliance with our procedural (and substantive) legal obligations.

For example, I worked with the BLM to develop its final rule to reduce methane waste from oil and gas operations on public lands (known as the “Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule,” and issued on November 18, 2016). In the 18 months that I worked with the agency, we conducted public meetings in four states, at which we heard from hundreds of industry employees and local citizens; we held four tribal outreach meetings; we took dozens of meetings with individual companies and industry trade associations; we took a similar number of meetings with NGOs; we extended the comment period in response to requests from industry; we reviewed more than 330,000 written comments from the public, of which approximately 1,000 were unique; and we met weekly with representatives from our solicitor’s office. Moreover, before I arrived in August 2015, the BLM had already engaged in one round of public outreach, issuing an advanced notice of proposed rulemaking and conducting a series of public and tribal meetings, and focused meetings with industry and NGOs, input from which shaped the original draft rule.

Once the extended comment period ended in the summer of 2016, we worked closely with our solicitors to amend the rule in response to comments received. Industry let us know, for

example, that regular leak inspections would be quite costly, particularly for smaller operators, so we worked to develop a less onerous leak detection and repair program, and added a provision that allows operators to request BLM approval of an alternative program in certain circumstances.

Secretary Sally Jewell's actions ahead of President Obama's designation of Bears Ears National Monument likewise illustrate the Obama administration's commitment to openness and public involvement. The administration waited to make a final decision about the monument until after Secretary Jewell engaged with stakeholders on both sides of the controversial designation. Specifically, prior to the designation, Secretary Jewell traveled—with members of the press—across more than 800 miles of Utah canyon lands; hosted a three hour public listening session attended by more than 1,500 people; and spent days meeting with Utah's Governor, staff members for Utah's congressional delegation, state legislators, commissioners from three counties, chairmen and councilmembers from at least five tribes, energy industry representatives, ranchers, and NGOs.

Overall, the political staff at DOI took the commitment to a sound decisionmaking process quite seriously. Moreover, in my experience, the agency's career staff shared that commitment. Most of these engineers, scientists, lawyers, and other professionals chose to work in the Department of the Interior—often at lower pay than they would receive in the private sector—because they believe in the agency's mission. That does not mean they share a point of view; career officials at the Department vary widely in their political affiliations. But they share a dedication to the wise and sustainable management of our public resources.

5. A commitment to open, transparent, and science-based decisionmaking is the only way to ensure balanced resource management decisions.

As noted above, during the Obama administration, the Department of the Interior engaged in a disciplined and open decisionmaking process in determining how to manage the nation's natural resources for the benefit of all Americans. The result is a balanced record of which I am proud—on the one hand, millions of acres protected from development, on the other, reduced conflict over mineral development in other, more suitable areas; on the one hand, millions of stream miles protected by buffer zones, on the other, an easier process by which energy developers can demonstrate compliance with the Endangered Species Act and Migratory Bird Treaty Act; on the one hand, limits on venting, flaring, and leaks from oil and gas wells, on the other, a streamlined process for obtaining a permit to drill.

Unfortunately, the Trump administration and Secretary Zinke seem to have abandoned the Obama administration's balanced approach, and its commitment to openness, transparency, and sound science, in favor of listening and responding only to industry stakeholders. A recent Washington Post review of Secretary Zinke's calendar revealed that over March and April of this year, he held more than a half-dozen meetings with executives from oil and gas firms, including BP America, Chevron and ExxonMobil. He also met with the American Petroleum Institute, the Western Energy Alliance, and Continental Resources. The calendars reveal that the discussions

covered actions that Secretary Zinke later took to reverse Obama-era policies, including an order purporting to postpone certain requirements of the methane waste rule on which I worked. Meanwhile, representatives from environmental NGOs report more difficulty obtaining access.

Comparing Secretary Zinke's trip to Utah to "review" the Bears Ears monument designation with Secretary Jewell's trip prior to the designation is also revelatory: according to the Salt Lake Tribune, Secretary Zinke held only two "meetings with pro-monument activists during his visit — the Bears Ears Inter-Tribal Coalition and Friends of Cedar Mesa — for a total of about an hour and a half, while he traveled extensively with anti-monument heavyweights." Likewise, he "offered little media availability outside of daily briefings, and no public meetings."

Meanwhile, in early May, Secretary Zinke suspended the upcoming meetings of the BLM's 30 Resource Advisory Councils (RAC). Established in 1995, these RACs each comprise 10-15 members from diverse interests in local communities, including state and local government officials, tribal members, ranchers, and environmental groups. The RACs are intended to provide the BLM with input on the agency's initiatives, regulatory proposals, and policy changes—input that Secretary Zinke now will not receive.

Finally, even the Trump administration's requests for public involvement serve to decrease rather than increase regulatory transparency. Take, for example, the administration's regulatory reform agenda to "alleviate unnecessary regulatory burdens placed on the American people." Each agency is charged with implementing this agenda in its own regulatory sphere. The Department of the Interior's public notice requesting comment on regulatory reform states that the agency is "seeking public input on how it can best" identify regulations for "repeal, replacement or modification." The notice then lists a series of criteria that might qualify an existing regulation for repeal—if the regulation eliminates jobs or inhibits job creation, if it is (in the commenter's view) ineffective or unnecessary, if it imposes costs that (in the commenter's view) exceed its benefits. In essence, the notice asks regulated entities to submit their wish list for rule revocation, and provides them with a checklist of rationales to support that revocation, but provides rule beneficiaries with no indication of which rules are likely to be targeted or how best to submit evidence to *support* the need to keep certain rules on the books.

I recognize that some of the Department of the Interior's decisions during the Obama administration were unpopular with some members of this committee, and with your constituencies. Unfortunately, that is inevitable, given that the Department's task is to balance multiple competing and conflicting demands on public resources. It's impossible to make everyone happy. But I submit that an unpopular decision is not evidence of agency overreach, nor of natural resources laws "gone astray." If an agency has in fact overreached its statutory authority or failed to follow required procedures, then affected parties have a remedy in court. But short of that, disagreement with the actions of a prior administration from a different party is just that: evidence of shifting political priorities, not of wrongdoing.

On the other hand, the trend in the current administration—toward increased secrecy and one-sided decisionmaking—is a recipe for agency overreach and for natural resource management to “go astray.” Consistent failure to engage in an open and transparent decisionmaking process, consistent failure to consult with unbiased scientists in assessing policy choices, insistence on meeting only (or mostly) with industry representatives and not with other stakeholders, unilateral and process-less postponement of regulatory requirements that are validly in force – those actions are evidence of unreasoned decisionmaking and overreach, as courts like the U.S. Court of Appeals for the District of Columbia Circuit are already beginning to remind the agency.

I would advise the regulated industries, therefore, to watch what you wish for from this administration. You may find yourself confronting serious litigation delays if you continue to push your wishlist and fail to remind the agency of its statutory responsibility to manage our natural resources for the benefit of *all* Americans, via an open, transparent, and scientifically sound process.

Lastly, I cannot in good conscience occupy this witness seat without addressing the elephant in the room. The single greatest threat to the United States’ resource wealth is climate change and associated resource depletion. There is simply no remaining doubt that human-induced climate change will profoundly affect us all. Devastating floods are increasing in frequency; increasing droughts are affecting the availability of water for drinking, agriculture, and fish habitat; shifting climatic zones are impacting crop production; expanding beetle ranges threaten forest resources; and warming and acidifying oceans are likely to decimate fisheries stocks. Rather than engaging in a misguided and ill-intentioned hunt for natural resources laws that have allegedly “gone astray,” this committee should focus its attention on these very real threats to America’s natural resource wealth, and indeed to our way of life. If we fail to address these threats, history will not judge us kindly.