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Attached is the daily news report for April 11.

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BUREAU OF LAND MANAGEMENT
DAILY NEWS REPORT - UTAH

UTAH – TOP STORIES – APRIL 11, 2017

1. **Critics say Utah power company's plan violates EPA ruling**

The Daily Herald, April 10 | Associated Press

SALT LAKE CITY — A Utah power company has come under fire by critics who say its latest 20-year strategic plan contains elements that would violate federal law.

2. **Interior chief Zinke partially lifts Utah ATV ban**

The Las Vegas Review-Journal, April 10 | The Associated Press

SALT LAKE CITY — U.S. Interior Secretary Ryan Zinke lifted a ban Monday on motorized vehicles in some parts of a Utah canyon that was the setting of a 2014 ATV protest ride that was a flashpoint in the Western struggle over government land management.

3. **NATIONAL MONUMENTS: Bears Ears change would show 'disrespect' to tribes — letter**

E & E News, April 11 | Jennifer Yachnin

Conservation advocates focused on increasing the racial and ethnic diversity of both public land visitors and managers today urged Interior Secretary Ryan Zinke and President Trump to maintain the Bears Ears National Monument in southeast Utah, asserting that it would be "a sign of profound disrespect to tribes" for the administration to make any changes to the 1.35-million-acre site.

E&E/NATIONAL NEWS – TOP STORIES

1. **Bunkerville Standoff: Testimony wraps up in first Bunkerville standoff trial**

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Two months of testimony in the first Bunkerville standoff trial concluded Monday with a defendant’s dramatic assertion that authorities sat in foxholes waiting to shoot protesters who arrived at the site where federal agents for days had been rounding up Cliven Bundy’s cattle.

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2. **Support for Gold Butte to be heard by Legislature**

The Spectrum, April 10 | Lucas M Thomas

A bill that would officially express the Nevada Legislature's support of the designation of Gold Butte National Monument will be heard by the Assembly Committee on Natural Resources, Agriculture, and Mining on Tuesday in Carson City.

3. **DAKOTA ACCESS: No end in sight for courtroom battle**

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The once fever-pitched battle over the Dakota Access pipeline has largely fallen off the public radar in the weeks since the Trump administration approved the project, protesters cleared out and oil began flowing.

4. **SUPREME COURT: Greens minimize role Gorsuch could play in climate policy**

E & E News, April 11 | Benjamin Hulac

The ascension of Justice Neil Gorsuch to the Supreme Court is alarming for the legal future of environmental causes though ultimately minor in the short term, according to advocates, who are taking a cautiously skeptical stance on the court's newest member.

5. **If government shuts down, senators want feds to get paid**

Federal Times, April 11 | Tony Ware

Seventeen senators have backed a bill to ensure federal employees would eventually get paid in the event of a government shutdown.

6. **PUBLIC LANDS: What state records reveal about potential sell-offs**

E & E News, April 11 | Jennifer Yachnin

When Utah Rep. Jason Chaffetz (R) renewed his long-running effort to sell 3.3 million federal acres earlier this year, hunters and anglers launched an aggressive social media campaign to kill the bill, arguing that states in turn would auction off the lands.

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7. **AGRICULTURE: Court rejects Bush rule exempting CAFOs from reporting**

E & E News, April 11 | Amanda Reilly

In a win for environmentalists, a federal court today tossed a George W. Bush-era rule exempting animal feeding operations from certain pollution reporting requirements.

8. **REGULATIONS: White House moves to kill lawsuit over 2-for-1 order**

E & E News, April 11 | Amanda Reilly

The Trump administration yesterday asked a federal court to toss a lawsuit challenging the president's requirement that agencies scrap two regulations for every new one created.

9. **COAL: Mining union faces 'life-and-death' test**

E & E News, April 11 | Dylan Brown

GLEN DANIEL, W.Va. — A year ago, Chuck Nelson's friends weren't sure they would see him again.

10. **INTERIOR: Leaked BLM 'priority work' list sparks green concerns**

E & E News, April 11 | Scott Streater

Several conservation and government watchdog groups say they're concerned about the direction the Bureau of Land Management is headed after a draft list of agency priorities under the Trump administration surfaced this week.

11. **WILDLIFE: USDA stops using cyanide to kill predators in Idaho**

E & E News, April 11 | Scott Streater

An Agriculture Department predator control program will stop using cyanide devices to kill coyotes and other so-called nuisance animals in Idaho following a petition by environmental groups and a recent incident in which one of the devices injured a teenage boy and killed his dog.

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12. **ENDANGERED SPECIES: Appeals court revives industry lawsuit over owl habitat**

E & E News, April 11 | Amanda Reilly

Federal appeals judges today revived lumber manufacturers' lawsuit over critical habitat for the northern spotted owl.

13. **NATURAL GAS: Congress is running out of time to repeal Obama orders**

High Country News, April 11 | Rebecca Leber/Mother Jones

With budget battles and promised tax reform ahead, President Donald Trump is running out of time to claim legislative wins. Especially since most of them have been from his rollback of environmental regulations put forward during the waning days of the Obama administration.

14. **Texas surveying board expresses concerns over BLM case**

Times Record News, April 11 | John Ingle

A Texas agency charged with overseeing land surveyors and the use of surveying techniques to determine gradient boundaries told a federal district court that should it choose to side with the federal government in a land dispute, it could potentially "disrupt precedent" of the near-century old method used in the state.

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UTAH – FULL STORY

1. **Critics say Utah power company's plan violates EPA ruling**

The Daily Herald, April 10 | Associated Press

SALT LAKE CITY — A Utah power company has come under fire by critics who say its latest 20-year strategic plan contains elements that would violate federal law.

Rocky Mountain Power's 300-page Integrated Resource Plan was submitted to the Utah Public Service Commission on Tuesday, The Salt Lake Tribune reported. The utility's "preferred" scenario would not involve installing specific pollution-control systems at two coal-fired power plants even though a 2016 U.S. Environmental Protection Agency decision requires the systems to be installed by 2021.

Rocky Mountain Power, which is the state's largest electrical utility and Utah have sued to challenge the EPA ruling. Federal legislation introduced last month by Rep. Jason Chaffetz and Sen. Mike Lee, both Utah Republicans, also seeks to overturn the ruling.

Critics argue that the EPA decision should be part of the company's long-term plans unless it is successfully overturned by the legislation or the legal challenge.

"It's baffling Rocky Mountain Power is acting in its future plans as if it can defy federal law, which requires it to reduce Utah's coal power-plant emissions," said Matt Pacenza in a statement. Pacenza is the executive director of the environmental advocacy group HEAL Utah.

Rocky Mountain Power spokesman David Eskelsen said the report does not lock in the company's future actions, and the utility's plan acknowledges the uncertain nature of the litigation. He said the utility typically selects the "preferred portfolio" that incurs the least cost and represents the least risk to consumers, adding that environmental compliance decisions are usually made during a separate process.

"I don't think it's reasonable to accuse the company of ignoring or thinking we cannot comply with the law," Eskelsen said. "The company always complies with the law."

BACK

BUREAU OF LAND MANAGEMENT
DAILY NEWS REPORT - UTAH

2. **Interior chief Zinke partially lifts Utah ATV ban**

The Las Vegas Review-Journal, April 10 | The Associated Press

SALT LAKE CITY — U.S. Interior Secretary Ryan Zinke lifted a ban Monday on motorized vehicles in some parts of a Utah canyon that was the setting of a 2014 ATV protest ride that was a flashpoint in the Western struggle over government land management.

The decision opens nearly 7 miles of trails for motorized vehicles at the north end of Recapture Canyon and the canyon's west rim. But ATVs still won't be allowed to travel the entire length of the canyon, including riparian areas on the canyon floor where some of the people rode in the protest ride, said Lisa Bryant, a Bureau of Land Management spokeswoman.

Providing recreation access on public lands is important, and disabled people can't get around without motorized vehicles, Zinke said in a news release Monday.

The move marks a shift from previous administrations that banned ATVs to protect Recapture Canyon, which is home to Native American cliff dwellings. The U.S. government had closed 1,871 acres of the canyon area to motorized vehicles because of damage caused by unauthorized trail construction and damage to the archaeological sites.

Zinke said the design of the trails and other measures will protect cliff dwellings and natural sites important to wildlife.

The May 2014 protest ride was organized shortly after Nevada rancher Cliven Bundy had a standoff with federal officials over a BLM roundup. San Juan County Commissioner Phil Lyman, who was convicted of trespassing in the Utah ride, became a cause celebre in the movement.

Lyman said Monday that Zinke's decision is "very vindicating" and brings some U.S. government recognition that the trail in the canyon is a road and opens the door for San Juan County's pending legal claims that the county has a right to and ownership of the road.
"I'll take it, and I'm grateful," said Lyman, who has appealed his conviction to the 10th U.S. Circuit Court of Appeals in Denver. The court has not yet ruled on the appeal.

Lyman said Zinke's decision on Recapture Canyon also bodes well for local officials who are calling for President Donald Trump to rescind the recent declaration of Bears Ears National

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Monument in the area. A coalition of tribes pushed for President Barack Obama to designate the monument, but Lyman, state lawmakers and Gov. Gary Herbert have called it overly broad and said it closes off access.

Zinke “has shown pretty clearly that he is willing to look at the realities of these situations,” Lyman said.

BACK

3. NATIONAL MONUMENTS: Bears Ears change would show 'disrespect' to tribes — letter

E & E News, April 11 | Jennifer Yachnin

Conservation advocates focused on increasing the racial and ethnic diversity of both public land visitors and managers today urged Interior Secretary Ryan Zinke and President Trump to maintain the Bears Ears National Monument in southeast Utah, asserting that it would be "a sign of profound disrespect to tribes" for the administration to make any changes to the 1.35-million-acre site.

The Next 100 Coalition, whose membership includes the Hispanic Access Foundation, National Urban League and Voto Latino, released a letter urging Trump and his administration to refrain from reducing the monument's boundaries or rescinding its status entirely.

The missive comes in the wake of assertions by a former member of Trump's Energy Department transition team, who last week said he expects Trump to issue a new executive order targeting the Antiquities Act, the 1906 law that allows presidents to designate national monuments (E&E News PM, April 4).

In its letter, the Next 100 Coalition urges Trump and Zinke to visit the Beehive State and to meet with the Bears Ears Commission, which represents the five tribal nations with ancestral ties to Bears Ears (E&E News PM, March 17).

"We strongly urge your Administration to not only meet with the Bears Ears Commission within the confines of office buildings, but also to send Secretary Zinke and other high-level Administration officials to spend time meaningfully engaging with the Bears Ears Commission on-site at the Bears Ears National Monument," the letter states.

The missive continued: "Your Administration can then hear first hand what the National Monument means to various tribes' cultures, spiritualities, and histories. It would be a sign of profound disrespect to tribes, and all who collectively steward public lands, for the Administration to make any decision regarding the Bears Ears National Monument before such substantive engagement has taken place."

Zinke has previously said he will visit the Utah monument but has not yet done so.

The Conservation for Economic Growth Coalition also released its own letter to Zinke today, urging the Interior secretary to "protect the integrity of the Antiquities Act" as well as Bears Ears in particular.

"You and the President have an opportunity now to protect from partisan, political attack one of the most spectacular landscapes in the American West that will be managed in a way that for the first time elevates the role of Native American tribes alongside local residents in the management of public lands," the letter states. "We could not support more strongly the preservation of the Bears Ears in Utah as a national monument, and want to see it protected as it is currently designated."

The organization, composed of venture capitalists including SolarCity co-founder Pete Rive, asserts that public lands "are important to the health and growth of entrepreneurial, innovative companies across America."

BACK

E&E/NATIONAL NEWS – FULL STORY

1. Bunkerville Standoff: Testimony wraps up in first Bunkerville standoff trial

The Las Vegas Review-Journal, April 10 | Jenny Wilson

Two months of testimony in the first Bunkerville standoff trial concluded Monday with a defendant’s dramatic assertion that authorities sat in foxholes waiting to shoot protesters who arrived at the site where federal agents for days had been rounding up Cliven Bundy’s cattle.

The accusation was among the last statements Idaho resident Eric Parker made to the jury before he stepped down from the witness stand late morning, after a day and a half spent testifying in

his own defense. Closing arguments are scheduled for Wednesday in the case against Parker and five other men charged as "gunmen" in the 2014 armed standoff.

Parker, a 33-year-old father of two, is the only defendant who decided to put himself in the line of courtroom crossfire by testifying on his own behalf. He controlled the narrative for hours on Friday while his defense lawyer questioned him. But on Monday, a federal prosecutor pressed him about his decisions the day of the standoff, as well as his social media postings in the lead-up to and aftermath of his trip to Bunkerville.

Assistant U.S. Attorney Nicholas Dickinson's line of questioning reflected an attempt to suggest to jurors that Parker was not truthful in testifying that he never planned to use violence and only raised his gun to defend women and children against a threatening law enforcement presence.

On April 12, 2014, Parker was photographed in the prone position, pointing a long gun through a crack in the jersey barrier of a highway bridge that overlooked a dried-up wash where protesters were face-to-face with Bureau of Land Management agents. Protesters assembled on the bridge and in the wash that day at rancher Bundy's behest.

Dickinson played a video of Parker and others milling around on the highway overpass as protesters gathered. He referenced the emotion Parker displayed during his testimony last week.

"It appeared you were getting emotional and were crying about your time on the bridge. … You're not crying in this video," Dickinson said.

"I was angry," Parker contended.

The standoff ended when federal authorities, who were outnumbered, released the cattle and left Bunkerville. Dickinson asked Parker about an exchange that occurred after authorities left, when protesters returned to the so-called militia camp they set up near Bundy's ranch.

"Were you sitting next to someone who asked Siri, 'What's the last time the federal government backed down?'"

"Yes sir," Parker replied.

"And what came up on Siri?"

"A picture of me."

The photo of Parker on the bridge went viral after the standoff, and online followers dubbed him the "Bundy Sniper."

Dickinson referenced Parker's social media postings after the shooting to suggest to jurors that he was proud of that title.

The standoff occurred after the Clark County sheriff announced at a morning rally that federal authorities decided to cease their cattle impoundment operation.

Protesters say they went to the wash to watch cows get released, not to threaten and intimidate federal agents. Parker maintained that was his intention, but he acknowledged the crowd of hundreds of protesters may have misunderstood the sheriff's announcement.

But, he said with an air of defiance: "What the sheriff didn't say is, I'd like you to not go over there because there's a lot of people wearing combat gear sitting in foxholes waiting to shoot you."

The Trial

Government witnesses: about 35
Defense witnesses: 4
Weeks of testimony: 7

The Defendants

Steven Stewart
Eric Parker
Scott Drexler
Todd Engel
Ricky Lovelin
Gregory Burleson

The Charges

Conspiracy to commit an offense against the United States
Conspiracy to impede or injure a federal officer
Assault on a federal officer

Use and carry of a firearm in relation to a crime of violence
Threatening a federal law enforcement officer
Use and carry of a firearm in relation to a crime of violence
Obstruction of the due administration of justice
Interference with interstate commerce by extortion
Interstate travel in aid of extortion

BACK

2. Support for Gold Butte to be heard by Legislature

The Spectrum, April 10 | Lucas M Thomas

A bill that would officially express the Nevada Legislature's support of the designation of Gold Butte National Monument will be heard by the Assembly Committee on Natural Resources, Agriculture, and Mining on Tuesday in Carson City.

Assemblywoman Heidi Swank (AD16) is the primary sponsor of Assembly Joint Resolution No. 13. Swank previously served on the board of the Friends of Gold Butte and is currently the Executive Director of the Nevada Preservation Foundation.

Swank said she is introducing AJR13 to proactively inform the Trump administration of Nevada's support of the Antiquities Act. Before being sworn in Secretary of the Interior Ryan Zinke said he would review the designation of Gold Butte National Monument during a Senate hearing in January.

"I have some concerns about if they're going to try to undo more of what the Obama administration has done, including Basin and Range and Gold Butte designations," Swank said.

Swank said that the need for the resolution comes from a shared belief among most Nevadans that the designations are good for the Silver State.

Jaina Moan, executive director of the Friends of Gold Butte, said the resolution would provide Nevada with immediate economic opportunity. She mentioned the Outdoor Retailer trade show, which has been held annually in Salt Lake City, is leaving Utah after more than two decades. Moan said the show is looking for a state that shares their position on public lands, and Nevada declaring support of the Antiquities Act could position the state to host such an event.

"I really do think it could have a positive impact on our economy from the leaders of our state standing up and saying that they support these protected places," Moan said.

Since being introduced on March 23, the public has expressed overwhelming support of AJR13 through public comments on the website of the Nevada State Legislature. Over 100 people voted in favor of AJR13 while only three voted against it.

Unsurprisingly, the Friends of Gold Butte have avidly supported AJR13 through a social media campaign urging supporters to rally around the Antiquities Act.

“I think that a lot of us here in Nevada are conservationists. There’s a lot of hunters who understand this. There’s a lot of folks that go out to these lands and use them for various uses. I would consider most of Nevada conservationists at heart, that’s why we live here,” she said.

When asked about Gold Butte during an April 3 White House press briefing, Zinke said "we are looking at everything across the board."

"When I came in, there was a lot of talk about different monuments in different places, and I talked to the senators. And so everything is on the board, looking at it. No monument in specific, but looking at the process, looking at the law, making sure that the monuments follow the law. And at the end of the day, it's important that we operate collaboratively," he said.

Zinke, a Montana Congressman before being tasked to head the Interior, acknowledged opposition to the monument designation, and mentioned unfavorable perception of the DOI and BLM in parts of the Western United States.

"If you're outside of Washington, D.C., there's a lot of anger out there," Zinke said. "I want the Department of Interior, our rangers and land managers, to be first viewed as rangers and land managers, not law enforcement. I don’t want us to be heavy-handed. And I want us to work with local communities, because that's where we're embedded. Our rangers, they have children, they play soccer, they coach, they do all those things -- I want to make sure the Department of Interior is the department that works with local communities, works with the states, and we want to be the 'yep' team; that means be an advocate rather than an adversary."

Those opposing the resolution called President Obama’s use of the Antiquities Act a “land grab” and said most Nevadans who actually live near Gold Butte do not support the designation.

"There's a lot of frustration out there with BLM and some of those are valid concerns. I think some of this often, when you mention BLM, gets rolled into all those frustrations that people feel, and I'm sympathetic there. There are definitely some issues we would like to be heard a bit better by the BLM," Swank said.

She added that national monument designations historically do not carry with them significant changes to use of the land, but understood why people are concerned.

"People get nervous about that kind of thing. I think it just shows how important public lands are to people in the state of Nevada," she said.

The resolution will be sent to President Donald Trump and Vice President Mike Pence, as well as Nevada's federal delegation. The declaration of support might confound some in Washington, D.C., after Nevada's two Republican representatives in Congress — Sen. Dean Heller and 2nd District Rep. Mark Amodei — introduced the Nevada Land Sovereignty Act to protect the state against future designations carried out without "Congressional approval or local support."

Swank said she hasn't received any active opposition to AJR13, but said she expects some during the hearing.

"I think that there's definitely going to be some mixed responses," Swank said. "I think some of that comes out of misunderstanding what the designation does."

BACK

3. DAKOTA ACCESS: No end in sight for courtroom battle

E & E News, April 11 | Ellen M. Gilmer

The once fever-pitched battle over the Dakota Access pipeline has largely fallen off the public radar in the weeks since the Trump administration approved the project, protesters cleared out and oil began flowing.

In the courtroom, however, the clash continues. Tribes and allies have staked out their positions against the government and the pipeline company, and a snarl of legal claims remains unresolved.

"Everybody is writing epitaphs and moving on, but there is still a very active court case here," said Jan Hasselman, the Earthjustice lawyer who has represented the Standing Rock Sioux Tribe in its legal battle since July.

Indeed, the central environmental claims in the case have yet to get full airing in court. While a federal judge in Washington has rejected legal maneuvers based on historic preservation and religious freedom arguments, he has not issued any rulings on the environmental issues that sparked the litigation last summer.

According to the Standing Rock and Cheyenne River Sioux tribes, the Army Corps of Engineers violated federal law and tribal treaties by conducting an overly narrow review for the project — even though the oil pipeline crosses a portion of the Missouri River just a half-mile from Standing Rock's reservation.

The tribes are now seeking what's known as summary judgment, asking the U.S. District Court for the District of Columbia to decide the environmental claims in their favor. If they win, Dakota Access could face huge disruptions.

"If the permits were granted illegally, as we believe, then the pipeline will have to be turned off until the process is fixed," Hasselman said.

Nagging legal uncertainty

Some court watchers are skeptical about how far the tribes' claims will go. In any case, the legal uncertainty nags as the project nears commercial service.

In a dizzying number of court filings in recent months, the two tribes have filed separate requests for summary judgment, the Army Corps has filed cross-motions against both tribes, and Dakota Access has filed a cross-motion against Cheyenne River and joined in the Army Corps' motion against Standing Rock.

They all want the same thing: a court decision resolving the crux of the case in their favor. Judge James Boasberg is likely to schedule a hearing soon to consider arguments from both sides.

The tribes' main request has remained the same throughout the litigation. They want the Army Corps to perform an in-depth environmental impact statement (EIS) for the pipeline rather than relying on a less-detailed environmental assessment (EA) completed last summer.

Obama officials in December agreed to do an EIS to consider tribal impacts and alternative routes. The Trump administration reversed that decision this year.

"The EIS process would put us exactly where we were before in making our case to the government and to the public that this was the wrong place to put a pipeline," Hasselman said.

But the tribes may have an uphill battle in the district court. Though Boasberg has not yet ruled on any environmental claims, he has been receptive to previous Army Corps arguments that the agency followed its standard process in reviewing parts of the pipeline.

The corps is also entitled to some deference from the court on how it conducts standard permitting.

"The issues the tribes are raising in terms of why [the EA] was improper fall squarely into: This agency has a lot of leeway on the scope of the review," Bloomberg Intelligence litigation analyst Brandon Barnes said. "Under the current case law, that's right. This is the province of the Army Corps to decide how expansive this review should be."

Barnes says a win for the tribes could represent a major expansion of the agency's obligations when considering whether to approve water crossings for infrastructure projects like Dakota Access.

"From a common-sense perspective, what you're asking the court to do is tell Army Corps that from now on when they have pipeline crossings, even though it's running next to an existing pipe and it's going underground, they have to do a full EIS for each one of those," he said. "This is wading into generally accepted EA territory."

But if Boasberg does side with the tribes and agrees that the EA was faulty, the question becomes the proper remedy. The tribes have asked the court to order a new EIS, vacate existing permits and halt pipeline operations.

It's possible, though, that the pipeline will be able to continue operating even if the tribes win.

"It's going to depend on what he deems the failure to be and whether or not it is so substantial that it needs to be dealt with only in the context of the stay," ClearView Energy Partners analyst Christi Tezak said.

Tezak noted that, in 2014, a federal court remanded a natural gas pipeline's environmental review to the Federal Energy Regulatory Commission, but the line was allowed to remain in operation while the agency conducted additional analysis.

Moving pieces

While the core conflict moves forward, several smaller but significant battles are also playing out in the district court.

Boasberg last week resolved a bitter dispute between the tribes and Dakota Access over whether certain spill-response documents should be withheld from the public (Greenwire, April 7).

He's also weighing requests from both tribes to update their legal complaints — initially filed last year — to include religious freedom claims and arguments that the Trump administration illegally reversed Obama officials' decision to conduct more in-depth review for the pipeline.

Up at the U.S. Court of Appeals for the District of Columbia Circuit, lawyers for Cheyenne River continue to push the tribe's complaint that the presence of the pipeline desecrates Lake Oahe waters used in religious sacraments. The district court rejected the argument last month, and the tribe appealed.

The D.C. Circuit has denied a request for an emergency freeze on pipeline work while the case moves forward. Briefs in the appeal are due in May and June.

Finally, the district court has a stack of claims to consider from other Sioux tribes. The Yankton Sioux and Oglala Sioux, both of South Dakota, filed separate lawsuits challenging the Army Corps' approval of Dakota Access, and their claims were recently consolidated with Standing Rock's case.

And after the district court issues a final decision on the various tribes' claims against the project, another round of litigation is likely to follow at the D.C. Circuit.

Sweeping impacts?

Despite the complex legal tangle, Tezak says investor concern has leveled off in recent months.

"From the investors' perspective, folks are keeping an eye out on the long view because it's something that's unresolved," she said. "But do I think they see it as a huge vulnerability? No. I think they keep an eye on it in case it goofs up."

Barnes agreed, asserting that the Army Corps' arguments have an edge in the case largely because he expects the court to defer to the agency's judgment on the proper scope of review.

Still, he said, a win for the tribes could have huge impacts for pipeline backer Energy Transfer Partners (ETP) and other developers.

"It's never 100 percent sure if you're still in court," he said. "An adverse decision for ETP here would potentially expand the scope of these reviews for Army Corps that would flow into other pipelines. You balance that against the new administration coming in and putting its people into place, and there's a tension there."

Craig Stevens, spokesman for the pro-pipeline Midwest Alliance for Infrastructure Now, dismissed the ongoing legal battle as "the cost of doing business."

"Unfortunately, fighting unwarranted litigation of these lawful infrastructure projects has just become part of the cost of doing business in the United States," he said. "Companies and government agencies follow the letter of the law just to be hauled into court and go through the procedural motions.

"While it won't stop energy and infrastructure development, it will add costs and potentially restrain economic growth," he added.

Hasselman noted that a courtroom victory could still be a narrow one — without sweeping implications for other pipelines. The broader precedent is already in motion, he said.

"Oil may be in the pipeline, but nobody at Energy Transfer looks at this and thinks, 'What a great success it's been,'" he said. "They have lost many hundreds of millions of dollars. Their name and

reputation has been greatly damaged. It's not like anybody's out there thinking, 'Oh, great, we can walk all over Indian tribes now.' I don't think anything ever happens again that looks like this."

BACK

4. **SUPREME COURT: Greens minimize role Gorsuch could play in climate policy**

E & E News, April 11 | Benjamin Hulac

The ascension of Justice Neil Gorsuch to the Supreme Court is alarming for the legal future of environmental causes though ultimately minor in the short term, according to advocates, who are taking a cautiously skeptical stance on the court's newest member.

Gorsuch was sworn in yesterday morning, first in a private ceremony at the court, then at the White House, where Justice Anthony Kennedy presided.

The court is scheduled to hear a series of cases next week, but it will take far longer for Gorsuch's work to ripple through the realms of climate and environmental law, environmentalists say.

"It's not going to change a whole lot in the short term," Joanne Spalding, chief climate counsel for the Sierra Club, said in an interview.

Attorneys and representatives at environmental advocacy groups, including the Sierra Club, the League of Conservation Voters, Greenpeace and WildEarth Guardians, said Gorsuch's presence on the court has not altered their legal work or prompted their organizations to shift course in how they conduct public outreach or launch campaigns.

"It does not change the work that we're doing," said Desiree Tims, judiciary program director for the League of Conservation Voters. "His confirmation is fresh and was something that was foreseeable."

Jason Schwartz, a Greenpeace spokesman, said Gorsuch's arrival doesn't significantly affect the group because it generally organizes its campaigns at the local and state level and isn't as litigious as other conservation organizations.

"Gorsuch is not central to our campaigns and strategy," Schwartz said in an interview, calling the justice a portion of the "pretty unsurprising parade of craziness coming out of the Trump administration."

Enviros' eyes are on the lower courts

Gorsuch, 49, is the second justice of the court from Colorado, after Byron White — a nominee of President Kennedy's — and could be a consistent conservative-leaning vote for decades.

Environmental advocates privately acknowledge deep concerns about Gorsuch and the opportunity for President Trump to nominate conservative justices who would lock the court into a consistently right-leaning body for a generation. Still, they also argue that the scale of the federal court system and the exclusivity of the Supreme Court work in their favor. And they say the court's history on climate cases is encouraging, too.

Tims said she will be closely watching the courts below the Supreme Court, which finalize the bulk of judge-made law.

"Really, the focus should be on the lower courts," Tims said. "They get to dip their hand in the candy jar first."

Federal district courts received about 290,000 civil cases last year and terminated roughly 260,000, while slightly fewer than 372,000 remained pending, according to recent figures compiled by the Administrative Office of the U.S. Courts. Those figures exclude appeals courts that hear federal cases.

By contrast, the Supreme Court hears about 80 cases a year.

"The Supreme Court, sure, they take on some high-profile cases," said Jeremy Nichols, climate and energy program director for WildEarth Guardians, which files lawsuits about wildlife, natural resources and endangered species in Western states.

"But more often than not, the cases we bring end up in district court, and that's where they end," he said.

What role for SCOTUS on climate?

BUREAU OF LAND MANAGEMENT
DAILY NEWS REPORT - UTAH

Pat Gallagher, director of the Sierra Club's Environmental Law Program, testified last month before the Senate Judiciary Committee against Gorsuch.

As a lower court judge, Gorsuch had a history of favoring companies to the exclusion of citizens and criticizing people who file environmental protection cases, Gallagher told senators.

"A pattern has begun to emerge from Judge Gorsuch's opinions that suggests he disfavors lawsuits brought by citizens and environmental nonprofits and will find ways to shut the courthouse doors on them," Gallagher said in his opening remarks.

Earthjustice, an active player in environmental protection cases, leveled a similar critique at the justice in a letter last month.

"Judge Gorsuch is an opponent of litigation in the public interest, even suggesting in an article written for the National Review that groups seeking to defend their constitutional rights — to marriage equality, for example — are 'addicted to litigation' and should seek recourse at the ballot box rather than the courts," it reads.

Yet in an interview, Gallagher said the top court's role in climate law will likely be negligible in the immediate future.

The court may get one or two cases about climate change a year, he said. "So the court is not going to dictate the future of climate cases or clean energy," he said.

Two of the most important lawsuits about climate change — one about U.S. EPA's Clean Power Plan and another on a rule of the agency's that would require climate standards for new fossil fuel power plants — are before the U.S. Court of Appeals for the District of Columbia Circuit.

"At this point, speculating about those cases is too early," Spalding said, adding that even if Gorsuch gets a chance to weigh in on those disputes, "We think we can win a majority of the court if it comes to that."

In two influential climate cases that reached the Supreme Court — Massachusetts v. Environmental Protection Agency and Utility Air Regulatory Group v. Environmental Protection Agency — the court upheld in varying degrees the government's authority to regulate greenhouse gases.

In a 9-0 finding for the UARG case, the court said U.S. EPA had overstepped its bounds to some extent but retained its legal rights to regulate greenhouse gases depending on context.

Justice Antonin Scalia, the fiery judge Gorsuch now replaces and someone whose legal legacy Gorsuch has often said he deeply admires, wrote the opinion in that case.

BACK

5. **If government shuts down, senators want feds to get paid**

Federal Times, April 11 | Tony Ware

Seventeen senators have backed a bill to ensure federal employees would eventually get paid in the event of a government shutdown.

The Federal Employee Fair Treatment Act of 2017 (S. 861) is intended to establish full and quick compensation for federal workers who are furloughed or forced to work without pay should Congress fail to produce a government funding measure by April 28.

Along with expediting pay following the government reopening, the legislation also allows those required to work during a shutdown to take scheduled annual leave and sick leave.

Sen. Ben Cardin, D-Md., sponsored the bill, which is similar to a guaranteed back pay measure he introduced in 2015 when Congress last faced a possible shutdown.

“Our bill is the right thing to do and the fair thing to do,” said Cardin in a news statement. “Federal workers are dedicated public servants who simply want to do their jobs on behalf of the American people. They shouldn’t suffer because of extreme partisan gamesmanship.”

Several federal employee unions have shown their support for the proposal. In an April 7 press release, National Treasury Employees Union National President Tony Reardon stated, “We are hopeful that Congress can avoid a disruption in government services. But just in case, it is good to know that Sen. Cardin and his colleagues are looking out for the federal employees who would otherwise be forced to pay for the political impasse.”

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6. **PUBLIC LANDS: What state records reveal about potential sell-offs**

E & E News, April 11 | Jennifer Yachnin

When Utah Rep. Jason Chaffetz (R) renewed his long-running effort to sell 3.3 million federal acres earlier this year, hunters and anglers launched an aggressive social media campaign to kill the bill, arguing that states in turn would auction off the lands.

"Keep our public lands for the many not for the few," one Instagram user wrote to Chaffetz, who went on to withdraw the legislation within days of its introduction. "The people of Utah value our public lands; listen to us" (Greenwire, Feb. 2).

In challenging Chaffetz and other proponents of transferring federal land to individual states, sportsmen and conservationists often turn to one particular argument to shore up their opposition: Turning over public lands will result in states selling those parcels off to the highest bidder.

"Look at history: States have a track record of selling these lands that were given to them at statehood," said Land Tawney, executive director of Backcountry Hunters & Anglers, which led the protest against Chaffetz's bill earlier this year. "The concern here is they've already done it, and they could definitely do it again."

But exactly how much federal land ends up in private hands once it has been transferred, sold or exchanged with individual states is an open question.

While the Congressional Research Service reported in 2014 that the federal estate had shrunk by 23.5 million acres since 1990, or about 4 percent, there is no formal system for tracking former federal lands.

That leaves conservationists to turn to property known as "state trust lands" as the best example of what could happen should advocates of disposing of the federal estate achieve their goals.

Those state trust lands, given to states upon their admission to the union, remain largely concentrated in the western United States: about 40 million acres across Arizona, Colorado, Idaho, Montana, New Mexico, Oregon, Utah, Washington and Wyoming.

"Groups fall back on that example because there haven't been large transfers of federal public lands to the states since those original agreements," said Matt Lee-Ashley, director of the Public

Lands Project at the Center for American Progress. "Instead, you've had a few more narrowly tailored agreements but no examples of large-scale transfers."

But even turning to state trust lands for research on what becomes of public land can prove difficult.

The Wilderness Society released an analysis on state trust acreage in New Mexico last month, revealing that the state has sold nearly 30 percent of the land it originally received from the federal government more than 100 years ago (Greenwire, March 21).

Because the state does not keep a specific database of prior sales, Wilderness Society New Mexico State Director Michael Casaus told E&E News the organization had to sift through reams of microfiche and other archival information in the state land office to piece together who purchased acreage and how it has subsequently been used.

The Wilderness Society similarly reviewed data in 2016 on more than 16,000 parcels of land in Idaho to determine that the state had sold off 41 percent of its original federal acreage to cattle ranchers, timber companies and private homeowners (Greenwire, May 5, 2016).

"It's basically a forewarning that if our public lands were under state control, they could be sold off anytime to private interests and corporations for profit," Casaus said last month.

A singular mandate

Shawn Regan, a research fellow at the Montana-based Property and Environment Research Center, argues that it's not appropriate to compare state trust lands to other would-be state property.

"To the extent that we're talking about transferring lands to state control, it requires an understanding of how states manage public lands," Regan said. "Federal lands are usually multiple-use, while state lands are used to generate revenue. In practice, that results in very different land management practices."

That's because state trust lands are not technically public lands but rather are intended to generate funds for public institutions, such as schools, universities and hospitals.

Regan noted that unlike lands under control of the Bureau of Land Management — which may be home to a variety of uses, such as hunting or fishing and other recreation, as well as energy development — "state lands are a unique thing, and they're often misunderstood."

The lands may be open to recreation or hunting, but typically the state generates funds by requiring contracts giving individuals or even other state agencies access to do so. Land may also be restricted for timber harvesting or oil and gas extraction.

"That singular mandate [to generate funds] doesn't always mean that we end up mining or harvesting or grazing these lands; it opens up opportunities for unique contracting arrangements to gain access to these lands or recreate on these lands," Regan added.

Regan likewise disputed suggestions that selling portions of state trust land results in a one-time profit for states, noting that such funds are deposited in state-controlled "permanent funds" that are dedicated to funding the same institutions.

New Mexico is one state with a notably robust Land Grant Permanent Fund, which in fiscal 2016 provided more than $656 million to schools, universities and other public institutions.

Still, Regan acknowledged that it remains to be seen how proponents of public land transfers would address management of a flood of new state land if they won their push for control of federal acreage.

"If there was a large-scale land transfer, the question is how would those lands be managed?" he said.

Trump views

The American Lands Council, which advocates for the transfer of the federal estate, asserts that states will be able to create "compatible economic productivity" to provide for costs like roads, utilities and emergency services on public lands.

"The argument that states cannot afford to manage their own public lands is a fallacy," ALC said in a statement provided to E&E News. The group does not offer specifics on land supervision, other than to note that former federal lands would be "managed in accordance with state and local plans."

ALC has also highlighted a 2015 report from the free-market Property and Environment Research Center that shows state trust lands earned $14.51 per dollar spent on management, compared with the federal government's 73-cents-per-dollar return rate (Greenwire, March 6, 2015).

The report did not address how much states would be required to spend on wildfire suppression if they took over control of federal lands, however, leaving out a significant cost factor.

That focus on generating income from state trust lands, however, is exactly why conservationists should look to such acreage to predict what states might do with a sudden influx of land, said Center for Biological Diversity Public Lands Director Randi Spivak.

"Their goal is revenue generation. They don't prioritize conservation, recreation, wildlife habitat," she said. "I don't think it's a direct comparison, but I do think it's instructive because states want these lands not because [of] their desires for conservation and wildlife habitat; they want these lands for extraction and to produce revenue."

Spivak — who asserted that land transfers should be referred to as "seizures" or even "stealing" — noted that President Trump and his political advisers made similar arguments during the 2016 presidential campaign.

In an interview with Field & Stream during the campaign, Trump argued against divesting federal lands, saying states might sell public lands when facing budget woes.

Similarly, Donald Trump Jr., seen as a key liaison between the Oval Office and the Interior Department, told voters in Colorado last year that transferring lands could reduce public access for hunters and anglers like himself.

"There should be no transfer back to the states where they can just unabashedly sell them to developers to make up for a budget shortfall," Trump Jr. said at that time (E&E News PM, Sept. 23, 2016).

While agencies like BLM, the Forest Service, the Fish and Wildlife Service or the National Park Service may sell or exchange land from time to time, Spivak said such transactions can't predict what a state would do when faced with more significant overhead for managing millions of new acres of land.

"Those low-level kind of transactions, adjusting boundaries, that's not the issue we're talking about here," she added. "I don't think it would take much imagination to paint a picture of what happens."

Hot spots

Conservationists who see the state trust lands as a preview of potential fallout for large-scale land transfers point to Nevada as a reason for concern.

While Nevada originally had 2.7 million acres of state trust lands, it now retains only about 3,000 acres. Other states, such as Montana and Wyoming, have as much as 90 percent of their initial estate.

"One of the broader concerns is that the state governments don't have a lot of extra resources available for land management," said Lee-Ashley.

Nonetheless, Nevada remains the state with the largest ratio of federal land, accounting for nearly 60 million acres, or 85 percent of the state's total landmass.

That makeup prompted congressional approval of the Southern Nevada Public Land Management Act in 1998, which allowed the sale of federal land in the Las Vegas area.

More recently, conservation and sportsmen's groups have raised concerns over the proposed sale of the 82,500-acre Elliott State Forest in Oregon, which sits on state trust lands.

The Oregon State Land Board voted in February to sell the forest to Lone Rock Timber and the Cow Creek Band of Umpqua Tribe of Indians for $221 million.

In the wake of public outcry over the sale, Oregon Gov. Kate Brown (D) — the only vote against the sale on the three-member land board — has pushed a plan to allow the state to seek public ownership of the forest.

State Treasurer Tobias Read also indicated last month that despite voting for the sale in February, he would not support an alternative. The board is set to meet May 9, when it will review both a sale agreement and other options.

"It's not making them enough money, and so they're going to sell it," Tawney said of debate over the forest. He argued that such decisions ignore the "intrinsic value" of the land.

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"The American people lose out every single time: It's a short-term gain for a long-term loss," Tawney said.

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7. AGRICULTURE: Court rejects Bush rule exempting CAFOs from reporting

E & E News, April 11 | Amanda Reilly

In a win for environmentalists, a federal court today tossed a George W. Bush-era rule exempting animal feeding operations from certain pollution reporting requirements.

A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit agreed with green groups that lawmakers never intended to give U.S. EPA the authority to exclude those operations.

Congress didn't "give the agency carte blanche to ignore the statute whenever it decides the reporting requirements aren't worth the trouble," Judge Stephen Williams, a Reagan appointee, wrote for the court.

The court also found that manure storage at livestock operations poses more than a "theoretical" risk to public health.

At issue is a rule that EPA adopted in December 2008 exempting all animal feeding operations from reporting releases of hazardous air pollution from animal waste under the Comprehensive Environmental Response, Compensation and Liability Act.

Typically, facilities covered by CERCLA have to report discharges of pollutants above certain thresholds to a National Response Center.

EPA's rule also exempted all but large concentrated animal feeding operations, or CAFOs, from reporting emissions to local and state emergency officials under the Emergency Planning and Community Right-to-Know Act.

The Waterkeeper Alliance, the Humane Society of the United States and other environmental groups filed the lawsuit, arguing that the rule put citizens at risk of breathing harmful ammonia and hydrogen sulfide.

EPA, though, said that requiring producers to report under CERCLA would be burdensome and fruitless because "local response agencies are very unlikely to respond" to reports of pollution. The government also argued that EPA lacked information on how to go about measuring emissions.

EPA noted that the statutes contained unrelated reporting exceptions, including one for releases of engine exhaust. The agency argued that it should be afforded deference under the Chevron legal doctrine because there was ambiguity over whether it could carve out new exemptions that weren't specifically written into the statute.

But Williams rejected those arguments, writing that Congress didn't mean for EPA to fashion new exemptions.

"Read together the statutory provisions set forth a straightforward reporting requirement for any non-exempt release," Williams wrote.

"Conspicuously missing," he added, "is any language of delegation, such as that reports be 'as appropriate,' 'effective,' 'economical,' or made 'under circumstances to be determined by the EPA.'"

Williams also rejected EPA's arguments that the environmentalists didn't have legal standing to sue because they couldn't show a concrete harm tied to EPA's reporting exemption. He agreed with the environmental groups that they have been harmed because they have been deprived of information about livestock operations (E&E News PM, Dec. 12, 2016).

The judge also slammed EPA's arguments about the fruitless nature of reporting: "We find that those reports aren't nearly as useless as the EPA makes them out to be," he wrote.

While acknowledging that it's difficult to measure releases from animal operations because emissions don't come out of a smokestack, Williams wrote that releases can pose a serious risk.

"Anyone with a pet knows firsthand that raising animals means dealing with animal waste," he wrote. "But many of us may not realize that as the waste breaks down, it emits serious pollutants — most notably ammonia and hydrogen sulfide."

When manure that's sitting in storage is agitated for pumping, it can stir up emissions of the hazardous air pollutants, Williams said.

The risk from manure storage "isn't theoretical," Williams wrote. "People have become seriously ill and even died as a result of pit agitation."

Along with vacating the 2008 rule, the court also dismissed as moot a lawsuit by the National Pork Producers Council challenging EPA's decision to require large CAFOs to report under the right-to-know law.

Chevron skepticism

Judges Janice Rogers Brown, a Republican appointee, and Sri Srinivasan, an Obama appointee, heard the case with Williams.

In a concurring opinion, Brown said she agreed with the court's finding but said she was skeptical about some of the recent debate in legal circles about the two-step analysis that courts typically undertake under the Chevron doctrine.

Under the first step, courts look to whether Congress has been silent or ambiguous on an issue. The second step requires an analysis of whether an agency has acted reasonably.

While she agreed that the D.C. Circuit did the proper Chevron analysis in the case at hand, Brown said she worried that some scholars advocate leaving out the first step and simply looking at whether a federal agency action is reasonable.

"Congress is out of the picture altogether," she wrote. "Agencies are free to experiment with various interpretations, and courts are free to avoid determining the meaning of statutes."

"It isn't fair. It isn't nice," Brown wrote, quoting the Frank Sinatra song "Luck Be A Lady."

Leaving out the first step, she said, would implicate the separation of powers concerns that Justice Neil Gorsuch — then a judge on the 10th U.S. Circuit Court of Appeals — raised in an August 2016 concurring opinion. Gorsuch, who was sworn in for a seat on the Supreme Court yesterday, has questioned whether Chevron is still a valid legal doctrine.

Collapsing the two-step analysis, Brown said, was "yet another reason to question Chevron's consistency" with judges' duty to "say what the law is."

Click here to read the court's opinion.

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8. REGULATIONS: White House moves to kill lawsuit over 2-for-1 order

E & E News, April 11 | Amanda Reilly

The Trump administration yesterday asked a federal court to toss a lawsuit challenging the president's requirement that agencies scrap two regulations for every new one created.

The executive order at issue was a "valid exercise" of President Trump's powers, the government said in a motion to dismiss the suit.

In the motion, the Trump administration argued both that environmental and public interest groups lack legal standing to bring their challenges and that they failed to state a claim that could be addressed by the courts.

The lawsuit raises "wholly unprecedented or exceedingly rare" claims, the motion says, that "ignore a 40-year history of Presidential Executive Orders directing agencies, to the extent permitted by law, to revise or repeal regulatory requirements that are not necessary or cost justified."

Along with requiring federal agencies to eliminate two rules for every new one, Trump's January executive order established a regulatory budget by which the president determines how much agencies can spend on new rules each year.

The budget for 2017 was zero dollars, meaning agencies must offset any new standards by repealing old ones.

In February, the Natural Resources Defense Council, Public Citizen and Communications Workers of America filed suit, arguing the order is illegal because it attempts to override laws passed by Congress in violation of the separation of powers in the Constitution.

The lawsuit argued that, by requiring agencies to consider the costs — and not the benefits — of rules, the order would effectively amend many statutes without going through the legislative process.

The suit in the U.S. District Court for the District of Columbia named Trump and several federal agencies as defendants.

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"President Trump's order would deny Americans the basic protections they rightly expect," NRDC President Rhea Suh said in a statement at the time.

But legal experts predicted the executive order could be hard to overturn in the courts (Greenwire, Feb. 9).

Yesterday's motion in the district court argued that environmental and public health groups cannot meet the procedural threshold to prove legal standing because any alleged injuries stemming from it are "speculative and not traceable."

The lawsuit is "entirely premature until an agency action becomes final," the motion says.

The Trump administration also argued that federal courts have previously rejected similar constitutional claims challenging presidential executive orders.

"The order does not require agencies to do anything they are forbidden to do by legislative command," the administration said of the separation-of-powers claims.

BACK

9. COAL: Mining union faces 'life-and-death' test

E & E News, April 11 | Dylan Brown

GLEN DANIEL, W.Va. — A year ago, Chuck Nelson's friends weren't sure they would see him again.

The retired coal miner had already lost one kidney. The other needed a bypass, but surgery damaged his liver, landing him in the hospital on dialysis.

He's back on his feet now. But after almost 30 years underground, the 61-year-old faces a lifetime of bills for miners' maladies, from a bad back to black lung.

Nelson knew the deal he made before disappearing beneath the mountain for the first time in 1975. His health would almost certainly be the price for the best paycheck around and benefits backed by his union — the United Mine Workers of America.

Now, that deal is in doubt.

Nelson is one of nearly 23,000 former UMWA miners or their widows who, without congressional action, will lose their health care April 28. And pension and health funds for more than 120,000 total retirees face the same threat down the road.

After six years of lawmakers' inaction, Nelson is not the only one canceling doctor appointments.

Wave after wave of retirees have implored Congress to keep a promise they believe the United States made in 1946.

Health care funding has support on Capitol Hill, but shoring up pensions rankles many conservatives, who don't think the federal government ever made such a promise.

"This really is a life-and-death proposition for us," UMWA President Cecil Roberts said.

Survival of the union itself may also hang in the balance.

Fewer than 8,000 UMWA members still mine coal after decades of mechanization, bloody picket-line battles and changing regulations.

The union — 500,000 strong in its 1930s heyday — numbered 67,440 members at the end of 2016. While new locals represent cops and truck drivers, most are retirees. There are simply more people relying on payouts than paying in.

That won't change despite President Trump's promise to put miners back to work — something even the most outspoken coal operators can't see happening.

The UMWA held on better than most organized labor. Private-sector unionization is 6 percent nationwide, compared with about 20 percent in coal mining.

But most major coal companies have no union miners at all. And bankruptcy — which almost all have faced — not only shrank the industry but sheared off hundreds of millions of dollars in obligations to retired miners.

Does the UMWA have a role in the future of coal? April 28 will be telling.

"There is no remedy here available to us other than Congress," Roberts said. "We're not saying we're going to win, lose or draw here. But we are saying we're going to fight until there is no other place to fight."

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The family union

It all began in 1946, when President Truman faced a problem.

The nation was emerging from World War II a superpower, fueled by coal, but a miners' strike threatened the recovery.

Death and injury rates had led the UMWA — the union of nearly every American miner — to strike. Negotiations broke down between coal operators and UMWA President John L. Lewis, who ran the union from 1919 to 1960.

Truman stepped in and nationalized the country's mines, putting Interior Secretary J.A. Krug in charge of negotiating with Lewis.

On May 29, 1946, the National Bituminous Wage Agreement was signed. The Krug-Lewis agreement mandated a six-day workweek and safety code, but it also created the first miner health and retirement plans. That set a precedent for government-backed benefits that still holds today, the UMWA argues.

Just a few months later, Roberts — Lewis' eventual successor — was born on West Virginia's Cabin Creek in UMWA District 17. Still the largest district, it covers the coal fields of southern West Virginia and eastern Kentucky.

Roberts recounted famed labor organizer Mary Harris "Mother" Jones stopping by his house, and his family fighting in the 1921 labor uprising known as the Battle of Blair Mountain — the largest armed insurrection since the Civil War.

Roberts' childhood saw mechanization cut the mining workforce in half. Shovels and picks gave way to cutting machines and conveyor belts, and the UMWA shrank.

But coal surged again when Roberts returned from the Vietnam War. The Arab oil embargo had focused America on energy independence, and President Carter told West Virginia coal was key.

"If you'd asked anyone ... do you think there's ever going to be a day when we despise coal? You would have been laughed out of existence," Roberts said.

Union members dominated the workforce.

"It was almost disgraceful to think somebody would try and open a mine non-union," said Roberts, who won his first union election in 1977.

Hard times surfaced in the 1980s.

As the once-mighty steel industry began to unravel, mills shuttered and workers were laid off by the thousands. Coal furnaces gone cold, miners quickly followed them to the unemployment line.

From 1983 to 2015, union membership in the U.S. fell by half.

"People who are opposed to unions act like people just walked away from unions and quit," Roberts said. "No, our jobs got shipped out."

The decline only worsened after A.T. Massey Coal Co. picked a fight with the UMWA in District 17.

The Massey effect

Nelson, the retiree now struggling with his health, remembers battling Massey in 1981 when it began construction on the Elk River mining complex and processing plant just across the Big Coal River from his home in Sylvester, W.Va., not far from Cabin Creek.

As always, the UMWA set out to organize the new mine, but for the first time in decades, the union failed.

Emboldened, Massey refused to sign new union contracts at several mines in counties to the south.

Roberts, fresh off his 1982 election victory as UMWA vice president on the ticket with new President Richard Trumka, joined protests in Mingo County. Massey subsidiary Rawls Sales and Processing had hired armed guards and attack dogs to protect out-of-town workers brought in to keep coal flowing there.

"They'd roll their windows down and start shaking $100 bills at us," Nelson said.

In 1985, a sniper killed a non-union coal truck driver in eastern Kentucky.

"Union terrorism," Rawls President Don Blankenship called it. The former accountant was born just over the Kentucky state line, but his local roots conferred no love for the union. Coal was "survival of the most productive." During the strike, he paid better than union scale and ran 200,000 tons a month. After 15 months, the UMWA line broke just before Christmas.

"We just didn't think he could do it," Nelson said. "Not in the heart of District 17, but he did."

Massey spent the next decade buying up union coal mines across Central Appalachia, closing them down and reopening non-union mines. In 1992, Blankenship became Massey CEO and built a mansion on a mountain over Rawls.

Two years later, Nelson's mine was purchased and the union contract ran out. Former union miners left in droves, but with a family to feed, Nelson felt he had no choice but to take a non-union job.

To meet his quota, Nelson would switch off his lamp, as effective in the thick dust as high beams in fog.

"I could see the silhouette of the coal piling up on my shuttle car, and I knew when to drag my chain back in order to fill my shuttle car up," Nelson said.

Workers would signal back into the mine about "a red pen," Nelson said, when an inspector was coming.

On April 5, 2010, 29 men died in an explosion at Massey's Upper Big Branch mine just a few miles from where Nelson worked.

Five years later, Blankenship was convicted of willfully violating mine safety laws at his mines. He maintains federal inspectors were to blame as he approaches the end of a one-year prison sentence (Greenwire, Feb. 24).

"They cut every corner they could," Nelson said. "And there's no doubt in my mind that if they were union mines down there, that would have never happened."

Westward, downward

The future of the UMWA grew even shakier as mining jobs moved West.

The 1990 Clean Air Act amendments, which tackled acid rain, put a premium on low-sulfur coal at power plants. That meant coal from out West, not Appalachia, and a migration toward massive surface mines. Industry titans sold assets in Appalachia to make fortunes in the Powder River Basin of Wyoming and Montana.

More coal was being mined and burned than ever. In 1999, for the first time, more of it came from west of the Mississippi River than east. Coal from unionized mines took the hit, Roberts said, and today accounts for less than 20 percent of all U.S. coal.

The shift cost the UMWA more than 20,000 jobs. Organizing in the West remains a struggle; surface mining requires fewer miners.

"If you organize every single coal miner in the Powder River Basin, you would only be recouping about a fraction of what you lost," Roberts said.

In Appalachia, demand for low-sulfur coal fueled the rise of mountaintop removal.

An environmental movement sprang up against the mining technique, which flattens mountains to reach coal seams. But to preserve the remaining union jobs, the UMWA sided with the industry, said Chuck Keeney, a historian and university professor who helped found the Mine Wars Museum in Matewan, W.Va.

The debate helped breach the wall between miner and operator from the time of Keeney's great-grandfather Frank Keeney, the District 17 leader who headed the 1921 march on Blair Mountain.

But Nelson, the retired fourth-generation coal miner, has become an outspoken activist, helping collect data for studies linking mountaintop removal to elevated rates of cancer and other diseases downstream, research hotly contested by the industry.

He respects Roberts, born just miles away, but can no longer abide the damage coal inflicts on their home state.

"I don't know if it eats at him," Nelson said. "It really eats at me."

Nelson gets called a hypocrite but still pays his union dues. He understands the tough spot the union is in, saving most of his ire for coal companies.

The split between the environmental and union movements, Keeney said, "caused a lot of blue-collar workers to go over to the other side," from Democrat to Republican. The UMWA's loss of influence is front and center in the current fight for miners' benefits.

The UMWA still endorses governors and state lawmakers, but its political capital is limited. In the 2014 Kentucky Senate race, Senate Majority Leader Mitch McConnell (R) shrugged off UMWA-backed Democrat Alison Lundergan Grimes. That New Year's Eve, the last union miner in Kentucky was laid off.

"If you don't have the horse, you can't pull the wagon," said Al Cross, director of the Institute for Rural Journalism and Community Issues in Kentucky.

Environmentalists rally around what they call a "just transition" to find new industries and opportunities for miners. Hillary Clinton promised $30 billion, and President Obama spent millions to jump-start Appalachia, but anger dominates politics.

"Right now, people are just desperate for work, period," Keeney said.

Without viable options, Roberts said, a just transition is "a really nice funeral."

A promise to keep?

Of the top coal companies, Arch Coal Inc. and Cloud Peak Energy Inc. now have no union miners, and Peabody Energy Corp.'s last union mine could soon be shut down (Climatewire, March 2). Bankruptcy and layoff worries have swirled around Murray Energy Corp., which employs roughly a quarter of all active union miners.

In the resurgent Illinois Basin, once solidly union, mines are almost exclusively non-union (E&E Daily, Nov. 14, 2016).

Roberts is left hoping Congress can save pensions and health care.

He has made his case to McConnell, who, after single-handedly killing a fix two years ago, is on board, at least with health care. The UMWA could face the choice to take health care now and risk isolating pensions.

The George H.W. Bush, Clinton and George W. Bush administrations all, at one time or another, took measures to shore up retiree health care.

"Coal miners have legitimate expectations of retiree health care benefits for life," the federal Coal Commission created by President George H.W. Bush stated in 1990. That decision came after the union beat back an early attempt by the Pittston Coal Co. to shed retiree obligations with a nearly yearlong strike.

Pensions are where the UMWA ran afoul of Capitol Hill's budget hawks.

The Heritage Foundation blames UMWA leadership for paying out benefits too soon, overpromising and underfunding.

"Should taxpayers have to pick up the tabs of any private or public pension so long as it represents workers in useful or laudable occupations?" entitlement analyst Rachel Greszler wrote.

Roberts says pension fund were well-managed until the recession hit. The Wall Street crash drained $2 billion at the worst possible time, during record payouts.

A much smaller coal industry has little hope to make up the difference.

Bankruptcies at more than 50 coal companies since 2011 have also strained UMWA retiree funds. Companies routinely shed retiree liabilities and pay their executives large bonuses with approval from federal bankruptcy courts that focus on what's best for the company as a whole, not individual stakeholders.

"Everybody gets rich off of bankruptcy, except for the people who work for the company," Roberts said.

One of those companies, Alpha Natural Resources Inc., bought Massey Energy in 2007 and, along with it, Chuck Nelson's health care and pension.

What happens to the UMWA if a deal doesn't get done?

"I'd give anything I could to save it, but I don't know," Nelson said. "If we lose our health care and pensions, I don't know what good a union is to the person anymore."

Seventy years old like the promise, Roberts said, "We're not quitting."

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10. **INTERIOR: Leaked BLM 'priority work' list sparks green concerns**

E & E News, April 11 | Scott Streater

Several conservation and government watchdog groups say they're concerned about the direction the Bureau of Land Management is headed after a draft list of agency priorities under the Trump administration surfaced this week.

The draft five-point "BLM Priority Work" list, first reported on yesterday by E&E News, calls for the agency to focus on increasing energy development in suitable areas of the 245 million acres BLM manages (Greenwire, April 10).

The document, which has not yet been circulated to BLM staff, calls on the agency to streamline federal coal, hardrock mining, and oil and gas "leasing and permitting" processes. It also prioritizes streamlining unspecified "processes" mandated by the National Environmental Policy Act (NEPA), as well as "land use planning to support energy and minerals development and other priorities," including "rights-of-way processing for pipelines, transmission lines, and solar/wind projects."

"The Trump administration is prioritizing drilling, mining and the construction of an immoral and environmentally-destructive border wall over protecting America's public lands and people's health," League of Conservation Voters Deputy Legislative Director Alex Taurel said today in a statement.

"Our country's public lands should be preserved for all people to enjoy and should not be handed over to corporate polluters," Taurel added.

Athan Manuel, director of the Sierra Club's public lands protection campaign, echoed Taurel's statement.

"The priorities from Trump's Bureau of Land Management make it clear that the administration is not planning to manage our parks and other special places for the use and enjoyment of the people, but rather for the profits of corporate polluters," Manuel said today in a statement.

"America's public lands are worth much more than what lies underneath," he added. "These are the places where families spend time together, where people and wildlife both can take refuge as they enjoy and explore our wild places."

A senior BLM official defended the priority work list, telling E&E News this week that it is meant to help agency staff understand that the Trump administration will prioritize the agency's full "multiple-use" mission — including increased public access and recreation — and not concentrate solely on promoting fossil fuels or any other energy development.

For example, the draft document lists expanding "wildlife conservation opportunities" and increasing "maintenance and capital improvement projects" on federal lands as top priorities.

The source insisted that the priority list was written by senior BLM officials, and was not an "edict" from Interior Secretary Ryan Zinke to agency staff.

But the list, which is being reviewed by members of the Trump administration's "beachhead team" of temporary political officials who assumed key Interior Department roles after the inauguration, clearly takes aim at Obama-era federal lands management initiatives, from landscape-level planning to livestock grazing.

It also focuses BLM attention on Trump administration efforts to protect the United States' southern boundary with Mexico, presumably by building the massive wall that the president has long proposed constructing.

"Building a border wall is an affront to our values, our nation's people, and to our cultural and ecological heritage," Taurel said.

Chris Saeger, executive director of the Western Values Project, wrote in a blog post yesterday that the priority list is "long on border security and fossil energy development, but short on conservation priorities that can maintain the health of the outdoor economy."

"It promises to open even more land to oil and gas development and speed up permitting for all kinds of resource development," Saeger wrote. "It makes virtually no mention of the billion dollar outdoor economy that depends on some public land from development."

Saeger also took a shot at Zinke's likening himself as a conservationist in the model of President Theodore Roosevelt.

The draft priority list is "disappointing to anyone who expected Secretary Zinke to make good on his promise to live up to the legacy of conservation hero former President Teddy Roosevelt," he wrote.

"President Roosevelt cautioned against the overuse of natural resources and protected millions of acres of public lands," he concluded. "Secretary Zinke continues to give us no reasons to believe he can meet that standard."

BACK

11. WILDLIFE: USDA stops using cyanide to kill predators in Idaho

E & E News, April 11 | Scott Streater

An Agriculture Department predator control program will stop using cyanide devices to kill coyotes and other so-called nuisance animals in Idaho following a petition by environmental groups and a recent incident in which one of the devices injured a teenage boy and killed his dog.

A top official at USDA's Wildlife Services, which is tasked with destroying animals deemed a threat to crops and livestock, sent a letter yesterday to the Western Watersheds Project informing the group that the program "has ceased all use" of M-44 devices containing sodium cyanide.

The letter from Jason Suckow, director of the program's Western Region, was sent in response to a petition filed last month by the Western Watersheds Project.

The petition from Western Watersheds and 19 other groups demanded that the program stop using the devices, saying they are a danger to the public and non-targeted wildlife (E&E News PM, March 28).

Indeed, a 14-year-old boy in Idaho last month was injured, and his yellow Labrador killed, after the dog accidentally triggered a cyanide trap that was intended for coyotes (Greenwire, March 22).

"We take seriously the incident in Idaho, which involved the unintentional activation of a small spring-loaded device (M-44)," Suckow wrote in the one-page letter to Erik Molvar, Western Watersheds' executive director.

"We immediately responded by removing all M-44s from the area, initiating an inquiry into the incident, and launching a review of current [Wildlife Services] operating procedures," Suckow wrote.

In addition to removing "all M-44s currently deployed on all land ownerships in Idaho," he wrote, Wildlife Services "has ceased all use of M-44 devices" in the state.

But Suckow did not commit to permanently banning the devices, writing in the letter to Molvar that Wildlife Services "will notify you 30 days prior to placing any new M-44s in Idaho."

Still, Molvar said the groups were pleased by Wildlife Services' decision.

"This is an important victory, at least a temporary one, for both wildlife and for public safety across Idaho," Molvar said. "We thank Wildlife Services for doing the right thing by removing these deadly and indiscriminate killing devices, and urge them to make the moratorium permanent."

Meanwhile, the debate over the use of cyanide devices to control predators continues.

A coalition of environmental groups last week filed a lawsuit against Interior Secretary Ryan Zinke and the Fish and Wildlife Services for what they called a failure to protect endangered species from the cyanide traps employed by Wildlife Services (E&E News PM, April 4).

The lawsuit demands that Fish and Wildlife complete a formal consultation with U.S. EPA to ensure that M-44s and another predator control chemical, Compound 1080, are not also harming animals listed for protection under the Endangered Species Act.

Rep. Peter DeFazio (D-Ore.), citing the Idaho incident last month involving the boy and his dog, introduced a bill, H.R. 1817, that would ban the use of sodium cyanide, Compound 1080 and other "lethal poisons" to kill predators (E&E Daily, March 31).

BACK

12. ENDANGERED SPECIES: Appeals court revives industry lawsuit over owl habitat

E & E News, April 11 | Amanda Reilly

Federal appeals judges today revived lumber manufacturers' lawsuit over critical habitat for the northern spotted owl.

BUREAU OF LAND MANAGEMENT
DAILY NEWS REPORT - UTAH

A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit found that lumber companies had legal standing to sue over the Obama administration's decision to designate more than 9.5 million acres for the threatened species.

The Fish and Wildlife Service's argument that the designation won't decrease the timber available for companies to harvest "defies basic common sense," wrote Judge Brett Kavanaugh, a George W. Bush appointee, for the court.

Judges Thomas Griffith, also a Bush appointee, and Sri Srinivasan, an Obama appointee, joined the opinion, which reverses a lower-court decision to dismiss the case.

The northern spotted owl has been listed as threatened under the Endangered Species Act since 1990. It's found in coniferous forests from British Columbia to central California.

In 2012, FWS finalized its critical habitat for the owl, an area stretching through Washington, Oregon and California.

Kavanaugh noted that the area covered a "huge swath" of forestlands: "For Easterners, imagine driving all the way up and then all the way back down the New Jersey Turnpike, and you will get a rough sense of the scope of the critical habitat designation here."

Trade organization American Forest Resource Council, labor union Carpenters Industrial Council and various lumber producers sued FWS and the Interior Department over the designation. Washington counties also intervened in the case, arguing that they will be harmed by increased regulatory burdens, lost revenue and growing wildfire threats.

FWS initially didn't challenge whether the entities had standing to sue. To show standing, plaintiffs must show that they've sustained or will sustain a concrete injury stemming directly from the action at issue and that that harm is redressable by the courts.

But while the litigation was ongoing, the D.C. Circuit ruled in a separate case, Swanson Group Manufacturing LLC v. Jewell, that some of the same parties lacked standing to challenge a Bureau of Land Management decision on federal timber contracts required by the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937.

Based on that decision, the U.S. District Court for the District of Columbia last year granted the government's motion to dismiss the spotted owl case.

On appeal, the lumber industry argued that it would suffer because the habitat designation would "clearly" reduce the amount of harvestable timber available.

One company testified in court that it had already suffered a $287,000 loss after the designation blocked three of its timber sales and forced it to purchase more expensive replacement timber on the open market (E&E News PM, Sept. 15, 2016).

The Obama administration, on the other hand, argued that claims of harm were too broad.

The D.C. Circuit ruled that industry had met the standing threshold.

"The decrease in the timber supply is likely to be significant," Kavanaugh wrote. "After all, we are talking about an area roughly twice the size of the state of New Jersey, much of which could previously be harvested for timber but which is now substantially off-limits to logging."

Unlike the district court, the D.C. Circuit found that the decision in Swanson focused on particular allegations that weren't relevant to the challenge to the spotted owl habitat.

Instead, the court relied on an earlier case, the D.C. Circuit's 1996 decision in Mountain States Legal Foundation v. Glickman, which found that firms can sue over government acts that constrict their supply of raw material.

There's a "substantial probability" that the decrease in timber harvest caused by the owl habitat designation is likely to cause timber companies "some economic harm," Kavanaugh wrote for the court.

"Unless the company can fully replace the source of supply at zero additional cost to the company (and by zero, we mean zero), then the company has suffered an economic harm," the judge wrote.

"That is Economics 101 and Standing 101," he said.

Click here to read the court's opinion.

BACK

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13. **NATURAL GAS: Congress is running out of time to repeal Obama orders**

High Country News, April 11 | Rebecca Leber/Mother Jones

With budget battles and promised tax reform ahead, President Donald Trump is running out of time to claim legislative wins. Especially since most of them have been from his rollback of environmental regulations put forward during the waning days of the Obama administration.

So far, Trump has signed 11 bills using the Congressional Review Act (CRA), a 1996 law that lets Congress overturn federal rulemaking with a simple majority vote. Republicans have been striking down Obama-era regulations that were anathema to the oil, gas, and coal industries, among them an Environmental Protection Agency rule protecting streams from coal debris, an anti-bribery rule requiring oil companies to disclose foreign payments, and an obscure Bureau of Land Management rule updating land management guidance. The White House this week celebrated its triumphs during a press call in which legislative director Marc Short insisted, "If you take in totality what we've been trying to do on the regulatory front, it is a news story."

But there is a limit for this legislative free-for-all. Use of the CRA is time-limited to 60 congressional working days, so the opportunity to use the CRA to repeal rules from the Obama administration that stretch back to mid-2016 will end around mid-May. And one environmental executive order that should have been a slam dunk is in trouble. The bill to overturn a methane regulation for public lands that has been long disliked by the oil and gas industry has stalled in the Senate. A number of moderate and Western state Republican senators have worried about the implications of permanently restricting the Interior Department's ability to regulate methane emissions.

Methane is a powerful greenhouse gas released by natural gas, landfill, and agricultural industries. It is far more potent (86 times) than carbon over the short term (of 20 years). By letting methane leak into the atmosphere, humans aren't just supercharging global warming or letting toxic chemicals escape; natural gas is also leaking, which means lost money for the industry and taxpayers.

The Interior Department's methane and natural gas rule limits the release of methane from oil and gas operations on public lands, a common practice of venting, leaking, and flaring the potent greenhouse gas. The rule requires oil and gas operators to phase in equipment upgrades and monitoring of methane leaks over the next five years, with a price tag that the Interior

Department estimated could be up to $279 million a year. But in 2016 the Interior Department determined the cost to the industry would be outweighed by the health and economic benefits.

The bill to repeal the methane rule passed the House in February. Advocates warned it could pass the Senate as far back as February. But it hasn't, for the simple reason that in this case, Republicans don't have the votes.

The part of the CRA that worries opponents most isn't how it chips away at Obama's legacy, but that it permanently restrains the agency's ability to put forward a "substantially similar" regulation in the future. The permanent nature of the CRA means that successful bills are blocking any future updates to these rules, including limiting the ability of BLM to update its guidance on leasing and land use. That, for Sen. Lindsey Graham (R-S.C.), is "too blunt an instrument in this case," according to The Hill. "I think we can replace it with a better reg, rather than a CRA," he said. Sen. Susan Collins (R-Maine), who's broken with her party on energy votes before, is "leaning against" it. Multiple Western senators including Cory Gardner and Rob Portman were undecided as of late March.

"If the methane rule is overturned, for example, can the BLM ever again regulate methane pollution on public lands?" Center for American Progress senior fellow Matt Lee-Ashley said. "That's an open question courts will have to figure out." The CRA is largely uncharted legal territory, so it's unclear just how the term "substantially similar" would be interpreted by courts.

Regardless, Republicans have lined up dozens of rules that could be rolled back from the Obama era, and contrary to the claims that these were "midnight" rules pushed out by Obama, many stretch back to May 2016, thanks to the peculiarities of the Senate calendar and were in the works for years before being finalized.

That's the case for the methane rule. The Western Congressional Caucus, echoing the American Petroleum Institute, described it as a "duplicative," "midnight" rule pushed out by Obama in his final days. In reality the rule was in the works since early 2014, with thousands of public comments and public forums held around the country. Advocates of the rule argue that some conservatives might be balking because the rule is inherently moderate and polls show public support. "The idea that conservatives would be attacking a waste reduction measure is kind of bizarre," the Wilderness Society's deputy director of energy and climate, Josh Mantell, told Mother Jones.

Nevertheless, the lobbying wars over it have been fierce, and CAP cites the major oil contributions to the members who are sponsoring the resolution as one reason this has emerged as a priority early in the session. The oil industry argues it has every incentive to limit methane on its own because restraints cut down on wasted natural gas. But cheap plentiful gas has provided the industry with little incentive to upgrade equipment, and by extension, oil companies avoid paying royalties on the lost gas.

Don Schreiber, a rancher whose property stands in the center of the San Juan basin gas field, has been on edge watching Congress to see what will happen to this energy regulation some Republicans are so eager to repeal. “It’s been put off and put off and put off,” Schreiber told me. When I called, he was on his ranch, at the center of one of the hottest areas for oil and gas development. He could spot up to seven wells visible from his property and another 122 natural gas wells surrounding him, earning the area the distinction of being first in per capita methane emissions in the country.

He became an activist after purchasing the ranch in 1999. He had grown wary of seeing the gas flares, smelling the associated toxic chemicals, and having to calibrate the direction of the wind every day. “As we were here on the ranch, we began to notice that each well in itself is a little pollution hub,” affecting wildlife, nature, and health, he said.

The Trump administration has other ways to handicap the rule, including through his recent executive order targeting regulation of the fossil fuel industry. But there is a big difference between Trump doing this through the agency and through the CRA: The agency would require a more formal process, one with public input, as opposed to a single congressional vote striking it down. Environmentalists are keeping close watch on what Trump is doing to undermine the rule, which could lead to legal action.

“There are ways to amend, to rewrite, and even repeal regulations that wouldn't tie the hands of agencies going forward,” Mantell said. “But because this party—and the industry that is pushing a lot of these—is so against the idea of regulation in general, they feel it's important to wipe out the chance for any regulation to happen ever again.”

As a property owner who had hoped to develop a sustainable cattle ranch in the middle of oil and gas country, Schreiber notes the importance of taking first steps to clean up methane. He’s worried his home is “now infamous for the methane hot spot having a huge impact on climate change—in the wrong direction.”

"The Clean Water Act didn't make all the rivers clean," he says. "It began to clean it up." By tackling methane one rule at a time, Schreiber hopes the same will happen with the oil and gas industry.

BACK

14. Texas surveying board expresses concerns over BLM case

Times Record News, April 11 | John Ingle

A Texas agency charged with overseeing land surveyors and the use of surveying techniques to determine gradient boundaries told a federal district court that should it choose to side with the federal government in a land dispute, it could potentially "disrupt precedent" of the near-century old method used in the state.

The Texas Board of Professional Land Surveying, in an amicus brief filed Monday in the U.S. District Court of the Northern District of Texas, said Texas surveyors have used the method approved by the U.S. Supreme Court in the 1920s to determine gradient boundaries along the state's navigable waterways since the technique was developed by Cols. Arthur Stiles and Arthur Kidder. The agency said further court cases have upheld the procedure, which was not properly administered by the Bureau of Land Management, the federal agency laying claim to private lands along the Red River in Wilbarger, Wichita and Clay counties.

The BLM admitted recently that it was incorrect in its implementation of the method.

"A ruling in this case that upholds the accuracy of the BLM markers would have the potential to disrupt precedent that has informed the practice of land surveying in Texas for nearly a century," the filing said. "This case involves boundary determination along a segment of the Red River, but it also implicates the remaining 423-mile stretch of the river. Moreover, because Texas has extended the gradient boundary rule to apply to all navigable rivers within the state ... recognition of the BLM markers could imperil boundaries between private and public ownership along other waterways."

The TBPLS presents three arguments in the brief: The BLM survey doesn't adhere to the proper application of the method to determine the gradient boundary; accepting the location of the BLM markers would disrupt gradient boundary surveying precedent in Texas; and recognition of the

BLM markers would frustrate the TBPLS because no Texas-licensed surveyor performed the survey for the BLM.

The agency argues that proper application of the methodology does not support where the BLM markers are located, sometimes more than a mile away from the river and located in vegetated areas. The Red River Compact of 2000, which was ratified by Congress, set the boundary between Texas and Oklahoma as the vegetation line along the south cut bank of the river.

"The proper application of the gradient boundary method would designate the southern boundary of the Red River to be much closer to the water flow of the river than the BLM markers indicated," the agency argued. "This is because the method prescribes a boundary that, by definition, is the midway point between the bottom of the river bank and the top of the lowest qualified bank on the Red River's accretion bank, the bank where natural materials are deposited by water in the stream."

The TBPLS argues the federal agency was attempting to set the boundary based on what was discovered in the 1920s without taking into consideration the effects of avulsion, erosion and accretion. The BLM admitted so in a March 29 letter from acting BLM chief surveyor for the New Mexico, Texas and Oklahoma region Steve Beyerlein to the New Mexico state director.

"This means that the non-avulsive changes in the river's course since the 1920s have resulted in corresponding changes in the location of the gradient boundary," the TBPLS argued. "However, the BLM surveys do not account for this change because they do not locate the gradient boundary by applying the rules and techniques established in "Oklahoma v. Texas" by performing a boundary analysis near the flow of the river."

The Texas agency also cited notes from a Texas and Oklahoma Red River Boundary Commission meeting in 1996. In that case, the top surveyor for the state, Ben Thomson, said the gradient boundary was the point between the water line and the vegetation line. BLM surveyor John Bennet, according to the filing, agreed with Thomson's statement as to where the gradient boundary would be.

The TBPLS also argued the BLM surveyors were not licensed by the state of Texas to, in this case, conduct gradient boundary surveys.

"... the BLM surveyors who set the contested markers are not on the active roster of licensed surveyors in Texas. Accordingly, their survey efforts should not be recognized insofar as they

apply to the determination of private-property boundaries," the state agency argued. "Recognition of the BLM markers as the northern boundary of private owners would be inconsistent with the (Texas Professional Land Surveying Practices) Act and could inhibit TBPLS's interest in protecting the public by requiring that real property boundaries in Texas are determined by surveyors licensed to practice in Texas.

"Moreover, a survey performed by Texas-certified surveyors would have produced different results in this case because those surveyors would be bound to apply Texas law setting the southern limit of the Red River at its southern gradient boundary."

The case is schedule for trial in July, However, the plaintiffs have asked Judge Reed O'Connor of the U.S. District Court of the Northern District of Texas to make a partial summary judgment before the trial date.

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