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Ellen M. Gilmer, E&E News reporter

Published: Tuesday, December 19, 2017

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<https://goo.gl/Jqg9Xk>

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<https://goo.gl/turcdV>

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Michael Doyle and Debra Kahn, E&E News reporters

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<https://goo.gl/E8sYov>

5. Patagonia founder declines Bishop's Hill invite

Kellie Lunney, E&E News reporter

Published: Tuesday, December 19, 2017

The founder of outdoor retail company Patagonia Inc. today declined an invitation from House Natural Resources Chairman Rob Bishop (R-Utah) to testify before his committee on federal lands management.

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1. Enviros win spot in litigation over oil and gas leasing

Ellen M. Gilmer, E&E News reporter

Published: Tuesday, December 19, 2017

Federal appellate judges smacked down a lower court for blocking environmentalists from a legal battle over oil and gas leasing.

The 10th U.S. Circuit Court of Appeals yesterday reversed a January decision from the U.S. District Court for the District of New Mexico, ruling that the lower court had inappropriately barred environmental groups from participating in an industry lawsuit over leasing on public and tribal lands.

The decision is a blow to industry group Western Energy Alliance, which had argued that environmentalists had no legal interest in a case centering on whether the Interior Department is leasing available public lands as often as the law requires.

But the ruling is a relief to advocacy groups that warned that a decision in industry's favor would have limited access to the courts for parties on both ends of the political spectrum seeking a seat at the table in various legal battles.

Environmental lawyers noted that a ruling in the industry group's favor would have marked a departure from the 10th Circuit's historically flexible approach to allowing third parties to join litigation. The coalition seeking to join the case included the Wilderness Society, the Sierra Club, WildEarth Guardians and others.

"Obviously, the conservation groups' environmental interests are front and center when the WEA seeks judicial intervention to alter the BLM's leasing practices with the stated goal of increasing oil and gas development on public lands," Judge Mary Beck Briscoe, a Clinton appointee, and Judge Robert Bacharach, an Obama appointee, wrote in the panel's majority opinion.

At issue in the case is whether the Interior Department has been shorting the oil and gas industry on leasing opportunities. The Denver-based Western Energy Alliance filed the lawsuit in August 2016, complaining that the agency was not meeting a Mineral Leasing Act requirement of quarterly lease sales in each state with eligible lands (*Energywire*, Aug. 12, 2016).

Environmentalists represented by Earthjustice sought to join the case to fight the industry's arguments. They say the lawsuit threatens to derail leasing reforms adopted by Interior's Bureau of Land Management during the Obama administration.

What's at stake?

Industry and environmental groups have tussled over what's actually at stake in the litigation. Industry has framed it as a narrow attempt to ensure that BLM holds required lease sales, while environmentalists paint it as a sweeping attack on BLM's ability to adjust leasing schedules to ensure adequate environmental review.

Under BLM's leasing reform policy, favored by environmentalists, the agency applies a rotational leasing schedule among field offices within states to give more time for review. Western Energy Alliance's 2016 legal complaint takes aim at the policy, but lawyers for the group told the New Mexico court last fall they were not seeking any direct revisions to the policy.

Judge William Johnson, a George W. Bush appointee on the New Mexico district court, accepted industry's narrower portrayal of the issues at play and ruled that environmentalists had no legal interest (*[Energywire](#)*, Jan. 17).

The 10th Circuit rejected that decision, accusing Western Energy Alliance of playing "word games" to keep environmentalists out.

"As made clear by the allegations in the complaint, the central issue in this case goes beyond the question of whether the BLM has violated the MLA [Mineral Leasing Act] by failing to hold quarterly lease sales," the majority wrote. "WEA also seeks to alter or rescind the Leasing Reform Policy to improve the likelihood of more frequent lease sales. We conclude that the conservation groups not only have an environmental interest in the lawsuit, but also an interest in preserving the Leasing Reform Policy that they worked to develop and implement."

Judge Harris Hartz dissented from the majority, saying he found that the district court had properly tailored the issues in the case.

The 10th Circuit remanded the issue to the New Mexico district court and ordered Johnson to allow the environmentalists to participate as the underlying lawsuit moves forward there. The appellate court reversed Johnson in a similar case four years ago when the district court judge blocked environmental groups from participating in a lawsuit over off-highway vehicle use in a national forest.

Earthjustice attorney Mike Freeman, representing the environmental coalition, praised yesterday's decision.

"The point of Rule 24 is that parties who are going to be affected by a lawsuit have a right to be at the table," he said, referring to a procedural rule that governs how third parties intervene in lawsuits. "What WEA was trying to do was keep us out of the case and prevent us from protecting our own interests based on a mischaracterization of what they were actually alleging."

He noted that environmental involvement in the case is especially important now because the groups cannot trust the Trump administration to continue defending the leasing reforms initiated under President Obama.

BakerHostetler attorney Mark Barron, representing Western Energy Alliance, said he favored Hartz's dissenting opinion.

"We think the dissent had a more fair characterization of the applicable facts than the majority opinion and recognized that the interest that the intervenors asserted was a conservation interest, and nothing about

Western Energy Alliance's complaint requests any modification to how environmental review is completed or attempts to curtail BLM's ability to conduct environmental review," he said.

The industry group could ask the 10th Circuit panel to reconsider its decision or for the full suite of active judges on the court to hear the case. The group is still weighing its options.

<https://goo.gl/Jqg9Xk>

2. **Enviros, states sue over rollback of BLM methane rule**

Ellen M. Gilmer, E&E News reporter

Published: Tuesday, December 19, 2017

Two states and a coalition of environmentalists are taking the Trump administration to court for rolling back Obama-era restrictions on methane emissions from the oil and gas industry.

California, New Mexico and 17 environmental groups filed separate suits today in the U.S. District Court for the Northern District of California, saying the Interior Department violated the law earlier this month when it suspended a regulation designed to curb methane waste on public and tribal lands.

Interior's Bureau of Land Management iced the methane rule until early 2019, concluding that some provisions create "burdens that unnecessarily encumber energy production" and do not align with President Trump's "energy dominance" approach to fossil fuel development (*Energywire*, Dec. 8).

But supporters of the Obama rule say the administration's latest action is contrary to law — violating BLM's legal duty to prevent methane waste and robbing states of the royalty money they would collect on the recovered gas. They say the rollback is a handout to oil and gas companies at the expense of public health and the environment.

"Defendants have prioritized a negligible increase in oil and gas operators' profits over the public interest in preventing the waste of a public resource that belongs to the American people," the states' **lawsuit** says. "In doing so, Defendants dismiss out of hand the harmful impacts of the thousands of tons of toxic air pollutants and hundreds of thousands of tons of greenhouse gases emitted as a result of operators' inefficient, outdated, and wasteful practices."

The oil and gas industry has long derided the Obama rule as a costly layer of red tape for drillers that are already working to reduce methane waste from their operations.

Methane, the main component of natural gas, often leaks from infrastructure or is flared or vented at well sites. The Obama administration's rule required drillers to reduce emissions and check for leaks of the potent greenhouse gas. The rule took effect in January 2017, with stricter provisions set to kick in next month.

Supporters of the Obama rule maintain that it features common-sense requirements that benefit taxpayers and the environment.

"These companies waste publicly-owned gas by deliberately venting it into the atmosphere, flaring it (burning it without capturing the energy), or otherwise allowing it to leak into the air," environmentalists wrote in their **complaint** today. "The Rule requires operators to control this waste and bring more gas to market using proven, widely-available technologies that are already required in some states and used by leading companies."

The states and the environmental coalition, represented in part by Earthjustice, the Western Environmental Law Center and the Clean Air Task Force, are challenging the suspension as a violation of the Administrative Procedure Act, National Environmental Policy Act, Mineral Leasing Act, and Federal Land Policy and Management Act.

In particular, environmentalists have criticized the rollback for "cooking the books" on its cost-benefit analysis to inflate the alleged costs to industry. They've also pushed back on BLM's contention that it may not have authority to enforce the standards.

Environmental groups and the two states have had previous success fighting the Trump administration's attempts to sideline the methane rule. Earlier this year, BLM used a provision of the Administrative Procedure Act to postpone compliance deadlines for the standards. The same California district court handling the new litigation ruled against the government in that case (*Energywire*, Oct. 5).

"By suspending the Waste Prevention Rule, the Trump Administration is effectively threatening the health of our families and our environment," California Attorney General Xavier Becerra (D) said in a statement. "The California Department of Justice won't stand by and subscribe to this blatant violation of our laws. We are committed to defending the Waste Prevention Rule."

The environmental coalition includes the Sierra Club, the Center for Biological Diversity, Earthworks, the Environmental Defense Fund, the Natural Resources Defense Council, the Wilderness Society, the National Wildlife Federation, Citizens for a Healthy Community, Diné Citizens Against Ruining Our Environment, the Environmental Law and Policy Center, Fort Berthold Protectors of Water and Earth Rights, the Montana Environmental Information Center, San Juan Citizens Alliance, the Western Organization of Resource Councils, the Wilderness Workshop, WildEarth Guardians, and the Wyoming Outdoor Council.

BLM declined to comment on the legal challenges.

<https://goo.gl/turcdV>

3. Californians' clout could swing policy decisions

Michael Doyle and Debra Kahn, E&E News reporters

Published: Tuesday, December 19, 2017

The Trump administration's Interior Department is remarkably well-stocked with officials fluent in California's convoluted water politics, and that could make a difference in policy battles to come.

A former staffer for Southern California's largest urban water district now heads the Bureau of Reclamation. A former attorney for the state's — and the nation's — largest agricultural water district is now Interior's deputy secretary.

A land-use attorney from the state's San Joaquin Valley is high up in the water and science hierarchy. And a rural California native and former longtime staffer for a San Joaquin Valley congressman helps oversee fish, wildlife and parks.

Taken together, Interior's roster has enough California depth to gratify many Golden Staters but also to worry some, who fear the directions a reinforced farm-friendly department may go.

"You don't have to explain things to them," said an enthusiastic Rep. Ken Calvert (R-Calif.), chairman of the House Energy and Water Appropriations Subcommittee. "They understand the issues quite well. It's certainly going to be helpful."

Some of Interior's California connections survived Senate scrutiny, such as Deputy Secretary David Bernhardt and newly sworn-in Bureau of Reclamation Commissioner Brenda Burman.

Others joined the department directly, including Austin Ewell, who left his Fresno-area business to become deputy assistant secretary for water and science, and Jason Larrabee, a California State University, Chico, graduate who's now principal deputy assistant secretary for fish and wildlife and parks (*Greenwire*, Oct. 2).

"The idea that there's someone back there who knows about and has an interest in California water, that's certainly good," said Jerry Meral, a former deputy director of the state Department of Water Resources. "If they can just move things along, just get people to say yes or no or what they want, that would be good."

California's size and wildly diverse demands challenge every administration's Interior Department, which have often anointed a point person for handling the state's myriad water conflicts. Frequently, that role has fallen to the department's deputy secretary.

Bernhardt

In Bernhardt, Interior has a Colorado native whose considerable experience with California water may be tempered by the corresponding need to recuse himself at times.

Bernhardt previously served in a series of positions at Interior under President George W. Bush, including solicitor, deputy chief of staff and counselor to former Secretary Gale Norton.

As a lobbyist until November 2016, Bernhardt worked closely with the giant Westlands Water District, on whose behalf he also filed a \$1 billion lawsuit against the federal government. Bernhardt's former law firm lobbied for Cadiz Inc., a company with a controversial plan to store water in a Mojave Desert aquifer and then sell it to municipalities.

Bernhardt himself provided legal services but did not register as a Cadiz lobbyist.

Whatever form it took, his past work exposed Bernhardt to the state's many divisions that, depending on the specific issue, can pit cities against farms, Northern California against Southern California and farms on the Valley's west side against those on the east side.

Westlands, for instance, is scrambling to secure congressional approval of an irrigation drainage deal that was previously negotiated with the Obama administration's Justice Department. The U.S. Court of Federal Claims lawsuit filed by Bernhardt had its roots in the same irrigation drainage problem addressed by the proposed settlement (*Greenwire*, Nov. 3).

Environmentalists and a cadre of House Democrats from Northern California oppose the agreement on myriad grounds, not least of which is their long-standing skepticism about Westlands.

In October, meanwhile, Interior reversed itself with a new legal opinion and a green light from the Bureau of Land Management for Cadiz to build a 43-mile water pipeline along a railroad right of way for its Southern California project (*Greenwire*, Oct. 17).

Looking ahead, Reclamation is preparing to reconsider Endangered Species Act protections for winter-run chinook salmon and delta smelt that govern water deliveries, a process that was begun last year under the Obama administration. The agency is aiming to finish the first phase, "a modification to restrictions on Delta exports," within a year.

"During the Bush administration, numerous political appointees ... helped to subvert science in order to unsustainably increase water pumping from the bay-delta, contributing to the collapse of salmon runs and native fish species," said Doug Obegi, an attorney with the Natural Resources Defense Council. "I am concerned that the Trump administration is seeking to repeat those mistakes, which would be disastrous for salmon fishermen and the health of the estuary."

Meral predicted more regulatory rollbacks to come.

"Clearly this administration is more interested in water supply than they are in protecting fish and wildlife," Meral said. "It's just a higher priority for them."

Democratic Sen. Maria Cantwell of Washington pressed Bernhardt on the specific California issues he might recuse himself from, but he kept his pledge general.

"I intend to actively seek and consult with the Department's designated agency ethics official regarding any particular matters involving specific parties of former clients or entities represented by my former firm," **Bernhard told** the Senate Energy and Natural Resources Committee.

Burman

Burman, who was sworn in this week as Reclamation commissioner, is a California native who after a variety of other water-related jobs returned to work for the Metropolitan Water District of Southern California.

"I was hired ... to work in their Sacramento office on, among other things, California drought, bay-delta matters, and Colorado River issues," Burman told the Senate Energy and Natural Resources Committee.

As head of Reclamation, Burman could immediately work on the Westlands drainage settlement and on the tunnels that Gov. Jerry Brown (D) wants to build underneath the state's main water hub, the Sacramento-San Joaquin River Delta. The project is supposed to decrease reliance on pumps that strip water from an environmentally sensitive area.

Under Obama, federal agencies in charge of water quality and Endangered Species Act permitting expressed concerns about the tunnels. Trump's Fish and Wildlife Service and NOAA Fisheries approved them in June, but funding remains uncertain.

Brown wants customers of the Reclamation-run Central Valley Project to contribute to their \$17 billion price tag. While Metropolitan Water District's board voted this fall to pay for a quarter of the cost, Westlands balked without commitments from other federal contractors.

Burman could help corral the contractors, Meral said.

"She needs to really engage to figure out how to make this salable to as wide a spectrum of beneficiaries as possible," he said.

Larrabee, a former chief of staff to Rep. Jeff Denham (R-Calif.), is effectively atop the Fish and Wildlife Service and National Park Service in the absence of nominees for the agencies or for the assistant secretary position.

Today, for instance, Larrabee is identified in a *Federal Register* notice as "exercising the authority" to propose revising regulations concerning wildlife and sport fish restoration programs.

<https://goo.gl/PDxzo5>

4. Booming wind industry pauses to weigh tax bill impact

Jeffrey Tomich, E&E News reporter

Published: Tuesday, December 19, 2017

The final weeks of the year should have been a victory lap for the wind industry, as dozens of new projects representing gigawatts of new capacity were plugged into a U.S. power grid even as electricity demand continued to erode.

Instead, the industry, which had already negotiated a phaseout of incentives, found itself scrambling to protect renewable energy provisions in a sprawling tax code rewrite quickly winding its way through Congress (*E&E Daily*, Dec. 18).

Becky Diffen, an attorney for McGuireWoods in Austin, said the pace of activity noticeably slowed as developers and counterparties had to take stock of potential tax law changes and who would bear the risk moving forward.

"Nobody wanted to stop doing deals, but it slowed down the deals tremendously," she said.

Only late Friday when final compromise language was released was the industry able to assess any damage. That process continued yesterday, with the general view that the bill represents more of a flesh wound than a knockout blow.

The American Wind Energy Association noted in a brief statement that the bill preserves the federal production tax credit (PTC) phase out and changes to the base erosion anti-abuse tax (BEAT) would enable continued investment in wind energy.

It was feared that the obscure BEAT provision, aimed at stopping multinational companies from shifting profits overseas, could severely limit the market for renewable energy tax credits and severely limit financing of wind and solar projects.

Industry analysts, too, were still studying the effect of key provisions of the tax bill, including the BEAT provisions and the reduction in the corporate tax rate to 21 percent from 35 percent.

"It's certainly not apocalyptic for wind, but it could have an impact," said Max Cohen, a renewable power research analyst at IHS Markit.

Cohen said the tax equity market doesn't currently represent a bottleneck for financing deals, but the fact that there are relatively few large banks, insurers and multinational companies that purchase the tax credits means it could change suddenly.

IHS, in its most recent semiannual report, forecast about 7 to 8 gigawatts of wind capacity coming online each year from 2017 to 2019. The firm expects new wind additions to peak at about 10 GW in 2020, reflecting the push by developers at the end of last year to start work on projects to qualify for 100 percent of the tax credit.

To what extent any of that new capacity could be in jeopardy is unclear, Cohen said.

What is clear is that the wind development queue is still full of projects that were "safe harbored" last year.

Safe harbor

The law requires wind farm developers to start construction on projects by the end of 2016 to qualify for the full PTC. They have four years to complete those projects. Projects that begin construction this year qualify for 80 percent of the PTC, with further step-downs to 60 percent and 40 percent in 2018 and 2019, respectively.

Under IRS rules, starting construction can include beginning physical work at a site, such as excavating for turbine foundations or building access roads, or expending 5 percent of the total anticipated project cost. Many developers did that by ordering equipment such as turbines and transformers.

With the clock ticking, developers continue to spend 2018 working on so-called off-take arrangements that will enable them to move forward with construction and complete wind farms by the end of 2020.

In many instances, those deals can take many forms, such as a sale to a utility or power purchase agreement (PPA) with a utility or corporate buyer or another, more complex off-take agreement.

"All of those deals are what's keeping everybody very, very busy right now, and I expect those deals to continue into next year," Diffen said.

John Marciano, a partner in Akin Gump's global project finance practice in Washington, D.C., said the type of wind deal varies by market. But a couple of significant trends are emerging.

"I think in the next year we're going to see a huge push toward corporate PPAs and hedges," he said in an interview Friday, before the tax bill language was released. "And I think that's largely going to be driven by the data center users, the big tech companies."

Another emerging trend in the wind business is the move by existing wind farm owners to repower older turbines to take advantage of the PTC.

Some of the wind industry's biggest players, including Warren Buffett's MidAmerican Energy Co., have already announced substantial repowering projects.

"There are a lot of turbines that are out there where we can take the existing tower, an existing pad, swap out the blades or swap out the nacelles, or both, and sometimes it's not even the same vendor," Marciano said.

And while much of the immediate focus will remain on projects coming online before 2020, wind developers are also qualifying new projects, even as the PTC steps down.

"All the major players are also looking ahead to the next round of projects," Diffen said.

Next projects

Among those next projects is the Dakota Range I and II project, a 300-megawatt wind farm announced by Xcel Energy Inc. in September.

The project, being developed for Xcel by Apex Clean Energy Inc., is part of a much larger wind energy expansion for the Minneapolis-based utility, but it was notable because it represented the first publicly announced wind project to advance under the PTC phase down.

Cohen, the analyst, said wind costs continued to decline because of market forces and improvements in technology.

At an 80 percent PTC level, wind energy "economics still make sense in many regions," he said. But IHS sees the new capacity additions tapering off from 2020 until the end of the PTC in 2024.

To Diffen, who previously worked as a wind developer, the PTC phaseout is working exactly how it was intended, with incentives helping jump-start the market, fueling innovation and driving out costs.

"This is the reason this whole tax reform stuff shook up the wind industry so much," she said. "They went and they negotiated this phase out and it's really, to me, a perfect success story on how subsidies are supposed to work."

<https://goo.gl/E8sYov>

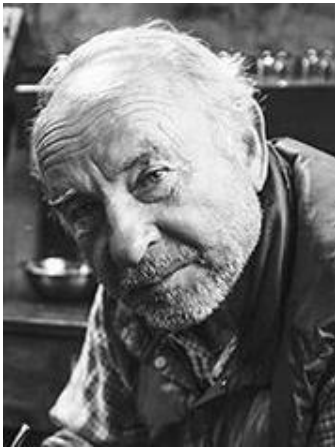
5. Patagonia founder declines Bishop's Hill invite

Kellie Lunney, E&E News reporter

Published: Tuesday, December 19, 2017

The founder of outdoor retail company Patagonia Inc. today declined an invitation from House Natural Resources Chairman Rob Bishop (R-Utah) to testify before his committee on federal lands management.

Yvon Chouinard said the Republican's offer to come to Capitol Hill was "disingenuous," after the Trump administration decided to reduce Bears Ears National Monument earlier this month — a decision, Chouinard said, that was "applauded" by the Utah congressional delegation.



Yvon Chouinard. @Patagonia/Twitter

"It is clear the House Committee on Natural Resources, like many committees in this failed Orwellian government, is shackled to special interests of oil, gas, and mining and will seek to sell off our public lands at every turn and continue to weaken and denigrate Theodore Roosevelt's Antiquities Act," the Patagonia leader wrote.

Bishop sent a letter Friday inviting Chouinard (*E&E News PM*, Dec. 15). "It is apparent through multiple media accounts that you have strong feelings on the topic as well," the chairman wrote.

Bishop told E&E News early this afternoon that he knew Patagonia had sent a response to his Friday request but that he hadn't seen it yet.

"I hope they don't want to hide and not show up, but I'll have to wait to actually see the letter," he said.

Patagonia posted the [letter to Bishop](#) on its blog.

Asked whether Chouinard's response meant he was declining Bishop's invitation, spokeswoman Corley Kenna said over email: "That is correct."

The outdoor retailer has been vocally opposed to the Trump administration's recent decision to reduce Bears Ears, drawing ire from Interior Secretary Ryan Zinke.

Patagonia recently joined tribal advocates, paleontology groups and others in suing the administration in the U.S. District Court for the District of Columbia over the decision.

The company emblazoned "The President Stole Your Land" on its website home page after Trump announced he would shrink Bears Ears in southeastern Utah by about 85 percent, to 202,000 acres.

"We have little hope that you are working in good faith with this invitation," Chouinard wrote in the letter to Bishop.

"Our positions are clear and public, and we encourage you to read them," he added, linking to several op-eds and statements from Patagonia.

<https://goo.gl/MnMBeH>