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Attached is the daily news report for August 29.

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UTAH – TOP STORIES – AUGUST 29, 2017

1. **Commentary: U.S. and Utah need to stop coddling domestic extremists**

The Salt Lake Tribune, Aug. 28 | Ian Summers

Secretary of the Interior Ryan Zinke capped off a recent presidentially mandated review of national monuments by declaring, “I am an advocate to never sell or transfer public land, and so is the president.”

2. **Regulators give Utah 60 days for pipeline cost estimate**

The Deseret News, Aug. 28 | Associated Press

ST. GEORGE — Federal regulators are asking Utah officials to show they'd be able to pay for a contentious proposed billion-dollar Lake Powell pipeline to draw water to southwestern Utah's growing Washington County.

E&E/NATIONAL NEWS – TOP STORIES

1. **COAL: Trump scrapped leasing moratorium, but demand has shrunk**

E & E News, Aug. 29 | Dylan Brown

One of the Trump administration's first acts this year was to end a moratorium on coal leasing to appease an industry that rallied behind the new president.

2. **NATIONAL MONUMENTS: Bruce Babbitt dings Trump admin over review**

E & E News, Aug. 29 | Jennifer Yachnin

Former Interior Secretary Bruce Babbitt criticized the Trump administration for keeping under wraps the findings of its review of dozens of national monuments, urging current Secretary Ryan Zinke to "open up the process."



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3. **PUBLIC LANDS: Former NPS officials urge Zinke to halt leasing near parks**

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A coalition of former National Park Service officials is asking Interior Secretary Ryan Zinke not to issue any oil and natural gas leases near national park units and to instead continue to follow Obama-era onshore energy development reforms.

4. **AIR POLLUTION: Court upholds SO2 settlement over states' objections**

E & E News, Aug. 29 | Jeremy P. Jacobs

Rejecting the objections of six states, a federal appeals court yesterday upheld a settlement between U.S. EPA and the Sierra Club on air standards..

5. **YELLOWSTONE: Zinke pushes for mining ban near park**

E & E News, Aug. 29 | Dylan Brown

Interior Secretary Ryan Zinke has pledged whatever resources he can provide to speed up the federal review of a mining ban north of Yellowstone National Park.

6. **COAL: Greens pounce after Colo. governor backs mine royalty drop**

E & E News, Aug. 29 | Dylan Brown

Environmentalists are pressing Colorado Gov. John Hickenlooper to reverse his support for reducing royalties charged at a controversial coal mine.

7. **DAKOTA ACCESS: Tribes warn against 'unjust path' of keeping line in service**

E & E News, Aug. 29 | Ellen M. Gilmer

Tribes opposed to the Dakota Access pipeline are making a final push to shut down the project.

In a court filing yesterday, the Standing Rock Sioux and Cheyenne River Sioux tribes urged a federal judge to force the oil pipeline out of service while the Army Corps of Engineers updates its environmental review for a contentious river crossing near tribal land in North Dakota. The court ruled earlier this summer that the agency failed to properly weigh several potential impacts.



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UTAH – FULL STORY

1. **Commentary: U.S. and Utah need to stop coddling domestic extremists**

The Salt Lake Tribune, Aug. 28 | Ian Summers

Secretary of the Interior Ryan Zinke capped off a recent presidentially mandated review of national monuments by declaring, “I am an advocate to never sell or transfer public land, and so is the president.”

His words were intended to be reassuring, but not to public land advocates.

Zinke also said that ranchers are, “as much a part of the culture of a lot of these monuments as some of the objects,” while in Bunkerville, Nevada, site of the infamous 2014 standoff between racist antigovernment rancher Cliven Bundy and the U.S. Bureau of Land Management, an agency that Zinke now oversees. If you recall, Bundy called on antigovernment extremists to shut down I-15 and force law enforcement officers to stand down at gunpoint. Bundy has been a cause célèbre on the far right ever since; if Zinke’s appearance was supposed to be a dogwhistle, it might as well have been a bullhorn.

This goes beyond just attempting to significantly reduce the size of national monuments – it’s a pattern of state and federal officials excusing extremist antigovernment rhetoric that fosters violent zealots against the public servants they are supposed to protect.

Over the course of my research for the American West Center, the David C. Williams Memorial Fellowship and the Department of Communication at the University of Utah, I’ve been struck at how often local and federal politicians pander to the radical “land transfer” movement. These groups espouse the thoroughly debunked notion that the federal government has no right to hold or administer land. For example, President Trump’s labeling of national monuments as a “land grab” echoes this belief, even though the federal government already owns the land in question.

Besides a willingness to set aside \$14 million in a quixotic lawsuit to annex 31 million acres of federal land, Utah politicians have been playing this game for years. In the same way that Trump has been slow to disavow his white nationalist supporters, so too have Utah officials refused to renounce land transfer radicals – who, incidentally, also have ties to white supremacists –



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because of the potential financial boon from opening up federal land for drilling, mining, and privatizing.

In 2015, the Center for Western Priorities accused state Rep. Ken Ivory and his non-profit American Lands Council of being the “bridge between extremism and the mainstream.” The following year, former state Rep. and vice chair of the Utah Republican Party, J. Morgan Philpot, served as counsel to Ammon Bundy, Cliven’s son and the architect behind the takeover of Malheur National Wildlife Refuge in Oregon.

Opposition to federal oversight of land has become an article of faith in Utah political circles. More recently, Zinke has acceded to local officials’ demands and reportedly recommended that Grand Staircase-Escalante and Bears Ears be significantly reduced in size.

The one thing you won’t find between current U.S. or Utah state officials? Any firm denunciation of these radicals or their violent attempts to wrest public lands that belong to all of us. Even Zinke declined to speak up in defense of his employees when asked about the Bunkerville standoff. For an administration that embraces law and order so proudly, their silence speaks volumes.

Sadly, but unsurprisingly, Utah has become a hotbed of domestic extremism. Last year, the authorities busted a Tooele County resident for attempting to plant a pipe bomb at a BLM facility in Mount Trumbull, Ariz. Three people indicted from Malheur hail from the state. Ryan Bundy, Ammon’s brother who helped concoct the Malheur takeover, was part of Phil Lyman’s 2014 illegal ATV ride through Recapture Canyon. Lastly, southern Utah native Robert “LaVoy” Finicum served as the Malheur standoff’s spokesman and died in a confrontation at a police checkpoint. In November 2015, Finicum met with Piute County ranchers and persuaded them to attempt a “withdrawal of consent” to be governed by the feds two months later. His funeral in Kanab attracted thousands of antigovernment sympathizers from across the country.

This radicalism is not going away. The more these people are indulged by the government, the more emboldened they will become. The longer Zinke stays silent on this form of domestic terrorism, the more likely a tragic attack will occur – at the expense of the men and women who serve under him.

Ian Summers is a graduate research fellow in the University of Utah’s Department of Communication and special advisor to Alliance for a Better Utah. His research focuses on



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public lands controversies and how social movements call themselves oppressed in order to justify their actions.

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2. **Regulators give Utah 60 days for pipeline cost estimate**

The Deseret News, Aug. 28 | Associated Press

ST. GEORGE — Federal regulators are asking Utah officials to show they'd be able to pay for a contentious proposed billion-dollar Lake Powell pipeline to draw water to southwestern Utah's growing Washington County.

The state submitted its application for the project in March 2016, and the Federal Energy Regulatory Commission has periodically asked for additional information. But the regulators' request Aug. 11 called for the state to provide a cost estimate and financing plan within 60 days.

Water managers believe the water will be needed sometime before 2030 to keep up with population growth and new development. The proposed line is a 140-mile project that would run from the reservoir to Washington and Kane counties.

Utah Division of Water Resources spokesman Joshua Palmer said he expects the state to respond within the 60-day timeframe, but he did not know what that response would include.

"Right now, we're in the process of evaluating the additional information request, assessing what direction we need to go," Palmer said.

The regulators' request was not specific about the criteria they want the cost estimate and financing plan to include.

John Fridell, the project manager with the Washington County Water Conservancy District, said he doesn't think the request constitutes anything the state or districts wouldn't be able to provide.

Opponents of the pipeline argue the relatively small communities of Washington and Kane counties aren't equipped to fund such a large project, arguing that taxpayers across the rest of the state would need to cover the costs.

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E&E/NATIONAL NEWS – TOP STORIES

1. **COAL: Trump scrapped leasing moratorium, but demand has shrunk**

E & E News, Aug. 29 | Dylan Brown

One of the Trump administration's first acts this year was to end a moratorium on coal leasing to appease an industry that rallied behind the new president.

But six months later, the number of company applications to extract federal reserves and the amount of public coal in play have dropped, according to Bureau of Land Management records.

The president campaigned on reviving coal's fortunes by stripping Obama-era restrictions, but despite a modest overall mining comeback, leasing has yet to pick up.

Neither coal companies nor their critics are surprised as an industry fresh off a historic downturn adjusts to a new, smaller normal.

But the BLM numbers puncture the argument from the president and his defenders that the Obama administration's three-year moratorium — meant to allow the Interior Department to study reforms — wrought havoc on mining communities.

Since March 29, when Interior Secretary Ryan Zinke officially reversed the ban, the number of pending leases and lease modifications has fallen from 41 to 40.

The amount of coal under consideration for lease dropped from 2.8 billion tons to 2.4 billion tons, BLM records show.

In March, Zinke promised to process lease requests "expeditiously" (Greenwire, March 20). However, nearly two-thirds of the coal that remains in play is — as it was six months ago — tied to applications that companies asked to put on hold, waiting for better market conditions.

In six months, the mining industry has filed only one new lease application. Peabody Energy Corp. is requesting 4.1 million tons of federal coal to expand its Twentymile mine in Colorado.

By contrast, companies have withdrawn four pending leases totaling 435 million tons. The biggest was for 253 million tons tied to Contura Energy Inc.'s Belle Ayr mine. Contura, a spinoff of Alpha Natural Resources Inc.'s bankruptcy, has controlled the Wyoming site since last year.



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With roughly 20 years of coal at current production levels already under lease, Contura declined to pursue the application when asked by BLM in June.

After a similar agency inquiry related to the nearby Buckskin mine in May, Kiewit Corp. withdrew a 167-million-ton application. The company had waited three years "in hopes that the coal market would improve."

Companies have not only backed out of pending applications. They have also relinquished coal that was already under their control.

Arch Coal Inc., for example, let go of 65 million tons after DKRW Advanced Fuels LLC abandoned a plan to turn coal into liquid fuel (Greenwire, June 21, 2016).

'Ban was devastating'

The leasing contraction follows the crash in U.S. coal production from more than 1 billion tons nationwide in 2014 to 728.2 million in 2016, largely driven by cheap natural gas fueling more power plants.

With more than 90 percent of U.S. coal burned for electricity, the power shift has had a particular effect on leasing because federal coal — roughly 40 percent of the national total — almost exclusively generates electricity.

The Powder River Basin of Wyoming and Montana, the source of nearly 90 percent of all federal coal, has been especially hard hit. Since 2012, BLM has not leased a single ton of coal in Wyoming, the nation's top coal mining state.

Despite the weak demand, when the Obama administration imposed its moratorium in January 2016, the Wyoming delegation led the revolt in Congress.

"This ban was devastating," Rep. Liz Cheney (R-Wyo.) said on behalf of her bill to require congressional approval for all future moratoriums (E&E Daily, July 28).

Acting BLM Director Michael Nedd made a similar case to support Zinke killing the Obama administration review and setting aside a report suggesting the leasing program needed reform (Greenwire, Jan. 12).



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In a March [memo](#) obtained by the anti-coal-leasing group WildEarth Guardians, Nedd wrote that although former Interior chief Sally Jewell "believed that the public and the coal program would benefit from imposing the leasing moratorium" pending scrutiny, "that benefit is outweighed by the economic hardship placed on the industry."

Federal data, however, suggest the moratorium had little or no impact on leasing.

The moratorium did not apply to already-approved applications, but with demand low, BLM only offered one tract: 56.6 million tons in Utah.

The Greens Hollow offering was approved during the Obama presidency, but Zinke got to finalize the sale and hailed it as "a sign of optimism."

Since then, the administration has approved one lease for Lighthouse Resources Inc. to access 9.2 million tons of coal to expand its Black Butte mine in Wyoming.

Why?

"There are enough leases out there to go at least another decade without anybody having to lease any more coal," said Wood Mackenzie Research Director Daniel Ruzs.

In 2010, major companies stocked up by leasing more than 2 billion tons of coal. And when it issued the moratorium, Obama's Interior made the case that 20 years' worth of coal was already under lease.

Mining firms blasted the justification, arguing it ignored the need for so-called maintenance leases to keep mines functioning.

'Ended the witch hunt'

Bucking the negative trend, despite posting a \$27.1 million loss thus far this year, Cloud Peak Energy Inc. welcomed the chance to resume pursuing leases near its three mines, all in the Powder River Basin.

"Rescinding the [moratorium] ended the witch hunt begun by Secretary Jewell [and] rebuked the fake economics used to justify it," Cloud Peak spokesman Rick Curtsinger said.



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Rusz said companies are starting the leasing process much further in advance because environmentalists have turned every step into a dogfight. Greens Hollow took more than a decade to sell.

"The federal coal resource is enormously valuable for energy security, and its value shouldn't be assessed by today's market or today's headlines," National Mining Association spokesman Luke Popovich said.

Among the pending applications are two leases that have been approved only to be challenged by "keep it in the ground" champions WildEarth Guardians.

The group is gearing up to fight two leases Interior has put out for public comment under Trump: Cloud Peak's application to expand its Antelope mine and Peabody's Colorado request. WildEarth Guardians is also taking issue with the administration's most recent approval at Black Butte.

"We are very concerned that BLM is going to be short-cutting its analysis and public involvement and that we could see these leases railroaded through," WildEarth Guardians climate and energy campaigner Jeremy Nichols said.

'As natural gas prices go ...'

The battle goes on, but the moratorium was largely irrelevant, Rusz said.

"There hasn't been any near-term need to get any new leases, in the Powder River Basin that is, and so it really hasn't had that much impact at all for planning purposes," he said.

Peabody's North Antelope Rochelle mine and Arch's Black Thunder site — both of which mine 15 percent of U.S. coal — have enough fuel locked down to last them until at least 2030, said Wood Mackenzie analyst Gregory Marmon.

"There are very few companies that need coal leases after that," Marmon said.

Wood Mackenzie forecasts that after a short reprieve in the next few years, production will start to fall as natural gas prices decline further early in the next decade.

"On the coal side, particularly [the Powder River Basin], everything kind of centers, more than anything, on natural gas prices," Rusz said. "As natural gas prices go, so does coal production."



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Wood Mackenzie says mines that produce coal with less energy content will be the hardest hit by lower gas prices. Sites that can product 8,800 British thermal units per pound, like North Antelope Rochelle and Black Thunder, will be better off than Contura's Belle Ayr mine, whose coal generally produces 8,400 Btu per pound.

Nichols said the Trump administration has undertaken a "Sisyphean" task. "They want to resuscitate the coal industry, but the coal industry is too far gone," he said.

In February, then-acting BLM Director Kristin Bail was looking at how to "spur coal mining" in the U.S. but said there was only so much the government could do, according to another memo obtained by WildEarth Guardians.

"Federal coal leasing is demand-driven, and invigoration of Federal coal leasing depends to a large extent on the national coal markets for electrical generation, a factor beyond the control of the BLM," she said.

Nichols said, "At the end of the day, the metrics that matter are whether you are leasing coal. And if this administration isn't leasing coal, then they are failing."

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2. NATIONAL MONUMENTS: Bruce Babbitt dings Trump admin over review

E & E News, Aug. 29 | Jennifer Yachnin

Former Interior Secretary Bruce Babbitt criticized the Trump administration for keeping under wraps the findings of its review of dozens of national monuments, urging current Secretary Ryan Zinke to "open up the process."

In an interview with E&E News, Babbitt, who serves on the board of the Conservation Lands Foundation, expressed disappointment with the Interior Department's review of 27 national monuments.

Although Zinke wrapped up a 120-day assessment of those sites last week, the Interior Department characterized his recommendations as a "draft" and has refused to publicly detail which sites are being targeted for reductions.



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"I don't understand why this is being done with such secrecy. It's hard to respond when they're hiding the ball," said Babbitt, who served two terms as Arizona's governor before joining the Clinton administration. "We need some transparency. The public is entitled to know what's going on."

A White House official told E&E News last week that the president needs time to review the report because "additional questions and issues" need to be studied before any decisions are made. The official said yesterday that no timeline has been set for the review's release.

Ahead of the review's completion, Zinke had already indicated that he would not recommend changes to six national monuments but would call for significant reductions to the 1.35-million-acre Bears Ears National Monument in Utah.

But Interior has refused to confirm details on other sites that could face changes, referring inquiries to the White House.

Nonetheless, people familiar with the review have indicated that numerous sites face potential boundary adjustments.

Nevada Sen. Dean Heller (R) told the Las Vegas Review-Journal yesterday that Zinke had told him "minor" changes will be made to both the Basin and Range and Gold Butte national monuments in his state.

"There will be some adjustments to both of those monuments, but they will be minor," Heller said. "You're not going to see wholesale changes in those monuments."

The Washington Post reported that both the Grand Staircase-Escalante National Monument in Utah and the Cascade-Siskiyou National Monument in Oregon and California would also face changes.

But Babbitt said he expects court challenges will hold up the monuments' current boundaries, asserting that while the Antiquities Act of 1906 allows presidents to create sites, it does not similarly permit them to reduce the boundaries.

"If this administration really wants to do this properly, they could, No. 1, be transparent, and No. 2, send a request to the Congress," Babbitt said, referring to Congress' exclusive power to manage public lands under the Constitution's Property Clause.



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Although presidents have reduced the size of some monuments — President Kennedy was the last to do so when he modified Bandelier National Monument in New Mexico — all those decisions occurred before the enactment of the Federal Land Policy and Management Act of 1976, a change that legal scholars have suggested outlawed future reductions.

"In the past, there has never been a challenge, and there clearly will be this time," Babbitt said. "The courts have not ruled on this, and those past presidential modifications, apparently they were generally acceptable because no challenges were filed."

Babbitt is familiar with the legal fights over monuments, particularly the Grand Staircase-Escalante in Utah that was created during his tenure.

"I believe that the Grand Staircase-Escalante has been repeatedly reviewed and settled," Babbitt said.

He pointed to the complex land exchange he brokered with then-Utah Gov. Mike Leavitt (R).

Under the agreement, congressional lawmakers paid \$50 million to Utah and granted the state about 145,000 acres, including lands now within the Kodachrome Basin State Park. The deal also added nearly 400,000 acres of state lands to the monument (Greenwire, May 2).

"I believe in the process of making those boundary changes, it was clearly an affirmation by Congress on the settled status of the monument," Babbitt said. "Those facts add up to, in my judgment, a ratification by both the state of Utah and the United States Congress."

Utah District Judge Dee Benson also ruled in 2004 that Clinton was within his rights to create the Utah monument, rejecting a challenge to the Antiquities Act, and the 10th U.S. Circuit Court of Appeals upheld that decision in 2006 (Greenwire, Aug. 25).

Babbitt added that he is "disappointed" about the current review: "The fact is, these issues have been discussed."

Echoing Democratic lawmakers including Arizona Rep. Raúl Grijalva, the top Democrat on the House Natural Resources Committee, Babbitt asserted that the review is at the behest of the energy industry, noting that President Trump has vowed to expand fossil fuel extraction on public lands (Greenwire, Aug. 23).



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"The only conclusion I can draw is this is being driven mainly by the oil and gas industry and the fossil fuel industry," Babbitt said. "There are plenty of public lands available ... for federal leases for oil and gas and coal. There's no lack of lands."

He added: "Everybody would feel a lot better if this weren't being conducted in secret negotiations with resource companies and if the secretary would simply turn to the United States Congress."

But Zinke defended his efforts when releasing the report, saying his recommendations "will maintain federal ownership of all federal land and protect the land under federal environmental regulations, and also provide a much-needed change for the local communities who border and rely on these lands for hunting and fishing, economic development, traditional uses, and recreation."

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3. **PUBLIC LANDS: Former NPS officials urge Zinke to halt leasing near parks**

E & E News, Aug. 29 | Scott Streater

A coalition of former National Park Service officials is asking Interior Secretary Ryan Zinke not to issue any oil and natural gas leases near national park units and to instead continue to follow Obama-era onshore energy development reforms.

The two-page [letter](#), signed by more than 350 former NPS employees and circulated by the Coalition to Protect America's National Parks, also claims that the Bureau of Land Management has decided not to complete work on any new "master leasing plans" in Utah.

MLPs, which are intended to guide oil and gas drilling to areas with the least natural resource and cultural conflicts, were a key part of Obama-era federal onshore leasing reforms that followed the controversial George W. Bush administration decision to issue 77 leases near Arches and Canyonlands national parks in Utah in 2008.

BLM has since approved, or is developing, nearly a dozen MLPs across millions of acres of public lands in Colorado, Utah and Wyoming.



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And last year, BLM approved the Moab MLP — the first in Utah — that closed 145,000 acres of BLM lands near Arches and Canyonlands national parks to future mineral leasing, capped well densities on projects in sensitive areas, and placed "no surface occupancy" restrictions on about 306,000 acres "that are highly valued for scenery and recreation" (E&E News PM, Dec. 15, 2016).

"We ask that you continue to uphold the policies that were adopted following the 2008 lease sale in Utah," the letter says. "Those policies, which include the Master Leasing Plan policy, are protecting our national parks, while reducing conflicts with proposed oil and gas development."

Megan Crandall, a BLM spokeswoman, said the agency has placed work on MLPs "on pause" to review them but has not made any decisions about canceling MLPs in Utah or any other state.

BLM had been developing other MLPs in Utah, including the 524,854-acre San Rafael Desert MLP, which covers lands west of the city of Green River and south of Interstate 70. The agency last year also began work on the Cisco Desert MLP, covering about 320,000 acres northeast of Moab and extending to the Colorado border.

And Heather Swift, an Interior spokeswoman, defended Zinke, noting he "has said on numerous occasions he will not open energy exploration in national parks." She also said he has backed the Forest Service's efforts to withdraw areas in Montana's Paradise Valley in the Upper Yellowstone watershed from mineral development.

Regardless, the former NPS employees in the letter to Zinke express "concern for the alarming number of oil and gas proposals that are advancing next to national parks."

Among those signing the letter are Maureen Finnerty, former superintendent of Olympic and Everglades national parks; Philip Francis, former superintendent of the Blue Ridge Parkway; and Mark Butler, former superintendent of Joshua Tree National Park.

They cite as an example BLM's ongoing review of three parcels nominated by industry for an oil and gas lease sale in December that are near Utah's Dinosaur National Monument, a proposal that has drawn concern from NPS and Gov. Gary Herbert (R) (Greenwire, July 27).

The letter also mentions industry-nominated parcels near Zion National Park in southwest Utah, which BLM pulled from a scheduled September lease sale. BLM, however, has yet to determine



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whether it will pull them permanently or eventually return them to auction (E&E News PM, June 2).

BLM, they write, has also proposed lease sales "in close proximity" to the Capitol Reef National Park, Chaco Culture National Historical Park, Hovenweep National Monument and Fort Laramie National Historic Site.

"As former land managers, we understand the need to balance competing priorities," they write. "But we fear the pendulum is swinging too far to the side of development."

They also express concern about what they termed "broader efforts by the Interior Department to reduce protections for national parks in order to encourage oil and gas drilling."

That's an apparent reference to Zinke's recently completed review of dozens of national monuments to determine whether they should be eliminated or their boundaries should be adjusted. Zinke last week submitted a detailed report to President Trump, though the report has yet to be released to the public.

Those concerned that eliminating or adjusting the boundaries of national monuments could open them to energy development point to the Carrizo Plain and San Gabriel Mountains national monuments, both in California (Greenwire, Aug. 18).

A spokesman for the Independent Petroleum Association of America told E&E News last week that the group would like to see a more transparent process in areas "where a national monument area stops and Bureau of Land Management land begins" and that should be managed for multiple use (Energywire, Aug. 23).

"Our national parks are not meant to be islands in seas of development. For this reason, we ask that you avoid issuing any oil and gas leases near our national parks," the letter says.

"There are many other places on our public lands where industry can pursue oil and gas leasing without threatening the majestic scenery, wildlife, visitor experience, and dark night skies that make our national parks such special places," it says.



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4. **AIR POLLUTION: Court upholds SO2 settlement over states' objections**

E & E News, Aug. 29| Jeremy P. Jacobs

Rejecting the objections of six states, a federal appeals court yesterday upheld a settlement between U.S. EPA and the Sierra Club on air standards.

The case concerns EPA's laggard pace of determining what areas of the country are in attainment for its June 2010 national ambient air quality standard for sulfur dioxide, a hazardous pollutant mainly caused by the combustion of fossil fuels in electricity generation.

EPA had three years to complete the nationwide attainment designations but failed to do so.

The Sierra Club and several states sued in August 2013. The environmental group reached a settlement — or consent decree — with EPA in June 2014 that required the agency to finalize the designations no later than the end of 2020, more than seven years after its original deadline.

The states — Arizona, Kentucky, Nevada, North Dakota, Louisiana and Texas — did not agree to the settlement. A federal district judge, however, approved it, leading to the states' appeal.

Yesterday, the San Francisco-based 9th U.S. Circuit Court of Appeals upheld the lower court's ruling.

"[T]he states cannot block the Consent Decree between the Sierra Club and the EPA simply because they disagree with its terms," Judge M. Margaret McKeown wrote for the majority of the divided three-judge panel.

Further, McKeown acknowledged that many of the states have their own lawsuits on the same issue, and the consent decree does not preclude those from moving forward.

The states had argued that the settlement imposed duties and legal obligations without their consent and unlawfully extended the deadline for EPA to issue the designations.

But ultimately the court concluded that the settlement did not require the states to do anything.



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"[A]s the State ultimately acknowledge, the Consent Decree does not subject them to any explicit obligations," McKeown wrote. She added that it is not the settlement that inflicts a "regulatory limbo" on the states, but rather EPA.

Judge J. Clifford Wallace dissented. He contended that the settlement unlawfully amended the terms of the Clean Air Act by extending EPA's deadline.

"I believe that the consent decree does conflict with the Act by permitting the EPA to delay its initial designations while it collects more data," Wallace wrote. "The separation of powers doctrine forbids our amending the statute — only the Congress can do that."

Sonoran Desert Area bald eagle ruling

Separately, the 9th Circuit yesterday rejected an effort by conservationists to protect a population of bald eagles under the Endangered Species Act.

The Center for Biological Diversity and Maricopa Audubon Society sought to classify the Sonoran Desert Area bald eagle as a "distinct population segment," essentially a separate species for purposes of ESA protections.

American bald eagles were originally listed as an endangered species in 1967 — before the Endangered Species Act was enacted. In 1995, they were listed as threatened in the lower 48 states.

Due to conservation efforts, bald eagles rebounded, and the Fish and Wildlife Service delisted them in 2007.

The population in question includes all bald eagle territories within Arizona; the Copper Basin breeding areas in California; and areas in Sonora, Mexico.

FWS in 2006, 2010 and 2012 concluded that the population did not constitute a distinct population segment. A lower court upheld that decision, and yesterday, the 9th Circuit affirmed that ruling.

[Click here](#) for the Clean Air Act opinion.



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[Click here](#) for the bald eagle opinion.

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5. **YELLOWSTONE: Zinke pushes for mining ban near park**

E & E News, Aug. 29 | Dylan Brown

Interior Secretary Ryan Zinke has pledged whatever resources he can provide to speed up the federal review of a mining ban north of Yellowstone National Park.

The former Montana congressman supports a proposed 20-year mineral withdrawal on more than 30,000 acres of the Custer Gallatin National Forest in his home state.

Requests from two companies to explore for gold and other minerals in Park County have sparked a backlash from local businesses looking to protect a burgeoning recreation and tourism economy in an area where mining dates back to 1863 (Greenwire, Aug. 3, 2016).

Last year, the Obama administration imposed a two-year pause while the Forest Service reviews the longer ban. While the withdrawal would not affect existing mining claims, it would effectively block development of large-scale mines.

"The secretary supports protecting the Paradise Valley from mineral development," Interior spokeswoman Heather Swift said. "He believes the environmental review is an important part of the process, and in an effort to speed up the process, he is dedicating Department of the Interior resources to assist the U.S. Forest Service."

In a [letter](#) to Agriculture Secretary Sonny Perdue, who oversees the Forest Service, Zinke offered a Bureau of Land Management geologist and mineral examiner to expedite the National Environmental Policy Act review.

The letter also requests expanding the withdrawal to include additional minerals like oil, gas, coal and phosphate but did not address the permanent ban, [S. 941](#), proposed by Sen. Jon Tester (D-Mont.) (E&E Daily, July 27).



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The Yellowstone Gateway Business Coalition hailed Zinke's leadership but urged support for the "Yellowstone Gateway Protection Act."

"We still need a permanent solution for our children, our businesses and our way of life," the group said in a statement.

Montana Republican Sen. Steve Daines has declined to support the bill, but a spokesman said Daines has urged Zinke and Perdue to make the review a "priority," reiterating that "this is not a suitable place for a mine."

Rep. Greg Gianforte (R-Mont.) also "supports a long-term moratorium on new mining claims that will help protect Paradise Valley's economy and way of life," a spokesman said. "And he will continue to work with the community for a permanent solution."

The mining industry, however, opposed the bill and withdrawal.

"A mineral withdrawal of the magnitude under analysis appears to be gross overreaction to two small proposed exploration projects," said Montana Mining Association Executive Director Tammy Johnson. "Mining activity has been present in the two historic mining districts for more than 100 years and has presented few, if any, significant environmental impacts."

Johnson and other industry groups have argued the existing regulatory framework can protect an area that was purposely left out of previous wilderness designations because of its mining potential.

"The idea that exploration and mining at Emigrant and Jardine is a threat to Yellowstone Park is not supported by the historical record or science, since both districts are downstream from the Park," the American Exploration & Mining Association wrote in [comments](#) to the Forest Service.

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6. **COAL: Greens pounce after Colo. governor backs mine royalty drop**

E & E News, Aug. 29 | Dylan Brown

Environmentalists are pressing Colorado Gov. John Hickenlooper to reverse his support for reducing royalties charged at a controversial coal mine.



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In a [letter](#) Friday, the Democrat confirmed his support for reducing the royalty rate from 8 percent to 5 percent at the West Elk mine in the Gunnison National Forest of western Colorado.

The Bureau of Land Management estimates mine owner Arch Coal Inc. would save an estimated \$8 million, roughly half of which would have gone to the state.

In justifying his position, Hickenlooper wrote, "If production from this federal coal seam does not occur at this time, local employment and revenues will be impacted."

The reduction, starting retroactively on Feb. 1, 2015, and lasting until Jan. 31, 2020, would apply only to coal mined near a split in the coal seam that has introduced ash and other impurities into the process.

Roughly one-third of coal produced during that five-year period — about 10.3 million tons — would come from the split area.

The company previously received a royalty reduction in 2010 when it built a wash plant, switched equipment and added roof supports at the mine.

"These nonstandard practices reduce productivity and increase operating costs," acting BLM Colorado Director Gregory Shoop wrote in his draft approval of the reduction.

While Hickenlooper argued the mine was too valuable to the local economy, he made his support contingent on Arch carrying through on its stated promise "to capture methane, and to explore ways to use the methane that would otherwise be vented."

Environmentalists question the governor's judgment concerning a mine considered to be Colorado's largest source of methane, a potent greenhouse gas (Greenwire, June 12).

"Talk is cheap, and Arch has done little for a decade but talk and vent billions of cubic feet of methane," said EarthJustice attorney Ted Zukoski.

"The state of Colorado can regulate this pollution. It did so with the oil and gas industry," he said, "and must do so for coal mine methane if Arch continues to filibuster."

Arch Coal did not respond to requests for comment.



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The Institute for Energy Economics and Financial Analysis, a research group, put revenue losses closer to \$12 million in arguing royalties should stay at current levels.

"It is a hard but true reality that many mines, including West Elk, need to close," IEEFA Director of Finance Tom Sanzillo wrote in a letter to Hickenlooper.

"Royalty income to the state might be best used at this time to assist with a rational plan for the phase-out of coal mining in Colorado," said Sanzillo, who has authored numerous reports critical of coal companies.

The Obama administration had proposed revisiting overall royalty rates, but the Trump administration ended the ongoing program review earlier this year (E&E News PM, March 29).

"BLM's proposal to reduce royalty payments at the West Elk mine fits with the Trump administration's agenda to push for more dirty coal," Zukoski said.

He estimates roughly half of the reduced-royalty coal has already been mined, which means that Arch fails to meet the standards of the Mineral Leasing Act.

The law allow for reductions "to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided."

Zukoski filed a Freedom of Information Act request to find out exactly how much would be paid retroactively to Arch after Interior declined to provide him with that information. That process could take months.

"The agency may well decide whether or not to approve the rate cut before it decides whether or not to inform the public of the costs," he said.

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7. **DAKOTA ACCESS: Tribes warn against 'unjust path' of keeping line in service**

E & E News, Aug. 29 | Ellen M. Gilmer

Tribes opposed to the Dakota Access pipeline are making a final push to shut down the project.



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In a court filing yesterday, the Standing Rock Sioux and Cheyenne River Sioux tribes urged a federal judge to force the oil pipeline out of service while the Army Corps of Engineers updates its environmental review for a contentious river crossing near tribal land in North Dakota. The court ruled earlier this summer that the agency failed to properly weigh several potential impacts.

"The fundamental question is whether there will be any meaningful consequences for that failure, or whether the Tribes will, like so many times in their history, be forced to bear the risks of someone else's bad decisions and pursuit of profits," lawyers for the tribes wrote. "This Court should not follow that unjust path."

The tribes' plea comes two months after the U.S. District Court for the District of Columbia in June ruled that the government's 2016 environmental assessment for Dakota Access fell short of National Environmental Policy Act requirements. Judge James Boasberg ordered the Trump administration to revisit the review to address potential oil spill risks, environmental justice impacts, and effects on tribal fishing and hunting rights.

But Boasberg declined to immediately scrap Dakota Access' permits and instead ordered the tribes, the company and the Trump administration to file new briefs addressing whether invalidating the permits would be appropriate.

Boasberg, an Obama appointee, noted that while NEPA violations typically result in vacated permits, vacatur "would carry serious consequences that a court should not lightly impose" (Energywire, June 15).

The opposing sides have volleyed briefs on the issue throughout the summer. According to Dakota Access and government lawyers, pipeline shutdown would be unnecessary and cause "undue hardship" for the government, the company and the public.

Plus, government lawyers said, there's a "serious possibility" the Army Corps will end up reaching the same conclusion about the \$3.8 billion pipeline's safety after it completes the additional review, which is expected in December (Energywire, July 18).

'Revisionist reading'

Much of the latest round of legal wrangling centers on a legal standard known as the Allied-Signal test, established in a 1993 ruling from the U.S. Court of Appeals for the District of Columbia Circuit.



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When considering whether to vacate underlying permits after a court has ruled that an agency erred in its decisionmaking process, the precedent directs judges to consider whether the agency will likely be able to support its original decision and whether scrapping the permits would have disruptive consequences.

Pipeline supporters and the Trump administration have argued that Dakota Access should prevail on both counts. They say that the problems in the Army Corps environmental assessment are minor and can be easily corrected and that taking the pipeline out of service would be costly and dangerous.

The tribes slammed that argument in yesterday's brief, countering that the Allied-Signal standard should not even apply in this case because the D.C. Circuit has established vacatur as the standard remedy for NEPA and Administrative Procedure Act violations and has turned to the balancing test only in extraordinary circumstances.

Lawyers for tribes argue that Dakota Access and the government's preferred approach would flip the D.C. Circuit's long-standing approach on its head.

"Instead, they promote a revisionist reading of the case law that, if accepted, would transform the nearly universal 'standard' remedy of vacatur for NEPA violations into one that would be appropriate in only the most unusual situations," the brief says.

A recent D.C. Circuit decision about another pipeline project gave the tribes new ammunition. Just last week, a three-judge panel ruled that the Federal Energy Regulatory Commission violated NEPA by failing to adequately consider indirect impacts from a natural gas pipeline network in the Southeast. The court ordered the agency to revise its environmental impact statement and vacated the project's permits (Energywire, Aug. 23).

"Without even weighing the Allied-Signal factors, the Court vacated the FERC certificate and remanded to the agency for a revised EIS," Standing Rock and Cheyenne River wrote. "Without a valid FERC certificate, the pipeline can no longer lawfully operate.

"Thus," the brief continues, "while the Corps cites an unpublished district court case from California that disparages the 'legal chestnut' that vacating decisions made in violation of NEPA is the standard remedy, that 'chestnut' remains the law in this Circuit."

Other arguments



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Tribal lawyers further argue that Dakota Access should be shut down even if the Allied-Signal test is applied.

They note that economic impacts would occur but would be minimal because the company would not have to remove the pipeline at this time; it would simply have to stop using it.

"The Tribes do not dispute that temporary suspension would involve some costs and inconveniences, both for DAPL and for third parties," the brief says. "But DAPL's claims that the market would not be able to accommodate the shift, or that there would be cascading chaos throughout the national economy, are unsupported."

If the district court declines to take the pipeline out of service, the tribes argued that it should, at a minimum, require the Army Corps and Dakota Access to coordinate with them on emergency response planning for Lake Oahe, where the line crosses a half-mile north of the Standing Rock Indian Reservation.

And, they say, the pipeline should be subject to third-party compliance monitoring with public disclosure.

"To be clear, the Tribes do not believe that this lesser remedy substitutes for vacatur, and do not offer it as a compromise outcome," they told the court. "However, if the Court declines to vacate, the Tribes ask that the Court impose these alternative conditions."

A decision from Boasberg on whether to scrap the pipeline's permits, and on whether to grant the tribes' alternative requests, may come in the next few weeks.

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