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Dear Public Lands News Subscriber:

September 22, 2017: Attached is the current issue of the newsletter Public Lands News (Volume 42 Number 18), in .doc format and in PDF format. Below are the headlines. We thank you for reading Public Lands News.

The Editors

BREAKING NEWS: Court rules on fracking. A federal appeals court gave both the oil and gas industry and environmentalists something to crow about yesterday (September 21) in a ruling on Obama administration hydraulic fracturing regulations.

On industry's behalf the Tenth U.S. Circuit Court of Appeals threw out an appeal from environmentalists of a district court decision invalidating the Obama rule. However, the three-judge panel also ruled on behalf of the environmentalists by vacating the district court's decision in the first place. The court took the twin actions because it said the Trump administration is preparing regulations to revoke the Obama administration and it is premature for the court to act.

Concluded the court, "While these appeals were pending, a new President of the United States was elected. After that change in Administration, and at the President's direction, the BLM began the process of rescinding the Fracking Regulation. Given these changed and changing circumstances, we conclude these appeals are prudentially unripe. As a result, we dismiss these appeals and remand with directions to vacate the district court's opinion and dismiss the action without prejudice."

The Western Energy Alliance and the Independent Petroleum Association of America (IPAA), co-plaintiffs in the case, celebrated. "Today's appeal validates the overreach taken by the Obama administration and that the regulatory process was flawed from the very beginning," said IPAA Barry Russell.

But the environmentalist law firm Earthjustice also praised the court's action. "We're very pleased with the court's decision," said Michael Freeman, staff attorney for Earthjustice who represented the citizen groups in the appeal. "The Tenth Circuit vacated the lower court's ruling, which means the rule will now take effect."

The legal battle will now be fought out over a proposed Trump administration rule revoking the Obama rule, when it is completed. BLM said July 25 it will attempt to cancel outright the Obama rule. That will take time.

The Tenth Circuit's decision is [here](#) and here:

<https://www.ca10.uscourts.gov/opinions/16/16-8068.pdf>.

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Zinke report would expand land uses in ten monuments

In a heretofore-secret recommendation to President Trump Secretary of Interior Ryan Zinke is calling for the reduction in size of four national monuments in the West and an increase in consumptive uses in 10 monuments around the country.

The document, obtained by the *Washington Post*, neither specifies how much the four monuments should shrink nor the specific uses that should be authorized in the 10 monuments.

On the chopping block for reductions in size, as had been deduced earlier from press reports, are Bears Ears National Monument in Utah, the Grand Staircase-Escalante National Monument in Utah, Cascade-Siskiyou National Monument in Oregon, and Gold Butte National Monument in Nevada.

The Zinke memo argues that past Presidents have violated the Antiquities Act

of 1906 by setting aside excessively large amounts of land for monuments.

"No President should use the authority under the Act to restrict public access, prevent hunting and fishing, burden private land, or eliminate traditional land uses, unless such action is needed to protect the object," Zinke said in the document titled *Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act*.

Zinke did not recommend reducing the size of the Rio Grande del Norte National Monument in New Mexico or the Organ Mountains-Desert Peaks National Monument in New Mexico, as had been widely anticipated. But he did call for changes in land use authorizations in each.

For the six major national monuments in the West up for major changes Zinke recommended that the Presidential Proclamation for each and the management plan for each be reshaped to authorize "traditional uses."

The Zinke recommendation explains what he means by traditional uses: "It appears that certain monuments were designated to prevent economic activity such as grazing, mining, and timber production rather than to protect specific objects. In regard to grazing, while it is uncommon for proclamations to prohibit grazing outright, restrictions resulting from monument designative such as vegetative management can have the indirect result of hindering livestock-grazing uses."

If President Trump does issue proclamations directing revisions to management plans, those revisions will take years to write. Historically, BLM has taken around five years to write monument management plans, which are then subject to appeal or lawsuit.

There is a management plan in place for Grand Staircase (effective 2000). There is also a management plan in place for the original Cascade-Siskiyou monument, which was established in June 2000 by President Clinton, but not for a 48,000-acre expansion by President Obama in January of this year.

BLM has barely begun work on plans for Bears Ears, Gold Butte, Rio Grande del Norte and Organ Mountains.

Zinke submitted his recommendations to President Trump on August 24. In an accompanying summary of his review Zinke said that public comments in favor of monuments were the result of "a well-orchestrated national campaign organized by multiple organizations."

He inferred in that August 24 summary that comments from monuments critics were more substantive. "Opponents point to other cases where monument designation has resulted in reduced public access, road closures, hunting and fishing restrictions, multiple and confusing management plans, reduced grazing allotments and timber production, and pressure applied to private landowners encompassed by or adjacent to a monument to sell," he said.

In his 19-page memorandum for the President Zinke called for boundary adjustments to Bears Ears, Grand Staircase, Cascade-Siskiyou and Gold Butte monuments with similar, but not identical, language. For instance of Bears Ears he said, "The boundary should be revised through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, to continue to protect objects and ensure the size is conducive to effective protection of the objects."

As for expanded land uses the Zinke memorandum proposes that the President in a revised proclamation and that land managers in management plans "protect objects and prioritize public access; infrastructure upgrades, repair, and maintenance;

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traditional use; tribal cultural use; and hunting and fishing rights.”

Zinke did sweeten the pot a bit by saying that three new sites “merit protection” under the Antiquities Act. They are the 130,000-acre Badger-Two Medicine, a traditional cultural district managed by the Forest Service in the Lewis and Clark National Forest in Montana; a 4,000-acre Camp Nelson in Kentucky, where African Americans trained during the Civil War; and, the home of murdered civil rights champion Medgar Evers in Jackson, Miss.

House Natural Resources Committee Chairman Rob Bishop (R-Utah) has led the Republican charge for modification in national monument designations, particularly Bears Ears. When Zinke announced in August that he had submitted recommendations to President Trump, Bishop said, “I am encouraged by the recommendations to revise previous designations that were inconsistent with the law and outside the Act’s size limitations. It is my hope that President Trump takes this opportunity to begin realigning uses of the law with its intended purpose.”

Also on Bears Ears, Utah Gov. Gary Herbert (R) has reportedly recommended a 90 percent reduction in the size of the 1.35 million-acre monument, according to the *Salt Lake Tribune*.

The paper said September 17 it had obtained state recommendations from the governor to Zinke that would protect about 120,000 acres. The state said its recommendations protect the most sacred Native American artifacts, while opening much of the monument to development, according to the *Tribune*.

Finally, the Southern Utah Wilderness Alliance September 18 filed a lawsuit against San Juan County charging the county violated Utah’s open meetings law by meeting *in camera* with Zinke, other Interior Department officials and members of the Utah Congressional delegation on Bears Ears. The lawsuit asked a Utah judicial court to forbid the state from holding further private discussions of public business.

New Mexico’s two Democratic senators blasted the proposal to revise land uses in Rio Grande del Norte and Organ Mountains-Desert Peaks. “The Department of Interior’s report to the president completely ignores New Mexicans’ overwhelming support for the monuments, and doesn’t even offer specifics and meaningful data to back up their vague recommendations,” said Sens. Tom Udall (D-N.M.) and Martin Heinrich (D-N.M.) in a statement. They urged President Trump to “reject this sham report.”

Sportsmen criticized the Zinke memorandum even though it purports to extend protections for hunting and fishing uses. The Backcountry Hunters and Anglers worried about destructive uses to hunting and fishing habitat.

“Our existing national monuments, however, merit management in a way that upholds their value to fish and wildlife - not opening them to expanded industrial development and diluting their importance as habitat for fish and game,” said association President Land Tawney. “This ain’t a sell off; it’s a sell out to industry.”

The Wilderness Society President Jamie Williams questioned the legality of executing Zinke’s recommendations. “If President Trump acts in support of these recommendations, The Wilderness Society will move swiftly to challenge those actions in court,” he said. “We urge the President to ignore these illegal and dangerous recommendations and instead act to preserve our natural wonders that are at the core of a great nation.”

From a different perspective the American Forest Resource Council, which has filed a lawsuit against the Obama expansion of Cascade-Siskiyou, said it was not sure

about the veracity of the news reports of Zinke's recommendations, i.e. the *Post* article.

"However," said council President Travis Joseph, "reconsideration of the illegal Cascade-Siskiyou Monument expansion would be a positive step. Congress already set aside these lands eighty years ago for the specific purpose of sustainable timber production in the O&C Act, and the President - regardless of party - doesn't have the authority to rewrite the law."

Trump began the monument review initiative April 26 when he signed an executive order directing the Interior Department to study the designations of national monuments of more than 100,000 acres made since 1996, plus a Katahdin Woods and Waters National Monument Maine monument. The Zinke review looked at 27 monuments.

Before the final cut Zinke had already announced he would not recommend any change to the Craters of the Moon National Monument and Preserve in Idaho, Hanford Reach National Monument in Washington, Canyons of the Ancients National Monument in Colorado, Upper Missouri River Breaks National Monument in Montana, Grand Canyon-Parashant National Monument in Arizona, and Sand to Snow National Monument in California.

The legal debate: Contrasting reports have been posted in the last year on the legality of a President's authority to unilaterally revoke or revise a national monument designation.

A 1938 U.S. Attorney General opinion and a Congressional Research Service report of last fall doubt Trump enjoys such authority. But an American Enterprise Institute (AEI) report published this spring argues that he does.

The Antiquities Act of 1906 is fairly simple. The crucial provision says, "That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. . ."

In 1938 Attorney General Homer Cummings, asked by the President Franklin Roosevelt administration about the legality of abolishing a Castle-Pinckney National Monument in South Carolina, said the President had no such authority. Congress later abolished the monument with legislation.

Argued Cummings of the Antiquities Act, "The statute does not in terms authorize the President to abolish national monuments, and no other statute containing such authority has been suggested. If the President has such authority, therefore, it exists by implication." He added that no other implied authority existed.

The Congressional Research Service, keying on Cummings opinion, said, "No President has ever abolished or revoked a national monument proclamation, so the existence or scope of any such authority has not been tested in courts. However, some legal analyses since at least the 1930s have concluded that the Antiquities Act, by its terms, does not authorize the President to repeal proclamations, and that the President also lacks implied authority to do so."

But in late March the American Enterprise Institute (AEI) published its report that argues Trump has unlimited authority to de-designate national monuments.

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Researchers John Yoo and Todd Gaziano argued that other legal precedent does allow Trump to reverse such national monument designations. Referring to the 1938 decision of Cummings, Yoo and Gaziano say, "We think this opinion is poorly reasoned; misconstrued a prior opinion, which came to the opposite result; and is inconsistent with constitutional, statutory, and case law governing the president's exercise of analogous grants of power. Based on a more careful legal analysis, we believe that a general discretionary revocation power exists."

They added, "We believe a president's discretion to change monument boundaries is without limit, but even if that is not so, his power to significantly change monument boundaries is at its height if the original designation was unreasonably large under the facts as they existed then or based on changed circumstances."

A copy of Zinke's recommendation memorandum is here:
<https://www.documentcloud.org/documents/4052225-Interior-Secretary-Ryan-Zinke-s-Report-to-the.html>.

Appeals court urges climate change study of coal tracts

A federal circuit court sort of ruled September 15 that BLM must consider the global climate change impacts of coal leasing before approving leases.

We say sort of because the court did not directly say that in every circumstance BLM must assess the impacts of climate change before issuing coal and oil and gas leases. But the court did say that when BLM says the same amount of coal would be produced in the country whether a lease is approved or not, it should consider global warming impacts in an EIS backing the lease.

In its decision the Tenth U.S. Circuit Court of Appeals did not vacate the four huge leases at issue that contribute to mines that produce twenty percent of the nation's coal.

But the court did direct BLM to rewrite its EISs and decision documents on the four leases.

The plaintiffs in the case - WildEarth Guardians and the Sierra Club - hailed the decision as a game-changer in their campaign to eliminate fossil fuels development on the public lands.

Said Michael Brune, executive director of the Sierra Club, "This decision marks a major step in our efforts to hold coal, oil, and gas companies accountable for their reckless contributions to climate change and to force the dotting Trump Administration to take our environmental laws seriously."

Said Jeremy Nichols, climate and energy program director for WildEarth Guardians, "To put this into context, this win overturns some of the largest coal leases ever approved by the federal government. These leases were set to expand the two largest coalmines in the world (which incidentally are owned by two of the world's largest privately owned coal companies). What's more, these mines are in the Powder River Basin, the nation's largest coal producing region."

The *Casper Tribune* said that Wyoming Gov. Matt Mead (R-Wyo.) was disappointed by the decision but was pleased that mining could continue.

At issue were four expansion leases that would allow the huge Black Thunder and North Antelope Rochelle mines to continue production. They are the two largest coalmines in the country. Burning the coal from the mines would produce 382 million tons of carbon dioxide annually, BLM estimated.

In its EISs supporting the four expansion leases BLM said there would be no difference in climate change impacts between a no lease alternative and a leasing alternative because the equivalent amount of coal would be produced elsewhere around the country if a lease were denied. BLM called that the "substitution assumption."

But the three-judge panel of the Tenth Circuit, written by Judge Mary Beck Briscoe (a President Clinton appointee), said that BLM did not prove its case that the coal production would be made up elsewhere.

"The BLM did not point to any information (other than its own unsupported statements) indicating that the national coal deficit of 230 million tons per year incurred under the no action alternative could be easily filled from elsewhere, or at a comparable price," the court said.

The court did not stop with the economics argument. It also asserted that attendant to BLM's substitution assumption the bureau did not consider climate change, and should have.

"Prioritizing the carbon emissions and global warming analysis in the RODs suggests that this question was critical to the decision to open the leases for bidding," held the lead decision. "Prioritizing the perfect substitution assumption within that analysis suggests it was critical to deciding between two alternatives: whether or not to issue the leases."

Concurring Judge Bobby R. Baldock (a President Reagan appointee) endorsed the majority's argument that BLM failed to balance the economic impacts of a leasing/no leasing decision, but he took issue with the majority's references to climate change impacts.

"The assertion that climate science is settled science is, in my view, both unnecessary to this appeal and questionable as a factual matter," Baldock said. "Such an assertion is not necessary to this appeal because there is no disputed issue of climate science before us and thus no question of climate science we must decide whether to defer to the BLM on."

Baldock also argued that climate change is not "settled science." He said, "Contrary to this Court's assertion, the Supreme Court has recognized that opposing views exist on climate science."

The Trump administration has promised a pivotal change in public lands energy policy in favor of accelerated fossil fuels development, including coal.

On March 28 President Trump posted a sweeping executive order that directs the Interior Department to terminate a coal-leasing moratorium declared by former Secretary of Interior Sally Jewell in January 2016.

Secretary of Interior Ryan Zinke the next day issued an executive order of his own - Secretarial Order 3348 - that terminates the moratorium. It says "the public interest is not served by halting the federal coal program for an extended time, nor is a PEIS required to consider potential improvements to the program." In other words the administration does not consider the prior work done on an EIS by the Obama administration does not demand continuation of that work, or an EIS to back a reversal.

Environmentalists immediately filed a lawsuit arguing that the Trump administration should prepare an EIS before cancelling the moratorium. That lawsuit was not before the circuit court in the instant decision.

How much the termination of the coal moratorium will help industry is unclear

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because (1) the moratorium already allowed some lease applications to proceed, (2) some 20 years worth of coal is already under lease and (3) the coal industry is having difficulty competing with natural gas and renewable energy in the marketplace.

The four leases involved in the September 16 circuit court decision are cases in point in the environmentalist counter-campaign.

The Tenth Circuit decision is available at: <https://www.ca10.uscourts.gov/opinions/15/15-8109.pdf>.

Trump team takes first step toward ANWR O&G exploration

The Interior Department intends to write a regulation that will lead to oil and gas *exploration* within the coastal plain of the Arctic National Wildlife Refuge, according to a department memo obtained by the *Washington Post* last week.

The August 11 memo ([here](#)) from Acting Fish and Wildlife Service (FWS) Director James W. Kurth tells the Alaska regional director to prepare a rule that, when completed, "will allow for applicants to [submit] requests for approval of new exploration plans."

FWS in the 1980s first authorized exploration in ANWR over an 18-month period to help estimate oil and gas reserves in the 1.5 million-acre coastal plain. Environmentalists and their supporters, including the Obama administration, have argued that that one exploration program was all that the law allowed, the law being the 1980 Alaska National Interest Lands Conservation Act (ANILCA).

Only Congress is allowed to authorize oil and gas *development* under ANILCA.

The authorization of additional exploration is sure to touch off political and legal battles, with the state and its Congressional delegation pushing for updated estimates of oil and gas reserves in the coastal plain. The plain is adjacent to the National Petroleum Reserve Alaska (NPR), where ConocoPhillips Alaska has identified significant oil deposits.

But the Obama administration has recommended the coastal plain be designated wilderness, a recommendation that stays in place unless either Congress overrules it or the Trump administration conducts a lengthy regulatory process to remove it.

Environmentalists questioned the legality of a new exploration program. "All Americans should be appalled by the Trump administration's latest scheme to sell out the Arctic National Wildlife Refuge to the oil industry," said Jamie Williams, president of The Wilderness Society. "Upending decades of established policy isn't just irresponsible, but it may be illegal. We will not stand idly by while they bend and break every rule for the benefit of special interests."

Environmentalists argue that ANILCA in Section 1002 only authorized exploration of the coastal plain between Oct. 1, 1984, and May 31, 1986.

But in 2014 the State of Alaska filed a permit for a new exploration program. Secretary of Interior Sally Jewell then denied it.

On July 21, 2015, a federal judge in Alaska upheld Jewell's decision, arguing that ANILCA was ambiguous on the subject and Jewell was entitled to discretion in interpreting that ambiguity.

But, importantly, Judge Sharon L. Gleason in U.S. District Court in Alaska only held that the Interior Department's decision was reasonable. Whether ANILCA could be interpreted as requiring future exploration is not a settled issue.

"Whether the statute authorizes or requires the Secretary to approve additional exploration after the submission of the 1987 report is ambiguous," Gleason held.

Section 1002 of ANILCA directs the establishment of exploration guidelines, but doesn't appear to limit exploration to one shot. "Within two years after the enactment date of this Act, the Secretary shall by regulation establish initial guidelines governing the carrying out of exploratory activities," the law says.

It continues, "After the initial guidelines are prescribed under subsection (d), any person including the United States Geological Survey may submit plans for exploratory activity (hereinafter in this section referred to as 'exploration plans') to the Secretary for approval." The law doesn't specifically limit the number or frequency of plans, although defenders of ANWR argue that act inferentially intended to allow just the one exploration program.

In the new Trump administration memo of August 11, acting FWS Director Kurth attached a draft regulation for the regional director to propose. The memo was fairly expansive on who could explore and how. "Any person wanting to conduct exploratory-activities may apply for a special use permit by submitting for approval one or more written exploration plans in triplicate to the Regional Director, . . ." the memo says, parroting ANILCA language.

The memo recommends 15 conditions for an exploration permit such as evidence of an applicant's technical ability, a description of the exploration activities anticipated and a schedule of the exploration.

The obvious goal of the additional exploration would be to identify significantly larger oil and gas reserves in the coastal plain to encourage Congress to open the area to drilling. As a result of the 1984 and 1985 drilling the U.S. Geological Survey estimated the coastal plain contained 7.7 billion barrels of technically recoverable oil.

The price of oil may affect industry's interest in the coastal plain, but companies project their interest in drilling over the long-term, not just the current price of oil.

Besides, ConocoPhillips Alaska is reportedly making progress on two major oil and gas projects in NPRA - Greater Mooses Tooth 1 and 2. Greater Mooses Tooth-1 is reportedly ready to begin production in December 2018 and BLM is working on an EIS for Greater Mooses Tooth-2.

As we have reported, Secretary of Interior Ryan Zinke joined up with the Alaska establishment on May 31 to launch an all-out campaign to open the North Slope of the state to energy development.

Zinke posted a two-headed Secretarial Order No. 3352 that (1) orders a replacement of a plan governing the National Petroleum Reserve in Alaska (NPRA) and (2) orders the development of a plan to assess oil and natural gas potential of both NPRA and the coastal plain of ANWR.

The Republican House is encouraging development on the coastal plain of ANWR. The House Budget Committee July 19 approved a fiscal year 2018 Congressional spending plan that would have the House Natural Resources Committee come up with \$5 billion from fiscal years 2018 through 2027. The \$5 billion figure reportedly comes from a 2012 Congressional Budget Office projection of the total revenue ANWR development would generate.

All of the 19 million-acre ANWR is locked up from oil and gas development,

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unless or until the new administration deems otherwise. That's become a reality April 3, 2015, when FWS began to implement a decision of President Obama to recommend the designation of 12.28 million acres of the Arctic National Wildlife Refuge as wilderness. That includes the 1.6 million acres of the possibly oil and gas rich coastal plain of ANWR. Seven million acres of ANWR are already Congressionally-designated wilderness.

The new Interior Department memo promoting exploration in NPRA is available at:

<http://apps.washingtonpost.com/g/documents/national/aug-11-2018-memo-directing-regulatory-changes-to-allow-seismic-studies-in-the-arctic-national-wildlife-refuge/2551/>.

Hill approves wildfire payback; long-term fix supported

President Trump signed into law September 8 legislation (PL 115-56) to allocate up to \$300 million to the Forest Service and Interior Department to compensate the agencies for wildfire costs in this fiscal year (2017).

The money would come from disaster assistance and not from the agencies' appropriations. The broader bill would extend fiscal 2017 spending through December 8 of fiscal 2018 to keep the government in money.

However, the \$300 million in assistance may be a little late because much of the damage has already been done as agencies have been forced to remove money from ongoing operations, such as fire prevention. Many of the foregone activities can't be resumed for some time.

In addition the Department of Agriculture said September 14 that federal land management agencies have overspent on wildfires by more than the \$300 million. Secretary of Agriculture Sonny Perdue said that wildfire costs for fiscal 2017 have exceeded \$2 billion, against an appropriation of \$1.6 billion.

The provision in PL 115-61 says first that the law appropriates money for several programs, including the wildfire suppression fund FLAME. Then it says that "such funds shall be available to be transferred to and merged with other appropriations accounts to fully repay amounts previously transferred for wildfire suppression." The bill doesn't specify the amount of repayments but western senators say \$300 million is needed to pay back non-fire programs.

Said a statement from the office of Sen. Jeff Merkley, "The agreement secured in today's funding bill will ensure that the Forest Service and other agencies will be able to retroactively cover the remaining costs of fighting fires for the 2017 fire season, which is on track to reach \$300 million beyond the previously-set firefighting budget for 2017."

The wildfire assistance is a temporary patch, not the permanent "fix" advocated by the Trump administration, the Obama administration and a bipartisan mix of House and Senate Republicans and Democrats. That fix is still in the Congressional sausage-maker.

A bipartisan group of western senators stepped into that breach September 19 by introducing a new version of their old bill (S 1842) to transfer some emergency wildfire costs to disaster spending. The big change in the measure from past years is the previous iterations of a bill would have transferred 70 percent of costs above the average; now it is 100 percent above the average.

Said Sen. Mike Crapo (R-Idaho), a lead cosponsor, "With over eight million acres burned, ten states choked with smoke, and lives and structures lost, this

year's fire season is a brutal reminder that we must start treating mega fires as the disasters that they are. Now is the time to both recognize that fires are major disasters and end the destructive cycle of fire borrowing that only makes the fire situation in this country worse."

In announcing the huge cost of fire-fighting this year Perdue made a pitch to Congress for more fire-fighting money to avoid fire borrowing. "Forest Service spending on fire suppression in recent years has gone from 15 percent of the budget to 55 percent - or maybe even more - which means we have to keep borrowing from funds that are intended for forest management," he said. "We end up having to hoard all of the money that is intended for fire prevention, because we're afraid we're going to need it to actually fight fires. It means we can't do the prescribed burning, harvesting, or insect control to prevent leaving a fuel load in the forest for future fires to feed on."

Perdue concluded, "We've got great people at the Forest Service and great procedures and processes in place. We can have all of that - the best people, the best procedures, and the best processes - but if we don't have a dependable funding source in place, then we'll never get ahead of the curve on fighting fires." The Senate bill responds in part to that demand.

The Forest Service and Interior Department agencies for the last decade have been forced to borrow from line activities because Congress has not appropriated enough money to cover emergency wildfire costs. In fiscal 2017, which ends September 30, more than 8.2 million acres have burned, compared to a ten-year average of 5.5 million.

To fix the "fire-borrowing" problem Perdue mentioned Congress is moving along several parallel avenues to do that by transferring emergency wildfire spending above 100 percent of the recent average to disaster spending. That would prevent most fire borrowing and remove a \$300 million and more annual drain from an Interior and Related Agencies appropriations bill.

Also last week 12 western senators including three Republicans asked Senate leadership to include a wildfire fix in any future disaster assistance bill that moves through Congress. Bills to offer assistance to Texas for Hurricane Harvey and to Florida for Hurricane Irma are imminent.

The senators, led by Sens. Ron Wyden (D-Ore.) and Mike Crapo (R-Idaho), first set the stage. "Congress must fix the way the government funds wildfire fighting now," they told Senate leaders. "The accounts being robbed to fight fires are those that fund wildfire preparedness and mitigation projects in our forests. Instead of robbing one set of priorities for another, what the nation needs is a consistently funded Forest Service that can address wildfire prevention, as well as emergency wildfire suppression, in the same year."

Then the senators told Senate Majority Leader Mitch McConnell (R-Ky.) and Senate Minority Leader Charles E. Schumer (D-N.Y.), "We ask that any disaster aid package or other must-pass legislation that passes through Congress include a wildfire funding fix. This fix is long overdue and people throughout the West desperately need our help."

There are three separate initiatives now afoot to transfer emergency wildfire costs to disaster spending, not counting the hurricane-relief bills. They are:

- a bill (S 1571) to extend the National Flood Insurance Program for six years. Senate Banking Committee Chairman Crapo on July 17 introduced this bill (S 1571) that includes a provision that would authorize the transfer out of appropriations bills all emergency wildfire costs greater than the 10-year average.

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It would do that by including emergency wildfire costs as major disasters under the national disaster relief law. Those disasters are now paid for in appropriations bills.

- a bill (HR 2936) approved by the House Natural Resources Committee June 27 that would not only authorize a disaster cap for emergency wildfire costs but also speed environmental reviews of timber sales. However, many Democrats and environmentalists contend that those speedy reviews are environmentally unsound. The bill from Rep. Bruce Westerman (R-Ark.) was cosponsored by seven Republicans and two Democrats - Reps. Rick Nolan (D-Minn.), Collin Peterson (D-Minn.)

- a bill (HR 2862) introduced June 8 by a bipartisan coalition of House members and the bill introduced September 20 by a bipartisan coalition of senators that would place a disaster cap on wildfire funding, without altering timber sales procedures. The measure under lead sponsor Rep. Mike Simpson (R-Idaho) would, again, transfer emergency wildfire expenses greater than the 10-year average out of discretionary appropriations and into disaster spending.

If none of those strategies worked Senate Energy Committee Chairman Lisa Murkowski (R-Alaska) said August 3 that wildfire funding is a top priority of her committee. "What we need is a comprehensive solution that addresses both wildfire budgeting and forest management," she said. "We need to tackle both of those, at once, because we know the wildfire problem is not just a budgeting problem - it's also a management problem."

Murkowski has suggested that Congress use as a starting point a draft outline that some of her committee members put together last year that includes an unspecified spending fix and unspecified procedures for expediting hazardous fuels projects.

At press time federal, state and other fire fighters were combatting more than 60 large fires over 1.6 million acres. The leading states were Montana with 21 fires and Oregon with 17. Thus far this year the fire season has been well above the ten-year average in acres burned. Already, more than 8.2 million acres have burned compared to an average of 5.5 million acres. Last year at this time just 4.8 million acres had burned.

House approves monster spending bill with DoI money

The House September 14 gave final approval to a gigantic fiscal year 2018 omnibus measure (HR 3354) after fiercely debating literally hundreds of amendments, including some major public lands riders. HR 3354 includes eight separate appropriations bills, led by an Interior and Related Agencies measure.

Prominently, the House approved amendments that would forbid the spending of any money by BLM to implement a methane emissions rule, oil and gas measurement orders, and an oil and gas site security order. And the House adopted an amendment to forbid EPA from spending money on a methane emissions rule of its own.

. The House did reject one amendment related to the public lands that would have authorized EPA and the Corps of Engineers to implement an Obama administration Waters of the United States rule.

The approval of the eight-bill HR 3354 by the House represents the first-step in a strategy by House leaders to move all fiscal 2018 appropriations bills in one fell swoop by mid-December. The House leaders plan to now couple the eight-measure omnibus with another five-bill security-agency omnibus before sending the whole mass to the Senate.

To keep the federal government in money until mid-December (December 8 to be exact), Congress approved an interim spending bill that President Trump signed into law (PL 115-56 of September 8).

Of note that interim bill allows the Forest Service and Interior Department to draw on some \$300 million to pay themselves back for money shifted from line programs to emergency fire-fighting in fiscal 2017. (See previous article.)

In sum HR 3354 is intended to establish appropriations for most domestic programs in fiscal 2018 outside of security-related activities.

Interest groups offered opposite - and predictable - reactions to the House bill. The Independent Petroleum Association of America (IPAA) praised the House for including provisions to limit implementation of Obama era energy regulations.

Said IPAA President Barry Russell, "The FY 2018 appropriations package contains provisions that will make it less burdensome for America's independent producers to safely and responsibly operate on federal, state, and private lands."

But the Sierra Club criticized the House for approving the amendments and asked the Senate to remove them. "Now, we look to the Senate to do what is right by Americans and come up with a clean spending bill that protects our health, our air and water, and public lands. The American people overwhelmingly support these environmental and public health priorities. We cannot afford to continue to unravel the five decades of progress we have made making our nation a cleaner, safer and healthier place with toxic provisions tacked onto essential legislation."

The Interior Department and Related Agencies Division of HR 3354 already included numerous riders when it reached the House floor. They included provisions to allow for the disposal of wild horses and burros that BLM deems to be surplus; a ban on implementing a wetlands regulation; a ban on listing the greater sage-grouse as threatened or endangered under the Endangered Species Act; and a ban against delisting of the gray wolf in Wyoming.

The legislation would also forbid the listing of any wolf species in the lower 48 states as threatened or endangered under the Endangered Species Act.

The House devoted considerable time to debating amendments that would forbid the spending of money on the implementation of Obama administration methane rules issued respectively by BLM and EPA. On September 8 the House approved by a 216-to-186 vote an amendment from Rep. Steve Pearce (R-N.M.) to block implementation of a BLM rule of Nov. 26, 2016.

Pearce argued that the Obama BLM rule would be excessively expensive for operators. "The estimates are for each well that a cost of \$60,000 is going to be required to come into compliance," he said. "Again, keep in mind that this rule comes after the methane is more carefully controlled today under greater production than it ever has been. The estimates are that we will lose thousands of wells if this venting and flaring rule continues."

But Pearce's fellow New Mexican Rep. Michelle Lujan Grisham (D) said the Obama rule was worth the price because it would recapture royalties on methane emissions. "New Mexico is currently home to the largest methane hot spot in the world," she said. "Not only is methane a powerful greenhouse gas, but every cubic foot of gas that is wasted into the atmosphere cheats hardworking New Mexican taxpayers out of precious royalty and tax payments which go toward public education, infrastructure, and community development programs."

Much of the Obama BLM methane rule is already in abeyance because on June 14 BLM delayed the implementation of ten or so provisions in it. However, on July 10,

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17 national and local environmental groups filed a lawsuit arguing the Administrative Procedures Act forbade BLM from delaying the rule without first conducting a rule-making procedure.

Separately, the House on September 13 approved an amendment from Rep. Markwayne Mullin (R-Okla.) to prevent EPA from spending money to implement a counterpart methane emissions rule of June 3, 2016. The vote was 218-to-195.

On April 30 EPA delayed implementation of its methane emissions rule for 90 days beyond a June 3 compliance deadline. On June 13 EPA proposed a two-year delay of the methane rule of June 3, 2016.

However, as Mullin noted in the House floor debate, on July 30 the U.S. Circuit Court of Appeals for the District of Columbia said in a 9-to-2 vote that EPA must under the Administrative Procedures Act follow formal rule-making procedures before delaying implementation of a rule. That decision may also threaten the BLM methane rule in the environmentalist litigation.

EPA had argued that it had broad discretion to revisit its own rules under the Clean Air Act. But the D.C. Circuit Court of Appeals ruled that the APA required a reproposal and comment period before suspending or terminating the rule. The Mullin amendment would effectively overrule that court order by blocking the Obama EPA rule, period.

By department HR 3354 contains appropriations for: Interior & Environment; Agriculture; Commerce, Justice, Science; Financial Services; Homeland Security; Labor, Health and Human Services, Education; State and Foreign Operations; and Transportation-Housing and Urban Development.

If and when the House and Senate Appropriations Committees get down to banging heads in December on a final Interior bill, they will be first and foremost far apart on total spending.

The Senate committee-spending ceiling for the Interior bill is \$600 million more than a House Appropriations Committee level (\$32 billion compared to the House number of \$31.4 billion). Further the Senate number is almost \$5 billion more than a Trump administration request of \$27.1 billion.

Wild horse rider: The House Appropriations Committee July 18 accepted in HR 3354 by voice vote a major amendment from Rep. Chris Stewart (R-Utah) that would allow for the disposal of wild horses and burros that BLM deems to be surplus.

The Trump administration first touched the third rail of wild horse management May 23 in releasing its fiscal year 2018 budget request - it proposed the sale of excess animals for slaughter. How the Trump proposal fits in with the Stewart amendment is not clear, but both would authorize disposal of a large number of the 70,000 wild horses and burros on the public range. The range only has a carrying capacity of 26,000 animals, according to Stewart.

For BLM resource management and the National Forest System the committee approved modest decreases. For BLM resource management the committee approved a decrease of \$20 million, from \$1.095 billion in fiscal 2017 to \$1.075 billion in fiscal 2018. For the National Forest System the committee also approved a decrease of \$20 million, from \$1.513 billion in fiscal 2017 to \$1.493 billion in fiscal 2018.

The committee allocations for some public lands programs were a little higher than those numbers would at first suggest, because the panel reduced allocations to federal land acquisition under the Land and Water Conservation Fund (LWCF). Thus the National Forest System allocation actually increased by a small amount outside of LWCF acquisitions.

As has become customary, wildfire suppression is eating up a significant portion of the subcommittee's \$31.4 billion allocation, \$3.4 billion, or about 11 percent of the total. And the committee did not act on recommendations that it attempt to shift emergency wildfire costs out of the bill and into disaster funding.

The committee set aside \$465 million for the payments-in-lieu of taxes (PILT) program, which Congress has occasionally paid for outside of appropriations bills. The \$465 million matches the fiscal 2017 appropriation. The Trump administration had recommended \$397 million for PILT.

House panel may address bills to limit impact of ESA

The House Natural Resources Committee has put at the top of its agenda five bills that would revise substantially the Endangered Species Act (ESA), although individually the bills would have limited impacts.

The committee scheduled the bills for mark-up September 13 but deferred action to later, perhaps because of the press of other business, i.e. an Interior spending bill was on the House floor. The measures are sure to be back soon.

After eight years of Obama administration objections to Republican plans to limit the sweep of the ESA, the bills have been endorsed in principle by the Trump administration.

The five bills: H.R. 1274, which would make listing data available to states prior to a listing; H.R. 424, which would forbid litigation against the delisting of the Wyoming population of the gray wolf; H.R. 717, which would include economic factors in listing decisions; H.R. 2603, which would bar nonnative species from being considered as imperiled under the ESA; and H.R. 3131, which would limit awards to environmental plaintiffs in ESA litigation.

House Natural Resources Committee Chairman Rob Bishop (R-Utah) made no bones about his intent to substantially rewrite the Endangered Species Act just before the scheduled September 13 mark-up. He called the measures "five commonsense bills to advance the Committee's longer-term goal of updating and improving the Endangered Species Act - which was last reauthorized in 1988. Most of these measures enjoy bipartisan support and a few have previously passed the House as part of other measures."

The Trump administration, in the person of acting Fish and Wildlife Service Director Gregory Sheehan, endorsed in principle the five bills at a July 19 committee hearing. Sheehan said, "In general, the Administration supports these bills and the Service welcomes the opportunity to work with the Committee to address some recommended technical modifications."

With a different perspective ranking committee Democrat Raúl M. Grijalva (D-Ariz.) said, "Despite years of Republican efforts to pass bills weakening the Act and cut funding for agencies that protect and recover imperiled American wildlife, 99 percent of listed species have continued to survive, and 90 percent are on schedule to meet their recovery goals."

In the Senate Sen. John Barrasso (R-Wyo.), chairman of the Senate Environment and Public Works (EPW) Committee, is taking the lead in revising the ESA.

Barrasso led off the Republican campaign with an initial Senate EPW committee oversight hearing February 15. Barrasso laid out this bottom line at the hearing: "Here's the problem. The Endangered Species Act is not working today and we should be concerned when the (ESA) fails to work. States, wildlife managers, home builders, construction companies, farmers, ranchers and other stakeholders are all

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making it clear that the (ESA) is not working today.”

A central complaint of critics of the law is the legal deadline for FWS to act on a listing petition. FWS must first determine within 90 days if a petition merits further study and, if so, make a listing determination within a year. David J. Willms, a policy advisor to Wyoming Gov. Matt Mead (R), told the House committee at the July 19 hearing, “These deadlines are the source of the greatest acrimony in ESA implementation.”

He recommended, “Congress could amend section 4 to give the FWS greater flexibility to prioritize petitions it receives, but with an understanding that it must still make a decision by a specific date. Alternatively, Congress could amend section 4 to give the FWS discretion to defer listing determinations up to five years if the species meets certain conditions.”

That recommendation is not among the five bills before the committee.

It is a given that the Republican Congress, in concert with the Trump administration, intends to make significant changes in the law. But the path in the legislative process won't be smooth because the ESA traditionally has enjoyed some Republican support and strong public support.

Bishop and his allies are particularly perturbed by two overarching agreements the Obama administration struck in 2011 with environmental groups to settle lawsuits. The environmentalists said FWS and the National Marine Fisheries Service were too slow in acting on 1,000 listing petitions.

In the first agreement on May 17, 2011, FWS struck a deal with WildEarth Guardians to process petitions for 251 candidate species. In return WildEarth, which had been plastering FWS with listing petitions, agreed to limit the number of future petitions. Among the 251 species is the Greater sage-grouse. On July 12, 2011, FWS reached a second agreement with the Center for Biological Diversity to protect 757 species by 2018.

No bumps in the road in hearing for two DoI nominees

The Trump administration's Department of Interior September 19 moved closer to a full complement of managers when the Senate Energy Committee approved the nominations of two top leaders.

The committee sent to the Senate floor the nominations of Ryan Nelson as Interior Department Solicitor and Joseph Balash as assistant secretary of the Interior for Land and Minerals Management. Only Sen. Al Franken (D-Minn.) offered a no vote, that to Balash.

Democratic senators offered few serious objections to the nominations at a September 7 committee hearing.

Despite the relatively smooth sailing for Balash and Nelson, the Trump administration continues to operate without most of its public lands cadre in the Interior Department.

Other than Ryan Zinke as secretary and David Bernhardt as deputy secretary, the department is largely operating under the guidance of acting assistant secretaries and acting agency heads.

The Forest Service is doing better because former chief Tom Tidwell, who had been in office since 2009, continued in that position until September 1. On

September 1 service veteran Tony Tooke took over. The chief does not require Senate confirmation.

Meanwhile, in another personnel matter an early move by Zinke to transfer 50 Senior Executive Service (SES) Employees is under review by the department's Office of Inspector General, it has been reported.

Senate Democrats, led by ranking energy committee minority member Maria Cantwell (D-Wash.), requested the review in July.

Cantwell and seven Democrats said in requesting the review, "Any suggestion that the Department is reassigning SES employees to force them to resign, to silence their voices, or to punish them for the conscientious performance of their public duties is extremely troubling and calls for the closest examination."

The action on the 50 SES employees is but one involving sweeping personnel changes by the Trump administration.

As part of the administration's ambitious government-wide program to reduce federal spending, the Interior Department budget would reduce employee levels by six percent, from 64,000 to 60,000 full-time equivalents. For the Park Service alone the budget would take away 1,242 jobs, reducing the number of full-time equivalent employees from 19,510 to 18,268.

Senate Energy Committee Chairman Lisa Murkowski (R-Alaska) endorsed the nominations of Nelson as solicitor and Balash as assistant secretary. "They all have my vote this morning," she said. "I'd like to thank Joe Balash for his service to Alaska and to this chamber and as Sen. Dan Sullivan's (R-Alaska) chief of staff. We are expediting these nominations so that Secretary Zinke can have (his) team in place."

Ranking committee Democrat Cantwell did not vote against Nelson's and Balash's confirmation, but said she wanted to visit with Balash again before the Senate votes. "I have not had a chance to talk in depth with Mr. Balash," she said. "I'm going to move forward on his nomination today but reserve the opportunity for he and I to have more conversations before we get to the floor."

The Alaska Wilderness League did take a shot at Balash for his advocacy of energy development in Alaska. "There's no doubt that, if confirmed, he will be advocating alongside a growing list of this administration's political appointees who seem dead set on drilling in the Arctic Refuge - despite the law and the will of the American people," said Kristen Miller, interim executive director of the league. "Balash is the wrong choice to act in the public interest and to protect iconic national treasures like the Arctic National Wildlife Refuge."

Murkowski's attitude toward Trump administration nominees is being closely watched because she voted against a health care bill supported by the President in July. Both the President and Zinke reportedly leaned on Murkowski to support the bill. That, in turn, raised the possibility that Murkowski might exact revenge of her own by holding up Trump nominees.

Meanwhile, as we have reported, Secretary of Interior Ryan Zinke has suggested strongly that he will attempt to move the headquarters for BLM, the Fish and Wildlife Service, and the Bureau of Reclamation from Washington, D.C., to Denver.

In addition Zinke said he intends to combine management of federal lands via inter-agency joint management areas (JMAs) with JMA leadership shifting among agencies.

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House tries its hand at blocking BLM, EPA methane rules

If the courts won't allow BLM and EPA to revoke/suspend methane emission rules, then the Republican Congress may step in to do the job.

To that end the House September 8 approved an amendment to a fiscal year 2018 omnibus appropriations bill (HR 3354) that would prevent implementation of a BLM emissions rule of Nov. 26, 2016.

And on September 13 the House approved a counterpart amendment to HR 3354 that would prevent implementation of an EPA emissions rule of June 3, 2016. The House then went on to approve HR 3354 September 14 and send it to the Senate.

The goal of House Republicans, led by westerners, is to block the two Obama administration rules designed to limit methane emissions and, in the BLM's case, recover royalties on the methane.

The arguments of the amendment sponsors are familiar to *PLN* readers - the rules are unnecessary because industry is already moving to reduce emissions under state regulation and BLM is at partial fault for the emissions because it doesn't approve pipeline rights-of-way quickly enough.

The arguments of critics are also familiar - the federal government should crack down on the release of polluting emissions and should recover lost royalties from the methane.

The House votes on the methane amendments came during consideration of an omnibus fiscal 2018 spending bill (HR 3354) that combines eight separate appropriations bills into one. The game plan now for House leaders is to send the whole package to the Senate, along with a national security package, in other words all dozen bills in one.

The Senate and the House will then have until December 8 to complete the legislation; that's when an interim spending law (PL 115-56 of September 8) expires.

The legal situation surrounding the methane rules is complex. EPA on June 30 first delayed implementation of a methane emissions rule for 90 days beyond a June 3 compliance deadline. On June 13 EPA proposed a two-year delay of the methane rule of June 3, 2016.

However, on July 30 the U.S. Circuit Court of Appeals for the District of Columbia said in a 9-to-2 vote that EPA must under the Administrative Procedures Act (APA) follow formal rule-making procedures before delaying implementation of a rule. That ruling also may set a precedent for the BLM methane rule.

EPA had argued that it had broad discretion to revisit its own rules under the Clean Air Act. But the D.C. Circuit Court of Appeals ruled that the APA required a reproposal and comment period before suspending/terminating the rule.

BLM tried a similar strategy to EPA's to block the Obama rule. On June 14 BLM delayed ten or so provisions of the rule.

On July 10, 17 national and local environmental groups filed a lawsuit arguing once again the Administrative Procedures Act forbade BLM from delaying the rule without first conducting a rule-making procedure.

In the House floor debate Rep. Steve Pearce (R-N.M.) offered the amendment to block the BLM rule, with the House voting 216-to-186 in his favor.

Pearce argued that the Obama BLM rule would be excessively expensive for operators. "The estimates are for each well that a cost of \$60,000 is going to be required to come into compliance," he said. "Again, keep in mind that this rule comes after the methane is more carefully controlled today under greater production than it ever has been. The estimates are that we will lose thousands of wells if this venting and flaring rule continues."

But Pearce's fellow New Mexican, Rep. Michelle Lujan Grisham (D), said the Obama rule was worth the price because it would recapture royalties on methane emissions. "New Mexico is currently home to the largest methane hot spot in the world," she said. "Not only is methane a powerful greenhouse gas, but every cubic foot of gas that is wasted into the atmosphere cheats hardworking New Mexican taxpayers out of precious royalty and tax payments which go toward public education, infrastructure, and community development programs."

Rep. Markwayne Mullin (R-Okla.) sponsored the amendment to prevent EPA from spending money to implement its methane emissions rule, which the House approved September 13 by a 218-to-195 vote. Said Mullin, "This rule is currently facing litigation and uncertainty, and Congress must act to block this job-killing regulation estimated to cost the U.S. economy \$530 million annually."

Rep. Betty McCollum (D-Minn.) said the rule is needed to protect the environment from methane emissions. "There is no doubt at all that methane contributes to the increased levels of greenhouse gas concentrations, which contribute to the long-lasting changes in our climate, such as rising global temperatures, sea level change, in weather and precipitation patterns, and changes in the ecosystem's habits and species diversity," she said.

There is a third lawsuit underway against the Obama administration's BLM methane rule, this one from the oil and gas industry. On January 16 Judge Scott W. Skavdahl in U.S. District Court in Wyoming refused for now to halt implementation of the BLM rule. He held that industry plaintiffs, including the Western Energy Alliance, had not yet proved they would be harmed by the regulation.

However, Skavdahl was skeptical of BLM's argument that the rule is designed to prevent waste, i.e. methane venting, and not to assume EPA's clean air responsibility. The oil and gas industry argue in their suit that BLM has no authority over Clean Air Act regulation; only EPA does. Said the judge, "The Court questions whether the 'social cost of methane' is an appropriate factor for BLM to consider in promulgating a resource conservation rule pursuant to its [Mineral Leasing Act] authority."

Small and big Utah O&G lease sales draw enviro critics

Compared to a looming December oil and gas lease sale in Utah, a lesser sale last week appears inconsequential.

But for environmentalist critics, both sales merit criticism, for different reasons.

In the September sale oil and gas companies bid on only three of nine tracts offered by the Utah State Office of BLM, covering 4,101 acres. But the offering of the nine tracts offended environmentalists because the lands are located in sage-grouse habitat.

"Why did the BLM say that Sheeprocks sage grouse need to have their habitat restored but then put that habitat up for auction?" asked Kelly Fuller, energy campaign coordinator with Western Watersheds Project. "If the BLM thinks fracking

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counts as sage-grouse habitat restoration, no wildlife on BLM land is safe.”

The scheduled December sale is a horse of a different color with a big 94,000 acres available for leasing, pending the results of protests. Environmentalists object to the sale of tracts near Dinosaur National Monument and in the San Rafael Swell in areas they have recommended for wilderness.

Said Nada Culver, senior director of agency policy and planning The Wilderness Society, “The Dinosaur National Monument is an incredible landscape and prehistoric treasure, attracting fossil researchers and enthusiasts for over 100 years with some of the most near-complete dinosaur skeletons in North America; while the San Rafael Swell is one of the most uniquely beautiful terrains in the world, with many native plants occurring nowhere else.”

The Trump administration in general and Secretary of Interior Ryan Zinke in particular have made no secret of their desire to expand oil and gas development on the public lands.

That campaign is delineated in a July 6 executive order from Secretary of Interior Ryan Zinke directing BLM to make sure each state office holds quarterly oil and gas lease sales and to identify impediments to swift processing of applications for permit to drill (APDs).

So BLM offices are attempting to sell tracts for oil and gas development within constraints established by the Obama administration. Thus, in December in addition to the big Utah sale BLM state offices in Colorado, Montana, Nevada, New Mexico and Wyoming have scheduled sales of their own.

The Wyoming State Office of BLM has scheduled a sale of 45 parcels totaling almost 72,900 acres in the High Desert District.

Environmentalists contend that the sales harken back to the oil and gas leasing wars in the George W. Bush administration.

Said Landon Newell, a staff attorney with the Southern Utah Wilderness Alliance, “BLM has quickly come full circle and brought us back to the ‘drill now-drill everywhere’ days of the early 2000s, and once again Utah is front and center on the national stage for these disastrous policies.”

Separately, as we reported in the last issue of *PLN*, a coalition of retired Park Service officials August 29 asked the Interior Department not to follow through on oil and gas lease sales near six national park units in the West.

The Coalition to Protect America’s National Park told Secretary of Interior Ryan Zinke that as veteran land managers they understood the need to balance protection of the parks with energy development. “But,” they said in an August 29 letter, “we fear the pendulum is swinging too far to the side of development.”

The coalition, led by the chair of its executive council, Maureen Finnerty, said, “We are writing out of concern for the alarming number of oil and gas proposals that are advancing next to national parks, as well as broader efforts by the Interior Department to reduce protections for national parks in order to encourage oil and gas drilling.”

More broadly, environmental groups have mounted a campaign to eliminate fossil fuels development on the public lands, a campaign that runs 180 degrees opposite the Trump campaign to increase fossil fuels development on the public lands.

The Keep-it-in-the-Ground campaign has some Senate Democratic support led by

Sen. Jeff Merkley (D-Ore.) He has introduced two bills to eliminate oil, gas and coal leasing on the public lands (S 750, S 987).

The Zinke secretarial order is available here: <https://www.doi.gov/sites/doi.gov/files/uploads/doi-so-3354.pdf>.

IBLA decisions

(We post current Interior Board of Land Appeals decisions at our website, <http://www.plnfpr.com/ibla.htm>. IBLA may be contacted at: Interior Board of Land Appeals, 801 North Quincy St., MS 300 QC, Arlington, VA 22203. Phone (703) 235 3750.)

Subject: Fossil excavation.

BLM decision: BLM will approve excavation of 40-million-year-old fossils on public land after preparing an environmental assessment (EA).

Appellant Indian tribe: BLM erred because the excavation could damage cultural objects.

IBLA decision: Affirmed BLM.

Case identification: *Pueblo of San Felipe, 191 IBLA 53*. Decided August 31, 2017. Twenty-eight pages. Appeal from a February 18, 2016, BLM decision denying the Pueblo of San Felipe's protest challenging the agency's issuance of a permit for fossil excavation on public lands.

IBLA argument: IBLA Chief Administrative Judge Eileen Jones upheld a BLM decision approving the excavation of 40-million-year-old fossils in New Mexico. The appellant Pueblo of San Felipe argued that the excavation could damage cultural resources protected by the Native American Graves and Repatriation Act. But BLM countered and Jones agreed that the Pueblo had not proved the site contained cultural resources sacred to the Pueblo. Jones held that "to be considered 'objects of cultural patrimony' such objects 'must have been considered inalienable by the culturally affiliated Indian tribe or Native Hawaiian organization at the time the object was separated from the group.' There is no evidence that the fossils at issue meet this definition." The Pueblo offered other objections, such as a failure by BLM to consult adequately and an inadequate EIS, but at bottom the tribe was concerned about the disturbance of cultural resources. The excavation was proposed by the New Mexico Museum of Natural History and Science and the University of New Mexico.

Subject: Right-of-way.

BLM decision: BLM will approve a right-of-way (ROW) to carry water from a coal mine to a power plant for use in the plant's operations.

Appellant environmentalists: IBLA should stay construction because ROW will damage creek and storage reservoir.

IBLA decision: Denied stay.

Case identification: *Heal Utah and Sierra Club, 191 IBLA 103*. Decided September 19, 2017. Eight pages. Appeal and petition to stay the effect of a decision of the Price (Utah) Field Office of BLM authorizing a right-of-way for construction of a buried pipeline to carry water from a coal mine to a nearby power plant in Emery County, Utah. UTU-91700.

IBLA argument: IBLA Administrative Judge Amy B. Sosin denied a request for a stay in the construction of a pipeline to carry water from a coalmine to a power plant for use in power plant operations. Sosin denied the stay because she said the appellants had not demonstrated that the pipeline would cause immediate and irreparable harm. The decision may have little impact because the applicant was scheduled to complete construction by September 15, two days before the IBLA decision was posted.

Notes

Senate Dems' mine law bill back. Five Senate Democrats September 19 jumped into the hard rock mining legislation fray by reintroducing their legislation (S 1833) that would impose a production royalty of between two and five percent on new mining. The bill would also create a reclamation fund for hard rock minerals. Lead sponsor Sen. Tom Udall (D-N.M.) said the legislation was needed in part because of the August 2015 mine waste spill in the Animas River in Colorado. "The Gold King Mine disaster - and the harm it has caused to Navajo Nation and New Mexico communities - show why we need to bring our laws into the 21st century," he said. "We no longer travel West by covered wagon and oxen, and our mining laws should no longer favor Manifest Destiny and the domination of the continent. This legislation

will help communities across the West clean up these dangerous abandoned mines, and ensure that taxpayers are getting their fair share of the profit from resources mined on public lands." In addition to the royalty and the reclamation program the bill would require annual rental for mining claimants and require a reclamation fee of .6 to 2 percent. The National Mining Association condemned the bill and said the government should give priority to swift approval of mining permits on the public lands. "In a time when the U.S. is more import reliant than ever for the minerals we need to support U.S. infrastructure projects, domestic manufacturing and technology development, this bill responds by adding new taxes and more red tape with the inevitable result of less output and fewer jobs," said NMA President Hal Quinn. "Instead of reintroducing bills that further disadvantage American industry, we should be looking for ways to produce more of the minerals our country needs domestically. A good start would be updating the cumbersome hardrock permitting process, which can take seven to 10 years on average." Republican senators and House members have introduced legislation (HR 520, S 145) to accelerate the permitting process. House and Senate hearings have been held on HR 520 and S 145.

Zinke renews rec access promise. Secretary of Interior Ryan Zinke once again September 15 took action to open the public lands to sportsmen. This time Zinke posted a [Secretarial Order 3356](#) that directs BLM, the Fish and Wildlife Service, and the Park Service to come up with plans within 120 days for expanding access for hunting and fishing. In a possible sensitive provision Zinke directs bureaus to make sure that the public has the right to hunt, fish and target-shoot on national monuments. Also perhaps sensitive the order directs agencies to identify private lands where access to public lands for recreation is limited. The Interior Department notes that the order surfaces just after the Fish and Wildlife Service reported that 2.1 million fewer Americans are hunters now than just six years ago. "The more people we can get outdoors, the better things will be for our public lands," Zinke said. On Zinke's first day in office, March 2, he posted an initial Secretarial Order 3347 that called for a number of actions to guarantee sportsmen access to the public lands. Meanwhile, the House Natural Resources Committee September 13 approved legislation designed to authorize expanded access to public lands for hunting and fishing (*see following item.*) Zinke's latest order is available at: https://www.doi.gov/sites/doi.gov/files/uploads/signed_so_3356.pdf.

House panel boosts rec access. The House Natural Resources Committee approved a jumbo sportsmen's bill (HR 3688) September 13 that includes 18 separate provisions to encourage outdoor recreation on the public lands, including one to designate public lands open for hunting and fishing unless specifically closed. The final vote on the bill was 22-to-13. While Democrats as well as Republicans support outdoor recreation on the public lands, most committee Democrats said some provisions went too far in support of gun owners. Rep. Jeff Duncan (R-S.C.) is the lead sponsor of the bill. Complained Rep. Anthony G. Brown (D-Md.), "This bill is no longer about American hunters protecting our outdoor heritage but has become a vehicle to weaken federal and state gun safety laws and boost gun profits as sales are lagging. If the majority wants to roll back our gun laws at the behest of the gun lobby, or tell states that the actions they've taken to reduce gun violence are unnecessary - they should do so openly and transparently. We should not use our hunters and sportsmen as a prop to enact the NRA's agenda." Committee Chairman Rob Bishop (R-Utah) defended the bill. "This legislation also includes several common-sense provisions outside this Committee's jurisdiction - that preserve and protect Second Amendment liberties fundamental to outdoorsmen and everyday Americans alike, . . ." he said. As for the bottom line of the bill - recreational access, he said, "HR 3668 will ensure millions of American sportsmen and women can continue their enthusiastic participation in traditional outdoor sporting activities - including hunting, shooting and angling - unimpeded by federal bureaucrats and burdensome regulations."

SRS committee members sought. Although Congress did not put up any money for the Secure Rural Schools (SRS) program for fiscal year 2017 and has nothing in the pipeline for fiscal 2018, the Forest Service is still seeking nominations

for an SRS advisory board. The service September 11 asked for nominations to the 15-member board from specific publics, such as state and county officials and the timber industry. The SRS payments are designed to compensate western counties for revenues they once received from a share of federal timber sales, back when those sales amounted to 12 billion board feet a year. The last timber sale year for which the service has data, fiscal 2016, counted 2.9 billion board feet of sales. Congress in a fiscal 2017 spending bill (PL 115-31 of May 5) approved no money for SRS. And the House September 14 approved a fiscal 2018 spending bill (HR 3354) with no money for the program. However, both Republican and Democratic senators in May promised to strive to insure full funding for twin county public lands assistance programs - SRS and payments-in-lieu of taxes (PILT). PILT is temporarily in decent shape, having received \$465 million in the fiscal 2017 money bill. SRS was last authorized in fiscal year 2015, with \$300 million in payments allocated in March of 2016. Information about the SRS program is available at <http://www.fs.usda.gov/pts/>.

Conference Calendar

OCTOBER

- 1-3. **Interstate Oil and Gas Compact Commission Annual Conference** in Pittsburgh. Contact: Interstate Oil and Gas Compact Commission, P.O. Box 53127, Oklahoma city, OK 75132-3127. (405) 525-3556. <http://www.iogcc.state.ok.us>
- 1-4. **Geothermal Resources Council Annual Meeting** in Salt Lake City, Utah. Contact: Geothermal Resources Council, P.O. Box 1350, Davis, CA 95617-1350. (530) 758-2360. <http://www.geothermal.org>.
- 16-20. **Annual Oil & Gas Law Short Course** in Westminster, Colo. For information see <https://www.rmmlf.org>. Contact: Rocky Mountain Mineral Law Foundation, 9191 Sheridan Blvd., #203, Westminster, CO 80031. (303) 321-8100. <http://www.rmmlf.org>.
- 22-25. **The Geological Society of America Annual Meeting** in Seattle, Wash. Contact: The Geological Society of America, 3300 Penrose Place, Box 9140, Boulder, CO 80301. (1) (800) 472-1988. <http://www.geosociety.org>.
- 26-28. **National Land Conservation Conference** in Denver. Contact: Land Trust Alliance, 1331 H St., N.W., Suite 400, Washington, DC 20005-4711. (202) 638-4725, <http://www.lta.org>.

NOVEMBER

- 2-3. **National Environmental Policy Act** special institute in Denver. For information see <https://www.rmmlf.org>. Contact: Rocky Mountain Mineral Law Foundation, 9191 Sheridan Blvd., #203, Westminster, CO 80031. (303) 321-8100. <http://www.rmmlf.org>.
- 8-10. **Independent Petroleum Association of America Annual Meeting** in Naples, Fla. Contact: Independent Petroleum Association of America, 1201 15th Street NW, Suite 300, Washington, DC 20005. (202) 857-4722. <http://www.ipaa.org>.
- 14-17. **The National Trust for Historic Preservation Conference** in Houston. Contact: National Trust for Historic Preservation, 1785 Massachusetts Ave., N.W., Washington, DC 20036. (202) 588-6100. <http://www.nationaltrust.org>.

DECEMBER

- 1-9. **Western Governors' Association Winter Meeting** in Phoenix. Contact: Western Governors' Association, 1515 Cleveland Place, Suite 200, Denver, CO 80202. (303) 623-9378. <http://www.westgov.org>.
- 4-8. **American Exploration & Mining Association Annual Meeting** in Reno, Nev. Check the association website at <http://www.miningamerica.org>.

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Zinke report would expand land uses in ten monuments

In a heretofore-secret recommendation to President Trump Secretary of Interior Ryan Zinke is calling for the reduction in size of four national

monuments in the West and an increase in consumptive uses in 10 monuments around the country.

The document, obtained by the *Washington Post*, neither specifies how much the four monuments should shrink nor the specific uses that should be authorized in the 10 monuments.

On the chopping block for reductions in size, as had been deduced earlier from press reports, are Bears Ears National Monument in Utah, the Grand Staircase-Escalante National Monument in Utah, Cascade-Siskiyou National Monument in Oregon, and Gold Butte National Monument in Nevada.

The Zinke memo argues that past Presidents have violated the Antiquities Act of 1906 by setting aside excessively large amounts of land for monuments.

"No President should use the authority under the Act to restrict public access, prevent hunting and fishing, burden private land, or eliminate traditional land uses, unless such action is needed to protect the object," Zinke said in the document titled *Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act*.

Zinke did not recommend reducing the size of the Rio Grande del Norte National Monument in New Mexico or the Organ Mountains-Desert Peaks National Monument in New Mexico, as had been widely anticipated. But he did call for changes in land use authorizations in each.

For the six major national monuments in the West up for major changes Zinke recommended that the Presidential Proclamation for each and the management plan for each be reshaped to authorize "traditional uses."

The Zinke recommendation explains what he means by traditional uses: "It appears that certain monuments were designated to prevent economic activity such as grazing, mining, and timber production rather than to protect specific objects. In regard to grazing, while it is uncommon for proclamations to prohibit grazing outright, restrictions resulting from monument designative such as vegetative management can have the indirect result of hindering livestock-grazing uses."

If President Trump does issue proclamations directing revisions to management plans, those revisions will take years to write. Historically, BLM has taken around five years to write monument management plans, which are then subject to appeal or lawsuit.

There is a management plan in place for Grand Staircase (effective 2000). There is also a management plan in place for the original Cascade-Siskiyou monument, which was established in June 2000 by President Clinton, but not for a 48,000-acre expansion by President Obama in January of this year.

BLM has barely begun work on plans for Bears Ears, Gold Butte, Rio Grande del Norte and Organ Mountains.

Zinke submitted his recommendations to President Trump on August 24. In an accompanying summary of his review Zinke said that public comments in favor of monuments were the result of "a well-orchestrated national campaign organized by multiple organizations."

He inferred in that August 24 summary that comments from monuments critics were more substantive. "Opponents point to other cases where monument designation has resulted in reduced public access, road closures, hunting and fishing restrictions, multiple and confusing management plans, reduced grazing allotments and timber production, and pressure applied to private landowners encompassed by or adjacent to a monument to sell," he said.

In his 19-page memorandum for the President Zinke called for boundary adjustments to Bears Ears, Grand Staircase, Cascade-Siskiyou and Gold Butte monuments with similar, but not identical, language. For instance of Bears Ears he said, "The boundary should be revised through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, to continue to protect objects and ensure the size is conducive to effective protection of the objects."

As for expanded land uses the Zinke memorandum proposes that the President in a revised proclamation and that land managers in management plans "protect objects and prioritize public access; infrastructure upgrades, repair, and maintenance; traditional use; tribal cultural use; and hunting and fishing rights."

Zinke did sweeten the pot a bit by saying that three new sites "merit protection" under the Antiquities Act. They are the 130,000-acre Badger-Two Medicine, a traditional cultural district managed by the Forest Service in the Lewis and Clark National Forest in Montana; a 4,000-acre Camp Nelson in Kentucky, where African Americans trained during the Civil War; and, the home of murdered civil rights champion Medgar Evers in Jackson, Miss.

House Natural Resources Committee Chairman Rob Bishop (R-Utah) has led the Republican charge for modification in national monument designations, particularly Bears Ears. When Zinke announced in August that he had submitted recommendations to President Trump, Bishop said, "I am encouraged by the recommendations to revise previous designations that were inconsistent with the law and outside the Act's size limitations. It is my hope that President Trump takes this opportunity to begin realigning uses of the law with its intended purpose."

Also on Bears Ears, Utah Gov. Gary Herbert (R) has reportedly recommended a 90 percent reduction in the size of the 1.35 million-acre monument, according to the *Salt Lake Tribune*.

The paper said September 17 it had obtained state recommendations from the governor to Zinke that would protect about 120,000 acres. The state said its recommendations protect the most sacred Native American artifacts, while opening much of the monument to development, according to the *Tribune*.

Finally, the Southern Utah Wilderness Alliance September 18 filed a lawsuit against San Juan County charging the county violated Utah's open meetings law by meeting *in camera* with Zinke, other Interior Department officials and members of the Utah Congressional delegation on Bears Ears. The lawsuit asked a Utah judicial court to forbid the state from holding further private discussions of public business.

New Mexico's two Democratic senators blasted the proposal to revise land uses in Rio Grande del Norte and Organ Mountains-Desert Peaks. "The

Department of Interior's report to the president completely ignores New Mexicans' overwhelming support for the monuments, and doesn't even offer specifics and meaningful data to back up their vague recommendations," said Sens. Tom Udall (D-N.M.) and Martin Heinrich (D-N.M.) in a statement. They urged President Trump to "reject this sham report."

Sportsmen criticized the Zinke memorandum even though it purports to extend protections for hunting and fishing uses. The Backcountry Hunters and Anglers worried about destructive uses to hunting and fishing habitat.

"Our existing national monuments, however, merit management in a way that upholds their value to fish and wildlife - not opening them to expanded industrial development and diluting their importance as habitat for fish and game," said association President Land Tawney. "This ain't a sell off; it's a sell out to industry."

The Wilderness Society President Jamie Williams questioned the legality of executing Zinke's recommendations. "If President Trump acts in support of these recommendations, The Wilderness Society will move swiftly to challenge those actions in court," he said. "We urge the President to ignore these illegal and dangerous recommendations and instead act to preserve our natural wonders that are at the core of a great nation."

From a different perspective the American Forest Resource Council, which has filed a lawsuit against the Obama expansion of Cascade-Siskiyou, said it was not sure about the veracity of the news reports of Zinke's recommendations, i.e. the *Post* article.

"However," said council President Travis Joseph, "reconsideration of the illegal Cascade-Siskiyou Monument expansion would be a positive step. Congress already set aside these lands eighty years ago for the specific purpose of sustainable timber production in the O&C Act, and the President - regardless of party - doesn't have the authority to rewrite the law."

Trump began the monument review initiative April 26 when he signed an executive order directing the Interior Department to study the designations of national monuments of more than 100,000 acres made since 1996, plus a Katahdin Woods and Waters National Monument Maine monument. The Zinke review looked at 27 monuments.

Before the final cut Zinke had already announced he would not recommend any change to the Craters of the Moon National Monument and Preserve in Idaho, Hanford Reach National Monument in Washington, Canyons of the Ancients National Monument in Colorado, Upper Missouri River Breaks National Monument in Montana, Grand Canyon-Parashant National Monument in Arizona, and Sand to Snow National Monument in California.

The legal debate: Contrasting reports have been posted in the last year on the legality of a President's authority to unilaterally revoke or revise a national monument designation.

A 1938 U.S. Attorney General opinion and a Congressional Research Service report of last fall doubt Trump enjoys such authority. But an American Enterprise Institute (AEI) report published this spring argues that he does.

The Antiquities Act of 1906 is fairly simple. The crucial provision says, "That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. . ."

In 1938 Attorney General Homer Cummings, asked by the President Franklin Roosevelt administration about the legality of abolishing a Castle-Pinckney National Monument in South Carolina, said the President had no such authority. Congress later abolished the monument with legislation.

Argued Cummings of the Antiquities Act, "The statute does not in terms authorize the President to abolish national monuments, and no other statute containing such authority has been suggested. If the President has such authority, therefore, it exists by implication." He added that no other implied authority existed.

The Congressional Research Service, keying on Cummings opinion, said, "No President has ever abolished or revoked a national monument proclamation, so the existence or scope of any such authority has not been tested in courts. However, some legal analyses since at least the 1930s have concluded that the Antiquities Act, by its terms, does not authorize the President to repeal proclamations, and that the President also lacks implied authority to do so."

But in late March the American Enterprise Institute (AEI) published its report that argues Trump has unlimited authority to de-designate national monuments.

Researchers John Yoo and Todd Gaziano argued that other legal precedent does allow Trump to reverse such national monument designations. Referring to the 1938 decision of Cummings, Yoo and Gaziano say, "We think this opinion is poorly reasoned; misconstrued a prior opinion, which came to the opposite result; and is inconsistent with constitutional, statutory, and case law governing the president's exercise of analogous grants of power. Based on a more careful legal analysis, we believe that a general discretionary revocation power exists."

They added, "We believe a president's discretion to change monument boundaries is without limit, but even if that is not so, his power to significantly change monument boundaries is at its height if the original designation was unreasonably large under the facts as they existed then or based on changed circumstances."

A copy of Zinke's recommendation memorandum is here:
<https://www.documentcloud.org/documents/4052225-Interior-Secretary-Ryan-Zinke-s-Report-to-the.html>.

Appeals court urges climate change study of coal tracts

A federal circuit court sort of ruled September 15 that BLM must consider the global climate change impacts of coal leasing before approving leases.

We say sort of because the court did not directly say that in every circumstance BLM must assess the impacts of climate change before issuing coal and oil and gas leases. But the court did say that when BLM says the same amount of coal would be produced in the country whether a lease is approved or not, it should consider global warming impacts in an EIS backing the lease.

In its decision the Tenth U.S. Circuit Court of Appeals did not vacate the four huge leases at issue that contribute to mines that produce twenty percent of the nation's coal.

But the court did direct BLM to rewrite its EISs and decision documents on the four leases.

The plaintiffs in the case - WildEarth Guardians and the Sierra Club - hailed the decision as a game-changer in their campaign to eliminate fossil fuels development on the public lands.

Said Michael Brune, executive director of the Sierra Club, "This decision marks a major step in our efforts to hold coal, oil, and gas companies accountable for their reckless contributions to climate change and to force the dotting Trump Administration to take our environmental laws seriously."

Said Jeremy Nichols, climate and energy program director for WildEarth Guardians, "To put this into context, this win overturns some of the largest coal leases ever approved by the federal government. These leases were set to expand the two largest coalmines in the world (which incidentally are owned by two of the world's largest privately owned coal companies). What's more, these mines are in the Powder River Basin, the nation's largest coal producing region."

The *Casper Tribune* said that Wyoming Gov. Matt Mead (R-Wyo.) was disappointed by the decision but was pleased that mining could continue.

At issue were four expansion leases that would allow the huge Black Thunder and North Antelope Rochelle mines to continue production. They are the two largest coalmines in the country. Burning the coal from the mines would produce 382 million tons of carbon dioxide annually, BLM estimated.

In its EISs supporting the four expansion leases BLM said there would be no difference in climate change impacts between a no lease alternative and a leasing alternative because the equivalent amount of coal would be produced elsewhere around the country if a lease were denied. BLM called that the "substitution assumption."

But the three-judge panel of the Tenth Circuit, written by Judge Mary Beck Briscoe (a President Clinton appointee), said that BLM did not prove its case that the coal production would be made up elsewhere.

"The BLM did not point to any information (other than its own unsupported statements) indicating that the national coal deficit of 230

million tons per year incurred under the no action alternative could be easily filled from elsewhere, or at a comparable price," the court said.

The court did not stop with the economics argument. It also asserted that attendant to BLM's substitution assumption the bureau did not consider climate change, and should have.

"Prioritizing the carbon emissions and global warming analysis in the RODs suggests that this question was critical to the decision to open the leases for bidding," held the lead decision. "Prioritizing the perfect substitution assumption within that analysis suggests it was critical to deciding between two alternatives: whether or not to issue the leases."

Concurring Judge Bobby R. Baldock (a President Reagan appointee) endorsed the majority's argument that BLM failed to balance the economic impacts of a leasing/no leasing decision, but he took issue with the majority's references to climate change impacts.

"The assertion that climate science is settled science is, in my view, both unnecessary to this appeal and questionable as a factual matter," Baldock said. "Such an assertion is not necessary to this appeal because there is no disputed issue of climate science before us and thus no question of climate science we must decide whether to defer to the BLM on."

Baldock also argued that climate change is not "settled science." He said, "Contrary to this Court's assertion, the Supreme Court has recognized that opposing views exist on climate science."

The Trump administration has promised a pivotal change in public lands energy policy in favor of accelerated fossil fuels development, including coal.

On March 28 President Trump posted a sweeping executive order that directs the Interior Department to terminate a coal-leasing moratorium declared by former Secretary of Interior Sally Jewell in January 2016.

Secretary of Interior Ryan Zinke the next day issued an executive order of his own - Secretarial Order 3348 - that terminates the moratorium. It says "the public interest is not served by halting the federal coal program for an extended time, nor is a PEIS required to consider potential improvements to the program." In other words the administration does not consider the prior work done on an EIS by the Obama administration does not demand continuation of that work, or an EIS to back a reversal.

Environmentalists immediately filed a lawsuit arguing that the Trump administration should prepare an EIS before cancelling the moratorium. That lawsuit was not before the circuit court in the instant decision.

How much the termination of the coal moratorium will help industry is unclear because (1) the moratorium already allowed some lease applications to proceed, (2) some 20 years worth of coal is already under lease and (3) the coal industry is having difficulty competing with natural gas and renewable energy in the marketplace.

The four leases involved in the September 16 circuit court decision are cases in point in the environmentalist counter-campaign.

The Tenth Circuit decision is available at:
<https://www.ca10.uscourts.gov/opinions/15/15-8109.pdf>.

Trump team takes first step toward ANWR O&G exploration

The Interior Department intends to write a regulation that will lead to oil and gas exploration within the coastal plain of the Arctic National Wildlife Refuge, according to a department memo obtained by the *Washington Post* last week.

The August 11 memo ([here](#)) from Acting Fish and Wildlife Service (FWS) Director James W. Kurth tells the Alaska regional director to prepare a rule that, when completed, "will allow for applicants to [submit] requests for approval of new exploration plans."

FWS in the 1980s first authorized exploration in ANWR over an 18-month period to help estimate oil and gas reserves in the 1.5 million-acre coastal plain. Environmentalists and their supporters, including the Obama administration, have argued that that one exploration program was all that the law allowed, the law being the 1980 Alaska National Interest Lands Conservation Act (ANILCA).

Only Congress is allowed to authorize oil and gas *development* under ANILCA.

The authorization of additional exploration is sure to touch off political and legal battles, with the state and its Congressional delegation pushing for up-dated estimates of oil and gas reserves in the coastal plain. The plain is adjacent to the National Petroleum Reserve Alaska (NPR), where ConocoPhillips Alaska has identified significant oil deposits.

But the Obama administration has recommended the coastal plain be designated wilderness, a recommendation that stays in place unless either Congress overrules it or the Trump administration conducts a lengthy regulatory process to remove it.

Environmentalists questioned the legality of a new exploration program. "All Americans should be appalled by the Trump administration's latest scheme to sell out the Arctic National Wildlife Refuge to the oil industry," said Jamie Williams, president of The Wilderness Society. "Upending decades of established policy isn't just irresponsible, but it may be illegal. We will not stand idly by while they bend and break every rule for the benefit of special interests."

Environmentalists argue that ANILCA in Section 1002 only authorized exploration of the coastal plain between Oct. 1, 1984, and May 31, 1986.

But in 2014 the State of Alaska filed a permit for a new exploration program. Secretary of Interior Sally Jewell then denied it.

On July 21, 2015, a federal judge in Alaska upheld Jewell's decision, arguing that ANILCA was ambiguous on the subject and Jewell was entitled to discretion in interpreting that ambiguity.

But, importantly, Judge Sharon L. Gleason in U.S. District Court in Alaska only held that the Interior Department's decision was reasonable.

Whether ANILCA could be interpreted as requiring future exploration is not a settled issue.

"Whether the statute authorizes or requires the Secretary to approve additional exploration after the submission of the 1987 report is ambiguous," Gleason held.

Section 1002 of ANILCA directs the establishment of exploration guidelines, but doesn't appear to limit exploration to one shot. "Within two years after the enactment date of this Act, the Secretary shall by regulation establish initial guidelines governing the carrying out of exploratory activities," the law says.

It continues, "After the initial guidelines are prescribed under subsection (d), any person including the United States Geological Survey may submit plans for exploratory activity (hereinafter in this section referred to as 'exploration plans') to the Secretary for approval." The law doesn't specifically limit the number or frequency of plans, although defenders of ANWR argue that act inferentially intended to allow just the one exploration program.

In the new Trump administration memo of August 11, acting FWS Director Kurth attached a draft regulation for the regional director to propose. The memo was fairly expansive on who could explore and how. "Any person wanting to conduct exploratory-activities may apply for a special use permit by submitting for approval one or more written exploration plans in triplicate to the Regional Director, . . ." the memo says, parroting ANILCA language.

The memo recommends 15 conditions for an exploration permit such as evidence of an applicant's technical ability, a description of the exploration activities anticipated and a schedule of the exploration.

The obvious goal of the additional exploration would be to identify significantly larger oil and gas reserves in the coastal plain to encourage Congress to open the area to drilling. As a result of the 1984 and 1985 drilling the U.S. Geological Survey estimated the coastal plain contained 7.7 billion barrels of technically recoverable oil.

The price of oil may affect industry's interest in the coastal plain, but companies project their interest in drilling over the long-term, not just the current price of oil.

Besides, ConocoPhillips Alaska is reportedly making progress on two major oil and gas projects in NPRA - Greater Mooses Tooth 1 and 2. Greater Mooses Tooth-1 is reportedly ready to begin production in December 2018 and BLM is working on an EIS for Greater Mooses Tooth-2.

As we have reported, Secretary of Interior Ryan Zinke joined up with the Alaska establishment on May 31 to launch an all-out campaign to open the North Slope of the state to energy development.

Zinke posted a two-headed Secretarial Order No. 3352 that (1) orders a replacement of a plan governing the National Petroleum Reserve in Alaska (NPRA) and (2) orders the development of a plan to assess oil and natural gas potential of both NPRA and the coastal plain of ANWR.

The Republican House is encouraging development on the coastal plain of ANWR. The House Budget Committee July 19 approved a fiscal year 2018 Congressional spending plan that would have the House Natural Resources Committee come up with \$5 billion from fiscal years 2018 through 2027. The \$5 billion figure reportedly comes from a 2012 Congressional Budget Office projection of the total revenue ANWR development would generate.

All of the 19 million-acre ANWR is locked up from oil and gas development, unless or until the new administration deems otherwise. That's become a reality April 3, 2015, when FWS began to implement a decision of President Obama to recommend the designation of 12.28 million acres of the Arctic National Wildlife Refuge as wilderness. That includes the 1.6 million acres of the possibly oil and gas rich coastal plain of ANWR. Seven million acres of ANWR are already Congressionally-designated wilderness.

The new Interior Department memo promoting exploration in NPRA is available at:
<http://apps.washingtonpost.com/g/documents/national/aug-11-2018-memo-directing-regulatory-changes-to-allow-seismic-studies-in-the-arctic-national-wildlife-refuge/2551/>.

Hill approves wildfire payback; long-term fix supported

President Trump signed into law September 8 legislation (PL 115-56) to allocate up to \$300 million to the Forest Service and Interior Department to compensate the agencies for wildfire costs in this fiscal year (2017).

The money would come from disaster assistance and not from the agencies' appropriations. The broader bill would extend fiscal 2017 spending through December 8 of fiscal 2018 to keep the government in money.

However, the \$300 million in assistance may be a little late because much of the damage has already been done as agencies have been forced to remove money from ongoing operations, such as fire prevention. Many of the foregone activities can't be resumed for some time.

In addition the Department of Agriculture said September 14 that federal land management agencies have overspent on wildfires by more than the \$300 million. Secretary of Agriculture Sonny Perdue said that wildfire costs for fiscal 2017 have exceeded \$2 billion, against an appropriation of \$1.6 billion.

The provision in PL 115-61 says first that the law appropriates money for several programs, including the wildfire suppression fund FLAME. Then it says that "such funds shall be available to be transferred to and merged with other appropriations accounts to fully repay amounts previously transferred for wildfire suppression." The bill doesn't specify the amount of repayments but western senators say \$300 million is needed to pay back non-fire programs.

Said a statement from the office of Sen. Jeff Merkley, "The agreement secured in today's funding bill will ensure that the Forest Service and other agencies will be able to retroactively cover the remaining costs of fighting fires for the 2017 fire season, which is on track to reach \$300 million beyond the previously-set firefighting budget for 2017."

The wildfire assistance is a temporary patch, not the permanent "fix" advocated by the Trump administration, the Obama administration and a bipartisan mix of House and Senate Republicans and Democrats. That fix is still in the Congressional sausage-maker.

A bipartisan group of western senators stepped into that breach September 19 by introducing a new version of their old bill (S 1842) to transfer some emergency wildfire costs to disaster spending. The big change in the measure from past years is the previous iterations of a bill would have transferred 70 percent of costs above the average; now it is 100 percent above the average.

Said Sen. Mike Crapo (R-Idaho), a lead cosponsor, "With over eight million acres burned, ten states choked with smoke, and lives and structures lost, this year's fire season is a brutal reminder that we must start treating mega fires as the disasters that they are. Now is the time to both recognize that fires are major disasters and end the destructive cycle of fire borrowing that only makes the fire situation in this country worse."

In announcing the huge cost of fire-fighting this year Perdue made a pitch to Congress for more fire-fighting money to avoid fire borrowing. "Forest Service spending on fire suppression in recent years has gone from 15 percent of the budget to 55 percent - or maybe even more - which means we have to keep borrowing from funds that are intended for forest management," he said. "We end up having to hoard all of the money that is intended for fire prevention, because we're afraid we're going to need it to actually fight fires. It means we can't do the prescribed burning, harvesting, or insect control to prevent leaving a fuel load in the forest for future fires to feed on."

Perdue concluded, "We've got great people at the Forest Service and great procedures and processes in place. We can have all of that - the best people, the best procedures, and the best processes - but if we don't have a dependable funding source in place, then we'll never get ahead of the curve on fighting fires." The Senate bill responds in part to that demand.

The Forest Service and Interior Department agencies for the last decade have been forced to borrow from line activities because Congress has not appropriated enough money to cover emergency wildfire costs. In fiscal 2017, which ends September 30, more than 8.2 million acres have burned, compared to a ten-year average of 5.5 million.

To fix the "fire-borrowing" problem Perdue mentioned Congress is moving along several parallel avenues to do that by transferring emergency wildfire spending above 100 percent of the recent average to disaster spending. That would prevent most fire borrowing and remove a \$300 million and more annual drain from an Interior and Related Agencies appropriations bill.

Also last week 12 western senators including three Republicans asked Senate leadership to include a wildfire fix in any future disaster assistance bill that moves through Congress. Bills to offer assistance to Texas for Hurricane Harvey and to Florida for Hurricane Irma are imminent.

The senators, led by Sens. Ron Wyden (D-Ore.) and Mike Crapo (R-Idaho), first set the stage. "Congress must fix the way the government funds wildfire fighting now," they told Senate leaders. "The accounts being robbed to fight fires are those that fund wildfire preparedness and mitigation

projects in our forests. Instead of robbing one set of priorities for another, what the nation needs is a consistently funded Forest Service that can address wildfire prevention, as well as emergency wildfire suppression, in the same year."

Then the senators told Senate Majority Leader Mitch McConnell (R-Ky.) and Senate Minority Leader Charles E. Schumer (D-N.Y.), "We ask that any disaster aid package or other must-pass legislation that passes through Congress include a wildfire funding fix. This fix is long overdue and people throughout the West desperately need our help."

There are three separate initiatives now afoot to transfer emergency wildfire costs to disaster spending, not counting the hurricane-relief bills. They are:

- a bill (S 1571) to extend the National Flood Insurance Program for six years. Senate Banking Committee Chairman Crapo on July 17 introduced this bill (S 1571) that includes a provision that would authorize the transfer out of appropriations bills all emergency wildfire costs greater than the 10-year average. It would do that by including emergency wildfire costs as major disasters under the national disaster relief law. Those disasters are now paid for in appropriations bills.

- a bill (HR 2936) approved by the House Natural Resources Committee June 27 that would not only authorize a disaster cap for emergency wildfire costs but also speed environmental reviews of timber sales. However, many Democrats and environmentalists contend that those speedy reviews are environmentally unsound. The bill from Rep. Bruce Westerman (R-Ark.) was cosponsored by seven Republicans and two Democrats - Reps. Rick Nolan (D-Minn.), Collin Peterson (D-Minn.)

- a bill (HR 2862) introduced June 8 by a bipartisan coalition of House members and the bill introduced September 20 by a bipartisan coalition of senators that would place a disaster cap on wildfire funding, without altering timber sales procedures. The measure under lead sponsor Rep. Mike Simpson (R-Idaho) would, again, transfer emergency wildfire expenses greater than the 10-year average out of discretionary appropriations and into disaster spending.

If none of those strategies worked Senate Energy Committee Chairman Lisa Murkowski (R-Alaska) said August 3 that wildfire funding is a top priority of her committee. "What we need is a comprehensive solution that addresses both wildfire budgeting and forest management," she said. "We need to tackle both of those, at once, because we know the wildfire problem is not just a budgeting problem - it's also a management problem."

Murkowski has suggested that Congress use as a starting point a draft outline that some of her committee members put together last year that includes an unspecified spending fix and unspecified procedures for expediting hazardous fuels projects.

At press time federal, state and other fire fighters were combatting more than 60 large fires over 1.6 million acres. The leading states were Montana with 21 fires and Oregon with 17. Thus far this year the fire season has been well above the ten-year average in acres burned. Already, more than 8.2 million acres have burned compared to an average of 5.5 million acres. Last year at this time just 4.8 million acres had burned.

House approves monster spending bill with DoI money

The House September 14 gave final approval to a gigantic fiscal year 2018 omnibus measure (HR 3354) after fiercely debating literally hundreds of amendments, including some major public lands riders. HR 3354 includes eight separate appropriations bills, led by an Interior and Related Agencies measure.

Prominently, the House approved amendments that would forbid the spending of any money by BLM to implement a methane emissions rule, oil and gas measurement orders, and an oil and gas site security order. And the House adopted an amendment to forbid EPA from spending money on a methane emissions rule of its own.

The House did reject one amendment related to the public lands that would have authorized EPA and the Corps of Engineers to implement an Obama administration Waters of the United States rule.

The approval of the eight-bill HR 3354 by the House represents the first-step in a strategy by House leaders to move all fiscal 2018 appropriations bills in one fell swoop by mid-December. The House leaders plan to now couple the eight-measure omnibus with another five-bill security-agency omnibus before sending the whole mass to the Senate.

To keep the federal government in money until mid-December (December 8 to be exact), Congress approved an interim spending bill that President Trump signed into law (PL 115-56 of September 8).

Of note that interim bill allows the Forest Service and Interior Department to draw on some \$300 million to pay themselves back for money shifted from line programs to emergency fire-fighting in fiscal 2017. (*See previous article.*)

In sum HR 3354 is intended to establish appropriations for most domestic programs in fiscal 2018 outside of security-related activities.

Interest groups offered opposite - and predictable - reactions to the House bill. The Independent Petroleum Association of America (IPAA) praised the House for including provisions to limit implementation of Obama era energy regulations.

Said IPAA President Barry Russell, "The FY 2018 appropriations package contains provisions that will make it less burdensome for America's independent producers to safely and responsibly operate on federal, state, and private lands."

But the Sierra Club criticized the House for approving the amendments and asked the Senate to remove them. "Now, we look to the Senate to do what is right by Americans and come up with a clean spending bill that protects our health, our air and water, and public lands. The American people overwhelmingly support these environmental and public health priorities. We cannot afford to continue to unravel the five decades of progress we have made making our nation a cleaner, safer and healthier place with toxic provisions tacked onto essential legislation."

The Interior Department and Related Agencies Division of HR 3354 already included numerous riders when it reached the House floor. They included provisions to allow for the disposal of wild horses and burros that BLM deems to be surplus; a ban on implementing a wetlands regulation; a ban on listing the greater sage-grouse as threatened or endangered under the Endangered Species Act; and a ban against delisting of the gray wolf in Wyoming.

The legislation would also forbid the listing of any wolf species in the lower 48 states as threatened or endangered under the Endangered Species Act.

The House devoted considerable time to debating amendments that would forbid the spending of money on the implementation of Obama administration methane rules issued respectively by BLM and EPA. On September 8 the House approved by a 216-to-186 vote an amendment from Rep. Steve Pearce (R-N.M.) to block implementation of a BLM rule of Nov. 26, 2016.

Pearce argued that the Obama BLM rule would be excessively expensive for operators. "The estimates are for each well that a cost of \$60,000 is going to be required to come into compliance," he said. "Again, keep in mind that this rule comes after the methane is more carefully controlled today under greater production than it ever has been. The estimates are that we will lose thousands of wells if this venting and flaring rule continues."

But Pearce's fellow New Mexican Rep. Michelle Lujan Grisham (D) said the Obama rule was worth the price because it would recapture royalties on methane emissions. "New Mexico is currently home to the largest methane hot spot in the world," she said. "Not only is methane a powerful greenhouse gas, but every cubic foot of gas that is wasted into the atmosphere cheats hardworking New Mexican taxpayers out of precious royalty and tax payments which go toward public education, infrastructure, and community development programs."

Much of the Obama BLM methane rule is already in abeyance because on June 14 BLM delayed the implementation of ten or so provisions in it. However, on July 10, 17 national and local environmental groups filed a lawsuit arguing the Administrative Procedures Act forbade BLM from delaying the rule without first conducting a rule-making procedure.

Separately, the House on September 13 approved an amendment from Rep. Markwayne Mullin (R-Okla.) to prevent EPA from spending money to implement a counterpart methane emissions rule of June 3, 2016. The vote was 218-to-195.

On April 30 EPA delayed implementation of its methane emissions rule for 90 days beyond a June 3 compliance deadline. On June 13 EPA proposed a two-year delay of the methane rule of June 3, 2016.

However, as Mullin noted in the House floor debate, on July 30 the U.S. Circuit Court of Appeals for the District of Columbia said in a 9-to-2 vote that EPA must under the Administrative Procedures Act follow formal rule-making procedures before delaying implementation of a rule. That decision may also threaten the BLM methane rule in the environmentalist litigation.

EPA had argued that it had broad discretion to revisit its own rules under the Clean Air Act. But the D.C. Circuit Court of Appeals ruled that

the APA required a reproposal and comment period before suspending or terminating the rule. The Mullin amendment would effectively overrule that court order by blocking the Obama EPA rule, period.

By department HR 3354 contains appropriations for: Interior & Environment; Agriculture; Commerce, Justice, Science; Financial Services; Homeland Security; Labor, Health and Human Services, Education; State and Foreign Operations; and Transportation-Housing and Urban Development.

If and when the House and Senate Appropriations Committees get down to banging heads in December on a final Interior bill, they will be first and foremost far apart on total spending.

The Senate committee-spending ceiling for the Interior bill is \$600 million more than a House Appropriations Committee level (\$32 billion compared to the House number of \$31.4 billion). Further the Senate number is almost \$5 billion more than a Trump administration request of \$27.1 billion.

Wild horse rider: The House Appropriations Committee July 18 accepted in HR 3354 by voice vote a major amendment from Rep. Chris Stewart (R-Utah) that would allow for the disposal of wild horses and burros that BLM deems to be surplus.

The Trump administration first touched the third rail of wild horse management May 23 in releasing its fiscal year 2018 budget request - it proposed the sale of excess animals for slaughter. How the Trump proposal fits in with the Stewart amendment is not clear, but both would authorize disposal of a large number of the 70,000 wild horses and burros on the public range. The range only has a carrying capacity of 26,000 animals, according to Stewart.

For BLM resource management and the National Forest System the committee approved modest decreases. For BLM resource management the committee approved a decrease of \$20 million, from \$1.095 billion in fiscal 2017 to \$1.075 billion in fiscal 2018. For the National Forest System the committee also approved a decrease of \$20 million, from \$1.513 billion in fiscal 2017 to \$1.493 billion in fiscal 2018.

The committee allocations for some public lands programs were a little higher than those numbers would at first suggest, because the panel reduced allocations to federal land acquisition under the Land and Water Conservation Fund (LWCF). Thus the National Forest System allocation actually increased by a small amount outside of LWCF acquisitions.

As has become customary, wildfire suppression is eating up a significant portion of the subcommittee's \$31.4 billion allocation, \$3.4 billion, or about 11 percent of the total. And the committee did not act on recommendations that it attempt to shift emergency wildfire costs out of the bill and into disaster funding.

The committee set aside \$465 million for the payments-in-lieu of taxes (PILT) program, which Congress has occasionally paid for outside of appropriations bills. The \$465 million matches the fiscal 2017 appropriation. The Trump administration had recommended \$397 million for PILT.

House panel may address bills to limit impact of ESA

The House Natural Resources Committee has put at the top of its agenda five bills that would revise substantially the Endangered Species Act (ESA), although individually the bills would have limited impacts.

The committee scheduled the bills for mark-up September 13 but deferred action to later, perhaps because of the press of other business, i.e. an Interior spending bill was on the House floor. The measures are sure to be back soon.

After eight years of Obama administration objections to Republican plans to limit the sweep of the ESA, the bills have been endorsed in principle by the Trump administration.

The five bills: H.R. 1274, which would make listing data available to states prior to a listing; H.R. 424, which would forbid litigation against the delisting of the Wyoming population of the gray wolf; H.R. 717, which would include economic factors in listing decisions; H.R. 2603, which would bar nonnative species from being considered as imperiled under the ESA; and H.R. 3131, which would limit awards to environmental plaintiffs in ESA litigation.

House Natural Resources Committee Chairman Rob Bishop (R-Utah) made no bones about his intent to substantially rewrite the Endangered Species Act just before the scheduled September 13 mark-up. He called the measures "five commonsense bills to advance the Committee's longer-term goal of updating and improving the Endangered Species Act - which was last reauthorized in 1988. Most of these measures enjoy bipartisan support and a few have previously passed the House as part of other measures."

The Trump administration, in the person of acting Fish and Wildlife Service Director Gregory Sheehan, endorsed in principle the five bills at a July 19 committee hearing. Sheehan said, "In general, the Administration supports these bills and the Service welcomes the opportunity to work with the Committee to address some recommended technical modifications."

With a different perspective ranking committee Democrat Raúl M. Grijalva (D-Ariz.) said, "Despite years of Republican efforts to pass bills weakening the Act and cut funding for agencies that protect and recover imperiled American wildlife, 99 percent of listed species have continued to survive, and 90 percent are on schedule to meet their recovery goals."

In the Senate Sen. John Barrasso (R-Wyo.), chairman of the Senate Environment and Public Works (EPW) Committee, is taking the lead in revising the ESA.

Barrasso led off the Republican campaign with an initial Senate EPW committee oversight hearing February 15. Barrasso laid out this bottom line at the hearing: "Here's the problem. The Endangered Species Act is not working today and we should be concerned when the (ESA) fails to work. States, wildlife managers, home builders, construction companies, farmers, ranchers and other stakeholders are all making it clear that the (ESA) is not working today."

A central complaint of critics of the law is the legal deadline for FWS to act on a listing petition. FWS must first determine within 90 days if a petition merits further study and, if so, make a listing determination within a year. David J. Willms, a policy advisor to Wyoming Gov. Matt Mead (R), told the House committee at the July 19 hearing, "These deadlines are the source of the greatest acrimony in ESA implementation."

He recommended, "Congress could amend section 4 to give the FWS greater flexibility to prioritize petitions it receives, but with an understanding that it must still make a decision by a specific date. Alternatively, Congress could amend section 4 to give the FWS discretion to defer listing determinations up to five years if the species meets certain conditions."

That recommendation is not among the five bills before the committee.

It is a given that the Republican Congress, in concert with the Trump administration, intends to make significant changes in the law. But the path in the legislative process won't be smooth because the ESA traditionally has enjoyed some Republican support and strong public support.

Bishop and his allies are particularly perturbed by two overarching agreements the Obama administration struck in 2011 with environmental groups to settle lawsuits. The environmentalists said FWS and the National Marine Fisheries Service were too slow in acting on 1,000 listing petitions.

In the first agreement on May 17, 2011, FWS struck a deal with WildEarth Guardians to process petitions for 251 candidate species. In return WildEarth, which had been plastering FWS with listing petitions, agreed to limit the number of future petitions. Among the 251 species is the Greater sage-grouse. On July 12, 2011, FWS reached a second agreement with the Center for Biological Diversity to protect 757 species by 2018.

No bumps in the road in hearing for two DoI nominees

The Trump administration's Department of Interior September 19 moved closer to a full complement of managers when the Senate Energy Committee approved the nominations of two top leaders.

The committee sent to the Senate floor the nominations of Ryan Nelson as Interior Department Solicitor and Joseph Balash as assistant secretary of the Interior for Land and Minerals Management. Only Sen. Al Franken (D-Minn.) offered a no vote, that to Balash.

Democratic senators offered few serious objections to the nominations at a September 7 committee hearing.

Despite the relatively smooth sailing for Balash and Nelson, the Trump administration continues to operate without most of its public lands cadre in the Interior Department.

Other than Ryan Zinke as secretary and David Bernhardt as deputy secretary, the department is largely operating under the guidance of acting assistant secretaries and acting agency heads.

The Forest Service is doing better because former chief Tom Tidwell, who had been in office since 2009, continued in that position until September

1. On September 1 service veteran Tony Tooke took over. The chief does not require Senate confirmation.

Meanwhile, in another personnel matter an early move by Zinke to transfer 50 Senior Executive Service (SES) Employees is under review by the department's Office of Inspector General, it has been reported.

Senate Democrats, led by ranking energy committee minority member Maria Cantwell (D-Wash.), requested the review in July.

Cantwell and seven Democrats said in requesting the review, "Any suggestion that the Department is reassigning SES employees to force them to resign, to silence their voices, or to punish them for the conscientious performance of their public duties is extremely troubling and calls for the closest examination."

The action on the 50 SES employees is but one involving sweeping personnel changes by the Trump administration.

As part of the administration's ambitious government-wide program to reduce federal spending, the Interior Department budget would reduce employee levels by six percent, from 64,000 to 60,000 full-time equivalents. For the Park Service alone the budget would take away 1,242 jobs, reducing the number of full-time equivalent employees from 19,510 to 18,268.

Senate Energy Committee Chairman Lisa Murkowski (R-Alaska) endorsed the nominations of Nelson as solicitor and Balash as assistant secretary. "They all have my vote this morning," she said. "I'd like to thank Joe Balash for his service to Alaska and to this chamber and as Sen. Dan Sullivan's (R-Alaska) chief of staff. We are expediting these nominations so that Secretary Zinke can have (his) team in place."

Ranking committee Democrat Cantwell did not vote against Nelson's and Balash's confirmation, but said she wanted to visit with Balash again before the Senate votes. "I have not had a chance to talk in depth with Mr. Balash," she said. "I'm going to move forward on his nomination today but reserve the opportunity for he and I to have more conversations before we get to the floor."

The Alaska Wilderness League did take a shot at Balash for his advocacy of energy development in Alaska. "There's no doubt that, if confirmed, he will be advocating alongside a growing list of this administration's political appointees who seem dead set on drilling in the Arctic Refuge - despite the law and the will of the American people," said Kristen Miller, interim executive director of the league. "Balash is the wrong choice to act in the public interest and to protect iconic national treasures like the Arctic National Wildlife Refuge."

Murkowski's attitude toward Trump administration nominees is being closely watched because she voted against a health care bill supported by the President in July. Both the President and Zinke reportedly leaned on Murkowski to support the bill. That, in turn, raised the possibility that Murkowski might exact revenge of her own by holding up Trump nominees.

Meanwhile, as we have reported, Secretary of Interior Ryan Zinke has suggested strongly that he will attempt to move the headquarters for BLM, the

Fish and Wildlife Service, and the Bureau of Reclamation from Washington, D.C., to Denver.

In addition Zinke said he intends to combine management of federal lands via inter-agency joint management areas (JMAs) with JMA leadership shifting among agencies.

House tries its hand at blocking BLM, EPA methane rules

If the courts won't allow BLM and EPA to revoke/suspend methane emission rules, then the Republican Congress may step in to do the job.

To that end the House September 8 approved an amendment to a fiscal year 2018 omnibus appropriations bill (HR 3354) that would prevent implementation of a BLM emissions rule of Nov. 26, 2016.

And on September 13 the House approved a counterpart amendment to HR 3354 that would prevent implementation of an EPA emissions rule of June 3, 2016. The House then went on to approve HR 3354 September 14 and send it to the Senate.

The goal of House Republicans, led by westerners, is to block the two Obama administration rules designed to limit methane emissions and, in the BLM's case, recover royalties on the methane.

The arguments of the amendment sponsors are familiar to *PLN* readers - the rules are unnecessary because industry is already moving to reduce emissions under state regulation and BLM is at partial fault for the emissions because it doesn't approve pipeline rights-of-way quickly enough.

The arguments of critics are also familiar - the federal government should crack down on the release of polluting emissions and should recover lost royalties from the methane.

The House votes on the methane amendments came during consideration of an omnibus fiscal 2018 spending bill (HR 3354) that combines eight separate appropriations bills into one. The game plan now for House leaders is to send the whole package to the Senate, along with a national security package, in other words all dozen bills in one.

The Senate and the House will then have until December 8 to complete the legislation; that's when an interim spending law (PL 115-56 of September 8) expires.

The legal situation surrounding the methane rules is complex. EPA on June 30 first delayed implementation of a methane emissions rule for 90 days beyond a June 3 compliance deadline. On June 13 EPA proposed a two-year delay of the methane rule of June 3, 2016.

However, on July 30 the U.S. Circuit Court of Appeals for the District of Columbia said in a 9-to-2 vote that EPA must under the Administrative Procedures Act (APA) follow formal rule-making procedures before delaying implementation of a rule. That ruling also may set a precedent for the BLM methane rule.

EPA had argued that it had broad discretion to revisit its own rules under the Clean Air Act. But the D.C. Circuit Court of Appeals ruled that the APA required a reproposal and comment period before suspending/terminating the rule.

BLM tried a similar strategy to EPA's to block the Obama rule. On June 14 BLM delayed ten or so provisions of the rule.

On July 10, 17 national and local environmental groups filed a lawsuit arguing once again the Administrative Procedures Act forbade BLM from delaying the rule without first conducting a rule-making procedure.

In the House floor debate Rep. Steve Pearce (R-N.M.) offered the amendment to block the BLM rule, with the House voting 216-to-186 in his favor.

Pearce argued that the Obama BLM rule would be excessively expensive for operators. "The estimates are for each well that a cost of \$60,000 is going to be required to come into compliance," he said. "Again, keep in mind that this rule comes after the methane is more carefully controlled today under greater production than it ever has been. The estimates are that we will lose thousands of wells if this venting and flaring rule continues."

But Pearce's fellow New Mexican, Rep. Michelle Lujan Grisham (D), said the Obama rule was worth the price because it would recapture royalties on methane emissions. "New Mexico is currently home to the largest methane hot spot in the world," she said. "Not only is methane a powerful greenhouse gas, but every cubic foot of gas that is wasted into the atmosphere cheats hardworking New Mexican taxpayers out of precious royalty and tax payments which go toward public education, infrastructure, and community development programs."

Rep. Markwayne Mullin (R-Okla.) sponsored the amendment to prevent EPA from spending money to implement its methane emissions rule, which the House approved September 13 by a 218-to-195 vote. Said Mullin, "This rule is currently facing litigation and uncertainty, and Congress must act to block this job-killing regulation estimated to cost the U.S. economy \$530 million annually."

Rep. Betty McCollum (D-Minn.) said the rule is needed to protect the environment from methane emissions. "There is no doubt at all that methane contributes to the increased levels of greenhouse gas concentrations, which contribute to the long-lasting changes in our climate, such as rising global temperatures, sea level change, in weather and precipitation patterns, and changes in the ecosystem's habits and species diversity," she said.

There is a third lawsuit underway against the Obama administration's BLM methane rule, this one from the oil and gas industry. On January 16 Judge Scott W. Skavdahl in U.S. District Court in Wyoming refused for now to halt implementation of the BLM rule. He held that industry plaintiffs, including the Western Energy Alliance, had not yet proved they would be harmed by the regulation.

However, Skavdahl was skeptical of BLM's argument that the rule is designed to prevent waste, i.e. methane venting, and not to assume EPA's clean air responsibility. The oil and gas industry argue in their suit that BLM has no authority over Clean Air Act regulation; only EPA does. Said the

judge, "The Court questions whether the 'social cost of methane' is an appropriate factor for BLM to consider in promulgating a resource conservation rule pursuant to its [Mineral Leasing Act] authority."

Small and big Utah O&G lease sales draw enviro critics

Compared to a looming December oil and gas lease sale in Utah, a lesser sale last week appears inconsequential.

But for environmentalist critics, both sales merit criticism, for different reasons.

In the September sale oil and gas companies bid on only three of nine tracts offered by the Utah State Office of BLM, covering 4,101 acres. But the offering of the nine tracts offended environmentalists because the lands are located in sage-grouse habitat.

"Why did the BLM say that Sheeprocks sage grouse need to have their habitat restored but then put that habitat up for auction?" asked Kelly Fuller, energy campaign coordinator with Western Watersheds Project. "If the BLM thinks fracking counts as sage-grouse habitat restoration, no wildlife on BLM land is safe."

The scheduled December sale is a horse of a different color with a big 94,000 acres available for leasing, pending the results of protests. Environmentalists object to the sale of tracts near Dinosaur National Monument and in the San Rafael Swell in areas they have recommended for wilderness.

Said Nada Culver, senior director of agency policy and planning The Wilderness Society, "The Dinosaur National Monument is an incredible landscape and prehistoric treasure, attracting fossil researchers and enthusiasts for over 100 years with some of the most near-complete dinosaur skeletons in North America; while the San Rafael Swell is one of the most uniquely beautiful terrains in the world, with many native plants occurring nowhere else."

The Trump administration in general and Secretary of Interior Ryan Zinke in particular have made no secret of their desire to expand oil and gas development on the public lands.

That campaign is delineated in a July 6 executive order from Secretary of Interior Ryan Zinke directing BLM to make sure each state office holds quarterly oil and gas lease sales and to identify impediments to swift processing of applications for permit to drill (APDs).

So BLM offices are attempting to sell tracts for oil and gas development within constraints established by the Obama administration. Thus, in December in addition to the big Utah sale BLM state offices in Colorado, Montana, Nevada, New Mexico and Wyoming have scheduled sales of their own.

The Wyoming State Office of BLM has scheduled a sale of 45 parcels totaling almost 72,900 acres in the High Desert District.

Environmentalists contend that the sales harken back to the oil and gas leasing wars in the George W. Bush administration.

Said Landon Newell, a staff attorney with the Southern Utah Wilderness Alliance, "BLM has quickly come full circle and brought us back to the 'drill now-drill everywhere' days of the early 2000s, and once again Utah is front and center on the national stage for these disastrous policies."

Separately, as we reported in the last issue of *PLN*, a coalition of retired Park Service officials August 29 asked the Interior Department not to follow through on oil and gas lease sales near six national park units in the West.

The Coalition to Protect America's National Park told Secretary of Interior Ryan Zinke that as veteran land managers they understood the need to balance protection of the parks with energy development. "But," they said in an August 29 letter, "we fear the pendulum is swinging too far to the side of development."

The coalition, led by the chair of its executive council, Maureen Finnerty, said, "We are writing out of concern for the alarming number of oil and gas proposals that are advancing next to national parks, as well as broader efforts by the Interior Department to reduce protections for national parks in order to encourage oil and gas drilling."

More broadly, environmental groups have mounted a campaign to eliminate fossil fuels development on the public lands, a campaign that runs 180 degrees opposite the Trump campaign to increase fossil fuels development on the public lands.

The Keep-it-in-the-Ground campaign has some Senate Democratic support led by Sen. Jeff Merkley (D-Ore.) He has introduced two bills to eliminate oil, gas and coal leasing on the public lands (S 750, S 987).

The Zinke secretarial order is available here:
<https://www.doi.gov/sites/doi.gov/files/uploads/doi-so-3354.pdf>.

IBLA decisions

(We post current Interior Board of Land Appeals decisions at our website, <http://www.plnfor.com/ibla.htm>. IBLA may be contacted at: Interior Board of Land Appeals, 801 North Quincy St., MS 300 QC, Arlington, VA 22203. Phone (703) 235 3750.)

Subject: Fossil excavation.

BLM decision: BLM will approve excavation of 40-million-year-old fossils on public land after preparing an environmental assessment (EA).

Appellant Indian tribe: BLM erred because the excavation could damage cultural objects.

IBLA decision: Affirmed BLM.

Case identification: *Pueblo of San Felipe, 191 IBLA 53*. Decided August 31, 2017. Twenty-eight pages. Appeal from a February 18, 2016, BLM decision denying the Pueblo of San Felipe's protest challenging the agency's issuance of a permit for fossil excavation on public lands.

IBLA argument: IBLA Chief Administrative Judge Eileen Jones upheld a BLM decision approving the excavation of 40-million-year-old fossils in New Mexico. The appellant Pueblo of San Felipe argued that the excavation could damage cultural resources protected by the Native American Graves and Repatriation Act. But BLM countered and Jones agreed that the Pueblo had not proved the site contained cultural resources sacred to the Pueblo. Jones held that "to be considered 'objects of cultural

patrimony' such objects 'must have been considered inalienable by the culturally affiliated Indian tribe or Native Hawaiian organization at the time the object was separated from the group.' There is no evidence that the fossils at issue meet this definition." The Pueblo offered other objections, such as a failure by BLM to consult adequately and an inadequate EIS, but at bottom the tribe was concerned about the disturbance of cultural resources. The excavation was proposed by the New Mexico Museum of Natural History and Science and the University of New Mexico.

Subject: Right-of-way.

BLM decision: BLM will approve a right-of-way (ROW) to carry water from a coal mine to a power plant for use in the plant's operations.

Appellant environmentalists: IBLA should stay construction because ROW will damage creek and storage reservoir.

IBLA decision: Denied stay.

Case identification: *Heal Utah and Sierra Club, 191 IBLA 103*. Decided September 19, 2017. Eight pages. Appeal and petition to stay the effect of a decision of the Price (Utah) Field Office of BLM authorizing a right-of-way for construction of a buried pipeline to carry water from a coal mine to a nearby power plant in Emery County, Utah. UTU-91700.

IBLA argument: IBLA Administrative Judge Amy B. Sosin denied a request for a stay in the construction of a pipeline to carry water from a coalmine to a power plant for use in power plant operations. Sosin denied the stay because she said the appellants had not demonstrated that the pipeline would cause immediate and irreparable harm. The decision may have little impact because the applicant was scheduled to complete construction by September 15, two days before the IBLA decision was posted.

Notes

Senate Dems' mine law bill back. Five Senate Democrats September 19 jumped into the hard rock mining legislation fray by reintroducing their legislation (S 1833) that would impose a production royalty of between two and five percent on new mining. The bill would also create a reclamation fund for hard rock minerals. Lead sponsor Sen. Tom Udall (D-N.M.) said the legislation was needed in part because of the August 2015 mine waste spill in the Animas River in Colorado. "The Gold King Mine disaster - and the harm it has caused to Navajo Nation and New Mexico communities - show why we need to bring our laws into the 21st century," he said. "We no longer travel West by covered wagon and oxen, and our mining laws should no longer favor Manifest Destiny and the domination of the continent. This legislation will help communities across the West clean up these dangerous abandoned mines, and ensure that taxpayers are getting their fair share of the profit from resources mined on public lands." In addition to the royalty and the reclamation program the bill would require annual rental for mining claimants and require a reclamation fee of .6 to 2 percent. The National Mining Association condemned the bill and said the government should give priority to swift approval of mining permits on the public lands. "In a time when the U.S. is more import reliant than ever for the minerals we need to support U.S. infrastructure projects, domestic manufacturing and technology development, this bill responds by adding new taxes and more red tape with the inevitable result of less output and fewer jobs," said NMA President Hal Quinn. "Instead of reintroducing bills that further disadvantage American industry, we should be looking for ways to produce more of the minerals our country needs domestically. A good start would be updating the cumbersome hardrock permitting process, which can take seven to 10 years on average." Republican senators and House members have introduced legislation (HR 520, S 145) to accelerate the permitting process. House and Senate hearings have been held on HR 520 and S 145.

Zinke renews rec access promise. Secretary of Interior Ryan Zinke once again September 15 took action to open the public lands to sportsmen. This time Zinke posted a Secretarial Order 3356 that directs BLM, the Fish and Wildlife Service, and the Park Service to come up with plans within 120 days for expanding access for hunting and fishing. In a possible sensitive provision Zinke directs bureaus to make sure that the public has the right to hunt, fish and target-shoot on national monuments. Also perhaps sensitive the order directs agencies to identify private lands where access to public lands for recreation is limited. The Interior Department notes that the order surfaces just after the Fish and Wildlife Service reported that 2.1 million fewer Americans are hunters now than just six years ago. "The more people we can get outdoors, the better things will be for our public lands," Zinke said. On Zinke's first day in office, March 2, he posted an initial Secretarial Order 3347 that called for a number of actions to guarantee sportsmen access to the public lands. Meanwhile, the House Natural Resources Committee September 13 approved legislation designed to authorize expanded access to public lands for hunting and fishing (*see following item.*) Zinke's latest order is available at:

https://www.doi.gov/sites/doi.gov/files/uploads/signed_so_3356.pdf.

House panel boosts rec access. The House Natural Resources Committee approved a jumbo sportsmen's bill (HR 3688) September 13 that includes 18 separate provisions to encourage outdoor recreation on the public lands, including one to designate public lands open for hunting and fishing unless specifically closed. The final vote on the bill was 22-to-13. While Democrats as well as Republicans support outdoor recreation on the public lands, most committee Democrats said some provisions went too far in support of gun owners. Rep. Jeff Duncan (R-S.C.) is the lead sponsor of the bill. Complained Rep. Anthony G. Brown (D-Md.), "This bill is no longer about American hunters protecting our outdoor heritage but has become a vehicle to weaken federal and state gun safety laws and boost gun profits as sales are lagging. If the majority wants to roll back our gun laws at the behest of the gun lobby, or tell states that the actions they've taken to reduce gun violence are unnecessary - they should do so openly and transparently. We should not use our hunters and sportsmen as a prop to enact the NRA's agenda." Committee Chairman Rob Bishop (R-Utah) defended the bill. "This legislation also includes several common-sense provisions outside this Committee's jurisdiction - that preserve and protect Second Amendment liberties fundamental to outdoorsmen and everyday Americans alike, . . ." he said. As for the bottom line of the bill - recreational access, he said, "HR 3668 will ensure millions of American sportsmen and women can continue their enthusiastic participation in traditional outdoor sporting activities - including hunting, shooting and angling - unimpeded by federal bureaucrats and burdensome regulations."

SRS committee members sought. Although Congress did not put up any money for the Secure Rural Schools (SRS) program for fiscal year 2017 and has nothing in the pipeline for fiscal 2018, the Forest Service is still seeking nominations for an SRS advisory board. The service September 11 asked for nominations to the 15-member board from specific publics, such as state and county officials and the timber industry. The SRS payments are designed to compensate western counties for revenues they once received from a share of federal timber sales, back when those sales amounted to 12 billion board feet a year. The last timber sale year for which the service has data, fiscal 2016, counted 2.9 billion board feet of sales. Congress in a fiscal 2017 spending bill (PL 115-31 of May 5) approved no money for SRS. And the House September 14 approved a fiscal 2018 spending bill (HR 3354) with no money for

the program. However, both Republican and Democratic senators in May promised to strive to insure full funding for twin county public lands assistance programs - SRS and payments-in-lieu of taxes (PILT). PILT is temporarily in decent shape, having received \$465 million in the fiscal 2017 money bill. SRS was last authorized in fiscal year 2015, with \$300 million in payments allocated in March of 2016. Information about the SRS program is available at <http://www.fs.usda.gov/pts/>.

Conference Calendar

OCTOBER

1-3. **Interstate Oil and Gas Compact Commission Annual Conference** in Pittsburgh. Contact: Interstate Oil and Gas Compact Commission, P.O. Box 53127, Oklahoma city, OK 75132-3127. (405) 525-3556. <http://www.iogcc.state.ok.us>

1-4. **Geothermal Resources Council Annual Meeting** in Salt Lake City, Utah. Contact: Geothermal Resources Council, P.O. Box 1350, Davis, CA 95617-1350. (530) 758-2360. <http://www.geothermal.org>.

16-20. **Annual Oil & Gas Law Short Course** in Westminster, Colo. For information see <https://www.rmmlf.org>. Contact: Rocky Mountain Mineral Law Foundation, 9191 Sheridan Blvd., #203, Westminster, CO 80031. (303) 321-8100. <http://www.rmmlf.org>.

22-25. **The Geological Society of America Annual Meeting** in Seattle, Wash. Contact: The Geological Society of America, 3300 Penrose Place, Box 9140, Boulder, CO 80301. (1) (800) 472-1988. <http://www.geosociety.org>.

26-28. **National Land Conservation Conference** in Denver. Contact: Land Trust Alliance, 1331 H St., N.W., Suite 400, Washington, DC 20005-4711. (202) 638-4725, <http://www.lta.org>.

NOVEMBER

2-3. **National Environmental Policy Act** special institute in Denver. For information see <https://www.rmmlf.org>. Contact: Rocky Mountain Mineral Law Foundation, 9191 Sheridan Blvd., #203, Westminster, CO 80031. (303) 321-8100. <http://www.rmmlf.org>.

8-10. **Independent Petroleum Association of America Annual Meeting** in Naples, Fla. Contact: Independent Petroleum Association of America, 1201 15th Street NW, Suite 300, Washington, DC 20005. (202) 857-4722. <http://www.ipaa.org>.

14-17. **The National Trust for Historic Preservation Conference** in Houston. Contact: National Trust for Historic Preservation, 1785 Massachusetts Ave., N.W., Washington, DC 20036. (202) 588-6100. <http://www.nationaltrust.org>.

DECEMBER

1-9. **Western Governors' Association Winter Meeting** in Phoenix. Contact: Western Governors' Association, 1515 Cleveland Place, Suite 200, Denver, CO 80202. (303) 623-9378. <http://www.westgov.org>.

4-8. **American Exploration & Mining Association Annual Meeting** in Reno, Nev. Check the association website at <http://www.miningamerica.org>.