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Kevin Bogardus and Kellie Lunney, E&E News reporters

Published: Tuesday, July 11, 2017

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<http://bit.ly/2tbI4Vz>

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<http://bit.ly/2tbhT1D>

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11. Trump gets first chance to shape powerful appeals court

Amanda Reilly, E&E News reporter

Published: Tuesday, July 11, 2017

A conservative judge who has been skeptical of regulations is stepping down from a federal court that is highly influential in environmental law.

<http://bit.ly/2uaYHFo>

12. Salazar, other former officials join reservation land dispute

Published: Tuesday, July 11, 2017

Several former top federal officials have signed onto a lawsuit between the Eastern Shoshone Tribe and Wyoming over the boundary of the Wind River Indian Reservation, including former Interior Secretary Ken Salazar.

<http://bit.ly/2ub2F0J>

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1. House proposes to slash EPA, Interior spending

Kevin Bogardus and Kellie Lunney, E&E News reporters

Published: Tuesday, July 11, 2017

House Republicans are pushing deep spending cuts for U.S. EPA and the Interior Department, although the planned cuts are not nearly as drastic as President Trump had proposed.

Released this afternoon, the House fiscal 2018 Interior and environment bill, up for subcommittee markup tomorrow, would fund EPA at \$7.5 billion, cutting the agency by about \$2 billion. Still, the funding amount is far more than the White House's proposed \$5.6 billion.

Rep. Ken Calvert (R-Calif.), chairman of the Interior and Environment Appropriations Subcommittee, said the bill "prioritized proven programs that have a meaningful impact to achieve these goals while also ensuring our economy can continue to grow."

The legislation includes a provision authorizing EPA and the Army Corps of Engineers to withdraw the Obama-era Clean Water Rule "without regard to any provision of statute or regulation that establishes a requirement for such withdrawal."

That language is identical to a provision included in the energy and water spending bill, and comes as the Trump administration is moving to repeal the rule, which aims to clarify the Clean Water Act's reach (Greenwire, June 27).

Exempting the rule, also known as the Waters of the U.S., or WOTUS, rule, from the Administrative Procedure Act could not only remove the requirement that it undergo certain public scrutiny but also make it easier for the new administration to ignore the Obama team's justifications for WOTUS.

That could include the cost-benefit analysis of the 2015 regulation and an accompanying 408-page technical report, as well as a review from EPA's Science Advisory Board.

The appropriations bill also reiterates that the Clean Water Act does not apply to farm ponds and irrigation ditches in agricultural areas.

The bill would maintain spending levels for the Chesapeake Bay and Great Lakes Restoration Initiative at \$72 million and \$300 million, respectively.

The move is a repudiation of the Trump administration's budget request, which had asked Congress to eliminate funding for regional cleanup efforts like those in the Great Lakes and Chesapeake Bay.

The bill would also provide \$1.14 billion in capitalization grants for the Clean Water State Revolving Fund, \$863 million of which would go toward the Drinking Water State Revolving Fund. The Water Infrastructure Finance and Innovation Act (WIFIA) program would receive an additional \$25 million.

Air and climate

Appropriators flatly rejected the White House's bid to slash or eliminate funding for two popular air quality grant programs.

The administration proposed cutting Diesel Emissions Reduction Act (DERA) grants from \$60 million this year to \$10 million; the draft would instead increase next year's total to \$75 million.

And while the White House is seeking to zero out Targeted Air Shed grants, which are getting \$30 million this year, the bill would boost the amount of money in next year's pot to \$40 million.

DERA grants are used to replace or retool older, higher-polluting school buses and other diesel-powered equipment; airshed grants are supposed to help areas suffering from unhealthy levels of ozone and particulate pollution.

The bill would further delay EPA attainment designations for its 2015 ozone standard until 2025; the agency had been scheduled to make those designations by this October, but Administrator Scott Pruitt recently pushed back that deadline until 2018.

Another rider would require EPA and other agencies to continue to treat forest biomass as carbon-neutral. In a victory for the forest products industry, almost identical language was included for the first time in the fiscal 2017 omnibus spending measure signed in May.

In an effort to relax industrial farming regulations, the legislation would prohibit agencies from requiring permits under the Clean Air Act to emit carbon dioxide, methane and other gases from livestock production.

The measure would also prohibit agencies from issuing rules that require mandatory reporting of greenhouse gas emissions from manure management systems.

The appropriations bill would provide more than \$1.1 billion for the Superfund program, around \$600.6 million more than the \$515.8 million requested by the president's budget. It also represents an increase of around \$27.6 million from the omnibus spending deal.

In addition, the bill seeks to send \$11 million to the Chemical Safety and Hazard Investigation Board, the same amount as last fiscal year. The Trump budget had called for CSB to be eliminated.

Interior

For Interior, the bill would provide \$11.9 billion in fiscal 2018. That's slightly more than the \$11.7 billion the White House requested. The legislation would also fund some popular programs at a higher level than the president's budget.

House appropriators, for example, want to fully fund the payment in lieu of taxes system at \$465 million and provide \$275 million for Land and Water Conservation Fund programs.

The bill hewed to the administration's recommendation on wildfire firefighting and prevention, fully funding the 10-year average for suppression costs for Interior and the Forest Service with \$3.4 billion. That's \$334 million below the fiscal 2017 level.

Several Interior agencies would see cuts from fiscal 2017:

- The Bureau of Land Management would receive \$1.2 billion, a decrease of \$46 million from fiscal 2017. The spending legislation would provide \$68.9 million for sage grouse conservation.
- The National Park Service would receive \$2.9 billion, a decrease of \$64 million from fiscal 2017, mostly a reduction in land acquisition activities.
- The Fish and Wildlife Service would receive \$1.5 billion under the bill, \$38 million less than the fiscal 2017 level. The fiscal 2018 bill also continues a one-year delay on Endangered Species Act reviews and rulemakings for sage grouse.
- The U.S. Geological Survey would receive \$1 billion in fiscal 2018 under the bill, \$46 million below the fiscal 2017 enacted level.
- The Office of Surface Mining Reclamation and Enforcement would receive \$213 million for fiscal 2018, \$40 million less than in fiscal 2017. That includes \$75 million to continue a pilot program to reclaim abandoned land mines and \$68.6 million for state regulatory grants.

<http://bit.ly/2tbl4Vz>

2. Greens, tribes sue to stop BLM stay

Pamela King, E&E News reporter

Published: Tuesday, July 11, 2017

Environmental and tribal citizen groups yesterday challenged the Interior Department's postponement of an Obama administration rule to curb methane emissions from energy operations on public lands.

Represented by Earthjustice attorneys, the groups called on the U.S. District Court for the Northern District of California to require industry compliance with the Bureau of Land Management's Methane and Waste Prevention Rule. The Trump BLM's stay of certain deadlines under that regulation violates the Administrative Procedure Act, the groups contend.

The lawsuit is separate from a similar challenge the states of California and New Mexico filed in the same district court last week.

"Trump and his administration cannot blatantly ignore the law just to benefit polluters at the expense of everyone else," Earthjustice attorney Robin Cooley said in a statement. "Compliance with public health rules

cannot be indefinitely delayed while the Trump administration and bad actors within the industry try to undo them."

In a blog post yesterday, Earthjustice linked the battle to other legal challenges of the new president's widespread efforts to undo the regulatory efforts of his predecessor.

"Delays of critical environmental protections have become a familiar tactic from federal agencies, as the Trump administration takes marching orders from polluting industries that want to unravel Obama-era regulations," Earthjustice senior staff writer Jessica Knoblauch wrote. "The courts, however, have proven to be a powerful tool in pushing back on Trump's delay tactics."

She cited a federal appeals court decision to reverse U.S. EPA's stay of its own rule to control methane leakage from new oil and gas equipment (*Greenwire*, July 3).

Attorneys involved in litigation over the BLM methane rule say that because the agencies relied on authorities granted under two separate statutes, the EPA decision does not set precedent in the BLM case (*Energywire*, July 6).

Western Energy Alliance President Kathleen Sgamma said the new lawsuit is "really no different" from the challenge by California and New Mexico.

She previously criticized the states for filing their lawsuit in a court with limited exposure to oil and gas issues.

"We're weighing our options and will decide our response soon," Sgamma said.

<http://bit.ly/2uf9rDg>

3. Senate Dems rally against changing any sites

Kellie Lunney, E&E News reporter

Published: Tuesday, July 11, 2017

A Capitol Hill rally today urging the Trump administration to keep intact the boundaries of 27 national monuments being reviewed raised this question: What specifically will lawmakers do if Interior Secretary Ryan Zinke recommends shrinking or rolling back those protections?

"We will fight" President Trump if he tries to reverse monument designations under the 1906 Antiquities Act, said Sen. Maria Cantwell (D-Wash.), the ranking member of the Energy and Natural Resources Committee, who spoke at the gathering along with five other Western Democratic senators.

But it's not clear that fight will involve a legislative battle — at least in the Senate.

"Congress always has a role to play, but I don't think that they are going to get involved in this," Sen. Tom Udall (D-N.M.) told reporters after his remarks.

Udall, who is ranking member of the Senate Interior Appropriations subcommittee, said that he doesn't believe the president has the legal authority to reduce or rescind national monument designations and that if the president tries to do so, the courts — both judicial and public opinion — will intervene.

Udall said there was "overwhelming support" from the public for the two monuments — Organ Mountains-Desert Peaks and Rio Grande del Norte — under review in New Mexico.

"Congress can always expand, it can always limit, it can do whatever it wants [on monuments], but I don't foresee that," Udall said. "Hopefully, we won't have to touch the New Mexico monuments or any of these others, for that matter."

House Natural Resources Chairman Rob Bishop (R-Utah) believes the Antiquities Act ultimately needs a legislative fix; he also has indicated he might introduce a bill related specifically to the footprint of Bears Ears National Monument in Utah during this legislative session. But for now, lawmakers in both chambers are content to wait and see what Zinke recommends in August and what action the president takes based on those proposals (*E&E Daily*, June 13).

Amid chants of "keep public lands in public hands," the Democratic senators today joined the League of Conservation Voters and members of the public outside the Capitol to emphasize the economic, spiritual and environmental benefits of the national monuments in their home states.

"This is critical to our economy in the West," said Sen. Michael Bennet of Colorado, noting that the Outdoor Retailer trade show decided earlier this year to move its twice-a-year extravaganza from Salt Lake City to Denver in 2018 to protest Utah efforts to reduce monument designations or transfer public lands.

Sen. Martin Heinrich of New Mexico disputed the argument that recent monument designations, including the ones in his home state, have been dictated by Washington rather than locals.

"There's been a lot of talk about what Washington did," Heinrich said today. "Well, with these two monuments, Washington didn't do anything. They just listened to the local voices."

Senate Democrats Catherine Cortez Masto of Nevada and Brian Schatz of Hawaii also spoke at the rally.

Interior received more than 1.4 million public comments on the monument review as of 11:59 p.m. yesterday, the deadline for submissions, according to [Regulations.gov](https://www.regulations.gov), but it's not clear how much weight Zinke will give them in his final analysis, due Aug. 24.

"The secretary is encouraged by the interest in the department's work and appreciates advocates on all sides of the issue weighing in," Interior spokeswoman Heather Swift told E&E News earlier this week (*E&E News PM*, July 10). "The department is hard at work reviewing all the comments, and we will have them read by the end of the review period."

Trump issued an executive order in late April mandating a review of the status of 27 land and marine national monuments created since 1996 that encompass more than 100,000 acres. The order required an interim report with specific recommendations for Bears Ears due June 10. Zinke recommended significantly shrinking the 1.35-million-acre Bears Ears monument in southeastern Utah in that report but didn't specify by how much.

Zinke told Colorado lawmakers during public appearances on Capitol Hill last month that he probably wouldn't recommend major changes to the state's Canyons of the Ancients National Monument.

"It's currently not on our priority review list," he told Sen. Cory Gardner (R-Colo.) during an Energy and Natural Resources Committee hearing (*E&E News PM*, June 20).

<http://bit.ly/2t1rnRC>

4. Texas political veteran tapped for key post

Michael Doyle, E&E reporter

Published: Tuesday, July 11, 2017

The Trump administration has nominated former Texas state official Susan Combs to serve as the Interior Department's assistant secretary for policy, management and budget.

A rancher from the Big Bend region, near the U.S.-Mexico border, Combs previously served as a lawmaker and the state's first female agriculture commissioner and, later, as the comptroller of public accounts.

The White House announcement praised the 72-year-old Vassar College and University of Texas School of Law graduate for "writing and passing the state's private property legislation, and working to ensure greater transparency in government spending" during her two terms in the Texas Legislature.



Susan Combs. Gage Skidmore/Wikipedia

"Susan is highly-qualified and will be a huge asset as we work to make government more efficient and more accountable to the people," Interior Secretary Ryan Zinke said in a statement today. "Her experience in both elected office and in the private sector, will bring a great perspective to our team here at the Department."

Calling Combs a "fierce advocate for rural Texans," Republican Sen. John Cornyn of Texas added today that she has "a clear record of promoting pro-growth policies and efficiently managing large organizations."

If confirmed by the Republican-controlled Senate, Combs would be the top budget officer for the department, which employs some 70,000 full-time workers and for which the Trump administration has proposed an \$11.7 billion budget for fiscal 2018. The Trump proposal amounts to a 12 percent cut.

Combs' nomination may be particularly welcome for Zinke's team, which still faces vacancies in myriad top Interior Department positions.

Trump's nominee for deputy secretary, lawyer and lobbyist David Bernhardt, passed successfully through the Senate Energy and Natural Resources Committee but is still awaiting Senate action. No nominees have yet been named for four other assistant secretary posts, or for the directorship of agencies including the National Park Service and the Fish and Wildlife Service.

Combs was a potential contender for the position of Agriculture secretary, a post that ultimately went to former Georgia Gov. Sonny Perdue (R) (*Greenwire*, Jan. 3).

Originally a supporter of former businesswoman Carly Fiorina's unsuccessful presidential campaign, Combs authored a book published this year titled "Texas Tenacity: A Call for Women to Direct Their Destiny."

"Susan Combs has pretty much been, been through, or done it all," the Amazon.com book blurb states. "She's experienced domestic abuse, fought for children's rights, pounded tough pavements running for office, and won and lost battles in the bruising world of politics."

Since leaving elected office, Combs has been working on HERdacity, described as an "online empowerment community for women."

<http://bit.ly/2tbhT1D>

5. House panel to take up 'sue-and-settle' bill

Amanda Reilly, E&E News reporter

Published: Tuesday, July 11, 2017

The House Judiciary Committee this week will take up legislation that supporters say is needed to prevent the so-called sue-and-settle phenomenon.

Introduced by Rep. Doug Collins (R-Ga.), **H.R. 469** would require agencies to publicly post and report to Congress any information on lawsuits, consent decrees or settlement agreements. The measure also prohibits same-day filing of complaints and pre-negotiated settlements (*Greenwire*, Jan. 13).

Collins and other backers of the bill, including Judiciary Chairman Bob Goodlatte (R-Va.), have argued that, under the Obama administration, green groups exploited citizen suit provisions of environmental laws to force friendly agencies to issue regulations.

"This legislation lessens the power of bureaucrats to burden hardworking Americans with rules that bog down our economy and erode Americans' right to know about and respond to federal rulemaking," Collins said in a statement earlier this year.

The markup comes after U.S. EPA Administrator Scott Pruitt directed his agency to limit the practice of "sue and settle" (*Greenwire*, July 3).

Democrats, environmental groups and former Obama administration officials have rejected the idea that agencies have invited litigation to create regulations.

Schedule: The markup is Wednesday, July 12, at 10 a.m. in 2141 Rayburn.

<http://bit.ly/2u5AVL2>

6. More people work at Kohl's stores than in mines

Published: Tuesday, July 11, 2017

Coal has kept its tight grip on the American imagination even as its share of the country's energy mix keeps slipping.

The fossil fuel comprises 15 percent of U.S. energy resources and produces about one-third of the country's electricity. Coal miners numbered fewer than 66,000 in 2015 — less than half the number of people employed by the Kohl's department store chain.

Yet coal dominates the country's political narrative in a way that renewables, hydraulic fracturing and even oil do not. It's coal jobs that President Trump touts to show off his commitment to the rural working class.

Indeed, the decline of coal has carried ruinous implications for Appalachian areas like Boone County, W.Va., home of the once-bustling Coal Festival that nowadays barely draws a crowd. Men with only a high school education cannot find other work that pays as well as mining. The local governments and school districts that depend on coal revenue are grappling with budgets in free fall.

But coal's clout is more than financial.

"Entire communities were formed to mine" coal, said Barbara Freese, author of "Coal: A Human History."
"Coal created its own geographical area and culture."

In West Virginia, people worry about what will happen to the mingled history of coal and culture if the former disappears.

"We're keeping our heritage alive. We don't want it to be a dying industry," said Delores Cook, who runs Boone County's Coal Festival. "This has been a way of life for people in West Virginia, keeping the lights on for all of the United States, for many, many years" (Karen Heller, *Washington Post*, June 9). — AAA

<http://bit.ly/2t1jOKD>

7. Senate confirms reg agency chief; other items in limbo

Manuel Quiñones, E&E News reporter

Published: Tuesday, July 11, 2017

The Senate last night approved the nomination of Neomi Rao to head the White House Office of Information and Regulatory Affairs, 54-41.

Rao — who has most recently led the Center for the Study of the Administrative State at George Mason University's law school — will take the helm at OIRA, an arm of the Office of Management and Budget, as it prepares to release the Trump administration's first Unified Agenda. OIRA has also been busy implementing executive orders to cut federal regulations.

Rao has also worked as associate counsel and special assistant to President George W. Bush, counsel to the Senate Judiciary Committee and clerk for Supreme Court Justice Clarence Thomas.

The Senate last night also moved forward with considering the nomination of David Nye to sit on the U.S. District Court for the District of Idaho.

Lawmakers on both sides of the aisle are looking to fill numerous posts, including at the Federal Energy Regulatory Commission (*[see related story](#)*).

Some Republicans and the administration blame Democrats for slow-walking the president's choices. And the White House yesterday released a memo to make its case.

It said the Senate has only confirmed roughly 50 of the president's 197 nominees. Solicitor general pick Noel Francisco is one of the White House's priorities.

Senate Democrats shot back, saying President Trump has made fewer nominations when compared with other presidents. "The White House has only itself to blame for the slow pace at which they've filled vacant administration posts," the minority said in a statement.

Energy bill

Senate Majority Whip John Cornyn (R-Texas) said yesterday it was unclear when the bipartisan energy bill, S. 1460, will appear on the floor this month.

"I know they're working on it, but I don't know the timing," he told E&E News yesterday. "I think that's one of those things that could be a gap filler, but the schedule's a little uncertain right now."

Cornyn added it was possible the measure would have to wait until after the August recess, saying legislation reauthorizing the Food and Drug Administration and Coast Guard may come first.

Energy and Natural Resources Committee ranking member Maria Cantwell (D-Wash.) also said it was unclear where the energy bill would fit into the busy July agenda.

"I think we should take it up, but we've got to get these guys to decide about all of this other stuff," she said.

Reporter Geof Koss contributed.

<http://bit.ly/2uaWGsP>

8. Solar funding down as uncertainty grows over trade

Daniel Cusick, E&E News reporter

Published: Tuesday, July 11, 2017

The solar finance sector cooled over the last three months as concerns about trade disputes, softening U.S. markets and other uncertainties cast a shadow over the world's fastest-growing energy field.

Corporate funding of solar fell steeply during the second quarter of 2017 compared with the same period in 2016, with venture capital, public market and debt financing totaling \$1.4 billion from April to June, according to a new analysis from Mercom Capital Group LLC.

That compares with \$3.2 billion raised during the first quarter of this year.

Yet when measured year-to-date, the analysis shows solar spending was slightly higher in the first six months of 2017 — at \$4.6 billion — compared with \$4.5 billion during the first half of 2016, experts said.

"There is a great deal of uncertainty in the solar markets right now, which is reflected in funding activity," Raj Prabhu, CEO of Mercom Capital Group, said in a statement.

But Prabhu said that publicly traded solar companies, especially on U.S. stock markets, have performed well in the first six months of 2017, even as a major trade case involving Georgia-based Suniva Inc. threatens to disrupt markets in the future.

"A lot is riding on how the Suniva anti-dumping case plays out as it will dictate market dynamics going forward," Prabhu said.

Suniva is one of two U.S. firms to ask the U.S. International Trade Commission to impose stiff penalties on inexpensive solar panels that have flooded the U.S. market over the last decade, making it increasingly difficult for American firms to compete on prices.

Among the core tenets of the Suniva trade petition are a 78-cent-per-watt floor on the price of solar modules, as well as a new 40-cent-per-watt tariff on imports of solar panels from China and other low-cost foreign manufacturers. A decision from the ITC is expected later this year.

The petition has garnered stiff opposition from many in the industry, including U.S. solar developers, installers and others who argue that solar's steeply falling costs — fueled by cheap modules and panels — have been the primary driver of the sector's remarkable growth over the last decade.

A recent analysis from GTM Research suggests the U.S. market could contract by half if the Suniva petition leads to new sanctions from the Trump administration (*Energywire*, June 26). The Solar Energy Industries

Association predicted the U.S. solar sector would shed 88,000 jobs under new trade sanctions (*E&E News PM*, June 15).

Experts have also observed a softening of key U.S. solar markets, including California, where residential rooftop solar has experienced a trend known as "consumer fatigue." Alternately, utility-scale solar has remained strong, accounting for much of the roughly 2 gigawatts of new solar capacity added between January and March of this year (*Climatewire*, June 8).

The mixed signals appear to have had a near-term negative effect on deep-pocketed solar funders, according to Mercom.

In 2017's second quarter, venture capital (VC) funding for the solar sector saw a steep decline, estimated at \$128 million in 23 deals. That's compared with \$585 million in 22 deals for the first quarter of this year, according to the analysis.

But when measured over the first six months of the year, global VC spending was 23 percent higher in 2017 than in 2016, at \$713 million, largely due to the strong first quarter, Mercom said.

Public market funding was especially up over the first half of 2017, with \$934 million raised compared with \$276 million during the same period of 2016. The sector also boosted spending levels between the first and second quarters of 2017, at \$473 million for the April-June period, compared with \$461 million from January to March.

Mercom tracked 206 new large-scale project announcements in the second quarter totaling 11.1 GW of solar power. Investment firms and funds were the most active acquirers for the first half of 2017, picking up 37 projects totaling 4.2 GW. Project developers reported 17 transactions accounting for 4.6 GW.

Top VC deals for the first half of 2017 include:

- \$200 million raised by ReNew Power Ventures Pvt. Ltd.
- \$155 million raised by Greenko Energy Holdings.
- \$125 million secured by Hero Future Energies Ltd.
- \$55 million raised by Silicon Ranch Corp.

<http://bit.ly/2ufEhvJ>

9. Bipartisan bill would boost recreational fishing

Cecelia Smith Schoenwalder, E&E News reporter

Published: Tuesday, July 11, 2017

Mississippi Sen. Roger Wicker (R) yesterday introduced legislation that aims to improve recreational fishermen's access to fisheries.

The "Modernizing Recreational Fisheries Management Act" would encourage regional fishery management councils to update policies regarding recreational anglers that use mixed-use fisheries in the Gulf of Mexico.

Under the bill, fishery management councils for the south Atlantic Ocean and the Gulf of Mexico would review the fishery allocations every five years.

The bill, which would amend the Magnuson-Stevens Fishery Conservation and Management Act, would also allow for alternatives to the current 10-year limit on rebuilding fish stocks to be considered.

Wicker said in a statement that Mississippi's fishermen have been dealing with government policies "based on bad data" for too long.

"This legislation would be an important first step to modernize the federal fishing policies on the Gulf Coast and preserve access to Mississippi's bountiful fishing resources for years to come," Wicker said.

The bill is co-sponsored by Sens. Bill Nelson (D-Fla.), Roy Blunt (R-Mo.), Joe Manchin (D-W.Va.), John Kennedy (R-La.) and Brian Schatz (D-Hawaii).

A House version, H.R. 2023, was introduced in April ([*Greenwire*](#), April 6).

Recreational fishing groups support the House and Senate measures.

"This bipartisan legislation includes key provisions that will adapt federal fisheries management to manage recreational fishing in a way that better achieves conservation and public access goals," said Mike Nussman, president of the American Sportfishing Association.

<http://bit.ly/2tKelja>

10. Governmentwide watchdog closer to confirmation

[Kevin Bogardus](#), E&E News reporter

Published: Tuesday, July 11, 2017

President Trump's nominee to lead the U.S. Office of Special Counsel is a step closer to Senate confirmation.



Henry Kerner. Cause of Action Institute

The Homeland Security and Governmental Affairs Committee this morning approved Henry Kerner by voice vote, along with Claire Grady to be undersecretary for management at the Department of Homeland Security.

The Office of Special Counsel protects federal employees from banned workplace practices, such as discrimination and retaliation for whistleblowing.

Kerner boasts investigative experience, working for the conservative-leaning watchdog group Cause of Action Institute. He has also worked for the House Oversight and Government Reform Committee and the Senate Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations.

Before coming to Capitol Hill, Kerner worked as a longtime prosecutor, including as a deputy district attorney for Los Angeles County.

If confirmed, Kerner would replace Carolyn Lerner; she received bipartisan support to stay on the job and was nominated for another term by President Obama, but President Trump withdrew that nomination in February.

<http://bit.ly/2u5BdS8>

11. Trump gets first chance to shape powerful appeals court

Amanda Reilly, E&E News reporter

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A conservative judge who has been skeptical of regulations is stepping down from a federal court that is highly influential in environmental law.

Judge Janice Rogers Brown will leave the U.S. Court of Appeals for the District of Columbia Circuit on Aug. 31, the court announced yesterday. She will not seek senior status.

Brown's retirement gives President Trump his first nomination for the court, which is home to litigation over most big environmental rules in which the defendant is U.S. EPA or another federal agency. The fight over the seat is likely to generate a lot of interest and be highly partisan.

"There are plenty of people all over the country who would love to sit on that court," said Carl Tobias, a professor at the University of Richmond School of Law who specializes in judicial selection. "One reason is because of the caseload. They get fascinating cases. The other is that it's a springboard to the Supreme Court."

Brown, 68, worked for several government agencies in California before being appointed to serve on the California Supreme Court in 1996. She was the first African-American to serve on California's highest court.

President George W. Bush first nominated Brown to serve on the D.C. Circuit in 2003 for the seat vacated when Judge Stephen Williams took senior status.

But Brown's nomination faced stiff Democratic opposition, and it wasn't until 2005 that she was finally appointed to the D.C. Circuit. She was confirmed in June of that year by a 56-43 vote.

"She was one of the most controversial and opposed by the environmental community of the Bush nominees," said Glenn Sugameli, an environmental lawyer who founded the Judging the Environment project.

In her opinions and dissents on the D.C. Circuit, Brown has been skeptical of giving federal agencies power without clear direction from Congress.

"She in general was skeptical of regulatory power. You could see that in her opinions," said Jonathan Adler, a law professor at Case Western Reserve University. "That would translate into opinions that were not always congenial to regulatory agencies."

During the Bush administration, Brown was part of D.C. Circuit panels that struck down the administration's mercury cap-and-trade rule and its Clean Air Act new source review rule.

During the Obama administration, EPA's greenhouse gas program was a target of her skepticism.

In a 23-page dissent to the D.C. Circuit's 2012 decision to uphold Obama administration greenhouse gas regulations, Brown raised doubt that EPA had the authority to regulate heat-trapping emissions under the Clean Air Act.

Brown made clear that she disagreed with the Supreme Court's 2007 decision in *Massachusetts v. EPA*, in which justices found EPA had such authority.

"At bottom, bad decisions make bad law," Brown wrote in a dissent when the D.C. Circuit declined to rehear the case. The D.C. Circuit had "read Massachusetts to its illogical ends and it is the American industry that will have to pay," she wrote (*Greenwire*, Dec. 20, 2012).

She has questioned the scope of the federal delegation doctrine, as well as legal doctrines that give agencies deference in court.

In a concurring opinion earlier this year, Brown raised some concerns with debates in legal circles on the *Chevron* doctrine, under which courts defer to agencies when Congress has been silent or ambiguous on an issue.

Brown said she worried that some scholars advocate leaving out the first step of the *Chevron* analysis — which involves analyzing where Congress stands on an issue — and simply looking at whether a federal agency action is reasonable.

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

"It isn't fair. It isn't nice," Brown wrote, quoting "Luck Be a Lady," the song from the musical "Guys and Dolls" (*Greenwire*, April 11).

Notably, some of Brown's opinions for the D.C. Circuit in the realm of regulatory scope during the Obama administration were overturned by the Supreme Court.

Those included the court's 2013 opinion curtailing Amtrak's ability to shape regulations to benefit its bottom line and a 2015 opinion throwing out a high-profile Federal Energy Regulatory Commission order that provided incentives for electricity users to consume less power (*Greenwire*, Jan. 25, 2016).

In one of her most recent actions on the court, Brown last week dissented from her colleagues' decision to strike down the Trump administration's stay of an Obama-era EPA rule curbing methane emissions from new oil and gas operations.

Brown wrote that she would have tossed out environmentalists' challenge for lack of jurisdiction. The Trump administration on Friday cited her dissent in its bid to halt compliance with the court's decision (*Greenwire*, July 3).

Sugameli said environmentalists' fears about Brown were borne out in her activity on the D.C. Circuit.

"The problem was what was identified when she was nominated, which was her unwarranted hostility to basic environmental safeguards and other government actions," he said.

Breaking with recent precedent

In the D.C. Circuit, it's common for judges to stay on after they retire and continue to hear cases as part of three-judge panels. A senior judge essentially gets to choose how many cases to take on.

Brown, though, has decided to forgo taking senior status.

"She's not following what had been the recent practice of continuing to take substantial caseloads as a senior judge," Adler said.

Brown's decision not to seek senior status has implications for the court, which currently has a 7-4 liberal tilt among active judges.

"Her not taking senior status does, at least until there's a replacement, further decrease the likelihood of a conservative panel on that court," Adler said.

Trump is likely to tap a younger conservative to fill Brown's vacant seat.

"My guess is that he'll consult pretty closely with the Federalist Society," Tobias said, referring to the conservative legal group that has wielded heavy influence in Trump's judicial picks.

But it's not clear whether Trump will choose a D.C. practitioner with heavy experience in administrative law or someone from outside the Beltway.

Adler said Trump may use the seat to alleviate logjams of potential nominees in other circuits.

For example, the president could choose to appoint one of three Texans for the D.C. Circuit who are currently in the running for two vacant seats in the 5th U.S. Circuit Court of Appeals, Adler said.

Those three are District Court Judge Reed O'Connor, Texas Supreme Court Justice Don Willett and Andy Oldham, a deputy general counsel to Texas Gov. Greg Abbott (R).

"If you were looking to replace her [Brown] with someone who has voiced a similar skepticism of regulation and some of the current deference doctrines, Justice Willett would be that person," Adler said.

Brown's retirement comes the same week that the 7th U.S. Circuit Court of Appeals announced that Judge Ann Williams, a Clinton appointee and the first African-American to sit on that court, has taken senior status.

There are currently 21 vacancies in federal courts of appeals. Trump has so far appointed one appellate judge: Judge Amul Thapar on the 6th U.S. Circuit Court of Appeals. He was confirmed 52-44 in late May (E&E News, May 25).

<http://bit.ly/2uaYHFo>

12. Salazar, other former officials join reservation land dispute

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Several former top federal officials have signed onto a lawsuit between the Eastern Shoshone Tribe and Wyoming over the boundary of the Wind River Indian Reservation, including former Interior Secretary Ken Salazar.

The Eastern Shoshone Tribe has the backing of Salazar, who served under President Obama, and former Solicitor General Seth Waxman, who served under President Clinton. The Northern Arapaho Tribe, which shares the reservation with the Eastern Shoshone, has hired Paul Clement, a solicitor general under President George W. Bush.

The tribes have filed separate legal challenges to a February decision by the 10th U.S. Circuit Court of Appeals, which ruled against them and the federal government. The ruling sided with the state's claim that disputed land was removed from the reservation in 1905.

"The divided panel decision in this case strips the Northern Arapaho and Eastern Shoshone Tribes of nearly two-thirds of their reservation homeland," wrote Clement (Arno Rosenfeld, *Billings [Mont.] Gazette*, July 10). — **NB**

<http://bit.ly/2ub2F0J>