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July 28, 2017: Attached is the current issue of the newsletter Public Lands News (Volume 42 Number 15), in .doc format and in PDF format. Below are the headlines. We thank you for reading Public Lands News.

The Editors

#### **Notice: Publishing Schedule Change**

*We are modifying our publishing schedule during the annual Congressional summer recess. The next issue of Public Lands News will be published on August 25. Because the Senate now intends to meet during the first two weeks of the planned recess we will publish a bulletin or bulletins as significant news breaks.*

*We will resume a regular biweekly publishing schedule of the formal newsletter in late August.*

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House panel okays money bill; Senate cap less onerous

The House Appropriations Committee July 18 approved a rider-packed fiscal year 2018 Interior and related agencies spending bill (HR 3354) and cleared the measure for House floor action. The bill could reach the House floor next month.

Although the committee bill would not go nearly as far as the Trump administration requested in reducing domestic spending for fiscal 2018, the ceiling of \$31.4 billion is \$800 million less than a fiscal 2018 appropriation of \$32.2 billion.

The Trump administration had recommended \$4.3 billion less than the subcommittee number, or \$27.1 billion. The House subcommittee on Interior and Related Agencies had approved the bill July 12.

The Senate Appropriations Committee July 20 set up a titanic battle for later this year by approving a spending ceiling for the Interior bill that is \$600 million more than the House committee level, and almost \$5 billion more than the Trump administration request.

The Senate subcommittee on Interior appropriations has no mark-up scheduled yet for its counterpart bill, a committee spokesman said.

Complementary to the appropriations actions the House Budget Committee July 19 approved a fiscal year 2018 Congressional budget that, if accepted by the House, would theoretically allow appropriations bills to proceed to the floor. That House budget would authorize \$7.5 billion less than the Senate for domestic operations.

One provision of the House budget would reportedly clear the way for the House Natural Resources Committee to act on legislation to open the coastal plain of the Arctic National Wildlife Refuge (ANWR) for oil and gas development. *(See related article page 14.)*

At the appropriations committee mark-up of HR 3354 Rep. Nita Lowey (D-N.Y.) attempted to head off ANWR leasing by proposing an amendment to forbid any spending on it. That amendment was defeated by a voice vote.

The House Appropriations Committee July 18 in its mark-up also rejected several major Democratic amendments, including one that would have struck a rider from the bill that would ban any work on listing any wolf subspecies under the Endangered Species Act.

**Wild horse rider:** The committee did accept 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.

In defending the amendment subcommittee on Interior appropriations chairman Ken Calvert (R-Calif.) argued, "The amendment only allows the humane euthanizing of unadopted horses and burros, just as we do for unadopted dogs and cats. This amendment does not allow horses and burros to be sold for processing for commercial products for consumption."

But Rep. Debbie Wasserman Shultz (D-Fla.) said, "This amendment would allow the cruel and inhumane practice of large-scale euthanasia of wild horses and burros. It's as simple as this: Americans overwhelmingly oppose the extermination of wild horses."

Wild horse advocates also protested. Said Suzanne Roy of the American Wild Horse Campaign, "Let's be clear: House Appropriations Committee members just signed a death warrant for America's mustangs and it will lead to the wholesale destruction of these irreplaceable national treasures."

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.

On a different subject ranking subcommittee Democrat Betty McCollum (D-Minn.) lashed out in committee at the spending ceiling assigned by the House Republican majority. "This level is simply too low. It is a step backwards. A cut of this magnitude endangers our nation's natural and cultural resources," she said.

She also objected to the inclusion of numerous policy amendments (16 by her count), in the bill. "I must also express my dismay with the 16 partisan riders in this bill. These extraneous provisions may benefit polluters, but they do nothing to help the American people," she said. "These riders undermine clean air and clean water standards, put the health and safety of American families at risk, and roll back protections for endangered species."

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 land acquisitions.

As has become customary, wildfire suppression ate 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.

Subcommittee chairman Calvert defended his bill, saying, "The agencies funded in the Interior and Environment Appropriations bill do important work protecting public lands, the air we breathe, and the water we drink. Our subcommittee prioritized proven programs that have a meaningful impact to achieve these goals while also ensuring our economy can continue to grow."

The amendments/riders in the bill include such things as 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 ban the listing of any wolf species in the lower 48 states as threatened or endangered under the Endangered Species Act (Section 117).

That blanket ban would forbid the use of funds to "treat" any wolf species as threatened or endangered under the act, including the Mexican gray wolf. The Fish and Wildlife Service June 30 proposed a new recovery plan for the endangered Mexican gray wolf that anticipates a future population in the Southwest of the United States of 320 wolves, plus 170 in Mexico. The population of the lobo, the most endangered of the wolf subspecies in the world, is currently 130 in Arizona and New Mexico.

Said Defenders of Wildlife President Jamie Rappaport Clark of the committee amendment, "This wolf rider means certain death for America's wolves. It forces the Department of the Interior to abdicate its responsibilities for protecting gray wolves, which are currently listed as endangered in much of the contiguous United States. It also disrupts the abilities of other federal agencies to comply with their obligations under the law. It is particularly egregious that this rider would halt all efforts to protect and recover the Mexican gray wolf the most endangered gray wolf in the world with just 113 in the U.S. and 35 in Mexico."

**Appropriations:** Here are some House committee recommendations in HR 3354 compared to final fiscal 2017 numbers:

**NATIONAL FOREST SYSTEM:** The committee approved \$1.493 billion, or \$20 million less than a fiscal 2017 appropriation of \$1.513 billion. The committee would also shift \$392.5 million from a wildfire account for hazardous fuels management to the National Forest System line item, bringing the total to \$1.886 billion.

**FOREST PRODUCTS:** The committee approved \$370 million for forest products (i.e. timber sales), or \$2 million more than a fiscal 2017 appropriation of \$368 million.

**BLM RESOURCE MANAGEMENT:** The committee approved \$1.075 billion, or \$20 million less than the fiscal 2017 appropriation of \$1.095 billion. When a decrease of \$18.6 million for federal land acquisition is deducted, the subcommittee allocation would only drop by \$1.4 million.

**WILD HORSES AND BURROS:** The committee approved \$80.6 million, the same as a fiscal 2017 appropriation of \$80.6 million.

**ENERGY AND MINERALS:** The committee approved \$168.4 million, or \$9 million less than a fiscal appropriation of \$177.4 million. Of note the committee approved \$11 million less for oil and gas than the Trump administration requested, \$118.8 million compared to a request of \$130 million.

**NATIONAL LANDSCAPE CONSERVATION SYSTEM:** The committee approved \$35.8 million, or \$1 million less than a fiscal 2017 appropriation of \$36.8 million. The Trump administration had requested \$8.1 million less.

**WILDFIRE FOREST SERVICE:** For a wildfire appropriation the committee recommended \$2.898 billion, compared to a fiscal 2017 appropriation of \$2.833 billion. For an emergency account called FLAME the committee recommended no money, compared to a fiscal 2017 FLAME appropriation of \$342 million.

**WILDFIRE INTERIOR:** For a wildfire appropriation the recommendation is \$956 million, compared to a fiscal 2017 appropriation of \$943 million. For an emergency account called FLAME the committee proposed no money, compared to a fiscal 2017 FLAME appropriation of \$65 million.

In addition, the committee did not address bipartisan legislative proposals (HR 2862, HR 2936) that would transfer emergency fire-fighting appropriations to a category of disaster funding. Such a shift would free up some \$400 million per year from the appropriations bill for other purposes and prevent the Forest Service from borrowing from other line programs to pay for fire fighting.

The committee report accompanying HR 3354 said a transfer of emergency wildfire costs to disaster spending is not within the panel's purview, being a budget question. But the report did express some optimism.

"While the budget request does not include a specific proposal, the Committee notes that the Administration has indicated its interest in working with Congress to find a solution," such as HR 2862 introduced by Rep. Mike Simpson (R-Idaho), the report says.

**PAYMENTS-IN-LIEU OF TAXES:** The committee approved \$465 million, the same as a fiscal 2017 appropriation. The Trump administration had recommended \$397 million.

**LWCF FEDERAL:** The committee approved \$110 million for federal land acquisition, or \$79 million less than a fiscal 2017 appropriation of \$189 million. The Trump administration had recommended an appropriation of \$51 million for land acquisition.

By agency BLM would receive \$12.8 million compared to \$31.4 million in fiscal 2017; the Fish and Wildlife Service would receive \$40.6 million compared to \$50 million; the Park Service would receive \$31.6 million compared to \$42 million; and the Forest Service would receive \$25 million compared to \$54.4 million.

**FWS REFUGE SYSTEM:** The committee approved \$483.9 million, the same as a fiscal 2017 appropriation.

**Riders/amendments:** HR 3354 includes these amendments:

*Wolf spending:* Section 117 of the bill forbids spending any money "to treat" any wolf as a threatened or endangered species under the Endangered Species Act (ESA). That would include the Mexican gray wolf that the Fish and Wildlife Service (FWS) designated as an endangered subspecies in January 2015. (The Mexican wolf was previously protected under a blanket gray wolf listing.)

On June 30 FWS proposed a new recovery plan for Mexican wolves that anticipates a future population in the Southwest of the United States of 320 animals, plus 170 in Mexico. The population of the lobo, the most endangered



of the wolf subspecies in the world, is currently 130 in Arizona and New Mexico.

*Wolf delisting - Wyoming:* Section 116 of the bill directs FWS to once again issue a rule keeping the gray wolf removed from listing under the Endangered Species Act in Wyoming. That is already the law but the amendment/rider would also exempt the rule from judicial review.

On Sept. 10, 2012, FWS initially issued a rule removing the gray wolf from the ESA in Wyoming. Environmentalists took that rule to court and won at the district court level but lost at the appeals court level. So on April 26 FWS for a second time removed the wolf from the ESA in Wyoming. Now appropriators are asking FWS to do so for a third time, only now the rule would be exempt from court review.

*Sage-grouse plans:* Section 113 would forbid FWS from proposing the listing of the greater sage-grouse as threatened or endangered under the ESA. Currently the greater sage-grouse is governed by 98 BLM and Forest Service land use plans, plus state plans, but is not proposed for listing under the ESA. That was the sum and substance of September 2015 actions by the Obama administration. (See related article page 16.)

Now the Trump administration, under Secretary of Interior Ryan Zinke's June 7 Secretarial Order 3353, has directed a review of the federal and state plans to determine compatibility. The appropriations language would make sure that Zinke doesn't rebel and propose a listing, however unlikely.

*Wetlands regulation:* Section 431 would authorize EPA and the Corps of Engineers to rescind an Obama administration rule governing permits to disturb wetlands under the Clean Water Act and to reinstall a Bush administration rule. EPA and the Corps proposed June 27 to do just that, but that effort might require an expensive and time-consuming exercise that could be exposed to a lawsuit.

Section 431 would have little immediate impact because the Sixth U.S. Court of Appeals has already stayed the 2015 Obama rule.

### First House challenge to DoI personnel changes defeated

The House Appropriations Committee July 18 rejected a proposal to force federal land management agencies to consult with Congress before undertaking large staffing changes.

The proposal, offered as an amendment to a fiscal year 2018 Interior and Related Agencies appropriations bill, addressed a Trump administration initiative to substantially reduce the number of domestic federal employees. Offered by Rep. Chellie Pingree (D-Me.), the proposal directly addresses an Interior Department plan to transfer as many as 50 people, many of them from the Senior Executive Service (SES), out of their present jobs.

"Where there are massive staffing changes, reorganizations and reassignments any business owner would make a plan and would share that plan with those who have the purse strings to make it happen," she said. "We have the purse strings and we have oversight over those changes."

Pingree also addressed the substance of the SES transfers. "To give you context of some changes that are occurring at the department, last month leaders of these agencies, some of whom have worked decades to protect wildfire, forest lands and wildlife refuges have been give 15 days 15 days to transfer to another department," she said.

But Rep. Ken Calvert (R-Calif.), chairman of the House subcommittee on Interior Appropriations, said personnel details should not be the business of Congress. "It's a terrible precedent for Congress to interfere with the Senior Executive Service," he said.

Besides, he said, the subcommittee had already conducted oversight. "This topic was discussed in each of our subcommittee hearings this year," he said. The committee then rejected the Pingree amendment by voice vote.

**Senators jump in:** Seven Senate Democrats July 24 asked the Interior Department Inspector General to investigate the transfer of the 50 SES employees.

The senators, led by Sen. Maria Cantwell (D-Wash.), said, "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.

In an early move Zinke has *in camera* reportedly begun reassigning as many as 50 people, many of them from the SES.

BLM is down for a reduction in force of 1,000 employees, to the distress of agency retirees organized as the Public Lands Foundation. Foundation President Jesse J. Juen wrote Sen. Lisa Murkowski (R-Alaska), chairman of the Senate subcommittee on Interior Appropriations July 18, and said, "Secretary of the Interior Zinke has issued a secretarial order to expand access to public lands and increase recreation, hunting and fishing opportunities. What the Secretary is asking is important, however, it will not be possible with the funding outlined in the President's budget. This puts the agency in an impossible situation and western communities in a lose-lose scenario."

At the top end of the Interior Department the Senate July 24 approved the nomination of David Bernhardt as the next deputy secretary of the department by a vote of 53-to-43. That broke a logjam of backed-up public lands nominees.

Separately, on July 19 the White House announced that President Trump intends to nominate Sen. Dan Sullivan's (R-Alaska) chief of staff, Joseph Balash, as the assistant secretary of Interior for Land and Mineral

Management. Balash would oversee BLM, among other things. He is a former commissioner of the Alaska Department of Natural Resources.

Thirdly, on July 27 the Senate Energy Committee was scheduled to consider the nomination of former Texas Comptroller Susan Combs as assistant secretary of Interior for Policy, but that meeting was cancelled.

A large alliance of groups asked Senate Energy Committee leaders to reject Combs's nomination. The environmentalists object particularly to her role in transferring the Texas endangered species program from the Department of Parks and Wildlife to her office.

"Ms. Combs used this new authority to oppose listing of species as threatened or endangered, which she described as 'incoming scud missiles' that impeded the state's business development," the groups wrote Murkowski, who chairs the energy committee, and ranking committee Democrat Maria Cantwell (D-Wash.)

At the agency level one rumor anticipates the nomination of Wyoming attorney Karen Budd-Falen as BLM director.

Budd-Falen is a veteran public lands attorney who has worked in the Interior Department and for the law firm Mountain States Legal Foundation, as well as her own law firm. Utah House Rules Chairman Michael E. Noel (R) had been high on the list of possible nominees for BLM director, but that possibility has reportedly faded.

Despite the personnel moves to the field contemplated by Zinke, the Trump administration still hasn't nominated agency directors.

Here are the acting heads of natural resource agencies and a few names being circulated as possible directors/chiefs:

*BLM:* Former BLM Eastern States Director Michael Nedd is serving as acting director. Utah's Noel had been high on the list of possible nominees for director, but that possibility has faded. Budd-Falen is a new favorite.

*Forest Service:* Tom Tidwell, long-time chief during the Obama administration, is expected to stay on for the immediate future until the Department of Agriculture gets a deputy secretary for natural resources.

*NPS:* Even before former director Jonathan B. Jarvis left office with the Obama administration the Park Service had made it clear that his assistant Mike Reynolds would serve as acting director in the early days of the Trump administration. A few names of possible nominees as director have been bandied about including David Mihalic, former superintendent of Yosemite National Park, and Rob Wallace, former Hill staffer. Wallace once served as assistant director of NPS and most recently has worked for i2Capital, an advisory company.

*FWS:* Jim Kurth has been serving as acting director, succeeding former director Dan Ashe. Kurth had served as the service's deputy director for operations for the last two years.

At the Department of Agriculture the Trump administration has yet to nominate an under secretary for Natural Resources but on June 16 Secretary of Agriculture Sonny Perdue named Dan Jiron as deputy under secretary for

Natural Resources. Jiron is well known in the public lands field as a recent associate chief of the Forest Service and for numerous recent high-level field positions.

In a side issue Rep. Scott Tipton (R-Colo.) and Sen. Cory Gardner (R-Colo.) introduced legislation (HR 2287, S 1007) in May that would authorize the transfer of BLM's headquarters from Washington, D.C., to one of 12 western states. The bills would allow the secretary of Interior to choose a new location.

Gardner in the past has suggested a transfer of the headquarters to Grand Junction, Colo. "Moving BLM's headquarters West is a commonsense solution that Coloradans from across the political spectrum support," he said.

But an alliance of BLM retirees says the BLM headquarters should remain in Washington, D.C. The Public Lands Foundation says BLM employees need to be in Washington to meet immediately with Congress and other players.

Said foundation president Jesse J. Juen in a June 14 letter to Zinke, "This includes attending impromptu yet critical meetings requiring face-to-face discussions and learning the process of how to be agile, flexible and handle difficult, complex and political discussions and situations related to the day-to-day demands of any administration, Congress, agency, community and partner."

### Zinke wouldn't change several monument designations

Secretary of Interior Ryan Zinke has begun to roll out recommendations on the possible modification/revocation of major national monuments in the West.

On July 21 he said he would recommend no modification to the Canyons of the Ancients National Monument. The 175,160-acre site was designated a monument in 2000.

Likewise, on July 13 Zinke said he would recommend no change to the 737,525-acre Craters of the Moon National Monument in Idaho, designated in 1924 and 2000, and the 194,451-acre Hanford Reach National Monument in Washington, designated in 2000.

On the other hand in a visit to Oregon a fortnight ago Zinke reportedly faulted the science used to identify the boundaries of a 103,000-acre Cascade-Siskiyou National Monument, designated in 2000 and 2017.

Oregon newspapers quoted Zinke as saying, "How were the boundaries made? Nobody knows how the boundaries were made." However, Zinke is not expected to make a final recommendation to President Trump until August 23.

Of the Canyons of the Ancients Zinke said, "Canyons of the Ancients is gorgeous land, but its monument status as the most high-density Native American archaeological sites in the Nation is clear. The history at this site spans thousands of years, and the federal protection of these objects and history will help us preserve this site for a thousand more years."

Of Craters of the Moon and Hanford Reach Zinke said, "When the President and I began the monument review process we absolutely realized that not all monuments are the same and that not all monuments would require modifications. Today I'm announcing that the Craters of the Moon and Hanford Reach National Monuments review process has concluded and I am recommending no changes be made to the monuments."

Zinke is now conducting an ambitious review of recent national monument designations, with the assumption he will recommend that President Trump trim the size of some of the monuments or outright revoke the designations.

Trump began the initiative April 26 when he signed an executive order directing the Interior Department to review the designations of national monuments of more than 100,000 acres made since 1996. Trump did not take the ultimate step and say he had the authority to revoke those designations.

The review is taking a look at the designation of 21 national monuments of more than 100,000 acres, plus an 87,500-acre Katahdin Woods and Waters National Monument in Maine and five huge marine monuments. That's 27 total.

The Trump-Zinke review could set the stage for the President to at least reduce the size of the national monuments, if not outright revoke their designations. It directs Secretary of Interior Ryan Zinke to report back to the White House within 120 days with recommendations for "Presidential actions, legislative proposals, or other actions consistent with law."

The schedule suggests a recommendation from Zinke to President Trump by the end of August.

Zinke has already taken one major step. On June 12 he recommended that the President reduce the size of the Bears Ears National Monument in southern Utah, touching off a political firestorm. President Obama designated the 1.3 million-acre Bears Ears monument on Dec. 28, 2016.

In one dramatic action, just before the comment period ended on the Zinke review July 10, the outdoor industry formally pulled its annual conference out of Salt Lake City.

The Outdoor Industry Association said it moved the conference to Denver worth \$45 million per year to the host city because of Utah politicians' hostility to national monuments.

The announcement that the rec industry conference will move to Denver represents the arrowhead in an all-out campaign by sportsmen and conservationists objecting to the review. Environmentalists say more than 2.5 million people have commented on the review.

Whether that public response will have an impact on the Trump administration remains to be seen. Western Republican politicians have overwhelmingly criticized the number and size of national monuments of more than 100,000 acres made since 1996.

Oregon politicians are divided over the Cascades-Siskiyou National Monument. President Clinton designated an original 53,000-acre monument in 2000 and President Obama expanded it by 50,000 acres January 12, for a total of 103,000 acres.

At the time of Obama's action, Rep. Greg Walden (R-Ore.) said, "I will work with the Trump Administration to do what we can to roll back this midnight expansion."

Walden said the Obama designation appeared to be rigged. "I've heard from landowners and county commissioners who were not even consulted in the crafting of the proposal," he said.

O&C County commissioners agreed in reporting on a meeting they held with Zinke a fortnight ago. Said Tim Freeman, president of the commissioners and Douglas County commissioner, "Commissioners pointed out that prior to the designation by President Obama, the counties were basically left out of discussions that were occurring with both of Oregon's U.S. senators, and the governor," Freeman said. "Impacts at the local level were ignored."

But Democratic Gov. Kate Brown (D-Ore.) and Oregon Democratic Sens. Jeff Merkley and Ron Wyden all supported the Obama designation. Merkley and Wyden wrote Zinke earlier this month, "We hope that you will consider the diverse public support and the public input process that led to expanding the Cascade-Siskiyou National Monument as you review national monument designations."

Oregon Attorney General Ellen Rosenblum, also a Democrat, reportedly took it one step further July 10 by writing Zinke with a threat to sue if Trump either revokes the designation or reduces the size of it.

Zinke was in Oregon over the July 15-16 weekend where he visited the Cascade-Siskiyou monument and talked to supporters and critics.

### BLM formally proposes rescission of fracturing rule

BLM made it official July 25: It is going to attempt to cancel outright a hydraulic fracturing rule of March 2015, instead of rewriting it.

The bureau said it does not intend to write a new regulation because other federal regulations and state standards adequately govern the practice.

In addition BLM suggested that it had authority to simply cancel the 2015 rule because the U.S. District Court in Wyoming set it aside in a June 21, 2016, decision. So if the rule never went into effect, BLM inferred, the bureau could simply cancel the rule.

"In sum, the 2015 final rule has never gone into effect, and was set aside by the District Court on June 21, 2016," said BLM. "The 2015 final rule would not go into effect unless and until the courts decide that the rule was properly promulgated."

Environmentalists led by the Earthjustice law firm have appealed the district court decision to the Tenth U.S. Circuit Court of Appeals. In March the administration told that court it did not intend to continue to defend the Obama-era rule. The July 25 proposal definitively makes the point.

The Sierra Club, one of the defenders of the BLM rule in court, said it would contest the BLM proposal. Said Kelly Martin, deputy director of the Sierra Club Beyond Dirty Fuels campaign, "The Sierra Club will continue to

defend this rule, ensuring that our publicly-owned lands remain protected from fracking and Donald Trump."

On July 26 the Tenth Circuit took arguments from all parties to the lawsuit. The Western Energy Alliance, which brought the successful lawsuit in District Court blocking the rule, made its case.

Said Kathleen Sgamma, president of the alliance, "Congress simply did not give the federal government authority to regulate fracking, period. We remain confident in our arguments and the previous decision."

In its July 25 action BLM proposed to return its standards for regulating hydraulic fracturing to those in effect before the 2015 rule was promulgated. On June 21 the Department of Interior submitted to the White House Office of Information and Regulatory Affairs a document titled "Rescission of the 2015 BLM Hydraulic Fracturing Rule," as we reported in the June 30 issue of *PLN*.

To support a rescission of the Obama rule BLM prepared an environmental assessment and will take public comments on it until September 25 at <http://www.regulations.gov>.

BLM's proposed rescission of the 2015 hydraulic fracturing rule is but one of dozens of actions the Trump administration has taken or intends to take to either cancel or revise public lands rules. The list of Interior Department rules on the chopping block is here:

[https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1000&Image58.x=41&Image58.y=22](https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1000&Image58.x=41&Image58.y=22).

As part of the Trump administration's pro-development energy policy Secretary of Interior Ryan Zinke March 29 had already ordered BLM to begin the groundwork toward rescinding the hydraulic fracturing rule. The suspension coupled with the court order would presumably give BLM time to rescind the rule before it could take effect, presuming the Tenth Circuit doesn't intervene.

Unlike several other department energy regulations, the hydraulic fracturing rule was too old to come under a Congressional regulatory repeal authority established by the Congressional Review Act.

Again, a federal court has already issued an injunction against the hydraulic fracturing rule. On June 21, 2016, U.S. District Court Judge Scott W. Skavdahl in Wyoming blocked implementation of the regulation, saying BLM had no authority to issue the regulation, period. He said Congress had forbidden both BLM and EPA from regulating non-diesel hydraulic fracturing.

That case is now before the 10<sup>th</sup> U.S. Circuit Court of Appeals and on March 16 the Department of Justice told the appellate court it would not defend the rule and that the Interior Department intends to write a new rule.

On March 26, 2015, under the Obama administration BLM issued the rule that would have companies (1) validate well integrity and cement barriers, (2) disclose chemicals used in fracking shortly after completing operations, (3) follow stiffer standards on storage of waste fluids and (4) submit more detailed information on the geology and location of existing wells.

A March 28 executive order from President Trump and the March 29 secretarial order from Zinke directs the Interior Department and BLM to get rid of the rule. The Trump order tells the Interior Department to review the rule to identify "burdensome" regulations and, if deemed necessary, to "as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules."

## Hard rock royalty doesn't reverberate with House GOP

Although the Trump administration has hinted that it is interested in imposing a royalty on hard rock minerals, leading House Republicans don't sound at all sympathetic.

At a July 20 House subcommittee on Energy and Mineral Resources hearing on possible revisions to hard rock mining policy, panel chairman Paul Gosar (R-Ariz.) laid out his objections.

"I encourage us to keep in mind the realities of hard rock mining. These economic and technical variables lead to different returns on investment from operator to operator," he said. "A one-size-fits-all gross royalty does not take into account the unique factors over every mine."

Ranking subcommittee Democrat Alan Lowenthal (D-Calif.) was more enthusiastic about a royalty. "It's simply long past time for the American people to get their fair share of minerals that belong to them," he said. "For nearly a century we received royalties for oil, gas coal, potash. It should be no different for gold, silver, copper and other minerals."

The hearing did not focus just on royalties; instead, Gosar said it focused on all "the pressing issues facing the hard rock industry." And Gosar's number one bête noire (and industry's number one bête noire) is the time required to obtain a mining permit on the public lands.

"The diversity of the nation's mineral endowment allows the nation to be self-sufficient, but the production of solid mineral resources is hindered by an arduous and uncertain regulatory scheme," he said.

Gosar added, "Delays in obtaining the various permits required for mine construction result in a project's loss in value. The NEPA (National Environmental Policy Act) process alone averages four-and-a-half years."

Again, Lowenthal took exception and said BLM should take care in its permitting so that the American people would be protected against damage from hard rock mining. "I know some will say hard rock mining does adhere to our environmental laws such as NEPA, the Clean Water Act and the Clean Air Act, but none of these laws today are really equipped to handle the specific environmental challenges that come from hard rock mining," he said.

With Republicans in control of both houses of Congress and the White House, on paper the chances that Congress will move legislation to remove regulatory restrictions under the 1872 Mining Law are quite good. But with Sen. John McCain (R-Ariz.) ill, the Republican margin in the Senate would be just 51-to-50, plus the Trump administration has posted mixed messages on a royalty.



That is, the Interior department budget request hints at a possible royalty recommendation. "(A) long-standing challenge is to provide a fair return to taxpayers for the use of their natural resources, without discouraging development," it says. "To meet this challenge and prepare for the President's 2019 budget, Interior will conduct a study to evaluate the production and development of hardrock minerals from Federal lands. In carrying out this study, Interior will include an analysis of revenue recovered by other entities, including other countries, which permit mining on their land."

Almost all countries and states impose royalties on hard rock minerals, including 12 western states, the Government Accountability Office has reported.

If Congress does act to speed up permitting, it may do so in critical minerals legislation (HR 520, S 145) that would have federal land managers set precise deadlines for the completion of all exploration and mining permits. The House subcommittee on Energy and Minerals Resources held a hearing on HR 520 March 21.

At the July 20 House subcommittee hearing on the greater mining law witnesses dove into the weeds to prove that the mining industry already pays its fair share of taxes and fees or, alternatively, freeloards on the public.

On industry's behalf, Jim Cress, an attorney for Bryan Cave LLP, said, "Any discussion of federal hardrock royalties should focus not only on the amount of the royalty, but on the entire tax and royalty burden applicable to mining. Mining companies take the same holistic view of the cost of doing business when they are deciding whether to invest their exploration and mine development capital in the U.S. or another country."

He summed up, "The total 'government take' (royalties, taxes and other fees) for mining operations in the United States is already comfortably within the range of other competitive mining countries."

But Lauren Pagel, policy director for the environmental group Earthworks, charged that industry does not pay its fair share because of a percentage depletion allowance that excludes some gross income from taxes.

"An extremely favorable tax code permits a company to deduct a fixed percentage from their gross income according to the mineral extracted, ranging from 22 percent for uranium to 15 percent for silver and other hardrock minerals," she said. "In some cases this deduction, over the life of the mine, actually exceeds the cost of acquiring the mineral deposit. The result is a situation where mining companies not only pay virtually nothing for the public's minerals, but also get paid by the government to mine public minerals they were freely given."

### FWS endorses five bills that would limit impact of ESA

After eight years of Obama administration objections to Republican proposals to limit the sweep of the Endangered Species Act (ESA), on July 19 a new voice was heard.

The Trump administration, in the person of acting Fish and Wildlife Service (FWS) Director Gregory Sheehan, endorsed in principle five House

bills, including one mandating the delisting of the Wyoming population of the gray wolf under the ESA.

At a House Natural Resources Committee hearing on the five bills, 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."

Individually, the five bills would not greatly revise the ESA but collectively they could. In addition they serve as point men for a possible overall rewrite of the act later in this Congress.

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.

Summed up House Natural Resources Committee Chairman Rob Bishop (R-Utah), "All-too-often, the act has been misused to control land, block a host of economic activities important for jobs, our energy and resources infrastructure and forest management. It has proliferated costly litigation that drains taxpayer resources away from actual conservation efforts."

To which 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."

Critics of the law complain often about the legal deadlines 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, "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 the Republican Congress, in concert with the Trump administration, intends to make significant changes in the law is a given. But the path in the legislative process won't be smooth because the ESA traditionally has enjoyed strong public support, including some Republican support.

The Republicans 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.

### House budget implies ANWR development is needed

The House Budget Committee July 19 approved a fiscal year 2018 Congressional spending plan that may open the way for Congress to approve oil and gas development in the coastal plain of the Arctic National Wildlife Refuge (ANWR).

If the House and Senate complete a Congressional budget, the ANWR recommendation would then be translated into a separate (reconciliation) bill that would authorize leasing in ANWR. The reconciliation bill would be filibuster-proof in the Senate, the plan goes.

Getting House approval of the budget won't be easy because of mega-disputes over taxes, overall domestic spending and other issues.

The key ANWR provision in the House committee budget 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.

Problem is, under existing law the State of Alaska receives 90 percent of onshore oil and gas royalties, leaving only \$500 million for the federal government.

Although the budget provision does not mention ANWR, environmentalists say the logical way for the resources committee to meet that charge is to approve oil and gas development in the Arctic, as proposed by the Trump administration.

Said Kelly Miller, interim executive director of the Alaska Wilderness League, "The members on the House Budget Committee must think that they are pulling the wool over the American peoples' eyes. It is not a secret as to how Congress will achieve their reconciliation goals they are banking on drilling in the Arctic Refuge."

Sen. Maria Cantwell (D-Wash.) promises to oppose leasing if and when the House budget reaches the Senate, or a House Natural Resources Committee leasing bill reaches the Senate. "If House Republicans insist on passing a

partisan budget that includes drilling in the Arctic National Wildlife Refuge, I will do everything I can to ensure it meets the same fate in the Senate as their failed health care bill," said Cantwell, ranking minority member of the Senate Energy Committee.

The greater budget process is already engulfed with controversy as Republicans attempt to establish military and domestic spending caps and open the way for tax reform. The Senate Budget Committee has not budged yet.

The budget reconciliation process is almost essential if Republican leaders hope to move tax reform legislation this year, because reconciliation legislation would require just 50 votes in the Senate, avoiding a filibuster. But under Congressional rules to use the reconciliation process the House and Senate first must agree on a fiscal year 2018 budget.

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 Trump administration's fiscal 2018 budget request assumes ANWR coastal plain leasing would begin in 2022 and would produce \$1.8 billion in revenue for the federal government by 2027.

However, Congress would have to pass legislation, which it has refused to do for more than 30 years. Sen. Lisa Murkowski (R-Alaska) has introduced legislation (S 49) to authorize leasing in the 1.4 million-acre coastal plain. But Sen. Edward Markey (D-Mass.) and Rep. Jared Huffman (D-Calif.) have introduced legislation (HR 1889, S 820) to designate the coastal plain as wilderness.

The Murkowski bill would presumably serve as a template for a reconciliation provision.

Murkowski maintains that her bill would limit maximum surface acreage covered in connection with the leasing program to "production and support facilities, including airstrips and any areas covered by gravel berms or piers for support of pipelines, (that) does not exceed 2,000 acres on the Coastal Plain."

But the Alaska Wilderness League and The Wilderness Society strenuously disagree, arguing in a position paper that the 2,000-acre limit is misleading.

"The 2,000-acre limitation does not include all necessary oil infrastructure or operations," says the paper. "It omits gravel mines, roads, seismic or other exploration operations, air and noise pollution, or even pipelines (except their posts). Development would require these pieces of infrastructure to spread across the entire Coastal Plain, since the U.S. Geological Survey estimates that oil located in the Refuge's Coastal Plain is scattered in small pockets throughout its 1.5 million acres."

BLM has already leased 189 tracts in NPRA covering 1,372,688 acres but Congress has yet to authorize oil and gas leasing in the coastal plain of ANWR.

Gov. Bill Walker (I-Alaska) and the Alaska Congressional delegation are chomping at the bit to accelerate oil and gas development in NPRA and begin leasing in ANWR. Their immediate and long-term goal is to produce enough oil to refill the Trans-Alaska Pipeline System and rescue a struggling Alaskan economy.

As always, the energy market will determine whether oil and gas companies make the risky investment to develop resources in NPRA and ANWR, assuming Congress at some point clears ANWR for leasing.

ConocoPhillips Alaska is reportedly making progress on two major 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.

### BLM revising sage-grouse policy, short of revocation

High on the list of Obama administration public lands policies targeted by the Trump administration sit 98 BLM and Forest Service sage-grouse management plans.

While those sage-grouse plans aren't included in a formal list of targeted Trump rules the Interior Department is already moving in several ways to modify if not replace the plans.

On the ground BLM said a fortnight ago that it has begun drafting a proposal for state-federal partnerships for managing the sage-grouse. That effort responds to an order from Secretary of Interior Ryan Zinke to strengthen collaboration between BLM and the states.

Concurrently, the department proposed a big \$11.5 million reduction in BLM's budget for sage-grouse management in fiscal year 2018. However, the House Appropriations Committee July 18 approved the same appropriations as fiscal 2017 in a fiscal year 2018 spending bill (HR 3354) - \$60.9 million.

For now the federal-state drafting proposal in response to Zinke's Secretarial Order 3353 is carrying the ball.

Although the order has been painted as merely establishing a procedural review, it recommends real change. That is, it would have BLM and the Forest Service revise grouse plans in accordance with Zinke's direction.

As Zinke told the House subcommittee on Interior appropriations June 8, "It opens up a state's ability to formulate a plan shaped to that state rather than just us."

That may allow BLM to work with states to revise management of the sage-grouse without having to go through a laborious, multi-year rewrite in total of the 98 plans. Of course that would invite a major lawsuit.

The Secretarial Order 3353 itself indicates that Zinke has made up his mind about giving states new and different authority to manage sage-grouse.

It says: "Consistent with governing laws, regulations, and policies, the Department will implement a multifaceted strategy to enhance cooperation with the Eleven Western States primarily responsible for the management and conservation of Sage-Grouse. The strategy will include supporting a partnership that allows the Department and the Eleven Western States to maintain healthy populations of Sage-Grouse and improve collaboration and integration of State and local concerns and approaches into sagebrush management and conservation on Federal lands."

Zinke told the press the day before he started the review that he had heard complaints from governors that the plans "have been heavy-handed. The complaints have been that the federal government is dictating terms too much."

The BLM-state negotiations are almost certain to attempt to lighten the sage-grouse regulatory limits imposed on commercial users of the public lands, whether oil and gas companies or mining companies or ranchers.

As BLM Deputy Director John Ruhs said of the negotiations, "The (Secretarial) Order directs the BLM to review federal plans and policies for conserving sage-grouse to ensure that they remain effective over the long term while also supporting economic growth and job creation."

Participating in the negotiations are representatives from BLM, the Fish and Wildlife Service, the Forest Service, the U.S. Geological Survey, and the Western Governors Association sage-grouse task force.

The western governors are not united in a demand for wholesale changes in the 98 plans. On May 26 Wyoming Gov. Matt Mead (R-Wyo.) and Colorado Gov. John Hickenlooper (D-Colo.) - wrote Zinke and asked him NOT to change course.

"We understand that you are considering changing the Department's approach to sage-grouse, moving from a habitat management model to one that sets population objectives for the states," they wrote Zinke. "We are concerned that this is not the right decision."

At the same time the House Appropriations Committee would maintain spending on the sage-grouse, it would also forbid the Fish and Wildlife Service from listing the greater sage-grouse as threatened or endangered under the Endangered Species Act. In that the Obama administration eschewed a listing under the act.

Currently the greater sage-grouse is governed by the 98 BLM and Forest Service land use plans, plus state plans, but is not proposed for listing under the ESA. Although there is the slimmest chance that the Trump administration would attempt to list the sage-grouse, appropriators are taking no chances.

On July 20 the Trump administration's Office of Information and Regulatory Affairs published a list of 860 Obama administration regulations it has targeted for cancellation or replacement. The list is available at: <https://www.reginfo.gov/public/do/eAgendaMain>.

The Obama administration sage-grouse policy, issued on Sept. 22, 2015, did not list the greater sage-grouse as an endangered or threatened species as western states had feared. Instead, it directed BLM and the Forest

Service to implement 98 records of decisions to protect the bird. The plans apply to 67 million acres across 10 western states.

### Supporters of King Cove road emphasize medical care

The House approved legislation (HR 218) July 20 that would authorize construction of a road across wilderness in a wildlife refuge to provide access to medical treatment for residents of King Cove, Alaska. The vote was 248-to-179.

Construction of the road was a major point of contention between the Alaska Congressional delegation and the Obama administration. In fact Secretary of Interior Sally Jewell on Dec. 23, 2013, rejected a land exchange that would have authorized a land exchange to open the way for a road.

That exchange, now in legislative form in the House, would authorize the transfer of wilderness lands within Izembek National Wildlife Refuge to the state, which would then construct the road between Cold Bay and King Cove. In exchange the state would convey lands to the refuge.

The sponsor of the House bill, Rep. Don Young (R-Alaska), said the road is needed for humane reasons. "Since the refusal to build this road, 19 people, my constituents, Aleut people from King Cove, have died because they could not be evacuated to the airport so you could fly them out. Now, some people will say, well, they have got an airport. Yes, 1,600 feet, winds are blowing 90 miles an hour, you try to get off. Or put yourselves on a boat and go across in 30-foot waves."

Young also addressed the environmental damage claims of exchange critics. "I stress the fact that the federal government is going to receive 43,000 acres for additional wilderness in exchange for 42 acres," he said. "I mean, I don't know how many deals you can ever work that you get that kind of deal. This is a great thing for the refuge. It is the right thing for the refuge."

Alaska Gov. Bill Walker (I) and Alaska Sens. Lisa Murkowski (R-Alaska) and Dan Sullivan (R-Alaska) welcomed the House action. "The federal government has for years been telling the people of King Cove that protecting birds is more important than their health and safety," Sullivan said.

But opponents said the road would damage a wilderness area and would set a troubling precedent. Said ranking House Natural Resources Committee Democrat Raúl Grijalva (D-Ariz.), "Ultimately, the Interior Department determined that building a road through the one-of-a-kind wilderness area is not justified because it will destroy an irreplaceable ecosystem, and there are other ways to improve transportation in the area. This is not just a simple trail through the woods. It is a road through a narrow chain of islands and lagoons."

Besides, he said, the motive behind the bill may be to do a favor for a commercial interest. "If you look at the decades-long effort to build this road, it becomes clear that there has always been a commercial purpose in mind," he said. "King Cove is home to one of the largest fish processing facilities, operated by Peter Pan Seafoods, a subsidiary of a Japanese company that is one of the largest seafood companies in the world."

The Trump administration is probably on board with the road. The Fish and Wildlife Service on June 23 approved a permit for the State of Alaska to attempt to identify a best route for a road.

In 2013 and 2014 several Obama administration nominees sat unconfirmed in the Senate while Senate Energy Committee Chairman Murkowski objected to Jewell's decision. Eventually, these five nominees were confirmed: Michal L. Connor as deputy director of the Interior Department; Neil Kornze as BLM director; attorney Janice M. Schneider as assistant secretary of Interior for Land and Minerals Management; Rhea Suh as assistant secretary of Interior for Fish and Wildlife and Parks; and Tommy Beaudreau as assistant secretary of Interior for Policy.

## IBLA decisions

(We post current Interior Board of Land Appeals decisions at our website, <http://www.blm.gov/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:** Oil and gas lease production.

**BLM decision:** BLM will cite a lessee for noncompliance for failure to report first production from a well.

**Appellant lessee:** BLM erred because the lessee was not required to report first production until all diesel injected in the well had been recovered.

**IBLA decision:** Affirmed BLM.

**Case identification:** *Oxbow Properties, Inc. 190 IBLA 328*. Decided July 7, 2017. Ten pages. Appeal from a September 15, 2014, State Director Review (SDR) decision issued by BLM, affirming a decision of BLM's Casper (Wyoming) Field Office to issue to Oxbow a Notice of Incidents of Noncompliance for failure to report first production from the Hercules 33-34L Well in a timely manner. SDR No. WY-2014-023.

**IBLA argument:** IBLA Administrative Judge Amy B. Sosin upheld a BLM decision charging the appellant oil and gas lessee with failure to report on time first production from a well for royalty purposes. BLM said first production began in July 2013 but by February 2014 production had not been reported. The appellant argued that BLM had advised it that the company would not have to report production until all diesel injected in the well was recovered. But judge Sosin said BLM regulations require notice of production within five days of the date liquid hydrocarbons are sold or shipped. She rejected the appellant's contention that a BLM employee advised the lessee that it could wait until all diesel injected in the well was recovered. Sosin concluded that the appellant "does not cite to or provide any evidence of affirmative misconduct, including any written decision, by a BLM official to support its allegations. And we do not see any such evidence in the administrative record."

**Subject:** Oil and gas lease production.

**BLM decision:** BLM will declare a lease expired if a lessee fails to demonstrate a well is producing oil or gas in paying quantities.

**Appellant lessee:** BLM erred because the lessee provided data demonstrating the well was capable of production, short of a flow test.

**IBLA decision:** Affirmed BLM.

**Case identification:** *Coastal Petroleum Company, 190 IBLA 347*. Decided July 25, 2017. Twelve pages. Appeal from a decision of the Montana State Office of BLM, which affirmed a decision issued by the Great Falls Field Office of BLM, holding that an oil and gas lease had expired because there was no well on the lease capable of producing in paying quantities. MTM 92206

**IBLA argument:** IBLA Deputy Chief Administrative Judge James F. Roberts upheld a BLM decision holding that an oil and gas lease had expired because the lessee had not demonstrated that a well was in production. The appellant argued that it had provided BLM with copious data indicating that its well was capable of production, short of conducting a flow test. But BLM argued, and judge Roberts agreed, that the lessee had to take the extra step to prove production. Said Roberts, "The lessee has the burden to prove, by a preponderance of the evidence, that there is a well on the lease



capable of production in paying quantities. Coastal admits that 2 weeks before the primary term of the lease expired, it had moved the rig required for any type of flow testing or production off the well site, and the well was shut in before a paying quantities determination could be made." Therefore, held the judge, the appellant hadn't demonstrated the well was capable of producing in paying quantities.

## Notes

**Trump puts regs targets in one place.** The Office of Management and Budget (OMB) has assembled in one place all 860 Obama administration regulations the Trump administration has either canceled or plans to undo. Most of the public lands rules on the list are familiar and we have reported on them in depth, such as a methane emissions rule, a hydraulic fracturing rule (*see related article page 10*), a BLM planning rule, and onshore oil and gas orders. The White House Office of Information and Regulatory Affairs compiled the list and published it July 20. At the website the office provides background on its plans for each rule, background on the rules themselves and contact information. The Interior Department list is available at:  
[https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1000&Image58.x=41&Image58.y=22](https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1000&Image58.x=41&Image58.y=22).

**Grazing trespass lawsuit filed.** The environmental group Public Employees for Environmental Responsibility (PEER) filed a lawsuit against BLM July 19 demanding data on possible grazing trespass on the public lands. The PEER lawsuit, submitted under the Freedom of Information Act, alleges that BLM has not responded to its request for such data. The request follows up on a 2016 Government Accountability Office (GAO) report concluding that BLM does not record most grazing trespass incidents. PEER submitted its Freedom of Information request on May 19 to determine if BLM was keeping its promise to GAO to track trespass data better. When BLM did not respond PEER filed suit. PEER suggested that BLM is allowing overgrazing. "In grazing allotments that BLM has assessed, more than 30 million acres an area the size of New York State fail the agency's own Standards for Rangeland Health due to overgrazing," said PEER Advocacy Director Kirsten Stadel. The PEER lawsuit is available at:  
[https://www.peer.org/assets/docs/blm/7\\_18\\_17\\_Grazing\\_FOIA\\_Complaint.pdf](https://www.peer.org/assets/docs/blm/7_18_17_Grazing_FOIA_Complaint.pdf).

**DoI opposes big Cal Desert bill.** The Trump administration July 26 said it can't support legislation (S 32) that would designate more than 230,000 acres of wilderness in the California Desert. The bill, from Sen. Dianne Feinstein (D-Calif.), would also encourage renewable energy development in the desert. But at a hearing of the Senate Energy Committee Acting BLM Deputy Director John Ruhs said that for a variety of reasons the administration does "not support" the bill. Among other things Ruhs objected to a bill provision that would allocate 25 percent of renewable energy revenues to states and 25 percent to counties. "The Department notes that all revenues from solar and wind energy authorizations on public lands currently go to the U.S. Treasury," he said. "We do not support the diversion of solar and wind energy receipts and have concerns with the potential long-term costs associated such diversion." S 32 follows up on President Obama's designation of 1.8 million acres of national monuments in the desert on Feb. 12, 2016. The bill would designate 230,000 acres of wilderness, 77 miles of wild and scenic rivers, and 142,000 acres for off-highway vehicle use. And it would address renewable energy by directing BLM to plan for thousands of acres of land exchanges with the State of

California. The 921,000-acre Mojave Trails National Monument, 135,000-acre Sand to Snow National Monument and 8,000-acre Castle Mountains National Monument combine with existing national parks and wilderness areas in the desert to protect nearly 10 million acres. The Mojave Trails and Sand to Snow monuments are currently being reviewed by Secretary of Interior Ryan Zinke for possible revocation or reduction.

**Oregonians ask land protection, again.** Oregon Democratic Sens. Ron Wyden and Jeff Merkley a fortnight ago introduced legislation (S 1548) that would protect more than 200,000 acres of BLM and Forest Service land in the state. The senators had introduced the legislation in the previous two Congresses. The measure would expand a Wild Rogue Wilderness Area (managed mostly by BLM) by more than 56,000 acres and add 125 miles to the Rogue Wild and Scenic River. It would designate a 30,500-acre Devil's Staircase Wilderness (both BLM and the Forest Service) in the Oregon Coast Range. Finally, the bill would designate a 95,000-acre Rogue Canyon National Recreation Area (mostly BLM). "It's time for Congress to listen to the voices of Oregonians from every part of our state who have spoken in favor of protecting these unmatched natural treasures for years to come," said Wyden.

**BLMers recommend no new planning rule.** The Public Lands Foundation, an alliance of retired BLM employees, recommended July 18 that BLM not bother to rewrite an existing planning rule. On March 27 President Trump signed into law (PL 115-12) a Congressional resolution formally cancelling an Obama administration planning regulation and reviving rules developed by Presidents Reagan and Bush. On July 3 BLM solicited advice on making its planning and environmental rules "timelier and less costly." The bureau, which said it was already consulting with state and local officials and other publics, took recommendations up until July 24. But the BLM employees said the bureau should not go to the great trouble of rewriting the rule. "Instead the Bureau should focus its time and energy on manual, handbook, and administrative changes, and how it will deal with a 10% reduction in the number of employees who will be expected to complete land use plans, faster, and with less complexity," foundation President Jesse J. Juen wrote Secretary of Interior Ryan Zinke. While he was at it Juen took exception to the widely-held notion that BLM plans must comply with state and local plans. In fact said Juen, "That is not what the law says. The full text of the law must be used, including the qualifier that if State and local plans are to be used they must be consistent with federal law and the purposes of (the Federal Land Policy and Management Act)."

**Zinke addresses conservative groups.** Secretary of Interior Ryan Zinke, a prominent advocate of retaining federal lands in federal control, on July 20 visited with members of a group that promotes the disposal of federal lands. Zinke met the American Legislative Exchange Council (ALEC) leaders privately at the council meeting in Denver, local newspapers reported. Zinke also addressed the Western Conservation Summit, an alliance of conservative leaders from around the country, over the weekend. ALEC's forte is writing legislation for state legislatures. It has reportedly drafted several bills that would have states claim ownership of federal lands. Said Brad Brooks, director of a public lands campaign for The Wilderness Society, of Zinke's meeting with ALEC, "By aligning himself with the most anti-public lands organization in America, Secretary Zinke is sending a clear message about his intentions with our nation's forests, monuments, refuges and other public lands. Few organizations have done more to block access to hunting, fishing, camping, biking on public lands than ALEC. Zinke's decision to speak at

their event is hypocritical, and calls into question his commitment to America's natural and cultural heritage."

**Ann Forest Burns retires.** We're not taking sides here but we would like to acknowledge the June 30 retirement of Ann Forest Burns, vice president of the American Forest Resource Council. The always-helpful Burns managed the association's legal program and represented the group to the press. She is both a forester and a lawyer. She took the lead for industry in responding to a 2012 Forest Service planning rule, among other things. Said the Council's staff, "On behalf of the American Forest Resource Council, its members, staff, our supporters and friends, we offer our sincerest appreciation and gratitude to Ann Forest Burns for an extraordinary, inspiring, and meaningful career committed to helping people, families, communities, and the forest products industry that supports them."

## Boxscore of Legislation

### **Fiscal year 2018 appropriations**

HR 3354 (Calvert). House committee approved July 18. Would reduce spending for most public lands programs, but not as much as the Trump administration has requested.

### **Fiscal year 2017 appropriations (full year)**

HR 244 (Cook). President Trump signed into law May 5 as PL 115-31. Appropriates roughly same amounts of money as fiscal 2016. Was stripped of riders.

### **Rule restrictions**

HR 21 (Issa). House approved January 4. Would allow Congress to revoke groups of regulations at one time with majority vote (no Senate filibuster.)

HR 5 (Goodlatte). House approved January 11. Would subject BLM and FS plans to major economic impact analysis.

*(Specific rules)* HJ Res 36 (Bishop), HJ Res 44 (Cheney), HJ Res 35 (Young). President Trump signed into law March 27 (PL 115-12) a resolution reversing a BLM planning rule (HJ Res 44). Trump signed into law April 3 a resolution (PL 115-20) reversing a FWS hunting rule in Alaska (HJ Res 35). The Senate defeated 51-to-49 a resolution that would have reversed a BLM methane emissions rule (HJ Res 36). The time has expired for Congress to act on other resolutions to reverse Obama energy regulations.

### **Federal land transfers**

H Res 5 (McCarthy). House approved January 3. Would not require economic offsets if Congress tried to transfer federal lands to states, local governments or tribes.

HR 232 (Young). Young introduced January 3. Would allow states to acquire up to 2 million acres of national forest.

### **National monument restrictions**

S 33 (Murkowski), S 132 (Crapo). Murkowski introduced January 5. Crapo introduced January 12. Murkowski would require Congressional and state approval of new monuments. Crapo would require Congressional approval.

### **New national monuments**

HR 360 (Grijalva). Grijalva introduced January 6. Would establish a Greater Grand Canyon Heritage National Monument.

#### **Wildfire**

HR 2862 (Simpson), HR 2936 (Westerman). Simpson introduced June 8. House committee approved HR 2936 June 27. Both would transfer emergency fire spending to disaster category; Westerman would also accelerate timber sales.

#### **Greater sage-grouse**

HR 527 (Bishop), S 273 (Risch). Bishop introduced January 13. Risch introduced February 1. Would largely revoke federal sage-grouse management policy and give the job to the states.

#### **Wolf in Wyoming**

HR 424 (Peterson, Cheney), S 164 (Johnson). Peterson introduced January 10. Johnson introduced January 17. Would maintain the delisting of the gray wolf in Wyoming, overcoming a judge's decision. (In House committee's fiscal 2018 approps bill.)

#### **Critical minerals**

HR 520 (Amodei), S 145 (Heller). House hearing March 21. Senate hearing March 28. Would have federal land managers establish time lines for acting on all mineral permits.

#### **Energy bill (omnibus)**

S 1460 (Murkowski). Murkowski introduced June 28. Would revise dozens of energy policies.

#### **Energy policy limitations**

S 737 (Markey), S 800 (Cantwell), HR 1819 (Cartwright), S 750 (Merkley), S 987 (Merkley). Markey introduced March 27. Cantwell and Cartwright introduced March 30. Merkley introduced March 28. Merkley introduced April 27. Markey would increase coal royalty, Cantwell and Cartwright would forbid coal self-bond, and Merkley would forbid new fossil fuels leasing from the public lands.

#### **County assistance**

S 1027 (Hatch), HR 2340 (Rodgers). Hatch, Rodgers introduced May 3. Would reauthorize Secure Rural Schools program for two years.

#### **Arctic National Wildlife Refuge (development)**

S 49 (Murkowski). Murkowski introduced January 5. Would open coastal plain to O&G development.

#### **Arctic National Wildlife Refuge (wilderness)**

HR 1889 (Huffman), S 820 (Markey). Huffman and Markey introduced April 4. Would designate coastal plain as wilderness.

#### **BLM foundation**

HR 1668 (Hice) HR 244 (Cook). President Trump signed the fiscal 2017 appropriations bill into law May 5 as PL 115-31 that establishes a BLM foundation, like those supporting NPS, FWS and FS.

#### **Land and Water Conservation Fund**

HR 502 (Grijalva), S 569 (Cantwell), S 896 (Burr), HR 2836 (Simpson), HR 2943 (Barragán). Grijalva introduced January 12. Cantwell introduced March 8. Burr introduced April 7. Simpson introduced June 8. Barragán introduced

June 21. HR 502, S 569, and S 896 would make the program permanent. HR 2836 would authorize for seven years and split money with land management agency maintenance. Barragán would set aside O&G royalties for city rec programs.

**Red Rock wilderness (Utah)**

HR 2044 (Lowenthal), S 948 (Durbin). Lowenthal introduced April 6. Durbin introduced April 26. Would protect 9.2 million acres of Utah land.

**Northern Rockies wilderness**

HR 2135 (Maloney), S 936 (Whitehouse). Maloney and Whitehouse introduced April 25. Would protect more than 20 million acres across the northern Rocky Mountains.

# Public Lands News®

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## House panel okays money bill; Senate cap less onerous

The House Appropriations Committee July 18 approved a rider-packed fiscal year 2018 Interior and related agencies spending bill (HR 3354) and cleared the measure for House floor action. The bill could reach the House floor next month.

Although the committee bill would not go nearly as far as the Trump administration requested in reducing domestic spending for fiscal 2018, the ceiling of \$31.4 billion is \$800 million less than a fiscal 2018 appropriation of \$32.2 billion.

The Trump administration had recommended \$4.3 billion less than the subcommittee number, or \$27.1 billion. The House subcommittee on Interior and Related Agencies had approved the bill July 12.

The Senate Appropriations Committee July 20 set up a titanic battle for later

this year by approving a spending ceiling for the Interior bill that is \$600 million more than the House committee level, and almost \$5 billion more than the Trump administration request.

The Senate subcommittee on Interior appropriations has no mark-up scheduled yet for its counterpart bill, a committee spokesman said.

Complementary to the appropriations actions the House Budget Committee July 19 approved a fiscal year 2018 Congressional budget that, if accepted by the House, would theoretically allow appropriations bills to proceed to the floor. That House budget would authorize \$7.5 billion less than the Senate for domestic operations.

One provision of the House budget would reportedly clear the way for the House Natural Resources Committee to act on legislation to open the coastal plain of the Arctic National Wildlife Refuge (ANWR) for oil and gas development. (*See related article page 14.*)

At the appropriations committee mark-up of HR 3354 Rep. Nita Lowey (D-N.Y.) attempted to head off ANWR leasing by proposing an amendment to forbid any spending on it. That amendment was defeated by a voice vote.

The House Appropriations Committee July 18 in its mark-up also rejected several major Democratic amendments, including one that would have struck a rider from the bill that would ban any work on listing any wolf subspecies under the Endangered Species Act.

**Wild horse rider:** The committee did accept 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.

In defending the amendment subcommittee on Interior appropriations chairman Ken Calvert (R-Calif.) argued, "The amendment only allows the humane euthanizing of unadopted horses and burros, just as we do for unadopted dogs and cats. This amendment does not allow horses and burros to be sold for processing for commercial products for consumption."

But Rep. Debbie Wasserman Shultz (D-Fla.) said, "This amendment would allow the cruel and inhumane practice of large-scale euthanasia of wild horses and burros. It's as simple as this: Americans overwhelmingly oppose the extermination of wild horses."

Wild horse advocates also protested. Said Suzanne Roy of the American Wild Horse Campaign, "Let's be clear: House Appropriations Committee members just signed a death warrant for America's mustangs and it will lead to the wholesale destruction of these irreplaceable national treasures."

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.

On a different subject ranking subcommittee Democrat Betty McCollum (D-Minn.) lashed out in committee at the spending ceiling assigned by the House Republican majority. "This level is simply too low. It is a step backwards. A cut of this magnitude endangers our nation's natural and cultural resources," she said.

She also objected to the inclusion of numerous policy amendments (16 by her count), in the bill. "I must also express my dismay with the 16 **DOI-2019-12-03039**

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this bill. These extraneous provisions may benefit polluters, but they do nothing to help the American people," she said. "These riders undermine clean air and clean water standards, put the health and safety of American families at risk, and roll back protections for endangered species."

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 land acquisitions.

As has become customary, wildfire suppression ate 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.

Subcommittee chairman Calvert defended his bill, saying, "The agencies funded in the Interior and Environment Appropriations bill do important work protecting public lands, the air we breathe, and the water we drink. Our subcommittee prioritized proven programs that have a meaningful impact to achieve these goals while also ensuring our economy can continue to grow."

The amendments/riders in the bill include such things as 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 ban the listing of any wolf species in the lower 48 states as threatened or endangered under the Endangered Species Act (Section 117).

That blanket ban would forbid the use of funds to "treat" any wolf species as threatened or endangered under the act, including the Mexican gray wolf. The Fish and Wildlife Service June 30 proposed a new recovery plan for the endangered Mexican gray wolf that anticipates a future population in the Southwest of the United States of 320 wolves, plus 170 in Mexico. The population of the lobo, the most endangered of the wolf subspecies in the world, is currently 130 in Arizona and New Mexico.

Said Defenders of Wildlife President Jamie Rappaport Clark of the committee amendment, "This wolf rider means certain death for America's wolves. It forces

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**Notice: Publishing Schedule Change**

*Dear Subscriber:*

*We are modifying our publishing schedule during the annual Congressional summer recess. The next issue of Public Lands News will be published on August 25. Because the Senate now intends to meet during the first two weeks of the planned recess we will publish a bulletin if significant news breaks.*

*We will resume a regular biweekly publishing schedule in late August.*

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the Department of the Interior to abdicate its responsibilities for protecting gray wolves, which are currently listed as endangered in much of the contiguous United States. It also disrupts the abilities of other federal agencies to comply with their obligations under the law. It is particularly egregious that this rider would halt all efforts to protect and recover the Mexican gray wolf – the most endangered gray wolf in the world with just 113 in the U.S. and 35 in Mexico.”

**Appropriations:** Here are some House committee recommendations in HR 3354 compared to final fiscal 2017 numbers:

**NATIONAL FOREST SYSTEM:** The committee approved \$1.493 billion, or \$20 million less than a fiscal 2017 appropriation of \$1.513 billion. The committee would also shift \$392.5 million from a wildfire account for hazardous fuels management to the National Forest System line item, bringing the total to \$1.886 billion.

**FOREST PRODUCTS:** The committee approved \$370 million for forest products (i.e. timber sales), or \$2 million more than a fiscal 2017 appropriation of \$368 million.

**BLM RESOURCE MANAGEMENT:** The committee approved \$1.075 billion, or \$20 million less than the fiscal 2017 appropriation of \$1.095 billion. When a decrease of \$18.6 million for federal land acquisition is deducted, the subcommittee allocation would only drop by \$1.4 million.

**WILD HORSES AND BURROS:** The committee approved \$80.6 million, the same as a fiscal 2017 appropriation of \$80.6 million.

**ENERGY AND MINERALS:** The committee approved \$168.4 million, or \$9 million less than a fiscal appropriation of \$177.4 million. Of note the committee approved \$11 million less for oil and gas than the Trump administration requested, \$118.8 million compared to a request of \$130 million.

**NATIONAL LANDSCAPE CONSERVATION SYSTEM:** The committee approved \$35.8 million, or \$1 million less than a fiscal 2017 appropriation of \$36.8 million. The Trump administration had requested \$8.1 million less.

**WILDFIRE FOREST SERVICE:** For a wildfire appropriation the committee recommended \$2.898 billion, compared to a fiscal 2017 appropriation of \$2.833 billion. For an emergency account called FLAME the committee recommended no money, compared to a fiscal 2017 FLAME appropriation of \$342 million.

**WILDFIRE INTERIOR:** For a wildfire appropriation the recommendation is \$956 million, compared to a fiscal 2017 appropriation of \$943 million. For an emergency account called FLAME the committee proposed no money, compared to a fiscal 2017 FLAME appropriation of \$65 million.

In addition, the committee did not address bipartisan legislative proposals (HR 2862, HR 2936) that would transfer emergency fire-fighting appropriations to a category of disaster funding. Such a shift would free up some \$400 million per year from the appropriations bill for other purposes and prevent the Forest Service from borrowing from other line programs to pay for fire fighting.

The committee report accompanying HR 3354 said a transfer of emergency wildfire costs to disaster spending is not within the panel’s purview, being a budget question. But the report did express some optimism.

“While the budget request does not include a specific proposal, the Committee notes that the Administration has indicated its interest in working with Congress to find a solution,” such as HR 2862 introduced by Rep. Mike Simpson (R-Idaho), the report says.

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**PAYMENTS-IN-LIEU OF TAXES:** The committee approved \$465 million, the same as a fiscal 2017 appropriation. The Trump administration had recommended \$397 million.

**LWCF FEDERAL:** The committee approved \$110 million for federal land acquisition, or \$79 million less than a fiscal 2017 appropriation of \$189 million. The Trump administration had recommended an appropriation of \$51 million for land acquisition.

By agency BLM would receive \$12.8 million compared to \$31.4 million in fiscal 2017; the Fish and Wildlife Service would receive \$40.6 million compared to \$50 million; the Park Service would receive \$31.6 million compared to \$42 million; and the Forest Service would receive \$25 million compared to \$54.4 million.

**FWS REFUGE SYSTEM:** The committee approved \$483.9 million, the same as a fiscal 2017 appropriation.

**Riders/amendments:** HR 3354 includes these amendments:

*Wolf spending:* Section 117 of the bill forbids spending any money "to treat" any wolf as a threatened or endangered species under the Endangered Species Act (ESA). That would include the Mexican gray wolf that the Fish and Wildlife Service (FWS) designated as an endangered subspecies in January 2015. (The Mexican wolf was previously protected under a blanket gray wolf listing.)

On June 30 FWS proposed a new recovery plan for Mexican wolves that anticipates a future population in the Southwest of the United States of 320 animals, plus 170 in Mexico. The population of the lobo, the most endangered of the wolf subspecies in the world, is currently 130 in Arizona and New Mexico.

*Wolf delisting - Wyoming:* Section 116 of the bill directs FWS to once again issue a rule keeping the gray wolf removed from listing under the Endangered Species Act in Wyoming. That is already the law but the amendment/rider would also exempt the rule from judicial review.

On Sept. 10, 2012, FWS initially issued a rule removing the gray wolf from the ESA in Wyoming. Environmentalists took that rule to court and won at the district court level but lost at the appeals court level. So on April 26 FWS for a second time removed the wolf from the ESA in Wyoming. Now appropriators are asking FWS to do so for a third time, only now the rule would be exempt from court review.

*Sage-grouse plans:* Section 113 would forbid FWS from proposing the listing of the greater sage-grouse as threatened or endangered under the ESA. Currently the greater sage-grouse is governed by 98 BLM and Forest Service land use plans, plus state plans, but is not proposed for listing under the ESA. That was the sum and substance of September 2015 actions by the Obama administration. (See related article page 16.)

Now the Trump administration, under Secretary of Interior Ryan Zinke's June 7 Secretarial Order 3353, has directed a review of the federal and state plans to determine compatibility. The appropriations language would make sure that Zinke doesn't rebel and propose a listing, however unlikely.

*Wetlands regulation:* Section 431 would authorize EPA and the Corps of Engineers to rescind an Obama administration rule governing permits to disturb wetlands under the Clean Water Act and to reinstall a Bush administration rule. EPA and the Corps proposed June 27 to do just that, but that effort might require an expensive and time-consuming exercise that could be exposed to a lawsuit.

Section 431 would have little immediate impact because the Sixth U.S. Court of Appeals has already stayed the 2015 Obama rule.

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First House challenge to DoI personnel changes defeated

The House Appropriations Committee July 18 rejected a proposal to force federal land management agencies to consult with Congress before undertaking large staffing changes.

The proposal, offered as an amendment to a fiscal year 2018 Interior and Related Agencies appropriations bill, addressed a Trump administration initiative to substantially reduce the number of domestic federal employees. Offered by Rep. Chellie Pingree (D-Me.), the proposal directly addresses an Interior Department plan to transfer as many as 50 people, many of them from the Senior Executive Service (SES), out of their present jobs.

"Where there are massive staffing changes, reorganizations and reassignments any business owner would make a plan and would share that plan with those who have the purse strings to make it happen," she said. "We have the purse strings and we have oversight over those changes."

Pingree also addressed the substance of the SES transfers. "To give you context of some changes that are occurring at the department, last month leaders of these agencies, some of whom have worked decades to protect wildfire, forest lands and wildlife refuges have been give 15 days - 15 days - to transfer to another department," she said.

But Rep. Ken Calvert (R-Calif.), chairman of the House subcommittee on Interior Appropriations, said personnel details should not be the business of Congress. "It's a terrible precedent for Congress to interfere with the Senior Executive Service," he said.

Besides, he said, the subcommittee had already conducted oversight. "This topic was discussed in each of our subcommittee hearings this year," he said. The committee then rejected the Pingree amendment by voice vote.

**Senators jump in:** Seven Senate Democrats July 24 asked the Interior Department Inspector General to investigate the transfer of the 50 SES employees.

The senators, led by Sen. Maria Cantwell (D-Wash.), said, "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.

In an early move Zinke has *in camera* reportedly begun reassigning as many as 50 people, many of them from the SES.

BLM is down for a reduction in force of 1,000 employees, to the distress of agency retirees organized as the Public Lands Foundation. Foundation President Jesse J. Juen wrote Sen. Lisa Murkowski (R-Alaska), chairman of the Senate subcommittee on Interior Appropriations July 18, and said, "Secretary of the Interior Zinke has issued a secretarial order to expand access to public lands and increase recreation, hunting and fishing opportunities. What the Secretary is asking

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is important, however, it will not be possible with the funding outlined in the President's budget. This puts the agency in an impossible situation and western communities in a lose-lose scenario."

At the top end of the Interior Department the Senate July 24 approved the nomination of David Bernhardt as the next deputy secretary of the department by a vote of 53-to-43. That broke a logjam of backed-up public lands nominees.

Separately, on July 19 the White House announced that President Trump intends to nominate Sen. Dan Sullivan's (R-Alaska) chief of staff, Joseph Balash, as the assistant secretary of Interior for Land and Mineral Management. Balash would oversee BLM, among other things. He is a former commissioner of the Alaska Department of Natural Resources.

Thirdly, on July 27 the Senate Energy Committee was scheduled to consider the nomination of former Texas Comptroller Susan Combs as assistant secretary of Interior for Policy, but that meeting was cancelled.

A large alliance of groups asked Senate Energy Committee leaders to reject Combs's nomination. The environmentalists object particularly to her role in transferring the Texas endangered species program from the Department of Parks and Wildlife to her office.

"Ms. Combs used this new authority to oppose listing of species as threatened or endangered, which she described as 'incoming scud missiles' that impeded the state's business development," the groups wrote Murkowski, who chairs the energy committee, and ranking committee Democrat Maria Cantwell (D-Wash.)

At the agency level one rumor anticipates the nomination of Wyoming attorney Karen Budd-Falen as BLM director.

Budd-Falen is a veteran public lands attorney who has worked in the Interior Department and for the law firm Mountain States Legal Foundation, as well as her own law firm. Utah House Rules Chairman Michael E. Noel (R) had been high on the list of possible nominees for BLM director, but that possibility has reportedly faded.

Despite the personnel moves to the field contemplated by Zinke, the Trump administration still hasn't nominated agency directors.

Here are the acting heads of natural resource agencies and a few names being circulated as possible directors/chiefs:

*BLM:* Former BLM Eastern States Director Michael Nedd is serving as acting director. Utah's Noel had been high on the list of possible nominees for director, but that possibility has faded. Budd-Falen is a new favorite.

*Forest Service:* Tom Tidwell, long-time chief during the Obama administration, is expected to stay on for the immediate future until the Department of Agriculture gets a deputy secretary for natural resources.

*NPS:* Even before former director Jonathan B. Jarvis left office with the Obama administration the Park Service had made it clear that his assistant Mike Reynolds would serve as acting director in the early days of the Trump administration. A few names of possible nominees as director have been bandied about including David Mihalic, former superintendent of Yosemite National Park, and Rob Wallace, former Hill staffer. Wallace once served as assistant director of NPS and most recently has worked for i2Capital, an advisory company.

*FWS:* Jim Kurth has been serving as acting director, succeeding former director

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Dan Ashe. Kurth had served as the service's deputy director for operations for the last two years.

At the Department of Agriculture the Trump administration has yet to nominate an under secretary for Natural Resources but on June 16 Secretary of Agriculture Sonny Perdue named Dan Jiron as deputy under secretary for Natural Resources. Jiron is well known in the public lands field as a recent associate chief of the Forest Service and for numerous recent high-level field positions.

In a side issue Rep. Scott Tipton (R-Colo.) and Sen. Cory Gardner (R-Colo.) introduced legislation (HR 2287, S 1007) in May that would authorize the transfer of BLM's headquarters from Washington, D.C., to one of 12 western states. The bills would allow the secretary of Interior to choose a new location.

Gardner in the past has suggested a transfer of the headquarters to Grand Junction, Colo. "Moving BLM's headquarters West is a commonsense solution that Coloradans from across the political spectrum support," he said.

But an alliance of BLM retirees says the BLM headquarters should remain in Washington, D.C. The Public Lands Foundation says BLM employees need to be in Washington to meet immediately with Congress and other players.

Said foundation president Jesse J. Juen in a June 14 letter to Zinke, "This includes attending impromptu yet critical meetings requiring face-to-face discussions and learning the process of how to be agile, flexible and handle difficult, complex and political discussions and situations related to the day-to-day demands of any administration, Congress, agency, community and partner."

### Zinke wouldn't change several monument designations

Secretary of Interior Ryan Zinke has begun to roll out recommendations on the possible modification/revocation of major national monuments in the West.

On July 21 he said he would recommend no modification to the Canyons of the Ancients National Monument. The 175,160-acre site was designated a monument in 2000.

Likewise, on July 13 Zinke said he would recommend no change to the 737,525-acre Craters of the Moon National Monument in Idaho, designated in 1924 and 2000, and the 194,451-acre Hanford Reach National Monument in Washington, designated in 2000.

On the other hand in a visit to Oregon a fortnight ago Zinke reportedly faulted the science used to identify the boundaries of a 103,000-acre Cascade-Siskiyou National Monument, designated in 2000 and 2017.

Oregon newspapers quoted Zinke as saying, "How were the boundaries made? Nobody knows how the boundaries were made." However, Zinke is not expected to make a final recommendation to President Trump until August 23.

Of the Canyons of the Ancients Zinke said, "Canyons of the Ancients is gorgeous land, but its monument status as the most high-density Native American archaeological sites in the Nation is clear. The history at this site spans thousands of years, and the federal protection of these objects and history will help us preserve this site for a thousand more years."

Of Craters of the Moon and Hanford Reach Zinke said, "When the President and I began the monument review process we absolutely realized that not all monuments are the same and that not all monuments would require modifications. Today, I'm

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announcing that the Craters of the Moon and Hanford Reach National Monuments review process has concluded and I am recommending no changes be made to the monuments."

Zinke is now conducting an ambitious review of recent national monument designations, with the assumption he will recommend that President Trump trim the size of some of the monuments or outright revoke the designations.

Trump began the initiative April 26 when he signed an executive order directing the Interior Department to review the designations of national monuments of more than 100,000 acres made since 1996. Trump did not take the ultimate step and say he had the authority to revoke those designations.

The review is taking a look at the designation of 21 national monuments of more than 100,000 acres, plus an 87,500-acre Katahdin Woods and Waters National Monument in Maine and five huge marine monuments. That's 27 total.

The Trump-Zinke review could set the stage for the President to at least reduce the size of the national monuments, if not outright revoke their designations. It directs Secretary of Interior Ryan Zinke to report back to the White House within 120 days with recommendations for "Presidential actions, legislative proposals, or other actions consistent with law."

The schedule suggests a recommendation from Zinke to President Trump by the end of August.

Zinke has already taken one major step. On June 12 he recommended that the President reduce the size of the Bears Ears National Monument in southern Utah, touching off a political firestorm. President Obama designated the 1.3 million-acre Bears Ears monument on Dec. 28, 2016.

In one dramatic action, just before the comment period ended on the Zinke review July 10, the outdoor industry formally pulled its annual conference out of Salt Lake City.

The Outdoor Industry Association said it moved the conference to Denver - worth \$45 million per year to the host city - because of Utah politicians' hostility to national monuments.

The announcement that the rec industry conference will move to Denver represents the arrowhead in an all-out campaign by sportsmen and conservationists objecting to the review. Environmentalists say more than 2.5 million people have commented on the review.

Whether that public response will have an impact on the Trump administration remains to be seen. Western Republican politicians have overwhelmingly criticized the number and size of national monuments of more than 100,000 acres made since 1996.

Oregon politicians are divided over the Cascades-Siskiyou National Monument. President Clinton designated an original 53,000-acre monument in 2000 and President Obama expanded it by 50,000 acres January 12, for a total of 103,000 acres.

At the time of Obama's action, Rep. Greg Walden (R-Ore.) said, "I will work with the Trump Administration to do what we can to roll back this midnight expansion."

Walden said the Obama designation appeared to be rigged. "I've heard from landowners and county commissioners who were not even consulted in the crafting of the proposal," he said.

O&C County commissioners agreed in reporting on a meeting they held with Zinke a fortnight ago. Said Tim Freeman, president of the commissioners and Douglas County commissioner, "Commissioners pointed out that prior to the designation by President Obama, the counties were basically left out of discussions that were occurring with both of Oregon's U.S. senators, and the governor," Freeman said. "Impacts at the local level were ignored."

But Democratic Gov. Kate Brown (D-Ore.) and Oregon Democratic Sens. Jeff Merkley and Ron Wyden all supported the Obama designation. Merkley and Wyden wrote Zinke earlier this month, "We hope that you will consider the diverse public support and the public input process that led to expanding the Cascade-Siskiyou National Monument as you review national monument designations."

Oregon Attorney General Ellen Rosenblum, also a Democrat, reportedly took it one step further July 10 by writing Zinke with a threat to sue if Trump either revokes the designation or reduces the size of it.

Zinke was in Oregon over the July 15-16 weekend where he visited the Cascade-Siskiyou monument and talked to supporters and critics.

### BLM formally proposes rescission of fracturing rule

BLM made it official July 25: It is going to attempt to cancel outright a hydraulic fracturing rule of March 2015, instead of rewriting it.

The bureau said it does not intend to write a new regulation because other federal regulations and state standards adequately govern the practice.

In addition BLM suggested that it had authority to simply cancel the 2015 rule because the U.S. District Court in Wyoming set it aside in a June 21, 2016, decision. So if the rule never went into effect, BLM inferred, the bureau could simply cancel the rule.

"In sum, the 2015 final rule has never gone into effect, and was set aside by the District Court on June 21, 2016," said BLM. "The 2015 final rule would not go into effect unless and until the courts decide that the rule was properly promulgated."

Environmentalists led by the Earthjustice law firm have appealed the district court decision to the Tenth U.S. Circuit Court of Appeals. In March the administration told that court it did not intend to continue to defend the Obama-era rule. The July 25 proposal definitively makes the point.

The Sierra Club, one of the defenders of the BLM rule in court, said it would contest the BLM proposal. Said Kelly Martin, deputy director of the Sierra Club Beyond Dirty Fuels campaign, "The Sierra Club will continue to defend this rule, ensuring that our publicly-owned lands remain protected from fracking and Donald Trump."

On July 26 the Tenth Circuit took arguments from all parties to the lawsuit. The Western Energy Alliance, which brought the successful lawsuit in District Court blocking the rule, made its case.

Said Kathleen Sgamma, president of the alliance, "Congress simply did not give the federal government authority to regulate fracking, period. We remain confident in our arguments and the previous decision."

In its July 25 action BLM proposed to return its standards for regulating hydraulic fracturing to those in effect before the 2015 rule was promulgated. On  
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June 21 the Department of Interior submitted to the White House Office of Information and Regulatory Affairs a document titled "Rescission of the 2015 BLM Hydraulic Fracturing Rule," as we reported in the June 30 issue of *PLN*.

To support a rescission of the Obama rule BLM prepared an environmental assessment and will take public comments on it until September 25 at <http://www.regulations.gov>.

BLM's proposed rescission of the 2015 hydraulic fracturing rule is but one of dozens of actions the Trump administration has taken or intends to take to either cancel or revise public lands rules. The list of Interior Department rules on the chopping block is here: [https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1000&Image58.x=41&Image58.y=22](https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1000&Image58.x=41&Image58.y=22).

As part of the Trump administration's pro-development energy policy Secretary of Interior Ryan Zinke March 29 had already ordered BLM to begin the groundwork toward rescinding the hydraulic fracturing rule. The suspension - coupled with the court order - would presumably give BLM time to rescind the rule before it could take effect, presuming the Tenth Circuit doesn't intervene.

Unlike several other department energy regulations, the hydraulic fracturing rule was too old to come under a Congressional regulatory repeal authority established by the Congressional Review Act.

Again, a federal court has already issued an injunction against the hydraulic fracturing rule. On June 21, 2016, U.S. District Court Judge Scott W. Skavdahl in Wyoming blocked implementation of the regulation, saying BLM had no authority to issue the regulation, period. He said Congress had forbidden both BLM and EPA from regulating non-diesel hydraulic fracturing.

That case is now before the 10<sup>th</sup> U.S. Circuit Court of Appeals and on March 16 the Department of Justice told the appellate court it would not defend the rule and that the Interior Department intends to write a new rule.

On March 26, 2015, under the Obama administration BLM issued the rule that would have companies (1) validate well integrity and cement barriers, (2) disclose chemicals used in fracking shortly after completing operations, (3) follow stiffer standards on storage of waste fluids and (4) submit more detailed information on the geology and location of existing wells.

A March 28 executive order from President Trump and the March 29 secretarial order from Zinke directs the Interior Department and BLM to get rid of the rule. The Trump order tells the Interior Department to review the rule to identify "burdensome" regulations and, if deemed necessary, to "as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules."

### Hard rock royalty doesn't reverberate with House GOP

Although the Trump administration has hinted that it is interested in imposing a royalty on hard rock minerals, leading House Republicans don't sound at all sympathetic.

At a July 20 House subcommittee on Energy and Mineral Resources hearing on possible revisions to hard rock mining policy, panel chairman Paul Gosar (R-Ariz.) laid out his objections.

"I encourage us to keep in mind the realities of hard rock mining. These



economic and technical variables lead to different returns on investment from operator to operator," he said. "A one-size-fits-all gross royalty does not take into account the unique factors over every mine."

Ranking subcommittee Democrat Alan Lowenthal (D-Calif.) was more enthusiastic about a royalty. "It's simply long past time for the American people to get their fair share of minerals that belong to them," he said. "For nearly a century we received royalties for oil, gas coal, potash. It should be no different for gold, silver, copper and other minerals."

The hearing did not focus just on royalties; instead, Gosar said it focused on all "the pressing issues facing the hard rock industry." And Gosar's number one *bête noire* (and industry's number one *bête noire*) is the time required to obtain a mining permit on the public lands.

"The diversity of the nation's mineral endowment allows the nation to be self-sufficient, but the production of solid mineral resources is hindered by an arduous and uncertain regulatory scheme," he said.

Gosar added, "Delays in obtaining the various permits required for mine construction result in a project's loss in value. The NEPA (National Environmental Policy Act) process alone averages four-and-a-half years."

Again, Lowenthal took exception and said BLM should take care in its permitting so that the American people would be protected against damage from hard rock mining. "I know some will say hard rock mining does adhere to our environmental laws such as NEPA, the Clean Water Act and the Clean Air Act, but none of these laws today are really equipped to handle the specific environmental challenges that come from hard rock mining," he said.

With Republicans in control of both houses of Congress and the White House, on paper the chances that Congress will move legislation to remove regulatory restrictions under the 1872 Mining Law are quite good. But with Sen. John McCain (R-Ariz.) ill, the Republican margin in the Senate would be just 51-to-50, plus the Trump administration has posted mixed messages on a royalty.

That is, the Interior department budget request hints at a possible royalty recommendation. "(A) long-standing challenge is to provide a fair return to taxpayers for the use of their natural resources, without discouraging development," it says. "To meet this challenge and prepare for the President's 2019 budget, Interior will conduct a study to evaluate the production and development of hardrock minerals from Federal lands. In carrying out this study, Interior will include an analysis of revenue recovered by other entities, including other countries, which permit mining on their land."

Almost all countries and states impose royalties on hard rock minerals, including 12 western states, the Government Accountability Office has reported.

If Congress does act to speed up permitting, it may do so in critical minerals legislation (HR 520, S 145) that would have federal land managers set precise deadlines for the completion of all exploration and mining permits. The House subcommittee on Energy and Minerals Resources held a hearing on HR 520 March 21.

At the July 20 House subcommittee hearing on the greater mining law witnesses dove into the weeds to prove that the mining industry already pays its fair share of taxes and fees or, alternatively, freeloards on the public.

On industry's behalf, Jim Cress, an attorney for Bryan Cave LLP, said, "Any discussion of federal hardrock royalties should focus not only on the amount of the royalty, but on the entire tax and royalty burden applicable to mining." DOI-2019-12-03049

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companies take the same holistic view of the cost of doing business when they are deciding whether to invest their exploration and mine development capital in the U.S. or another country."

He summed up, "The total 'government take' (royalties, taxes and other fees) for mining operations in the United States is already comfortably within the range of other competitive mining countries."

But Lauren Pagel, policy director for the environmental group Earthworks, charged that industry does not pay its fair share because of a percentage depletion allowance that excludes some gross income from taxes.

"An extremely favorable tax code permits a company to deduct a fixed percentage from their gross income according to the mineral extracted, ranging from 22 percent for uranium to 15 percent for silver and other hardrock minerals," she said. "In some cases this deduction, over the life of the mine, actually exceeds the cost of acquiring the mineral deposit. The result is a situation where mining companies not only pay virtually nothing for the public's minerals, but also get paid by the government to mine public minerals they were freely given."

### FWS endorses five bills that would limit impact of ESA

After eight years of Obama administration objections to Republican proposals to limit the sweep of the Endangered Species Act (ESA), on July 19 a new voice was heard.

The Trump administration, in the person of acting Fish and Wildlife Service (FWS) Director Gregory Sheehan, endorsed in principle five House bills, including one mandating the delisting of the Wyoming population of the gray wolf under the ESA.

At a House Natural Resources Committee hearing on the five bills, 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."

Individually, the five bills would not greatly revise the ESA but collectively they could. In addition they serve as point men for a possible overall rewrite of the act later in this Congress.

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.

Summed up House Natural Resources Committee Chairman Rob Bishop (R-Utah), "All-too-often, the act has been misused to control land, block a host of economic activities important for jobs, our energy and resources infrastructure and forest management. It has proliferated costly litigation that drains taxpayer resources away from actual conservation efforts."

To which 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."

Critics of the law complain often about the legal deadlines 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, "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 the Republican Congress, in concert with the Trump administration, intends to make significant changes in the law is a given. But the path in the legislative process won't be smooth because the ESA traditionally has enjoyed strong public support, including some Republican support.

The Republicans 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.

### House budget implies ANWR development is needed

The House Budget Committee July 19 approved a fiscal year 2018 Congressional spending plan that may open the way for Congress to approve oil and gas development in the coastal plain of the Arctic National Wildlife Refuge (ANWR).

If the House and Senate complete a Congressional budget, the ANWR recommendation would then be translated into a separate (reconciliation) bill that would authorize leasing in ANWR. The reconciliation bill would be filibuster-proof in the Senate, the plan goes.

Getting House approval of the budget won't be easy because of mega-disputes over taxes, overall domestic spending and other issues.

The key ANWR provision in the House committee budget 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.

Problem is, under existing law the State of Alaska receives 90 percent of onshore oil and gas royalties, leaving only \$500 million for the federal government.

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Although the budget provision does not mention ANWR, environmentalists say the logical way for the resources committee to meet that charge is to approve oil and gas development in the Arctic, as proposed by the Trump administration.

Said Kelly Miller, interim executive director of the Alaska Wilderness League, "The members on the House Budget Committee must think that they are pulling the wool over the American peoples' eyes. It is not a secret as to how Congress will achieve their reconciliation goals - they are banking on drilling in the Arctic Refuge."

Sen. Maria Cantwell (D-Wash.) promises to oppose leasing if and when the House budget reaches the Senate, or a House Natural Resources Committee leasing bill reaches the Senate. "If House Republicans insist on passing a partisan budget that includes drilling in the Arctic National Wildlife Refuge, I will do everything I can to ensure it meets the same fate in the Senate as their failed health care bill," said Cantwell, ranking minority member of the Senate Energy Committee.

The greater budget process is already engulfed with controversy as Republicans attempt to establish military and domestic spending caps and open the way for tax reform. The Senate Budget Committee has not budged yet.

The budget reconciliation process is almost essential if Republican leaders hope to move tax reform legislation this year, because reconciliation legislation would require just 50 votes in the Senate, avoiding a filibuster. But under Congressional rules to use the reconciliation process the House and Senate first must agree on a fiscal year 2018 budget.

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 Trump administration's fiscal 2018 budget request assumes ANWR coastal plain leasing would begin in 2022 and would produce \$1.8 billion in revenue for the federal government by 2027.

However, Congress would have to pass legislation, which it has refused to do for more than 30 years. Sen. Lisa Murkowski (R-Alaska) has introduced legislation (S 49) to authorize leasing in the 1.4 million-acre coastal plain. But Sen. Edward Markey (D-Mass.) and Rep. Jared Huffman (D-Calif.) have introduced legislation (HR 1889, S 820) to designate the coastal plain as wilderness.

The Murkowski bill would presumably serve as a template for a reconciliation provision.

Murkowski maintains that her bill would limit maximum surface acreage covered in connection with the leasing program to "production and support facilities, including airstrips and any areas covered by gravel berms or piers for support of pipelines, (that) does not exceed 2,000 acres on the Coastal Plain."

But the Alaska Wilderness League and The Wilderness Society strenuously disagree, arguing in a position paper that the 2,000-acre limit is misleading.

"The 2,000-acre limitation does not include all necessary oil infrastructure or operations," says the paper. "It omits gravel mines, roads, seismic or other exploration operations, air and noise pollution, or even pipelines (except their

posts). Development would require these pieces of infrastructure to spread across the entire Coastal Plain, since the U.S. Geological Survey estimates that oil located in the Refuge's Coastal Plain is scattered in small pockets throughout its 1.5 million acres."

BLM has already leased 189 tracts in NPRA covering 1,372,688 acres but Congress has yet to authorize oil and gas leasing in the coastal plain of ANWR.

Gov. Bill Walker (I-Alaska) and the Alaska Congressional delegation are chomping at the bit to accelerate oil and gas development in NPRA and begin leasing in ANWR. Their immediate and long-term goal is to produce enough oil to refill the Trans-Alaska Pipeline System and rescue a struggling Alaskan economy.

As always, the energy market will determine whether oil and gas companies make the risky investment to develop resources in NPRA and ANWR, assuming Congress at some point clears ANWR for leasing.

ConocoPhillips Alaska is reportedly making progress on two major 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.

### BLM revising sage-grouse policy, short of revocation

High on the list of Obama administration public lands policies targeted by the Trump administration sit 98 BLM and Forest Service sage-grouse management plans.

While those sage-grouse plans aren't included in a formal list of targeted Trump rules the Interior Department is already moving in several ways to modify - if not replace - the plans.

On the ground BLM said a fortnight ago that it has begun drafting a proposal for state-federal partnerships for managing the sage-grouse. That effort responds to an order from Secretary of Interior Ryan Zinke to strengthen collaboration between BLM and the states.

Concurrently, the department proposed a big \$11.5 million reduction in BLM's budget for sage-grouse management in fiscal year 2018. However, the House Appropriations Committee July 18 approved the same appropriations as fiscal 2017 in a fiscal year 2018 spending bill (HR 3354) - \$60.9 million.

For now the federal-state drafting proposal in response to Zinke's Secretarial Order 3353 is carrying the ball.

Although the order has been painted as merely establishing a procedural review, it recommends real change. That is, it would have BLM and the Forest Service revise grouse plans in accordance with Zinke's direction.

As Zinke told the House subcommittee on Interior appropriations June 8, "It opens up a state's ability to formulate a plan shaped to that state rather than just us."

That may allow BLM to work with states to revise management of the sage-grouse without having to go through a laborious, multi-year rewrite in total of the 98 plans. Of course that would invite a major lawsuit.

The Secretarial Order 3353 itself indicates that Zinke has made up his mind about giving states new and different authority to manage sage-grouse.

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It says: "Consistent with governing laws, regulations, and policies, the Department will implement a multifaceted strategy to enhance cooperation with the Eleven Western States primarily responsible for the management and conservation of Sage-Grouse. The strategy will include supporting a partnership that allows the Department and the Eleven Western States to maintain healthy populations of Sage-Grouse and improve collaboration and integration of State and local concerns and approaches into sagebrush management and conservation on Federal lands."

Zinke told the press the day before he started the review that he had heard complaints from governors that the plans "have been heavy-handed. The complaints have been that the federal government is dictating terms too much."

The BLM-state negotiations are almost certain to attempt to lighten the sage-grouse regulatory limits imposed on commercial users of the public lands, whether oil and gas companies or mining companies or ranchers. As BLM Deputy Director John Ruhs said of the talks, "The (Secretarial) Order directs the BLM to review federal plans and policies for conserving sage-grouse to ensure that they remain effective over the long term while also supporting economic growth and job creation."

Participating in the negotiations are representatives from BLM, the Fish and Wildlife Service, the Forest Service, the U.S. Geological Survey, and the Western Governors Association sage-grouse task force.

The western governors are not united in a demand for wholesale changes in the 98 plans. On May 26 Wyoming Gov. Matt Mead (R-Wyo.) and Colorado Gov. John Hickenlooper (D-Colo.) - wrote Zinke and asked him NOT to change course.

"We understand that you are considering changing the Department's approach to sage-grouse, moving from a habitat management model to one that sets population objectives for the states," they wrote Zinke. "We are concerned that this is not the right decision."

At the same time the House Appropriations Committee would maintain spending on the sage-grouse, it would also forbid the Fish and Wildlife Service from listing the greater sage-grouse as threatened or endangered under the Endangered Species Act. In that the Obama administration eschewed a listing under the act.

Currently the greater sage-grouse is governed by the 98 BLM and Forest Service land use plans, plus state plans, but is not proposed for listing under the ESA. Although there is the slimmest chance that the Trump administration would attempt to list the sage-grouse, appropriators are taking no chances.

On July 20 the Trump administration's Office of Information and Regulatory Affairs published a list of 860 Obama administration regulations it has targeted for cancellation or replacement. The list is available at: <https://www.reginfo.gov/public/do/eAgendaMain>.

The Obama administration sage-grouse policy, issued on Sept. 22, 2015, did not list the greater sage-grouse as an endangered or threatened species as western states had feared. Instead, it directed BLM and the Forest Service to implement 98 records of decisions to protect the bird. The plans apply to 67 million acres across 10 western states.

### Supporters of King Cove road emphasize medical care

The House approved legislation (HR 218) July 20 that would authorize construction of a road across wilderness in a wildlife refuge to provide access to medical treatment for residents of King Cove, Alaska. The vote was 248-to-179.

Construction of the road was a major point of contention between the Alaska Congressional delegation and the Obama administration. In fact Secretary of Interior Sally Jewell on Dec. 23, 2013, rejected a land exchange that would have authorized a land exchange to open the way for a road.

That exchange, now in legislative form in the House, would authorize the transfer of wilderness lands within Izembek National Wildlife Refuge to the state, which would then construct the road between Cold Bay and King Cove. In exchange the state would convey lands to the refuge.

The sponsor of the House bill, Rep. Don Young (R-Alaska), said the road is needed for humane reasons. "Since the refusal to build this road, 19 people, my constituents, Aleut people from King Cove, have died because they could not be evacuated to the airport so you could fly them out. Now, some people will say, well, they have got an airport. Yes, 1,600 feet, winds are blowing 90 miles an hour, you try to get off. Or put yourselves on a boat and go across in 30-foot waves."

Young also addressed the environmental damage claims of exchange critics. "I stress the fact that the federal government is going to receive 43,000 acres for additional wilderness in exchange for 42 acres," he said. "I mean, I don't know how many deals you can ever work that you get that kind of deal. This is a great thing for the refuge. It is the right thing for the refuge."

Alaska Gov. Bill Walker (I) and Alaska Sens. Lisa Murkowski (R-Alaska) and Dan Sullivan (R-Alaska) welcomed the House action. "The federal government has for years been telling the people of King Cove that protecting birds is more important than their health and safety," Sullivan said.

But opponents said the road would damage a wilderness area and would set a troubling precedent. Said ranking House Natural Resources Committee Democrat Raúl Grijalva (D-Ariz.), "Ultimately, the Interior Department determined that building a road through the one-of-a-kind wilderness area is not justified because it will destroy an irreplaceable ecosystem, and there are other ways to improve transportation in the area. This is not just a simple trail through the woods. It is a road through a narrow chain of islands and lagoons."

Besides, he said, the motive behind the bill may be to do a favor for a commercial interest. "If you look at the decades-long effort to build this road, it becomes clear that there has always been a commercial purpose in mind," he said. "King Cove is home to one of the largest fish processing facilities, operated by Peter Pan Seafoods, a subsidiary of a Japanese company that is one of the largest seafood companies in the world."

The Trump administration is probably on board with the road. The Fish and Wildlife Service on June 23 approved a permit for the State of Alaska to attempt to identify a best route for a road.

In 2013 and 2014 several Obama administration nominees sat unconfirmed in the Senate while Senate Energy Committee Chairman Murkowski objected to Jewell's decision. Eventually, these five nominees were confirmed: Michal L. Connor as deputy director of the Interior Department; Neil Kornze as BLM director; attorney Janice M. Schneider as assistant secretary of Interior for Land and Minerals Management; Rhea Suh as assistant secretary of Interior for Fish and Wildlife and Parks; and Tommy Beaudreau as assistant secretary of Interior for Policy.

## 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.)

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**Subject:** Oil and gas lease production.

**BLM decision:** BLM will cite a lessee for noncompliance for failure to report first production from a well.

**Appellant lessee:** BLM erred because the lessee was not required to report first production until all diesel injected in the well had been recovered.

**IBLA decision:** Affirmed BLM.

**Case identification:** *Oxbow Properties, Inc. 190 IBLA 328*. Decided July 7, 2017. Ten pages. Appeal from a September 15, 2014, State Director Review (SDR) decision issued by BLM, affirming a decision of BLM's Casper (Wyoming) Field Office to issue to Oxbow a Notice of Incidents of Noncompliance for failure to report first production from the Hercules 33-34L Well in a timely manner. SDR No. WY-2014-023.

**IBLA argument:** IBLA Administrative Judge Amy B. Sosin upheld a BLM decision charging the appellant oil and gas lessee with failure to report on time first production from a well for royalty purposes. BLM said first production began in July 2013 but by February 2014 production had not been reported. The appellant argued that BLM had advised it that the company would not have to report production until all diesel injected in the well was recovered. But judge Sosin said BLM regulations require notice of production within five days of the date liquid hydrocarbons are sold or shipped. She rejected the appellant's contention that a BLM employee advised the lessee that it could wait until all diesel injected in the well was recovered. Sosin concluded that the appellant "does not cite to or provide any evidence of affirmative misconduct, including any written decision, by a BLM official to support its allegations. And we do not see any such evidence in the administrative record."

**Subject:** Oil and gas lease production.

**BLM decision:** BLM will declare a lease expired if a lessee fails to demonstrate a well is producing oil or gas in paying quantities.

**Appellant lessee:** BLM erred because the lessee provided data demonstrating the well was capable of production, short of a flow test.

**IBLA decision:** Affirmed BLM.

**Case identification:** *Coastal Petroleum Company, 190 IBLA 347*. Decided July 25, 2017. Twelve pages. Appeal from a decision of the Montana State Office of BLM, which affirmed a decision issued by the Great Falls Field Office of BLM, holding that an oil and gas lease had expired because there was no well on the lease capable of producing in paying quantities. MTM 92206

**IBLA argument:** IBLA Deputy Chief Administrative Judge James F. Roberts upheld a BLM decision holding that an oil and gas lease had expired because the lessee had not demonstrated that a well was in production. The appellant argued that it had provided BLM with copious data indicating that its well was capable of production, short of conducting a flow test. But BLM argued, and judge Roberts agreed, that the lessee had to take the extra step to prove production. Said Roberts, "The lessee has the burden to prove, by a preponderance of the evidence, that there is a well on the lease capable of production in paying quantities. Coastal admits that 2 weeks before the primary term of the lease expired, it had moved the rig required for any type of flow testing or production off the well site, and the well was shut in before a paying quantities determination could be made." Therefore, held the judge, the appellant hadn't demonstrated the well was capable of producing in paying quantities.

## Notes

**Trump puts regs targets in one place.** The Office of Management and Budget (OMB) has assembled in one place all 860 Obama administration regulations the Trump administration has either canceled or plans to undo. Most of the public lands rules on the list are familiar and we have reported on them in depth, such as a methane emissions rule, a hydraulic fracturing rule (*see related article page 10*), a BLM planning rule, and onshore oil and gas orders. The White House Office of Information and Regulatory Affairs compiled the list and published it July 20. At the website the office provides background on its plans for each rule, background on the rules themselves and contact information. The Interior Department list is available at: [https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1000&Image58.x=41&Image58.y=22](https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1000&Image58.x=41&Image58.y=22).

**Grazing trespass lawsuit filed.** The environmental group Public Employees for Environmental Responsibility (PEER) filed a lawsuit against BLM July 19 demanding data on possible grazing trespass on the public lands. The PEER lawsuit is dated July 19, 2017. DOI-2019-12-03056



under the Freedom of Information Act, alleges that BLM has not responded to its request for such data. The request follows up on a 2016 Government Accountability Office (GAO) report concluding that BLM does not record most grazing trespass incidents. PEER submitted its Freedom of Information request on May 19 to determine if BLM was keeping its promise to GAO to track trespass data better. When BLM did not respond PEER filed suit. PEER suggested that BLM is allowing overgrazing. "In grazing allotments that BLM has assessed, more than 30 million acres - an area the size of New York State - fail the agency's own Standards for Rangeland Health due to overgrazing," said PEER Advocacy Director Kirsten Stade. The PEER lawsuit is available at:

[https://www.peer.org/assets/docs/blm/7\\_18\\_17\\_Grazing\\_FOIA\\_Complaint.pdf](https://www.peer.org/assets/docs/blm/7_18_17_Grazing_FOIA_Complaint.pdf).

**DoI opposes big Cal Desert bill.** The Trump administration July 26 said it can't support legislation (S 32) that would designate more than 230,000 acres of wilderness in the California Desert. The bill, from Sen. Dianne Feinstein (D-Calif.), would also encourage renewable energy development in the desert. But at a hearing of the Senate Energy Committee Acting BLM Deputy Director John Ruhs said that for a variety of reasons the administration does "not support" the bill. Among other things Ruhs objected to a bill provision that would allocate 25 percent of renewable energy revenues to states and 25 percent to counties. "The Department notes that all revenues from solar and wind energy authorizations on public lands currently go to the U.S. Treasury," he said. "We do not support the diversion of solar and wind energy receipts and have concerns with the potential long-term costs associated such diversion." S 32 follows up on President Obama's designation of 1.8 million acres of national monuments in the desert on Feb. 12, 2016. The bill would designate 230,000 acres of wilderness, 77 miles of wild and scenic rivers, and 142,000 acres for off-highway vehicle use. And it would address renewable energy by directing BLM to plan for thousands of acres of land exchanges with the State of California. The 921,000-acre Mojave Trails National Monument, 135,000-acre Sand to Snow National Monument and 8,000-acre Castle Mountains National Monument combine with existing national parks and wilderness areas in the desert to protect nearly 10 million acres. The Mojave Trails and Sand to Snow monuments are currently being reviewed by Secretary of Interior Ryan Zinke for possible revocation or reduction.

**Oregonians ask land protection, again.** Oregon Democratic Sens. Ron Wyden and Jeff Merkley a fortnight ago introduced legislation (S 1548) that would protect more than 200,000 acres of BLM and Forest Service land in the state. The senators had introduced the legislation in the previous two Congresses. The measure would expand a Wild Rogue Wilderness Area (managed mostly by BLM) by more than 56,000 acres and add 125 miles to the Rogue Wild and Scenic River. It would designate a 30,500-acre Devil's Staircase Wilderness (both BLM and the Forest Service) in the Oregon Coast Range. Finally, the bill would designate a 95,000-acre Rogue Canyon National Recreation Area (mostly BLM). "It's time for Congress to listen to the voices of Oregonians from every part of our state who have spoken in favor of protecting these unmatched natural treasures for years to come," said Wyden.

**BLMers recommend no new planning rule.** The Public Lands Foundation, an alliance of retired BLM employees, recommended July 18 that BLM not bother to rewrite an existing planning rule. On March 27 President Trump signed into law (PL 115-12) a Congressional resolution formally cancelling an Obama administration planning regulation and reviving rules developed by Presidents Reagan and Bush. On July 3 BLM solicited advice on making its planning and environmental rules "timelier and less costly." The bureau, which said it was already consulting with state and local officials and other publics, took recommendations up until July 24. But the BLM employees said the bureau should not go to the great trouble of rewriting the rule. "Instead the Bureau should focus its time and energy on manual, handbook, and administrative changes, and how it will deal with a 10% reduction in the number of employees who will be expected to complete land use plans, faster, and with less complexity," foundation President Jesse J. Juen wrote Secretary of Interior Ryan

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Zinke. While he was at it Juen took exception to the widely-held notion that BLM plans must comply with state and local plans. In fact said Juen, "That is not what the law says. The full text of the law must be used, including the qualifier that if State and local plans are to be used they must be consistent with federal law and the purposes of (the Federal Land Policy and Management Act)."

**Zinke addresses conservative groups.** Secretary of Interior Ryan Zinke, a prominent advocate of retaining federal lands in federal control, on July 20 visited with members of a group that promotes the disposal of federal lands. Zinke met the American Legislative Exchange Council (ALEC) leaders privately at the council meeting in Denver, local newspapers reported. Zinke also addressed the Western Conservation Summit, an alliance of conservative leaders from around the country, over the weekend. ALEC's forte is writing legislation for state legislatures. It has reportedly drafted several bills that would have states claim ownership of federal lands. Said Brad Brooks, director of a public lands campaign for The Wilderness Society, of Zinke's meeting with ALEC, "By aligning himself with the most anti-public lands organization in America, Secretary Zinke is sending a clear message about his intentions with our nation's forests, monuments, refuges and other public lands. Few organizations have done more to block access to hunting, fishing, camping, biking on public lands than ALEC. Zinke's decision to speak at their event is hypocritical, and calls into question his commitment to America's natural and cultural heritage."

**Ann Forest Burns retires.** We're not taking sides here but we would like to acknowledge the June 30 retirement of Ann Forest Burns, vice president of the American Forest Resource Council. The always-helpful Burns managed the association's legal program and represented the group to the press. She is both a forester and a lawyer. She took the lead for industry in responding to a 2012 Forest Service planning rule, among other things. Said the Council's staff, "On behalf of the American Forest Resource Council, its members, staff, our supporters and friends, we offer our sincerest appreciation and gratitude to Ann Forest Burns for an extraordinary, inspiring, and meaningful career committed to helping people, families, communities, and the forest products industry that supports them."

## Boxscore of Legislation

### **Fiscal year 2018 appropriations**

HR 3354 (Calvert). House committee approved July 18. Would reduce spending for most public lands programs, but not as much as the Trump administration has requested.

### **Fiscal year 2017 appropriations (full year)**

HR 244 (Cook). President Trump signed into law May 5 as PL 115-31. Appropriates roughly same amounts of money as fiscal 2016. Was stripped of riders.

### **Rule restrictions**

HR 21 (Issa). House approved January 4. Would allow Congress to revoke groups of regulations at one time with majority vote (no Senate filibuster.)

HR 5 (Goodlatte). House approved January 11. Would subject BLM and FS plans to major economic impact analysis.

(Specific rules) HJ Res 36 (Bishop), HJ Res 44 (Cheney), HJ Res 35 (Young. President Trump signed into law March 27 (PL 115-12) a resolution reversing a BLM planning rule (HJ Res 44). Trump signed into law April 3 a resolution (PL 115-20) reversing a FWS hunting rule in Alaska (HJ Res 35). The Senate defeated 51-to-49 a resolution that would have reversed a BLM methane emissions rule (HJ Res 36). The time has expired for Congress to act on other resolutions to reverse Obama energy regulations.

**Federal land transfers**

H Res 5 (McCarthy). House approved January 3. Would not require economic offsets if Congress tried to transfer federal lands to states, local governments or tribes.

HR 232 (Young). Young introduced January 3. Would allow states to acquire up to 2 million acres of national forest.

**National monument restrictions**

S 33 (Murkowski), S 132 (Crapo). Murkowski introduced January 5. Crapo introduced January 12. Murkowski would require Congressional and state approval of new monuments. Crapo would require Congressional approval.

**New national monuments**

HR 360 (Grijalva). Grijalva introduced January 6. Would establish a Greater Grand Canyon Heritage National Monument.

**Wildfire**

HR 2862 (Simpson), HR 2936 (Westerman). Simpson introduced June 8. House committee approved HR 2936 June 27. Both would transfer emergency fire spending to disaster category; Westerman would also accelerate timber sales.

**Greater sage-grouse**

HR 527 (Bishop), S 273 (Risch). Bishop introduced January 13. Risch introduced February 1. Would largely revoke federal sage-grouse management policy and give the job to the states.

**Wolf in Wyoming**

HR 424 (Peterson, Cheney), S 164 (Johnson). Peterson introduced January 10. Johnson introduced January 17. Would maintain the delisting of the gray wolf in Wyoming, overcoming a judge's decision. (In House committee's fiscal 2018 approps bill.)

**Critical minerals**

HR 520 (Amodei), S 145 (Heller). House hearing March 21. Senate hearing March 28. Would have federal land managers establish time lines for acting on all mineral permits.

**Energy bill (omnibus)**

S 1460 (Murkowski). Murkowski introduced June 28. Would revise dozens of energy policies.

**Energy policy limitations**

S 737 (Markey), S 800 (Cantwell), HR 1819 (Cartwright), S 750 (Merkley), S 987 (Merkley). Markey introduced March 27. Cantwell and Cartwright introduced March 30. Merkley introduced March 28. Merkley introduced April 27. Markey would increase coal royalty, Cantwell and Cartwright would forbid coal self-bond, and Merkley would forbid new fossil fuels leasing from the public lands.

**County assistance**

S 1027 (Hatch), HR 2340 (Rodgers). Hatch, Rodgers introduced May 3. Would reauthorize Secure Rural Schools program for two years.

**Arctic National Wildlife Refuge (development)**

S 49 (Murkowski). Murkowski introduced January 5. Would open coastal plain to O&G development.

**Arctic National Wildlife Refuge (wilderness)**

HR 1889 (Huffman), S 820 (Markey). Huffman and Markey introduced April 4. Would designate coastal plain as wilderness.