

EXAMINING POLICY IMPACTS OF EXCESSIVE LITIGATION AGAINST THE DEPARTMENT OF THE INTERIOR

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND
INVESTIGATIONS

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

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**OVERSIGHT HEARING ON EXAMINING POLICY
IMPACTS OF EXCESSIVE LITIGATION
AGAINST THE DEPARTMENT OF THE
INTERIOR**

**Wednesday, June 28, 2017
U.S. House of Representatives
Subcommittee on Oversight and Investigations
Committee on Natural Resources
Washington, DC**

The Subcommittee met, pursuant to notice, at 10:08 a.m., in room 1324, Longworth House Office Building, Hon. Mike Johnson [Vice-Chairman of the Subcommittee] presiding.

Present: Representatives Radewagen, Bergman, Johnson; Huffman, Soto, Clay, and Grijalva.

Also present: Representatives McClintock, Pearce, Gosar; and Barragán.

Mr. JOHNSON. The Subcommittee on Oversight and Investigations will come to order. Thank you all for being here this morning.

The Subcommittee is meeting today to hear testimony on “Examining Policy Impacts of Excessive Litigation Against the Department of the Interior.”

Under Committee Rule 4(f) any oral opening statements at hearings are limited to the Chairman, the Ranking Minority Member, the Vice-Chair, and the Vice-Ranking Member. Therefore, I ask unanimous consent that all other Members’ opening statements be made part of the hearing record if they are submitted to the Subcommittee Clerk by 5:00 p.m.

Hearing no objections, so ordered.

Also, I ask unanimous consent that the gentleman from California, Mr. McClintock; the gentleman from New Mexico, Mr. Pearce; the gentleman from Arizona, Mr. Gosar; the gentleman from California, Mr. Costa; and the gentlelady from California, Ms. Barragán, be allowed to sit with us today in the Subcommittee, and participate in the hearing.

Hearing no objection, that is so ordered.

I will now recognize myself for 5 minutes for an opening statement.

STATEMENT OF THE HON. MIKE JOHNSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. JOHNSON. Today we will explore how litigation against the Department of the Interior impacts the Department’s ability to carry out its mission of managing our country’s vast natural resources and trust responsibilities. Legal actions shape agency decision making and influence its policies.

While a case may involve only the Department and a plaintiff, the parties to the suit are not the only ones bound by the outcome.

In reality, a legal sub-industry has thrived from endless environmental litigation, while burdening the livelihoods of countless citizens. The costs also include the inhibition of multiple use and sustained yield, as well as species recovery. Excessive litigation against the Department drains our taxpayer dollars away from good stewardship of our natural resources.

Our legal system is an important avenue for citizens seeking redress of wrongs perpetrated by the Federal Government. Litigation, like legislative and regulatory processes, is intended to provide a crucial check against agency over-reach.

However, special interests repeatedly exploit our legal system to further their own agendas, and sidestep the legislative and regulatory processes. Excessively litigious organizations constantly abuse opportunities to impede agency actions, simply because they generally oppose a particular land use, species management, or trust activity.

Litigation begets litigation, and some of our current laws, including the Equal Access to Justice Act, perpetuate the cycle by allowing plaintiffs to collect attorney's fees above a statutory cap for suing the Federal Government. Originally intended to ease the burden on individuals and small businesses that contest government actions, activist groups now leverage the holes in this law as a weapon to paralyze agency actions, finance endless lawsuits, and drain taxpayer dollars away from important programs.

Today, we hope to identify some of the incentives that facilitate repeat plaintiffs and obstructionist litigation. We will also discuss potential solutions that may be available to curb excessive lawsuits, and we are seeking some transparency into the process.

Previous Subcommittee efforts to learn more about the opaque litigation process and the true volume and nature of litigation against the Interior have produced little useful information. Publicly available resources, such as the Interior's budget justifications and the Judgment Fund online database, provide an incomplete picture.

We also hope to learn more about the nature of the relationship and collaboration between the Department of Justice and Interior's Office of the Solicitor in managing litigation against the Department of the Interior.

For example, last December, the Subcommittee sent a letter to then-Secretary Jewell requesting information about settlement agreements with Native American tribes in excess of \$3.3 billion in the previous administration. The Subcommittee is still waiting to receive a substantive response to some of the requested information.

The Subcommittee eventually learned that the Solicitor's Office does not keep centralized records regarding litigation against the Department and resulting settlements. There are also no Department-kept records of which statutes generate the most litigation. The Justice Department also does not track the quantity of suits filed against the Interior Department compared to those against other departments in the Federal Government.

In addition to leaving the public with little insight regarding pending and finalized litigation that affects their lives, the lack of reporting and recordkeeping deprives the Congress and the agency

of a chance to identify vulnerabilities created by excessive legal action and challenges.

We look forward to learning more about the Department's processes for dealing with litigation and any efforts it may undertake to become more transparent and accountable in tracking litigation in the future.

There is an expectation that the problem will worsen as opponents of domestic energy resource development and multiple-use principles utilize the court system as a weapon to advance their agendas. In fact, in its most recent budget justification, the Department's Office of the Solicitor reported that it is bracing for an "influx of litigation," including litigation on "every major permitting decision authorizing energy development on Federal land."

I look forward to hearing from our witnesses, and we thank them again, and in advance, for their testimony today.

[The prepared statement of Mr. Johnson follows:]

PREPARED STATEMENT OF THE HON. MIKE JOHNSON, VICE CHAIRMAN,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

Today, we will explore how litigation against the Department of the Interior impacts the Department's ability to carry out its mission of managing our country's vast natural resources and trust responsibilities. Legal actions shape agency decision making and influence its priorities. While a case may involve only the Department and a plaintiff, the parties to the suit are not the only ones bound by the outcome. In reality, a legal sub-industry has thrived from endless environmental litigation while burdening the livelihoods of countless citizens. The costs also include the inhibition of multiple use and sustained yield as well as species recovery. Excessive litigation against the Department drains our taxpayer dollars away from good stewardship of our natural resources.

Our legal system is an important avenue for citizens seeking redress of wrongs perpetrated by the Federal Government. Litigation, like legislative and regulatory processes, is intended to provide a crucial check against agency over-reach. However, special interests repeatedly exploit our legal system to further their own agendas and sidestep the legislative and regulatory processes. Excessively litigious organizations constantly abuse opportunities to impede agency actions simply because they generally oppose a particular land use, species management, or trust activity.

Litigation begets litigation and some of our current laws, including the Equal Access to Justice Act, perpetuate the cycle by allowing plaintiffs to collect attorney's fees above a statutory cap for suing the Federal Government. Originally intended to ease the burden on individuals and small businesses that contest government actions, activist groups now leverage the holes in this law as a weapon to paralyze agency actions, finance endless lawsuits, and drain taxpayer dollars away from important programs.

Today, we hope to identify some of the incentives that facilitate repeat plaintiffs and obstructionist litigation. We also will discuss potential solutions that may be available to curb excessive lawsuits. We are also seeking some transparency into the process.

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I look forward to hearing from our witnesses and thank them for their testimony.

Mr. JOHNSON. Since the Ranking Member of our Subcommittee, Mr. McEachin, could not be here this morning, the Chairman now recognizes the Ranking Member of the Full Committee, Mr. Grijalva, for 5 minutes for an opening statement.

STATEMENT OF THE HON. RAÚL M. GRIJALVA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. GRIJALVA. Thank you very much, Mr. Chairman. I would like to welcome all the witnesses, with a special welcome to Lois Schiffer, who is taking time away from a well-deserved retirement to testify on very, very short notice. I appreciate that very much. Lois' experience and perspective will be critical to this hearing.

The premise of this hearing is false. Judges are already empowered to deal with litigation that is without merit or frivolous, including the authority to punish attorneys for pursuing abusive litigation. The number of cases where courts use that authority is small, and it happens no more often with environmental litigation than with any other kinds of cases.

So, why does the Interior Department get sued? Because it fails to live up to the standards set by this Congress for managing our natural, cultural, and historical resources.

Who sues the Interior Department? Non-profit organizations seeking to uphold the standards we set, average citizens who want their government to be more accountable, and industry, when they think they are getting a raw deal.

Why does the Interior Department lose when they get sued? Often, it is because this Congress has failed to give agencies the people and the money they need to meet the demands that are placed on them.

House Republicans set out to cripple these agencies, to prevent NEPA, ESA, or the Clean Water Act from being enforced, and then hold hearings bemoaning the fact that there is so much litigation and the process is too slow. Too often, it seems like my Republican colleagues are starting the fire one day, and then they are firefighters the next.

The ability to sue the government and win leads to better policy outcomes, more faith in government, more stable and predictable regulations over time, and can save enormous amounts of money compared to big government schemes that are put in place and

never challenged, no matter how ill-conceived or unfair they turn out to be.

This litigation is not excessive, and the doors to the courthouse do not need to be slammed shut in the name of efficiency.

My Republican colleagues need to make up their minds. Are judges power-mad, judicial activists, or are they just defenseless victims being abused by environmental lawyers? The truth is, they are neither.

You will hear no evidence today that environmental plaintiffs are subject to more fines or punishments than any other kind of plaintiffs. This is not a real problem. The irony is, courts have strict standards requiring honesty and evidence in pleadings and rulings, and there are standards that most hearings in Congress, including this one, could never meet.

If House Republicans think we should no longer enforce the Endangered Species Act or NEPA, they should have the courage to go before the voters with plans to repeal these laws. What they should not do is attack citizens and businesses who seek help from the courts to enforce those laws as a back-door way to undermine statutes they don't like. This is exactly the kind of misleading and unfair tactic a responsible judge would throw out of court.

With that, Mr. Chairman, I yield back.

[The prepared statement of Mr. Grijalva follows:]

PREPARED STATEMENT OF THE HON. RAÚL M. GRIJALVA, RANKING MEMBER,
COMMITTEE ON NATURAL RESOURCES

Thank you Mr. Chairman.

I'd like to welcome all of our witnesses, with a special welcome to Lois Schiffer, who is taking time away from her well-deserved retirement to testify on very short notice. Lois' experience and perspective will be critical to this hearing.

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Why does the Interior Department *lose* when they get sued?

Often, it's because this Congress has failed to give agencies the people and money they need to meet the demands we have placed on them.

House Republicans set out to cripple these agencies, to prevent NEPA, or ESA, or the Clean Water Act from being enforced, and then hold hearings bemoaning the fact that there is so much litigation.

Too often, it seems like my Republican colleagues are arsonists one day, and fire-fighters the next.

The ability to sue the government and win leads to better policy outcomes, more faith in government, more stable and predictable regulations over time, and can

save enormous amounts of money compared to big government schemes that are put in place and never challenged, no matter how ill-conceived or unfair they turn out to be.

This litigation is not “excessive” and the doors to the courthouse don’t need to be slammed shut in the name of “efficiency.”

If House Republicans think we should no longer enforce the Endangered Species Act or NEPA, they should have the courage to go before the voters with plans to repeal those laws.

What they should NOT do is attack the citizens and businesses who seek help from the courts to enforce those laws as a back-door way to undermine statutes they don’t like. That is exactly the kind of misleading and unfair tactic a responsible judge would throw out of court.

I yield back.

Mr. JOHNSON. Thank you. I will now introduce today’s witnesses. Mr. Daniel Jorjani is the Principal Deputy Solicitor within the Office of the Solicitor at the Department of the Interior.

Mr. Mark Barron is a partner at BakerHostetler in Denver, Colorado, and is also a former trial attorney at the Department of Justice’s Environment and Natural Resources Division.

Ms. Lois Schiffer is the former General Counsel of the National Oceanic and Atmospheric Administration, as well as former Assistant Attorney General for the Department of Justice’s Environment and Natural Resources Division.

Ms. Caroline Lobdell is the Executive Director and Supervising Attorney at the Western Resources Legal Center in Portland, Oregon, in addition to being a faculty member at Lewis and Clark Law School.

Thank you all again for being here.

Let me remind the witnesses that under the Committee Rules, oral statements must be limited to 5 minutes, but your entire written statement will appear in the hearing record.

In regards to testimony and questions, our microphones are not automatic, so you need to press the talk button in front of you before speaking into the microphone. When you begin, the lights on the witness table will turn green. When you have 1 minute remaining, the yellow light will come on. Your time will have expired when the red light comes on, and I may ask you to please conclude your statement.

I will also allow the entire panel to testify before we begin questioning the witnesses.

The Chair will now recognize Mr. Jorjani for his testimony for 5 minutes.

STATEMENT OF DANIEL JORJANI, PRINCIPAL DEPUTY SOLICITOR, OFFICE OF THE SOLICITOR, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. JORJANI. Vice-Chairman Johnson, Ranking Member Grijalva, members of the Subcommittee, thank you for the opportunity to appear before you today to discuss the impacts of excessive litigation against the U.S. Department of the Interior.

My name is Daniel Jorjani. I serve as both the Principal Deputy Solicitor and Acting Solicitor at DOI, where I have the privilege of leading the Nation’s premier team of natural resource lawyers. I

am also proud to be part of the Department-wide team led by Secretary of the Interior, Ryan Zinke.

DOI plays an important role in advancing President Trump's domestic policy vision for our Nation, including advancing the American First energy policy, reducing regulatory burdens, and rebuilding our Nation's infrastructure, while at the same time protecting the environment.

Interior oversees the responsible, onshore and offshore development of 20 percent of U.S. energy supplies, stewards 20 percent of the Nation's land, including national parks and wildlife refuges, and serves as the largest water provider in the 17 western states.

Interior also works with federally recognized tribes, American Indians, Alaska Natives, and insular communities, such as American Samoa, Guam, the U.S. Virgin Islands, and the Northern Marianas.

As would be expected for an agency with such a diverse mission, the legal work carried out in the Solicitor's Office is equally diverse, providing legal advice to client bureaus, including on both judicial and administrative matters.

While the mission of the Department is great, and while our lawyers always seek to conduct themselves with humility, integrity, and professionalism, our work is often controversial, and we are frequently sued in Federal court.

DOJ handles litigation in which DOI is a party. DOI, therefore, does not have the legal authority to litigate or settle cases on our own. We work very, very closely with DOJ to defend the lawful actions of DOI, and follow long-standing DOJ policies that restrict settlements from converting discretionary authorities into mandatory duties.

Any proposal to settle litigation receives a careful legal assessment by DOI counsel, is reviewed, and if appropriate, approved at DOJ in accordance with DOJ protocols and policies. In doing so, we work with DOJ to prepare legal defenses of agency action, support litigation through discovery or the preparation of administrative records, and assess litigation risk and the effect of continued litigation on the operations of the Department.

As employees of the Federal Government, attorneys in the Solicitor's Office have a professional responsibility to serve the Secretary of the Interior and the officials to whom he has delegated his authority. Attorneys are also bound by the rules of professional conduct. This means we must represent our clients, rather than external interests.

Many settlements, such as those resolving class actions or requiring consent decrees, are also reviewed and approved by the presiding judges in the matter. These reviews by the Federal judiciary ensure that the settlements are consistent with the law, and are in the public interest.

When appropriately utilized, settlements can create value by allowing for amicable resolution of disputes on terms acceptable to all stakeholders, eliminating the risk of adverse decisions that could impact future agency operations, saving taxpayer dollars by reducing the amount paid in litigation, and including terms to minimize, effectively and efficiently, the risk of future litigation.

While the system is certainly not perfect, under our watch, there will be no collusive settlements.

Ultimately, the Department has a duty to uphold the highest standards on behalf of the taxpayers we serve. Moving forward, Secretary Zinke signed Secretary's Order 3349, which revoked the compensatory mitigation policies of the previous administration, and directed a robust and thorough review, so that we can shift to a more accountable process. This is just one example of the work we are doing, but we appreciate the opportunity to work with you and the members of this Committee to create value on this important issue.

I look forward to answering any questions that you might have. Thank you.

[The prepared statement of Mr. Jorjani follows:]

PREPARED STATEMENT OF DANIEL JORJANI, PRINCIPAL DEPUTY SOLICITOR,
DEPARTMENT OF THE INTERIOR

Chairman Labrador, Ranking Member McEachin, Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss the impacts of excessive litigation against the Department of the Interior. My name is Dan Jorjani and I was recently appointed to be the Principal Deputy Solicitor at the Department.

The Office of the Solicitor is responsible for providing legal services for all programs, operations, and activities of the Department. As the Principal Deputy Solicitor, I oversee the work of the attorneys in the Solicitor's Office, who provide advice, counsel, and legal representation to the Secretary, the Assistant Secretaries, and the bureaus and offices overseen by the Secretary. As would be expected by such a large agency with diverse missions, the legal work carried out in the Solicitor's Office is equally as diverse, including both judicial and administrative matters.

While the mission of the Department is great, our work is also often controversial and we are often sued in Federal court. The Department of Justice handles litigation in which the Department of the Interior is a party. The Department of the Interior's policy decision makers and lawyers therefore do not have the legal authority to litigate or settle cases on our own.

However, the Solicitor's Office performs an important service to the Department in providing legal advice to client bureaus and, ultimately, the Department of Justice on whether to litigate or settle cases. In doing so, Solicitor's Office attorneys work with Department of Justice attorneys to prepare legal defenses of agency action, support litigation through discovery or the preparation of administrative records, assess litigation risk and the effect of continued litigation on the operations of the Department, and work with the affected client bureaus and Department officials to determine whether settlement is in the best interests of the agency and the United States.

As employees of the Federal Government, attorneys in the Solicitor's Office have a professional responsibility to serve the Secretary of the Interior and the officials to whom he has delegated his authority. Attorneys are also bound to the rules of professional conduct, which means we must represent our clients rather than external interests.

Any proposal to settle litigation receives a careful legal assessment by agency counsel and is assessed and, if appropriate, approved by attorneys and officials at the Department of Justice, in accordance with its regulations and policies.

Many settlements, such as those resolving class actions or requiring consent decrees, are also reviewed and approved by the presiding judges in the matter. These reviews by the Federal judiciary ensure that the settlements are consistent with the law and are in the public interest. Courts can and have refused to approve consent decrees or other settlements that are not consistent with the law.

When appropriately utilized, settlements can be useful and beneficial: they can allow for amicable resolution of disputes on terms acceptable to all stakeholders; save taxpayer dollars by reducing the amount paid in litigation and associated attorneys' fees; eliminate the risk of adverse decisions that could impact future agency operations; include terms to minimize the risk of future litigation; and conserve judicial, agency, and private party resources.

However, the system certainly is not perfect.

Ultimately, the Department and the rest of the Federal Government has a duty to uphold the highest standards on behalf of the taxpayers we serve. For example, Secretary Zinke signed S.O. 3349 which revoked the compensatory mitigation policies of the previous administration and directed a thorough review so we can shift to a more fair and accessible process. This is just one example of the work we are doing, but we appreciate the opportunity to work with you and the members of this Committee to increase transparency and accountability at all levels.

I look forward to answering any questions you might have.

QUESTIONS SUBMITTED FOR THE RECORD BY REP. McEACHIN TO DANIEL JORJANI,
PRINCIPAL DEPUTY SOLICITOR, OFFICE OF THE SOLICITOR, U.S. DEPARTMENT OF
THE INTERIOR

Question 1. Deeply troubling cases of sexual harassment at the Park Service have come to light in recent years. The previous administration at the Department of the Interior left a transition briefing book which revealed that the high profile sexual harassment cases at the Park Service have spurred about 120 new sexual harassment and related reprisal allegations at the Department of the Interior that need to be resolved. The brief went on to say “Because the Employment and Labor Law Unit’s existing resources were inadequate to manage and litigate these cases, as well as to undertake efforts necessary to ensure such cases do not recur in the future, the Division of General Law requested client funding to hire six new experienced employment and labor law attorneys . . .” These attorneys don’t just litigate cases; they also provide guidance to supervisors who have to investigate allegations themselves. When I checked 3 weeks ago to see whether the attorneys were hired, I learned that all six had not been hired; Secretary Zinke’s hiring freeze prevented the rest from moving forward.

- a. Have you been briefed on the sexual harassment issue at NPS as well as the rest of the Department? When were you briefed? Who briefed you?
- b. Have you read the brief from the previous administration?
- c. Have you taken any action(s) recommended in the brief? If yes, what actions have you taken?
- d. At the time of the writing of the briefing transition book, there was a backlog of approximately 120 potential sexual harassment cases that awaited action from the Department of the Solicitor’s Office. What is the size of that backlog now? When you expect the backlog to be eliminated?
- e. Of the six attorneys, how many have you hired? Of those, please list their first day of work.
- f. Have you requested of the Secretary that he hire some or all of these attorneys? What response did you get and from whom?
- g. Have you discussed with your staff the need to fill these positions?
- h. Have you proposed making an exception to the hiring freeze to fill the six attorney positions that were recommended in the brief?
- i. Has Secretary Zinke instructed you to treat sexual harassment as a high priority in the Office of the Solicitor? If so, when?
- j. If the Office of the Solicitor does not hire all six attorneys, what is the plan for addressing the backlog of potential sexual harassment cases?

Answer. Secretary Zinke said at his confirmation hearing that he takes issues of sexual assault and harassment seriously and that there will be zero tolerance for it at the Department under his leadership. The entire transition team was briefed on these allegations, and we continue to monitor the progress of the National Park Service’s implementation of a variety of initiatives to address these issues. To date, the NPS has:

- Hired a Sexual Harassment Prevention and Response Coordinator to help develop and coordinate a strategic response and began tracking statistics related to employee misconduct;
- Realigned the NPS Equal Employment Opportunity Office to report to the Director of the NPS;

- Implemented online sexual harassment awareness training for employees and issued a Harassment Prevalence Survey, in which almost 50 percent of employees responded. That survey will be given to the seasonal workforce this summer. The survey results will provide information about the extent and nature of the problem and will inform design of additional anti-harassment initiatives.
- Trained 24 employees to instruct *Civil Treatment for Leaders*®, which seeks to prevent harassment and improve civility in the NPS. All supervisory employees are required to take the 4-hour in-person training in 2017 and 2018.
- Established the NPS Ombuds program, which explores the confidential resolution of workforce problems. The Ombuds will visit 24 parks, park clusters, or regional offices to gather input and feedback by the end of 2017.

In addition, a culture change team with representatives from the Equal Employment Opportunity Program, the NPS Office of Relevancy, Diversity and Inclusion, and field representatives are assessing structural issues related to information sharing, communication, trust, employee support resources and training, and policies and procedures for reporting, tracking, investigating and disciplining harassment are being revised to ensure transparency and accountability. In the Solicitor's Office, the Employment Law and Litigation Group has in the past 6 months increased its staffing and we continue to closely monitor the Group's caseload to ensure that the Department's legal needs are met and that managers have the tools and support they need to create a positive work environment free from discrimination and harassment.

Mr. JOHNSON. Thank you, Mr. Jorjani.
The Chair now recognizes Mr. Barron for his testimony.

**STATEMENT OF MARK S. BARRON, PARTNER,
BAKERHOSTETLER, DENVER, COLORADO**

Mr. BARRON. Good morning. I would like to thank the Vice Chair, the Ranking Member, and the Committee for the opportunity to testify this morning. My name is Mark Barron. I am a partner in the BakerHostetler law firm in Denver, Colorado. Today, I speak on my own behalf.

I would like to preface my statement with a few clarifications regarding my testimony.

First, it is not my opinion that excessive litigation is the sole reason that the Department of the Interior is frequently unable to execute its mission consistent with the statutory parameters that define the agency's obligations. Interior is the custodian of much of our Nation's natural resources wealth, particularly the Federal mineral estate and many of our most treasured landscapes.

Earlier in my career, I had the opportunity to serve in the Environment and Natural Resources Division at the Department of Justice. During that time, I represented many of the agencies whose work is implicated in this hearing today, including BLM, the Bureau of Indian Affairs, the National Park Service, the Forest Service, the Corps of Engineers, the Mineral Management Service, and the Bureau of Reclamation. These agencies are staffed by hard-working and well-meaning public servants. Their job is difficult and complex, and the resources with which they are asked to perform their tasks are almost always scarce.

Nor am I suggesting that litigation challenges to government conduct are improper, *per se*. The fact that citizens have the ability to hold the government accountable when it acts in error is one of the hallmarks of our democracy.

But with this as background, my experience and the experience of our clients suggest that certain parties have abused aspects of the current system to exacerbate the challenges that the agencies face under the best of circumstances. The result is policy being driven by ideologically motivated litigants who choose cases not based on legal merits, but on what makes the biggest political splash.

In my personal practice, I am more often than not working with independent energy companies seeking to develop energy projects on Federal lands. When counseling these companies, the likelihood, if not certainty, of litigation features prominently in project planning and the advice that we provide.

In my written testimony, I detailed the cycle of an oil and gas project and some of the deadlines that apply to those projects. Under the Mineral Leasing Act, the Department of the Interior is mandated to offer leases quarterly in all states in which eligible parcels are available for leasing. That deadline is almost never met. Over the last several years, most of the large public land states have offered leasing, at most, two to three times per year.

In a lawsuit pending currently in the District of New Mexico, environmental groups who are attempting to intervene in that lawsuit have acknowledged that those lease sales have been canceled, based on administrative protests that environmental groups have filed.

When lease sales are conducted, the Mineral Leasing Act requires that leases are issued to the successful bidders within 60 days from payment for the bonus bids. Again, a Federal judge in the District of Wyoming has found that that obligation is mandated by statute. That is another deadline that is almost never met.

Once leases are issued, the Mineral Leasing Act requires that within 10 days of an application for a permit to drill, the Interior Department—or BLM, specifically—identify to the operator whether or not the application is complete. And if it is not complete, what is missing.

Once an application is complete, BLM has 30 days under statute to either issue the permit or explain why the permit is not being issued, and provide estimates of the amount of time it will require to process the permit. Again, this deadline is virtually never met in the field.

Our clients report that oftentimes, when they interact with field offices and ask why these deadlines are not met, it is reported to them that it is because field office personnel is being used to respond to and support efforts to defend lawsuits.

I want to talk briefly before my time runs out on the parties that are involved in these lawsuits. The public perception is that these cases are driven by big oil and big energy. The reality is drastically different.

Most of American energy production is driven by small, independent, family-owned companies. The median size of a member of the Independent Petroleum Association of America is 12 people—a 12-member company. These people compete in court against, essentially, law firms and lobbying groups who use litigation to raise money, and then rely on the fee transfer provisions in the statutes to fund their next litigation.

Recently, in the press, these organizations have acknowledged that their current initiatives are politically driven. The result is, beyond delays, land management policy being crafted not by this body or even the agencies themselves, but by Federal judges.

I thank the Committee.

[The prepared statement of Mr. Barron follows:]

PREPARED STATEMENT OF MARK S. BARRON, PARTNER, BAKERHOSTETLER LAW FIRM,
DENVER, COLORADO

Mark S. Barron is a partner in the national energy practice group of the BakerHostetler law firm. Mr. Barron's practice is focused on natural resources litigation and environmental law, with special emphasis on the administration of Federal public lands (including tribal lands) and energy production. The majority of Mr. Barron's work is comprised of litigation and regulatory matters, with a smaller percentage involving corporate transactions between energy companies.

Mr. Barron's work touches on most aspects of environmental and natural resources law—particularly as that law is applied to commercial activity on public lands. Mr. Barron is a leading national practitioner with extensive experience related to onshore and offshore oil and gas operations and regulation, including matters involving leasing and permitting delays and suspensions. He is counsel to both individual companies and national trade associations on issues concerning the regulation of hydraulic fracturing, the administration of the Federal oil and gas leasing program, Federal royalty calculation and reporting, and the environmental impact of energy projects.

Before entering private practice, Mr. Barron served as a trial attorney for the U.S. Department of Justice in the Environment & Natural Resources Division. As a member of the Natural Resources Section, Mark's practice focused on environmental takings claims, administrative challenges to mineral and resource development on Federal public lands, and Federal management of natural resources on tribal lands. In that capacity, Mr. Barron represented numerous components of the Department of the Interior as well as other Federal land management agencies in Federal litigation. Mr. Barron has represented, among other agencies: the Bureau of Land Management, the Bureau of Indian Affairs, the Fish & Wildlife Service, the National Park Service, the U.S. Forest Service, the U.S. Army Corps of Engineers, the Minerals Management Service, the Bureau of Reclamation, and the Surface Transportation Board.

Mr. Barron is a graduate of Cornell University and a magna cum laude graduate of the University of New Mexico School of Law where he earned membership to the Order of the Coif and served on the New Mexico Law Review. A prolific author and speaker on topics affecting energy producers, Mr. Barron has been featured or quoted in dozens of industry and mainstream media outlets on topics related to energy policy, hydraulic fracturing, and commercial development on public lands. In 2016, Law360 selected Mr. Barron as a national "Energy MVP." In 2015, Law360 named Mr. Barron one of five national "Rising Stars" in Energy—a designation given to the best attorneys in America under 40 years of age.

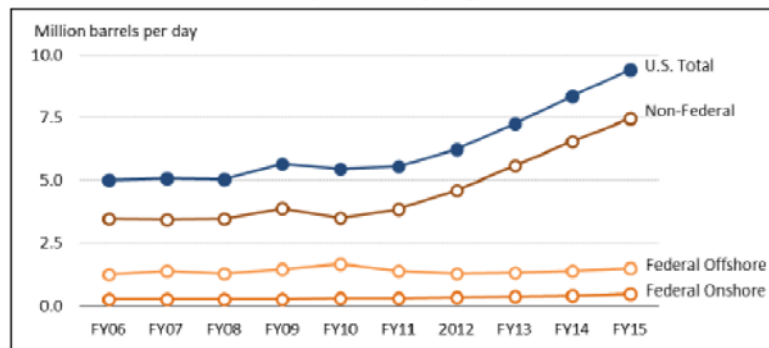
I. INTRODUCTION

The Department of the Interior serves a critical function as the custodian of much of the Nation's natural resources wealth. In this role, the Department's agencies are required to perform daily a myriad of tasks to ensure the prudent and efficient development of resources in a manner that optimizes public benefits, promotes national security, and protects treasured landscapes. Under the best circumstances, meeting each of these objectives is a complex and onerous task. And Interior rarely, if ever, works under "the best circumstances." Too often, special interest groups intent on preventing Interior from accomplishing its statutorily imposed mission are able to delay, compromise, or defeat the Department's ability to complete essential functions through the use (and abuse) of administrative and judicial litigation tactics.

The best example of how Interior's agencies struggle to accomplish their mission is the administration of the Federal oil and gas leasing program. Since the turn of the new century, technical advancements that allow producers to identify promising sources of oil and gas and to extract hydrocarbons from previously inaccessible geologic formations, combined with the entrepreneurial ingenuity of American industry, have resulted in American energy companies reaching production levels once

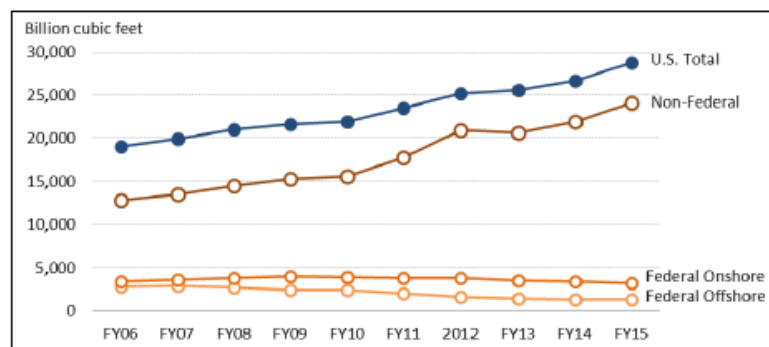
thought impossible. The accessibility of abundant oil and gas resources has transformed conventional understandings of the energy landscape, leading some to predict millions of new jobs and the reindustrialization of America as well as imminent American energy independence. But while domestic production has grown in recent years, the percentage of that production that is extracted from Federal lands has declined in the same period.¹

**Figure 1. U.S. Crude Oil Production:
Federal and Nonfederal Areas FY2006-FY2015**
(million barrels per day)



Source: Federal data obtained from ONRR Production Data, <http://www.onrr.gov>. Nonfederal from EIA. Figure created by CRS.

**Figure 2. U.S. Natural Gas Production:
Federal and Nonfederal Areas FY2006-FY2015**



Source: Federal data obtained from ONRR Statistics, <http://www.onrr.gov> (using sales year data). Figure created by CRS.

The reasons for this divergence are not open to reasonable dispute. Under President Obama, executive agencies undertook an unprecedented campaign to expand the regulatory burdens imposed on oil and gas producers operating on Federal lands. These regulatory initiatives touched every component of oil and gas development, impacting, among other aspects: (i) the manner in which operators construct and complete wells; (ii) the requirements for maintenance and repair of wells; (iii) the methods by which produced oil and gas is transported to market; (iv) the value of production for royalty reporting; and (v) the contractual terms of Federal leases. These regulatory requirements—along with logistical efficiencies inherent in the

¹ Congressional Research Serv., *U.S. Crude Oil & Natural Gas Prod. in Fed. & Nonfed. Areas*, Figs. 1–2, at 3, 5 (June 22, 2016).

Federal Government's management of the Nation's public lands—represent an enormous incentive for operators to focus their efforts on state and private lands.

There are signs that the current Administration intends to alleviate some of the more egregious administrative obstacles that domestic energy producers face. Both the President and the Secretary of the Interior have recently directed executive agencies to evaluate whether existing rules and policies impose unreasonable burdens on the production of Federal minerals. On March 28, 2017, President Trump signed an Executive Order directing all Federal agencies to enact policies “to promote clean and safe development of our Nation's vast energy resources” and to avoid “burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.”² On the next day, March 29, 2017, Secretary Zinke issued Secretary's Order No. 3349. Order No. 3349 states that the Department of the Interior's objective “is to identify agency actions that unnecessarily burden the development or utilization of the Nation's energy resources and support action to as soon as practicable.”

But whereas the need to curtail excessive regulation has received attention from industry groups, media, and political figures, there is a second, less discussed complication for operators who wish to produce Federal minerals—the prolific amount of litigation that special interest groups initiate to slow or prevent development of Federal minerals. While the prospect of litigation is a burden often attendant to oil and gas development, that prospect has become a virtual certainty when working on Federal lands. And because the United States wears several hats in oil and gas exploration and development—administrator, regulator, and market participant—there are numerous possible situations in which operators may find their projects enmeshed in challenges to how the United States has exercised its responsibilities and balanced its various roles.³

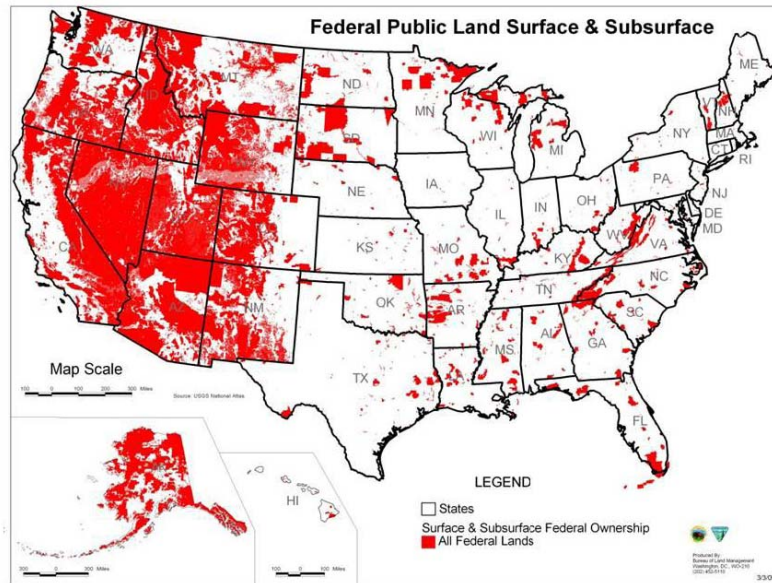
Nor do these challenges represent ordinary lawsuits. Once a dispute arises and a legal challenge is filed, the burden litigation imposes on an operator is often more onerous when the United States is involved. First, a lack of understanding regarding how the Federal Government and its agencies are organized can make developing a legal strategy more difficult than it might otherwise be in a case involving only private litigants. Second, the effectively unlimited extent of the legal resources that both the Federal Government and special interest groups can wield makes prosecuting or defending a public lands case time consuming and prohibitively expensive. Third, jurisdictional limitations applicable to suits involving the government may confine litigation to specialty courts or administrative settings that require proceedings be conducted in locations far from the community in which the dispute is actually taking place and that apply unfamiliar and idiosyncratic rules.

II. THE LITIGATION BURDEN

Given the attendant challenges, it is natural to question why an operator would ever choose to develop minerals on Federal lands. The reality is that, for most operators, the sheer scope of the government's landholdings make at least some involvement on Federal lands unavoidable. The Federal Government controls approximately one-third of the Nation's surface area—nearly 650 million acres—and over 700 million acres of Federal mineral estate.

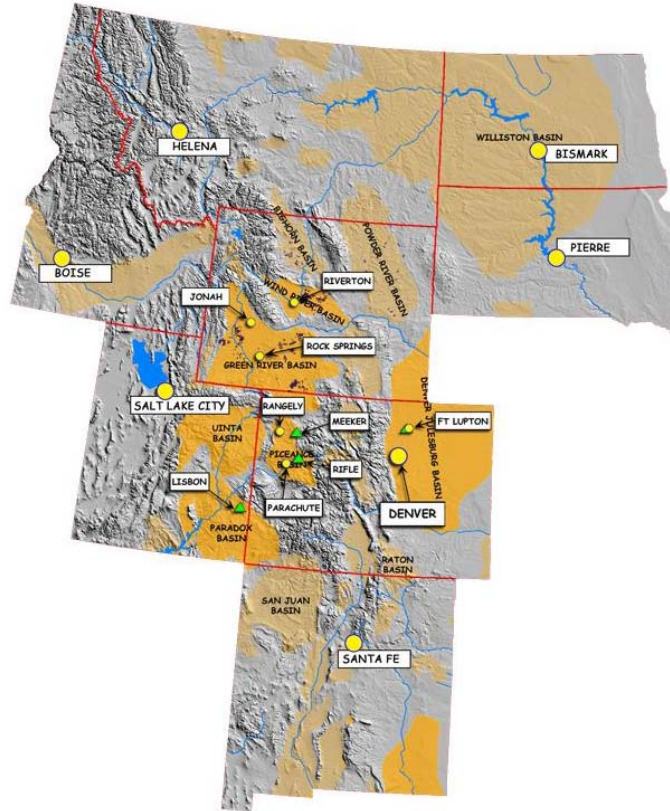
² Exec. Order 13,783, *Promoting Energy Independence & Econ. Growth* (Mar. 28, 2017).

³ Sometimes, of course, it is the operator itself that is compelled to sue to enforce its rights under the public land laws. But more often than not, it is third parties that attempt to use the courts to block or delay land use decisions of which they disapprove.



Particularly for those operators who explore for and develop oil and gas in the western United States, avoiding Federal lands is essentially impossible. With the exception of fields in Texas, Federal lands dominate virtually all of the important fields being actively developed today west of the Mississippi River. Examples include, but are not limited to: the Permian and San Juan Basins in New Mexico; the Piceance Basin in Colorado; the Uinta Basin in Utah; the Green River, Wind River, and Powder River Basins in Wyoming; and to a lesser extent, the Bakken Shale in North Dakota.⁴

⁴The Federal Government controls more than 54 percent of the land in the 11 contiguous states west of the 100th Meridian: Arizona, 48.06 percent; California, 45.3 percent; Colorado, 36.63 percent; Idaho, 50.19 percent; Montana, 29.92 percent; Nevada, 84.48 percent; New Mexico, 41.77 percent; Oregon, 53.11 percent; Utah, 57.45 percent; Washington, 30.33 percent; and Wyoming, 42.33 percent. See U.S. Gen. Serv. Admin., Fed. Real Prop. Profile at 18 & Table 16 (Sept. 30, 2004). The Federal Government also controls more than 69 percent of the surface acreage in Alaska. See *id.*



Exacerbating the challenges that operating on Federal lands present, special interest groups have not confined litigation challenges to those projects that fall within the boundaries of Federal lands. Several environmental statutes have provisions that apply—and can therefore be theoretically enforced—beyond the Federal property line. Special interest groups frequently attempt to manipulate the provisions of the Endangered Species Act, the Clean Water Act, the Clean Air Act, and the National Historic Preservation Act, among others, to disrupt development on and off Federal lands.

And even where statutes don't reach beyond Federal boundaries expressly, a recent trend has been for special interest groups to bring challenges to projects based on allegations that, while not located on Federal property, the projects have the potential to affect environmental or cultural values on Federal property. Such is the case with the ongoing challenge to development in northwestern New Mexico, where special interest groups have requested a moratorium on drilling permits in an area well beyond the boundaries of Chaco Canyon National Park. Challenges to pipeline and infrastructure projects across the country are likewise based on a similar theory that, while the pipeline may not traverse Federal property, the project may have collateral consequences for Federal or tribal assets. This incorporation of artificial boundaries and reliance on a liberal interpretation of “impacts” allows special interest groups to justify challenges to projects anywhere in the country, notwithstanding that many of the challenges are premised on questionable legal arguments.

A. Interior Routinely Fails to Meet Statutorily Imposed Deadlines

The Property Clause of the United States Constitution affords Congress “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁵ It is undisputed that the Property Clause grants Congress broad, if not plenary, authority to regulate the manner in which Federal property is managed and developed. Like all executive branch components, Interior and its agencies possesses only the power that Congress has delegated and must fulfill their land management duties in the manner Congress has prescribed. Yet Interior routinely fails to meet some of its most essential statutorily imposed obligations.

The first step in the development of onshore Federal oil and gas resources is land use planning. During this phase, BLM prepares resource management plans to determine which lands should be open to oil and gas leasing and to prescribe necessary lease stipulations to protect various resources in the event of future leasing. Once land use planning is completed, parcels in areas identified as open for oil and gas leasing in a resource management plan may be nominated for leasing. Anyone can nominate lands by sending a written expression of interest to the BLM State Office with jurisdiction over the parcel.⁶ BLM reviews each nomination to ensure that the parcels are, in fact, available under the resource management plan and that “environmental concerns” are addressed before a nominated parcel is offered for sale.⁷ Dozens, if not hundreds, of nominations are pending at any given time in each BLM State Office.

The Mineral Leasing Act imposes a discrete, ministerial obligation with which the Secretary “shall” abide: “Lease sales shall be held for each state where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary.”⁸ Consistent with that obligation, BLM’s regulations require that “each proper BLM State [sic] office shall hold sales at least quarterly if lands are available for competitive leasing.”⁹ BLM’s regulations also articulate specific categories of “Lands available for competitive leasing.”¹⁰ These categories include, but are not limited to, “Lands included in any expression of interest.”¹¹ The Mineral Leasing Act’s implementing regulations specify that “all lands available for leasing shall be offered for competitive leasing.”¹²

BLM regularly fails to comply with the obligation to conduct quarterly lease sales in each of the states where eligible lands are available. Over the last 2 years, none of the major oil and gas producing states have conducted quarterly lease sales in each state under the Office’s jurisdiction: the New Mexico State Office conducted two sales in 2015 and two sales in 2016; the Montana/Dakotas State Office allowed more than 6 months to pass in between sales of leases in North Dakota and Montana; the Wyoming State Office conducted only three lease sales in 2016; the Utah State Office conducted two sales in 2015 and two sales in 2016; and the Colorado State Office conducted three sales in 2015 and two sales in 2016.¹³ Not surprising, many of the cancellations and deferrals are in response to suits and legal challenges that special interest groups brought in opposition to fossil fuel leasing on Federal lands.¹⁴

Once a sale is conducted, a second set of deadlines is triggered. The Mineral Leasing Act provides that “[l]eases shall be issued within 60 days following payment by the successful bidder.”¹⁵ Federal courts have interpreted this provision to mean that “energy companies are entitled to a final decision on whether the lands are or are not to be leased within 60 days of the dates the leases were paid for by the top

⁵ U.S. Const. art. IV, § 3, cl. 2.

⁶ See Bureau of Land Mgmt., *Guidelines for Submitting an Expression of Interest (EOI)* (“EOI Guidelines”): https://www.blm.gov/nm/st/en/prog/energy/oil_and_gas/guidelines_for_submitting.html.

⁷ See *id.*

⁸ 30 U.S.C. § 226(b)(1)(A).

⁹ 43 C.F.R. § 3120.1–2.

¹⁰ 43 C.F.R. § 3120.1–1.

¹¹ 43 C.F.R. § 3120.1–1(e).

¹² 43 C.F.R. § 3120.1–1.

¹³ See Bureau of Land Mgmt., *Reg’l Oil & Gas Lease Sales*: <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing>.

¹⁴ *W. Energy Alliance v. Jewell*, No. 1:16–CV–912–LF–KBM (D.N.M.), Conservation Groups’ Mot. to Intervene at 16 (Oct. 19, 2016) (explaining that the New Mexico State Office canceled a January 2015 lease sale in response to an administrative appeal that special interest groups filed).

¹⁵ 30 U.S.C. § 226(b)(1)(A).

qualified competitive bidders under the Mineral Leasing Act.”¹⁶ Like the leasing obligation, BLM routinely fails to meet this obligation to timely issue leases that companies have won at auction and paid for. In almost every circumstance, this failure is the result of BLM’s inability to resolve administrative protests that special interest groups file in opposition to virtually every parcel that is offered for lease.¹⁷

And even when leases are issued, BLM consistently fails to meet its obligations to timely process operational permits. The Mineral Leasing Act requires that, no later than 10 days after the date on which BLM receives an APD, BLM shall: (i) notify the applicant that the application is complete; or (ii) notify the applicant that information is missing and specify any information that is required to be submitted for the application to be complete.¹⁸ BLM almost never meets this deadline and, indeed, rarely if ever prepares and transmits any formal notice that an application is complete.

Then, not later than 30 days after the applicant for a permit has submitted a complete application, BLM must issue the permit, if the requirements under the National Environmental Policy Act and other applicable law have been completed.¹⁹ As with the deadline to issue leases, Federal courts have held that processing permits consistent with this timeline is statutorily required.²⁰ But again, BLM almost never meets this controlling 30-day deadline. To the contrary, the former BLM Director has testified that, even after improvements in BLM’s efficiency, the average processing time for a drilling permit on Federal lands is approximately 200 days.²¹ Our clients report that BLM field offices frequently identify obligations associated with responding to lawsuits as a significant drain on agency resources that prevents the field offices from processing permits more efficiently.

B. Special Interest Groups’ Litigation Advantage

Special interest groups have acknowledged expressly that litigation is an essential tool in their politicized efforts to oppose the Trump administration’s economic and energy agenda. And it is no secret that lawsuits are piling up. Dozens of suits have been filed challenging numerous aspects of the President’s Executive Orders, rule-making activities, project approvals, and other manifestations of executive policy. Donations to special interest groups have grown exponentially since the November 2016 Presidential election and numerous groups have promised to fight each of the Trump administration’s initiatives in the courts.²²

These lawsuits divert already limited resources away from the core functions of the agency. But they also have significant implications for energy producers and the communities in which the producers operate. Oil and gas producers are unable to rely on statutorily prescribed timelines when planning projects and committing investment capital. Projects instead are held in limbo for indeterminate amounts of time until BLM can commit the necessary personnel and resources required to perform essential functions. In the interim, energy producers are forced to cut staff, prohibited from realizing returns on investment, and have their ability to finance projects restricted.

And the impact of these delays extends well beyond individual companies. Particularly for the western public lands states, the stakes of Federal oil and gas activity are high. A state receives 50 percent of all monies received in the form of sales, bonuses, and royalties (including interest charges) derived from oil and gas production on Federal lands within a state’s borders.²³ Litigation that frustrates or delays development and incentivizes operators to move development activity off of Federal lands and on to private lands actively harms states and taxpayers.²⁴

¹⁶ *W. Energy Alliance v. Salazar*, No. 10–CV–0226, 2011 WL 3737520, at *7 (D. Wyo. 2011).

¹⁷ *Id.* at *2 (“Although BLM strives to review and resolve protests in a timely manner, the number, timing and complexity of protests typically cause BLM to fail to issue the protested leases within the 60-day window specified in the MLA.”).

¹⁸ See 30 U.S.C. § 226(p)(1)(A)–(B).

¹⁹ See 30 U.S.C. § 226(p)(2)(A).

²⁰ See *EnerVest, Ltd. v. Jewell*, No. 2:16–cv–01256–DN, 2016 WL 7496116 (D. Utah Dec. 30, 2016).

²¹ Breaking the Logjam at BLM: Hearing on S. 279 and S. 2440 Before the S. Comm. on Energy & Natural Resources, 113th Cong. 491 at 20 (July 29, 2014) (testimony of Neil Kornze) (explaining that since 2011, average processing times have ranged between 196 and 300 days).

²² Ben Wolfgang, *Trump helps drive donations to environmental groups*, Wash. Times (Feb. 9, 2017) (“Virtually all prominent environmental groups say donations are pouring in at unprecedented rates.”).

²³ 30 U.S.C. § 191(a).

²⁴ The sums involved are significant. In Fiscal Year 2014, for example, Federal oil and gas royalties totaled almost \$3.1 billion. See 80 Fed. Reg. 22,148, 22,150 (Apr. 21, 2015). Of that amount, \$112.6 million was distributed to Colorado; \$16.2 million to Montana; \$546.4 million to New Mexico; \$191.5 million to Utah; and \$542.7 to Wyoming. See Center for Western

The impacts of litigation on private companies and local communities is especially pronounced because the special interest groups that frequently sue to block development projects have two important inherent advantages. The first and most important advantage is a virtually unlimited access to litigation funding. Contrary to common perception, small family companies—not vertically integrated international conglomerates—are responsible for the overwhelming majority of domestic oil and gas production. Independent producers develop 90 percent of the wells in the United States, producing 54 percent of the Nation's oil and 85 percent of the Nation's natural gas.²⁵ The median size of these companies is 12 people.²⁶ These small companies cannot realistically compete in high stakes litigation with well-heeled advocacy groups that: (i) can tap into funding across the entire country; (ii) use litigation itself as a fundraising tool; (iii) do not depend on the ebbs and flows of global commodity prices; and (iv) take advantage of fee shifting provisions in environmental statutes that frequently result in taxpayers reimbursing the advocacy groups for their legal fees.

The special interest groups' second advantage is that their relationship with government agencies is much less transactional than the relationship between energy producers and the regulators that oversee operations. When taking a position in a suit concerning a project on public lands, private companies must consider not only the project that is the subject to the challenge, but the company's ongoing working relationship with the agency that the company will undoubtedly need to work with again on other projects in the future. Unlike special interest groups that sue whenever dissatisfied with any agency decision, operators frequently choose not to challenge adverse decisions on individual permits and projects in the interest of preserving the operator's overall working relationship with local regulators.²⁷ Large, national political advocacy organizations do not have their strategic flexibility confined in this same way. Special interest groups based in Washington, DC or San Francisco have much less need to maintain a working relationship with local field offices in Price, Utah or Carlsbad, New Mexico than do the small companies that work daily with the agencies' field office personnel.

III. SUMMATION

History demonstrates that constant litigation is a significant contributor to the Interior's consistent failure to meet statutorily imposed obligations attendant to Interior's management of the public lands. Now politically motivated special interest groups have stated expressly that the groups intend to increase the amount of litigation they initiate specifically to frustrate Interior's ability to execute the new Administration's policy choices. Without structural changes, this litigation will serve as an obstacle depriving private companies and taxpayers of the important benefits of responsible commercial development on our Nation's public lands.

QUESTIONS SUBMITTED FOR THE RECORD TO MARK BARRON, PARTNER,
BAKERHOSTETLER LAW FIRM

Questions Submitted by Rep. Grijalva

Question 1. You testified about delay caused by litigation, but did not propose another way to assure that the views of all interested citizens are taken into account when the agency considers whether to grant a permit or right-of-way. What alternative means to do you propose for taking views of all stakeholders into account and assuring that Federal agencies meet the important principles in all of our laws?

Answer. The question appears to be premised on a misrepresentation of my testimony. In my opening statement, I emphasized that I do not hold the opinion that excessive litigation is the exclusive reason that Federal agencies are frequently unable to execute their mission consistent with the statutory parameters that define

Priorities, *A Fair Share: The Case for Updating Oil and Gas Royalty Rates on Our Public Lands* at 5 (June 18, 2015).

²⁵See Indep. Petroleum Ass'n of Am., *Who Are America's Independent Producers?*, available at: <http://www.ipaa.org/independent-producers/>.

²⁶See *id.*

²⁷The need to protect a company's relationship with regulators is why, when energy companies choose to initiate their own lawsuits, they frequently prefer to litigate through trade associations. But while the trade association vehicle may be useful, it still requires consensus among members and deprives any individual company of total control over litigation that may affect the company's operations.

the agencies' obligation. Nor have I suggested that challenging government conduct through litigation is *per se* improper.

What I have emphasized is that there is evidence that certain special interest groups use litigation as a tool not to overturn illegal agency action, but to advance preferred policies, regardless of the merits of the groups' legal actions. The following example is illustrative: a Westlaw search for all Federal court decisions in the last 3 years in which the Center for Biological Diversity was a party returns 117 results. By comparison, the same search for decisions in which the Independent Petroleum Association of America was a party return two results.

This data suggests that special interest groups are choosing to sue not just when agency action is arbitrary and capricious or contrary to law, but whenever the action is inconsistent with the groups' policy preferences. Almost without exception, there have been ample opportunities for special interest groups to advance their views before final agency action—virtually all meaningful environmental review requirements involve processes for public notice and comment. The administrative process, not the courtroom, is the appropriate forum for these groups to advance their policy concerns and objectives.

Questions Submitted by Rep. Johnson

Question 1. Do unsuccessful legal or administrative challenges against an agency, such as those involving the leasing and permitting process you discussed, or suits that are dismissed still affect the agency and require time and resources to address?

Answer. There is no direct relationship between the merits of a legal challenge and the time and resources necessary to defend against that challenge. Every case that is properly filed requires a response under the applicable administrative or court rules. So, even when a legal challenge is ultimately unsuccessful, it still requires the agency use resources to review the complaint, gather facts to dispute or refute the allegations made in the complaint, and take action to defend the agency as may be appropriate based on whether an administrative body or court will adjudicate the dispute.

Even simple and frivolous challenges impact agency resources. Based on my experience representing Federal agencies while a Trial Attorney at the Department of Justice, I am familiar with the procedures that Federal land management agencies undertake when served with a legal challenge. At a minimum, that process typically involves: (i) correspondence and/or in person meetings with agency counsel and, in lawsuits filed in Federal court, with DOJ counsel; (ii) factual investigation into the allegations presented in the challenge, including, but not limited to, interviews with involved personnel and collection of relevant documentary materials; (iii) review of existing and ongoing programs or actions to ensure that the agency does not have additional legal exposure; and (iv) review of legal filings that counsel draft to ensure technical accuracy and completeness.

Because Federal agencies are at all times accountable to Congress and the public, agencies face the additional complexity of requiring documentation to support the litigation choices that the agency makes. Unlike private litigants, the strategic rationale for an agency's litigation choices must be documented in the filings the agency submits to the adjudicator or—particularly in cases that are resolved through settlement—in internal memoranda that support the agency's choices. The obligation to document the rationale for its litigation choices is not conditional on the strength or validity of the legal challenges to which an agency must respond.

Mr. JOHNSON. Thank you very much.

And the Chair now recognizes Ms. Schiffer for her testimony.

STATEMENT OF LOIS SCHIFFER, FORMER GENERAL COUNSEL, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, WASHINGTON, DC

Ms. SCHIFFER. Chairman Labrador, Ranking Member Grijalva, and members of the Subcommittee and the Committee, thank you for the opportunity to testify today about settlements in Federal agency litigation, with particular attention to the Department of the Interior.

I speak today on my own behalf, based on years of experience as a Federal Government lawyer over the course of almost 40 years. I had two stints at the U.S. Department of Justice, from 1978 to 1984, 7 years as Assistant Attorney General in the Environment Division, and 7 years as General Counsel at NOAA, ending last January. So, I have had significant experience handling, supervising, and being a client for litigation and settlements on behalf of the United States and its Federal agencies.

The gist of my testimony is that settlements serve important public interests when used appropriately. I will summarize five points briefly.

First, lawsuits are a toolkit that our constitutionally established, three-branch system of government makes available through the Constitution and Federal statutes to help assure that agencies comply with the laws that Congress passes. It provides an orderly means of dispute resolution among the government and others with a wide range of interests. It is part of our democracy.

Settlement is one tool in this toolkit. Citizens, states, and organizations bring lawsuits against Federal agencies to challenge agency action or failure to act to carry out requirements of specific statutes or regulations.

A plaintiff has a legal burden in bringing a lawsuit against the Interior Department. He or she must establish standing, show injury, that the agency action or failure caused the injury, and that the court may redress the injury. They must have a claim under specific provisions of a Federal statute. In effect, those bringing lawsuits are seeking to assure that the agency carries out what Congress and the Constitution require.

Moreover, in filing a lawsuit in Federal court, the lawyer must, under Rule 11 of the Federal Rules of Civil Procedure, warrant, subject to sanction, that claims, defenses, and other legal contentions are non-frivolous. So, before there is a possibility of settlement, there has to be a notice or a filing of a non-frivolous lawsuit against the agency meeting key legal requirements.

Second, settlement may be useful to litigation. Settlement may give better results than either a win or a loss by a court order. An assessment of possible settlement will take into account the costs, work involved, delay, and uncertainty of preparing the case and having the court decide.

The advantages of settlement are often money and time savings, pragmatism, certainty, and control. In cases seeking money, settlement may protect public funds by leading to more reasonable results. Adjustments can be made in settlement amounts that are not available in litigation. Money cases are more likely to require trials, and settlements may avoid the expense and time that trials take.

Third, agency requirements and procedures mean that a lawyer for the Federal Government cannot “give away the store.” Settlements require significant internal review at Interior and Justice, so the public interest is taken into account. By regulation and policy, settlements require approval of persons with appropriate authority at both Interior and Justice. Monetary settlements are reviewed carefully with an eye to sensible limit on costs to the public. Our

attorneys are mindful that claims on the Federal Judgment Fund should be made wisely.

Fourth, money claims for attorney's fees are strictly regulated by specific provisions in the governing statutes, including the Equal Access to Justice Act. Indeed, Congress enacted EAJA, which requires that attorney's fees be paid from the agency budget, rather than the Judgment Fund, to encourage lawful agency conduct and deter agency decisions that skirt the law.

Attorney's fees claims are evaluated carefully before payment is made, and payment of EAJA fees is a sobering message for agency officials. Settlement of attorney's fees claims generally limits the amounts paid by the Federal Government, including avoiding fees on fees.

Fifth, settlements are public. People on all sides of issues have raised concerns over the years about secret settlements or sue-and-settle—and I mean on all sides. While settlement discussions of necessity are confidential, settlements themselves are quite public. I cannot recall a settlement I worked on for a Federal agency, with the exception of personnel actions, that did not have a public document as the outcome.

In sum, the practical benefits of settling cases are well recognized by the Federal courts, virtually all of which have put in place alternative dispute resolution programs, procedures, and requirements to encourage settlements.

I am finishing.

The practical benefits are also well recognized by litigants against the government of every interest and by Federal agencies. If a more manageable result can be achieved with less time for briefing, assembling a record, working with witnesses, trying cases, that serves everyone's interest.

Thank you for the opportunity to testify about this important subject.

[The prepared statement of Ms. Schiffer follows:]

PREPARED STATEMENT OF LOIS SCHIFFER, RETIRED GENERAL COUNSEL OF THE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Chairman Labrador, Ranking Member McEachin, and members of the Subcommittee, thank you for the opportunity to testify today about settlements in Federal agency litigation, with particular attention to the Department of the Interior.

With intermittent Federal agency service of 25 years through several positions at the U.S. Department of Justice, the National Oceanic and Atmospheric Administration, and the National Capital Planning Commission, and as an adjunct professor of environmental law at Georgetown University Law Center for 30 years, I have had significant experience handling litigation and reaching and approving settlements of Federal agency cases. I began work at the U.S. Department of Justice in 1978 as Chief of the General Litigation Section (now the Natural Resources Section) in the Land and Natural Resources Division, with responsibility for public land and water cases, surface mining, some cases related to Indians, and litigation generally under numerous Federal statutes. In 1981, I became a Senior Litigation Counsel in the Lands Division, a position I held until 1984. I returned to the U.S. Department of Justice Department in 1993, first as Deputy Assistant Attorney General, then as Acting Assistant Attorney General, and from 1994 through January 2001, as Assistant Attorney General for the (renamed) Environment and Natural Resources Division. I have also served at General Counsel at the National Capital Planning Commission (2005–2010) and at NOAA (2010 through January 2017). I have worked in private practice at law firms and as a lawyer at non-profit organizations as well. I am also a trained mediator with the Federal courts in the District of Columbia, and established a mediation program in the Environment Division in the 1990s. In

these roles I have litigated and supervised thousands of cases, and have over many years been involved in settlements large and small. My remarks today are based on my own experience and are on my own behalf; I am not speaking for any Federal agency or private group.

Today I will describe how several different types of lawsuits against the Department of the Interior are handled—cases where the plaintiff seeks injunctive relief, either against an agency rule or an individual action such as issuance or denial of a lease or permit; or seeks to compel the agency to comply with a mandatory duty under a statute; and cases where the plaintiff seeks monetary relief.

Overall, litigation is a means that our constitutionally established three-branch system of government makes available through the U.S. Constitution and Federal statutes to help assure that agencies comply with congressional statutes, agency regulations, the U.S. Constitution, and other laws. Courts decide disputes among parties with differing interests. It is an orderly and effective means of dispute resolution among the government and other parties, including state and local governments, citizens, and companies and organizations supporting a wide range of interests. Settlement is one tool in this toolkit, and certainly a tool used—outside of government cases—by businesses as well as governments. Indeed many approaches to alternative dispute resolution are designed to identify common interests of disputing parties in lawsuits so that they can achieve a settlement. Those who seek to have the government run more like a business must be aware that full use of settlement authority in appropriate circumstances is one way to do that.

A word of background about lawsuits against the Federal Government: they are brought to challenge agency action or failure to act under specific statutes or regulations. They reflect the fact that in its actions under Federal laws agencies are taking into account a broad range of legal requirements and public interests, often expressed through public comment or communicated to the agency through other means. Under Federal law, the party bringing the lawsuit must establish standing—showing injury in fact, that the action or failure to act caused the injury, and that it may be redressed by the court. If the defendant does not object to an assertion that a plaintiff has standing, the Court on its own may determine that the plaintiff has not met this burden. In addition, the party suing must demonstrate that the case falls within the zone of interests protected by the statute or law at issue; that a statute provides a “cause of action,” and that the agency either acted under the statute or regulation in an arbitrary and capricious manner or otherwise contrary to law, or that it failed to perform a mandatory duty. In effect, those bringing lawsuits are seeking to hold the agency to the requirements that Congress and the U.S. Constitution establish for agency action. Lawsuits are brought either under the Administrative Procedure Act, or under specific provisions of the substantive law.

Moreover, in filing a lawsuit in Federal court, where most actions against Federal agencies are brought, the lawyer must meet the requirements of Rule 11 of the Federal Rules of Civil Procedure, by which s/he must warrant, *inter alia*, that “the claims, defenses, and other legal contentions are warranted by existing law, or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law”.¹ So before there is a possibility of settlement, there has to be a notice of or a filing of a non-frivolous lawsuit against the agency based on a statute, regulation, or the Constitution.

Litigation or settlement of cases seeking injunctive relief. Once a suit is filed, both the party bringing the case and the government agency, represented in Court in most instances by the U.S. Department of Justice, assess the nature and the merits of their case. Settlement is often considered as a possibility. Without invading any

¹ Rule 11(b) of the Federal Rules of Civil Procedure provides:

“(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.”

client confidences, I may say that it is useful for each party to assess what happens if s/he wins, what happens if s/he loses and what happens if s/he settles.

It is useful to make this assessment against the costs, delay, and uncertainty of the court deciding, either by summary judgment on a record and the pleadings, or after trial (depending on the type of case). At a minimum, the agency will be required to assemble an administrative record, and to work with the Justice Department on writing briefs and often, presenting argument to a judge. In cases seeking injunctive relief, the advantages of settlement are often time-savings, pragmatism, and control. As a specific example, under express provisions of the Endangered Species Act, the agency must take certain actions within specified time frames (*e.g.* within 12 months of receiving a petition to list or de-list a species that the agency has found has sufficient information that action may be warranted). These schedules do not dictate particular outcomes, but do require action. If the agency misses the time frame, and a petitioner sues to enforce the time frame, the court may hold the agency to short and firm dates that the agency does not have resources to meet. That represents a loss for the agency and for the petitioner—seeking either listing or de-listing—because a court victory may not get results. Alternatively a settlement for a schedule taking into account both the petitioner's interest and the agency's resources, may result in more practical dates without the need for full briefing to the Court.

The practical benefits of settling cases is well-recognized by the Federal courts, virtually all of which have put in place alternative dispute resolution programs, procedures and requirements to encourage settlements.

The practical benefits are also well recognized by litigants against the government of every interest, and by Federal agencies. If a more manageable result can be achieved with less time for briefing and assembling a record, that serves everyone's interest.

For settlements seeking injunctive relief—for example, the agency failed to meet a mandatory duty, the regulation should be set aside, the lease should be issued rather than denied based on the record before the agency—the settlement will require approval of both the Department of the Interior by a person with appropriate authority, and by the Department of Justice by a person of appropriate authority. In my experience, at the Department of Justice, the approval of a Section Chief or Assistant Chief, and possibly an even higher official, will be required for a significant non-monetary settlement. See generally 28 C.F.R. 0.160, the Justice Department regulation that specifies what settlements must be elevated beyond the Assistant Attorney General. Within each Division at Justice, provisions are set forth as to what levels of approval are required for settlement.

Settlements may be reflected in Consent Decrees—an order approved by the Court, or by settlement agreement—in effect contracts between the parties setting forth what each party will do. Another benefit of settlements, rather than litigated judgments, is that the option of a contract-like settlement agreement, rather than a court order, is available. In fact, the Federal Government usually settles cases against it by settlement agreement rather than consent decree, so that any failure to comply is addressed in the first instance by further proceedings before the court as a failure to meet a contract term rather than as a contempt proceeding.

Under several statutes, including the Endangered Species Act and some of the pollution protection statutes like the Clean Air Act and Clean Water Act, Congress may be seen to contemplate settlements—a party may be required to give notice (for example, of 60 days) before a suit may be filed. The intention of such notice periods is to permit the agency to correct the problem or resolve the issue before a lawsuit is filed. A settlement agreement is one means for such resolution.

Suits against the Federal Government for money. In a suit against a Federal agency or the United States for a monetary claim, once the claim is made (for example a tort claim) or the suit is filed (for example, a takings claim), a similar assessment by each party of strengths and weaknesses of its claims and arguments is a useful internal process. Claims for money occur under specific statutes where Congress has waived the sovereign immunity of the United States. Claims against the United States, such a takings claims, may directly relate to actions of a particular agency, including the Department of the Interior. Claims for money are more likely to be addressed in court through an evidentiary trial, rather than on an administrative record through summary judgment. That makes the cost and time of going to trial an additional factor. It is also useful to note that the Justice Department, which generally handles litigation of monetary claims, is governed by Justice Department regulations that require the approval of the Associate Attorney General or Deputy Attorney General for payments of claims against the United States where the payment is in excess of \$4 million. Other factors also require approval above

the Assistant Attorney General level. See generally 28 C.F.R. 0.160 (the Justice Department regulation on settlement authority).

In my experience, in the Environment and Natural Resources Division at Justice, monetary settlements are reviewed carefully, with an eye to limiting costs to the public. Attorneys are mindful that they have responsibility to see that claims on the Federal Judgment Fund are made wisely.

Money claims for attorneys' fees are strictly regulated by the governing statutes, including the Equal Access to Justice Act and attorneys' fees provisions in other statutes. These statutes, which are waivers of sovereign immunity, have specific standards for payment. Indeed, Congress enacted the Equal Access to Justice Act, which requires that attorneys' fees be paid from the agency budget rather than the Judgment Fund, to encourage lawful agency conduct and deter agency decisions that skirted the law. From my experience at both NOAA and the Justice Department I note that claims for attorneys' fees under EAJA and other statutes are evaluated carefully before payment is made. Settlement generally has the effect of limiting the amounts paid by the Federal Government, in part because Courts may be less flexible, and in part because litigation over the fees generates "fees on fees"—fees go the plaintiff to litigate the claim if the government does not prevail, or does not (under EAJA) have a substantial basis for its position.

Concerns that settlements aren't transparent. Some have raised concerns about "secret settlements," and I have heard these concerns about settlements from a full range of parties. A few points: while settlement discussions of necessity are confidential to get results—a party cannot easily take a position in court and publicly undercut it in a public settlement discussion, but can in a private discussion—the settlements themselves are quite public—I cannot recall being involved in a settlement on behalf of a Federal agency (with the exception of personnel actions, where Privacy Act concerns may pertain) that did not have a public document as the outcome.

In conclusion, Congress and the Constitution provide citizens and organizations with the right to bring lawsuits against Federal agencies and the United States as one means to assure that the agencies are meeting the requirements of the laws. Those seeking to sue must meet a set of requirements including establishing standing and making non-frivolous claims. Once notice is given or a suit is filed, evaluating whether a consensual resolution through settlement, rather than litigation and a court order, is an important and useful tool for both plaintiffs and the government in some cases. Many requirements within the government help assure that the tool is used appropriately.

Thank you for the opportunity to testify about this important subject.

QUESTIONS SUBMITTED FOR THE RECORD BY REP. GRIJALVA TO LOIS SCHIFFER,
FORMER GENERAL COUNSEL, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Question 1. In your experience, do environmental groups bring a series of frivolous lawsuits against a particular project in order to delay it?

Answer. In my experience, environmental groups do not bring a series of frivolous lawsuits against a particular project in order to delay it. First, to file a Federal lawsuit, a lawyer has to sign the Complaint in compliance with Rule 11 of the Federal Rules of Civil Procedure, which requires under penalty of sanctions that the facts and law set forth are not frivolous. Further, there are legal requirements that claims related to the same matter have to be brought at the same time, not sequentially. Finally, someone challenging an agency action has a set of requirements to meet including standing, a cause of action under a statute, that the case is ripe. These requirements are not easy to meet, and deter frivolous suits.

Question 2. Are deadline suits caused by excessive litigation or by inadequate funding for agencies?

Answer. A number of statutes require agency action by a deadline and those deadlines may be difficult to meet. In the case of the Department of the Interior regarding Endangered Species Act deadlines, inadequate resources have long been a reason for missing the deadlines. As to deadlines in laws enacted by Congress, for example, some of the pollution prevention statutes require that EPA issue regulations within certain time frames. Another example, the Endangered Species Act provides that people may petition the agency for action, and then specifies time frames by which the agency must act on those petitions. The Freedom of Information Act also has deadlines, and they are deadlines that Congress continues to make stricter. If the agency misses these legislated deadlines, the person or organization seeking

action may bring a lawsuit to compel the agency to take the action it was supposed to take by the deadline. The legal name for this suing to enforce a “mandatory duty.” In general, agencies miss these deadlines because they do not have adequate resources—staff, technology, and money—to take all the actions by deadlines that these statutes require. More staffing, better technology, more resources in general would help agencies meet the established deadlines.

Question 3. The Multi District Litigation provided a single schedule for the Department of the Interior to handle a large number of petitions for listing of species under the Endangered Species Act, rather than many spate lawsuits with no coordinate schedule. Was that approach helpful or frivolous?

Answer. While I have not had personal involvement with this ESA multi-district litigation, I am sufficiently familiar with it to know that it establishes a single, unified and prioritized schedule for the Department of the Interior to evaluate a large number of listing petitions—petitions for considering whether a species of plants or animals should be listed as threatened or endangered—and that approach is clearly preferable to a scattershot of responding to petitions without adequate resources whenever they come in the door. Department officials have testified about the importance of this approach to the effective work of the agency. https://www.doi.gov/ocl/hearings/112/EndangeredSpeciesAct_120611.

An illustration may be helpful: If a student has 10 homework assignments, and teachers kept assigning more, we would all counsel that student to make a list and set priorities instead of panicking about each new assignment because of the overload. The Multi-District approach was a good one to enable the Department of the Interior to approach the deadlines set by Congress in a more sensible way with its limited resources.

Question 4. Ms. Lobdell raised questions about small companies that are intervenors in a case not being able to take appeals. Could you address that concern?

Answer. As I understand it, Ms. Lobdell’s concern arises under the following circumstance: Her clients think the government has acted properly, and that the plaintiffs who challenge that action in a lawsuit are wrong; her clients intervene in the case on the side of the government; and the trial court then rules that the government failed to handle the matter properly under the law and remands (sends back) the case to the agency for further consideration. If the government decides it will comply with the trial court’s order, and conduct further proceedings rather than appealing the ruling, then under the current law the Court has ruled that Ms. Lobdell’s clients may get relief from the agency proceeding and therefore cannot at that time appeal. As a matter of the law, there is no “final order” from the court because the matter is back at the agency for consideration. Ms. Lobdell’s concern would arise in any case where the government decided to comply rather than seek appeal. While the *agency* could decide to appeal rather than comply with the trial court ruling, if the agency decides to comply with the trial court ruling, under a principle called “the final order doctrine” that is established by a statute—28 U.S.C. 1291—there is no final order for the intervenor, because s/he can go back to the agency to seek relief. In the cases Ms. Lobdell has provided (*Pit River Tribe* and *Alsea*), the Ninth Circuit Court of Appeals has said that the intervenor has the opportunity to protect its interests before the agency in that instance, and can appeal to the court after the agency takes further action if the intervenor does not get relief from the agency, but cannot appeal until the agency acts. That Ninth Circuit principle would apply in any case where these circumstances pertain.

Ms. Lobdell’s approach that her clients could appeal even if the agency wanted to act further, if put into a statute, would create an exception to the well-established and sensible “final order doctrine,” and would discourage the government from deciding to comply with a court order rather than challenge it further. In effect, Ms. Lobdell would prefer that the agency not comply with the court order, or comply and let her take an appeal in the meantime. Either approach would cause additional and possibly unnecessary litigation, and be contrary to the sensible usual approach of giving the parties to the lawsuit one forum at a time (court or agency) and not two. If the agency prefers to comply, long-standing “final order” requirements set the rules. In effect, the Court is ruling that an agency may choose to comply rather than be drawn into an appeal. That is generally a sound approach. If Congress were to consider legislating an exception to the final order doctrine—an approach that would upset long-standing court precedent—then it should create that exception for any intervenor, not just small companies.

Question 5. What are your views about allowing affected companies to intervene in lawsuits?

Answer. Anyone—individuals, companies, non-profit groups, others, directly affected by a lawsuit, should be able make their views known in compliance with the approaches and procedures in the law, which generally work well. There are legal standards about when someone may intervene in a suit, either as of right or permissively, set forth in the Federal Rules of Civil Procedure; sometimes additional rules are set forth in statutes. Courts are familiar with the rules and apply them. If someone meets the legal standard to intervene, and the Court does not permit it, s/he may appeal the Court's ruling. Courts may also allow participation as an amicus instead of as a party to hear views of the person or company. Changing the law to provide special rights of intervention for small companies when they do not meet the current standards—that include an analysis of whether the parties in the case already are sufficiently protecting the views of the proposed intervenor—would cause unnecessary delay in cases for little benefit.

Question 6. Does any study analyze the kinds of cases where EAJA is used most?

Answer. A helpful analysis is in a report of the Chairman of the Administrative Conference of the United States (2013), which analyzes 2010 data for the amounts that agencies paid under the Equal Access to Justice Act. That report on the tables at pages 8–9 shows that in that year the Veterans Administration and the Social Security Administration EAJA payments totaled about \$38 million, while Department of the Interior paid approximately \$1.2 million. The report is attached here.

Question 7. Is alternative dispute resolution (e.g. mediation) helpful in resolving the kinds of lawsuits raised in the hearing?

Answer. Alternative dispute resolution, including mediation and other approaches, can definitely help agencies and those who sue them reach settlements in the right circumstances. A settlement generally gives an agency more control over the outcome and its work going forward—with a court decision, the agency may win or lose, and if it loses may face orders that are not practical to implement. An outside facilitator like a mediator may well help the parties find common ground and reach a settlement. Courts are generally enthusiastic about alternative dispute resolution and most Federal courts have programs for alternative dispute resolution to facilitate settlements.

Question 8. One witness testified that agencies spend time complying with the environmental group request under FOIA instead of doing other work. Do you think agencies should be given additional staff and resources to comply with FOIA?

Answer. The Freedom of Information Act is an important law that gives the public information about how the government operates. Going through the many agency records that FOIA requestors seek takes time and resources, including effective electronic resources. Because of deadlines that Congress has established in the FOIA statute, responding may have priority in an agency. Agencies should certainly be given adequate resources—staff, electronics, and other resources, to do their jobs effectively, including adequate resources for responding to FOIA requests and doing other work at the same time.

Question 9. Were any points raised in the hearing—about collusion or any other topic—to which you would like to respond?

Answer. I note that it has been my experience in many years of working with Federal agency lawyers that in general these public servants are able, hardworking, and conscientious. As lawyers they are bound by standards of professional conduct administered by state bars. In my experience these lawyers do not “collude” with lawyers on the other side of a case.

Thank you for the opportunity to answer these questions.

The following document was submitted as an attachment to Ms. Schiffer's responses. This document is part of the hearing record and is being retained in the Committee's official files:

—Administrative Conference of the United States, January 9, 2013, Report of the Chairman on Agency and Court Awards in FY 2010 Under the Equal Access to Justice Act.

Mr. JOHNSON. Thank you very much.

And the Chair now recognizes Ms. Lobdell for her testimony.

**STATEMENT OF CAROLINE LOBDELL, EXECUTIVE DIRECTOR
AND SUPERVISING ATTORNEY, WESTERN RESOURCES
LEGAL CENTER, PORTLAND, OREGON**

Ms. LOBDELL. Good morning, Mr. Chairman, Ranking Member, and members of the Subcommittee. It is an honor to be here today.

I am Caroline Lobdell, the Executive Director and Supervising Attorney for the Western Resources Legal Center. We are a non-profit legal education program out of Portland, Oregon that provides clinical education to law students who are interested in resource use, such as livestock grazing, timber harvesting, oil and gas exploration and production, and mining. I am here today on my own behalf.

Today, I will address three topics: concerns over recovery of attorney's fees under the Equal Access to Justice Act, otherwise known as EAJA; the marginalization of resource users as limited interveners that want to help defend the Department's resource use decisions in court; and steps that the Department of the Interior can take to avoid litigation and streamline the challenges to its resource projects, so that projects benefiting natural resources and projects benefiting our rural communities are not delayed by years by the agency's own appeal process.

EAJA is a taxpayer-funded meal ticket for environmental groups to collect attorney's fees at enhanced rates, even if the non-profit net assets exceeds the \$2 million limit that precludes attorney's fees recoveries for individuals. EAJA is an incentive to sue the Department of the Interior and other agencies, and is a funding source for expansion of the staff and offices of groups that want to halt environmentally and economically beneficial natural resource projects.

The taxpayers lose all around. They pay plaintiffs, and they lose revenues from the projects that have come to a halt.

Congress should consider three reforms that will bring some sanity to stop the EAJA gravy train for plaintiff groups.

First, a non-profit should be subject to the same net worth limit that precludes recovery for other plaintiffs.

Second, there should be no enhanced rate for environmental litigation. Decades ago, environmental law was considered a specialty area with few lawyers practicing in the fields, and the courts concluded that enhanced rates were then justified. However, today, almost every law school has an environmental law clinic. Environmental law simply is no longer a specialty justifying enhanced rates.

And third, a plaintiff should not be considered a prevailing party if it only obtains a favorable ruling on a few or limited claims.

State and local governments, potential purchasers of timber sales, and grazing allotments and existing contract and permit holders are allies of the Department of the Interior to defend lawsuits filed to halt resource projects. These third parties can help demonstrate the economic impacts and the negative environmental consequences from halting a resource project.

Unfortunately, there is no comparable legislation that provides a right for these third parties to intervene in a lawsuit that seeks to halt a departmental project.

For example, on the Point Reyes National Seashore north of San Francisco, families engaged in ranching and dairy moved to intervene in a lawsuit that challenges the Park Service's over-delayed revision of the seashore's general management plan and the authorization of long-term leases for ranches. These multi-generational ranch and dairy families were land stewards before Point Reyes was even created, and they are a significant part of the agricultural base of Marin County.

The Park Service acquired these private lands under threat of condemnation, and the court, urged by plaintiffs, limited the ranchers and counties' participation. The Park Service has capitulated to plaintiffs and provided only short-term leases.

When the government loses a case, the Ninth Circuit has held that interveners have no right to appeal if the government does not appeal. So, bad precedent is established by one-sided settlements.

Finally, there are at least two actions the Department can implement to avoid litigation and streamline challenges.

First, the Department needs to build flexibility into the resource management plans when the plans are amended and revised. Plaintiffs love to plumb the depths of the luminous management plans to find inflexible standards and required procedures to serve as foundation for lawsuits. Every word "shall" in a management plan lifts a plaintiff's heart, and provides another arrow to shoot down a resource project. A plan full of discretionary standards defeats an agency's ability to engage in adaptive management.

Second, the Department of the Interior's administrative review process is far more extensive than that of the Forest Service or USDA. The Forest Service has one objection process. In stark contrast, Interior has a three-level review process.

For example, I represent Caroline and Manuel Manuz from Clifton, Arizona, who are seeking to build a solar-powered well. There is no reason for three levels of review to make a decision to drill a modest well on a grazing allotment in an area far from surface water and that will benefit wildlife and cattle. This is only one of countless examples where simple decisions that benefit all become paralyzed by the litigation process.

Thank you for this opportunity.

[The prepared statement of Ms. Lobdell follows:]

PREPARED STATEMENT OF CAROLINE LOBDELL, EXECUTIVE DIRECTOR, WESTERN
RESOURCES LEGAL CENTER, PORTLAND, OREGON

Good morning Chairman Labrador, Ranking Member McEachin, and members of the Subcommittee. I am Caroline Lobdell the Executive Director of the Western Resources Legal Center (WRLC). WRLC is a nonprofit organization that provides clinical education at Lewis and Clark Law School in Portland, Oregon for those students interested in resource use such as livestock grazing, timber harvest, mining, and oil and gas exploration and production. My remarks are based on my experience as an educator and litigator and do not represent the position of the Law School. Today I will address three topics: concerns over recovery of attorney's fees under the Equal Access to Justice Act (EAJA); the marginalization of resource users as limited intervenors that want to help defend the Department's resource use decisions in court; and steps that the Department of the Interior can take to avoid litigation and streamline the challenges to its resource projects so that projects benefiting natural

resources and rural communities are not delayed for years by its own appeals process.

EQUAL ACCESS TO JUSTICE ACT REFORMS

EAJA is a taxpayer funded meal ticket for environmental groups to collect attorney's fees at enhanced rates even if the non-profit's net assets exceed the \$2 million limit that precludes attorney's fees recovery for individuals. EAJA is an incentive to sue the Department of the Interior and other agencies and is a funding source for expansion of the staff and offices of groups that want to halt environmentally and economically beneficial natural resource projects. The taxpayers lose all around. They pay plaintiffs and they lose revenue from the projects that are halted.

Congress should consider three reforms that will bring some sanity to stop the EAJA gravy train for plaintiff groups. First, a nonprofit should be subject to the same net worth limit that precludes recovery for other plaintiffs. If the nonprofit's net assets exceed \$2 million, then there should be no recovery of attorney's fees. Second, there should be no enhanced rates for environmental litigation. Decades ago environmental law was considered a specialty area with few lawyers practicing in the field and the courts concluded that enhanced rates were justified for environmental plaintiffs. However, today almost every law school has an environmental law clinic. A multitude of newly minted lawyers challenge BLM, Fish and Wildlife Service, and other Department of the Interior actions to get experience straight out of law school and hope for a big EAJA payday. Environmental law simply is no longer a specialty justifying enhanced rates. We have seen cases where law students used on the cases are awarded rates of \$150 an hour and they are not even admitted to practice law. Third, a plaintiff should not be considered a "prevailing party" entitled to EAJA fees if it only obtains a favorable ruling on a few claims. A plaintiff should be required to prevail on all, or at least half, of its claims before it can recover under EAJA.

LEVEL THE LITIGATION PLAYING FIELD FOR THOSE WHO SUPPORT DEPARTMENT OF THE INTERIOR DECISIONS

State and local governments, potential purchasers of timber sales and grazing allotments, and existing contract and permit holders are allies of the Department of the Interior to defend lawsuits filed to halt resource projects. These third parties can help demonstrate to the court the adverse economic impacts and negative environmental consequences from halting a resource project. Unfortunately, there is no legislation that provides a right for a state or local government, contractor, or permit holder to intervene in a lawsuit that seeks to halt a Departmental project. For example, on the Point Reyes National Seashore north of San Francisco, families engaged in ranching and dairying moved to intervene in a lawsuit that challenges the Park Service over delayed revision of the Seashore's General Management Plan and the authorizations of long-term leases for the ranches. These multi-generational ranch and dairy families were land stewards before the National Seashore was created. The Park Service acquired these private lands under threat of condemnation. Congress recognizes the importance of the ranches and provided for continuation of ranching and dairying in the pastoral zone of the Seashore. These families have been caring for the land and provide locally grown, organic, and grass-fed cattle, sheep, and dairy products and are a major part of the agricultural base of Marin County. The ranchers and Marin County moved to intervene in a lawsuit. The court, at the urging of plaintiffs, limited the ranchers' and County's participation to the point where they are not considered full parties to the settlement negotiations. Secretary Ken Salazar directed that 10-year ranching leases be issued, but the Park Service has capitulated to plaintiffs and only provided 1-year leases. The short-term leases make it hard for the ranchers to justify investments in water distribution, pond improvements, and range rejuvenation that will benefit wildlife and water quality.

Finally, when the government loses a case, the Ninth Circuit has held that intervenors have no right to appeal if the government does not appeal. So, bad legal precedent is established by one-sided settlements. Furthermore, when the Department is prevented by the Solicitor General from appealing an adverse decision, which an intervenor cannot appeal, because of bad Ninth Circuit law.

ACTIONS WITHIN THE CONTROL OF THE DEPARTMENT OF THE INTERIOR TO AVOID LITIGATION AND STREAMLINE ADMINISTRATIVE REVIEW

Finally, there are at least two actions that the Department of the Interior can implement to avoid litigation and streamline the challenges to resource projects. First,

Department of the Interior agencies need to build flexibility into their Resource Management Plans when the plans are amended and revised. Plaintiffs love to plumb the depths of voluminous Management Plans to find inflexible standards and required procedures to serve as a foundation for lawsuits to stop agency projects. Every use of the word “shall” in a management plan lifts a plaintiff lawyer’s heart and provides another arrow to shoot down a resource project. Not surprisingly, courts have held that an agency must follow the nondiscretionary mandates in its management plan. A plan full of nondiscretionary standards defeats an agency’s ability to engage in adaptive management during a given year and over the life of the plan. For example, a provision in a plan that BLM “shall retain 500 pounds of residual dry matter per acre” after the grazing season does not account for the annual variation in weather or site conditions that could allow greater forage utilization while maintaining the health of the range.

Second, the Department of the Interior’s administrative review process is vastly more cumbersome and lengthy than the administrative review of the Forest Service and the Department of Agriculture. The Forest Service has an objection process that provides one level of administrative challenge to a resource project such as a timber sale. In stark contrast, the Department of the Interior has a three-level review process. A protest before the Bureau of Land Management, then an appeal to the Department of the Interior Office of Hearings and Appeals administrative law judge, and then another appeal to a three-judge panel of the Interior Board of Land Appeals (IBLA). IBLA itself is not a creature of statute but is one of two Boards in the Office of Hearings and Appeals that the Secretary of the Interior created in 1970. The Secretary has the power to shape and modify the administrative appeals process and define which decisions are subject to administrative appeal and whether there is one level of challenge instead of three. For example, under the Department of the Interior Manual there is no appeal of a biological opinion issued by the Fish and Wildlife Service. Certain decisions could have one level of protest just like Forest Service decisions. For example, I represent Carolyn and Manuel Manuz from Clifton, Arizona, who are seeking to build a solar powered well. There is no reason for three levels of review of the decision to drill a modest well on the Twin C Grazing Allotment in Arizona far from any surface water source, that will benefit wildlife and cattle with a new water source, and reduce water withdrawals from a well on the Gila River. Decisions to maintain the status quo, such as renewal of a grazing permit at the same level of livestock use, are another class of decisions that could be subject to only one level of administrative challenge.

Thank you for this opportunity to testify, and I am happy to answer any questions.

The following documents were submitted as supplements to Ms. Lobdell’s testimony. These documents are part of the hearing record and are being retained in the Committee’s official files:

- Resource Renewal Institute, et al. v. National Park Service, et al.*, U.S. District Court, Northern District of California (Oakland Division), Case No.: 4:16-cv-00688-SBA; Doc. 103–36 Declaration of Amy Meyer, Doc. 103–37 Declaration of Brigitte Moran, Doc. 103–38 Declaration of Jamison Watts.
- The Mercury News: *Point Reyes: Lawsuit challenges historic ranching operations at iconic park*, by Paul Rogers, February 10, 2016.
- Twin C Grazing Permit Renewal and Goat Camp Well: Figure 3—Proposed Goat Camp Well looking south; Figure 4—Proposed Goat Camp Well capped.

QUESTIONS SUBMITTED FOR THE RECORD BY REP. JOHNSON TO CAROLINE LOBDELL,
EXECUTIVE DIRECTOR, WESTERN RESOURCES LEGAL CENTER

Question 1. The question period of the hearing generated some confusion regarding the Equal Access to Justice Act and the statute’s limitations on which parties are eligible to be awarded attorney’s fees in actions against the United States. Can you clarify the limits the statute sets on party’s eligibility to be awarded attorney’s fees and whether any organizations are exempt from these limits?

Answer. The limitations as to the parties that can recover attorney’s fees under the Equal Access to Justice Act (“EAJA”) are clearly defined in the statute under 5 U.S.C. § 504(b)(1)(B). Individuals whose net worth does not exceed \$2 million and

businesses whose net worth does not exceed \$7 million can pursue attorney's fees under EAJA.

There was some suggestion during the hearing that 501(c)(3) tax-exempt nonprofit organizations are without exception, and therefore, subject to the same net worth limitations. That is, however, in direct conflict with the plain language of 5 U.S.C. § 504(b)(1)(B), which states in pertinent part:

except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association

Thus, while there are caps for business and individuals, EAJA creates a specific exception for nonprofit organizations and they are not subject to any limitations on net worth and can pursue attorney's fees no matter how much the organization is worth.

Question 2. How has the litigation against the National Park Service regarding ranching at the Point Reyes National Seashore interfered with the Park Service's ability to manage that area properly?

Answer. The litigation on the Point Reyes National Seashore has paralyzed and completely halted the Parks Service's completion of a National Environmental Policy Act Comprehensive Ranch Management Plan. Completion of a Ranch Management Plan was stopped in its tracks when the Park Service stipulated with plaintiffs to stay any work on the Ranch Management Plan, effectively conceding to a de facto preliminary injunction.

Second, the Park Service, prior to the litigation, had provided ranch leases exceeding 1 year. However, after commencement of litigation, the Park Service has provided only 1-year lease extensions. These year-to-year lease extensions discourage investments in improvements to the land and long-term environmentally beneficial conservation projects in cooperation with the Natural Resource Conservation Service. The Park Service was paralyzed when the plaintiffs filed a Motion for Preliminary Injunction. That injunction sought a complete halt to the Ranch Management Planning NEPA process and the issuance of leases longer than 1 year.

Ongoing settlement discussions have stayed further action on the Motion for Preliminary Injunction. However, by halting the work on the Ranch Management Plan and issuing only 1-year short term leases, the Park Service capitulated to plaintiffs and basically acceded to their demands in the Motion for Preliminary Injunction.

The Committee should also note that the severe restrictions on intervenors' participation in this litigation have been appealed to the 9th Circuit Court of Appeals. That appeal is also currently stayed given ongoing settlement discussions.

I would be happy to answer any further questions that the Committee may have.

Mr. JOHNSON. Thanks so much, Ms. Lobdell. And thanks again to all the witnesses for your testimony today.

I would like to remind the Members that Committee Rule 3(d) imposes a 5-minute limit on our questions. To begin questioning, I will recognize myself as the Chair for 5 minutes.

Mr. Barron, last Thursday, Secretary Zinke testified before our Full Committee. At that hearing, we heard some strong viewpoints from both sides of the aisle, as well as from the Secretary himself, regarding the Department's budgetary priorities.

As you know, payments are made under the Equal Access to Justice Act, they come directly from the agency's budget in most cases. Given the exorbitant attorney's fees that we have heard about that are paid to environmental lawyers under the EAJA, sometimes at enhanced rates as high as \$750 an hour, in what ways does constant litigation further strain the Department's budget, and ultimately hinder its ability to fulfill its core missions?

Mr. BARRON. Thank you, Mr. Chair.

Mr. JOHNSON. Hit your button for me, the talk button, yes.

Mr. BARRON. Thank you, Mr. Chair. I think, in all ways, as I mentioned in my opening statement, the Department is initially burdened by a lack of resources, so it is already starting from behind the eight ball. And then, this constant litigation exacerbates that existing problem.

I think what is notable is that this body has acted in the past to try to address some of those concerns, and the litigation has continued to undermine those efforts. For example, in the last several years, there have been pilot projects to fund field offices with particularly large permit demands. The cost of a drilling permit on Federal lands has been increased over the last several years, and yet those steps have not resulted in any benefits in the field. The field offices are still under stress.

As I mentioned in my testimony, we have received anecdotal evidence that one of the real troubling issues for some of these field offices is responding to FOIA requests from these environmental groups, that resources that would be allocated to permitting, permit processing, and managing the lands is being used to respond to FOIA requests and to support litigation efforts.

Mr. JOHNSON. That is good. Would you describe this as a vicious cycle? Is that a fair characterization of it? And does the current system, do you think, incentivize more lawsuits being brought against the Department?

Mr. BARRON. What I would say, Mr. Chair, is that when we counsel clients who are planning projects on Federal lands, that we encourage them to incorporate in their timelines the virtual certainty of litigation delaying the project.

I can use as an example a master development plan that was recently approved for a client in the Permian Basin in New Mexico. Master development plans are a tool that BLM emphasizes as streamlining the permitting and environmental review process. Several years of environmental review went into approving the master development plan. Within days of the plan being approved and posted on the Carlsbad field office's website, there was an environmental challenge to a plan that was subject to public participation for several years.

So, in our view, people operating on public lands should expect litigation. It is part of operating in that sphere.

Mr. JOHNSON. I appreciate that. We know that advocacy groups benefit from the receipt of taxpayer dollars through government grants. And then, of course, they are also receiving uncapped attorney's fees in these lawsuits against the government.

In your testimony, you explain that advocacy groups also use litigation as a fundraising tool, which further cements the fact that they have a built-in sort of cottage industry, money-making industry around litigation. Can you elaborate on that just a little more?

Mr. BARRON. Sure. I think you will note, if you look at the publicly available websites for most of the major environmental groups, they issue a press release and a fundraising request every time that a lawsuit is filed. And I don't think that it is a controversial opinion. I mean it has been prevalent in the media that they have acknowledged that they intend to challenge every approval, every

permit processing, and every implementation of environmental policy under the new Administration.

I think that part of that is, as you can also see from their public releases and from their websites, that has driven fundraising, particularly in the last quarter, but that's a consistent pattern that we have seen.

Mr. JOHNSON. It says something about their motives, I think.

Mr. Jorjani, there are concerns about frequent repeat litigants here. And, as a matter of fact, our Ranking Member, Mr. Grijalva, requested a report from the Government Accountability Office that was just released this February. The report, which addresses so-called deadline suits under the Endangered Species Act, found a total of 141 of these suits against the Fish and Wildlife Service and National Marine Fisheries Service over a 10-year period.

Most shockingly, the data revealed that just two environmental groups alone were responsible for half of those suits. It took a GAO study on just these types of suits to discover how often these repeat litigants sue.

It seems that special interest plaintiffs have developed a strategy around exploiting the Endangered Species Act's vulnerability to litigation, and environmental groups will file an overwhelming number of petitions to review a species for listing, knowing that Fish and Wildlife and National Marine Fisheries cannot possibly complete the finding in time, giving them an opportunity to sue the agency when the deadline is missed.

The same report found that Fish and Wildlife prioritizes completing actions under Section 4 of ESA mandated by settlement agreements resulting from lawsuits.

So, basically, are Federal agencies tasked with protecting our most vulnerable species, or prioritizing which species gain protections first because of lawsuits brought on by the same environmental groups that claim to want to protect these species? This not only devalues the integrity of the ESA, but science in general. A more centralized case information system might help us better identify these patterns.

The question is—I am out of time, but would this be something you are willing to continue a conversation with the Committee on?

Mr. JORJANI. I am not familiar with that specific report, but yes, we welcome the opportunity to continue working with this Committee on this very important issue.

Mr. JOHNSON. I appreciate that. I am out of time for my questions, and I am going to recognize Mr. Clay first for questions for 5 minutes.

Mr. CLAY. Thank you, Mr. Chairman, and thank you all for coming to the hearing today.

Ms. Schiffer, Mr. Barron claimed in his testimony that special interest groups have virtually unlimited access to litigation funding. He says the oil and gas companies are small companies that cannot realistically compete in high-stakes litigation with well-heeled advocacy groups. But he is a high-priced lawyer from a major law firm representing their interests. In fact, he represented their interests well when he killed the fracking rule, which would have protected drinking water sources.

In your experience, did you find that oil companies were unable to find enough money to bring cases against Interior or anyone else, for that matter?

Ms. SCHIFFER. Congressman Clay, thank you for your question. In my experience, what I see is the lawsuits that the government gets, either when I was at NOAA or when I was at the Justice Department. And basically, Congress has appropriately recognized that there are many different interests, and the Department of the Interior is one of the agencies that really has to take into account, under statutes, a very wide range of interests.

And part of how people assert those interests is when it thinks the agency has done something wrong or has failed to act, it brings a lawsuit. So, in my experience, there are lawsuits by oil and gas companies, big and small, by environmental groups, and by individual citizens and local citizens groups. And the fact that the groups may or may not be well funded seems to go across the board of types of interest that are expressed.

I would also note, because there has been some suggestion that the Equal Access to Justice Act provides sort of a big pocket of money, that the standards for getting attorney's fees under the Equal Access to Justice Act are pretty clearly set forth in the statute.

It has one financial standard for an individual, a person who has a net worth of less than \$2 million, and a separate standard for every other kind of group. It makes no distinction between nonprofits, unincorporated businesses, corporations, associations, or units of local government. They are all together with \$7 million, they have to have less than \$7 million.

Once they meet that threshold, then the group has to show that they prevailed in the lawsuit. And that is a standard that courts have interpreted in rather complicated ways to determine what prevailing in a lawsuit is. But a version, they have to win it.

And then, when they win it, the government can show that its position was substantially justified. And if the government took a substantially justified—that is, a reasonable—position, then the people do not get attorney's fees. And even then, there is an hourly rate, which is relatively low, in the statute, and with limited exceptions for going above it. So, it is a heavy burden, and it happens only after the lawsuit is over.

As a practical matter—I am not in any groups, and I don't know their motives, but it would appear that that would not be the basis for suing.

And I will say, if you look on the websites of some of these groups, they have pretty broad purposes and policies that, assuring statutes are implemented, do not relate to having funding.

Mr. CLAY. Sure. Thank you for that response. Ms. Schiffer, Mr. Barron claims that oil and gas operators frequently choose not to challenge adverse decisions on individual permits and projects in the interest of preserving the operator's overall working relationship with local regulators.

In your experience, when oil companies sue BLM, do the regulators at the local level care so much about the cases that it affects their relationship with the oil companies? If so, is that a deterrent to filing lawsuits for oil companies?

Ms. SCHIFFER. Well, I certainly don't know the specific facts of Mr. Barron's clients. I do know that everybody worries about how they are going to get along with the local regulators. That includes people who work on environmental protection, as well as oil and gas companies, and everybody else who deals with the regulators, and that interest is widespread.

It is a little bit of—you can disagree without being disagreeable. And I will say that I have spent certain amounts of time explaining to really terrific Federal employees, people who work for all of us, as employees of the Federal Government, that the fact that somebody sues you does not mean you are a bad person or that you have done something wrong.

Mr. CLAY. Sure.

Ms. SCHIFFER. It means that they have a disagreement with the agency.

So, I cannot address Mr. Barron's clients. I can say that there is an interest in working at the local level in a cooperative way, but there is also the capacity—as Congress has recognized and the courts have recognized—to go ahead and bring lawsuits when it is necessary, when people believe it is necessary to assure that the agency is carrying out what Congress specified.

Mr. CLAY. Yes, thank you for your response. My time is up, but I am sure we have to protect those small little oil and gas companies from litigation. I yield back.

Mr. JOHNSON. Thank you. The Chair now recognizes Mrs. Radewagen for 5 minutes.

Mrs. RADEWAGEN. [Speaking native language]. Good morning. Thank you, Chairman Johnson and Ranking Member Grijalva, for holding this hearing. And thank you all for testifying today. I have a question here for Mr. Barron.

In regards to an earlier question regarding the Bureau of Land Management's hydraulic fracturing rule, do you draw a distinction between a group of stakeholders directly impacted by a rule, which multiple states and tribes also challenged and a district court judge ruled was outside the scope of the Bureau's congressionally delegated authority, and advocacy organizations indiscriminately challenging individual projects and agency decisions as a part of a larger strategy to eliminate oil and gas resource development on Federal land?

Mr. BARRON. Yes, I would draw that distinction. The particular rule in question, I think that the premise of the Congressman's question may have been flawed. In addition to the statutory authority arguments that the Federal judge ruled on, the judge had also found during the preliminary injunction stage that the rule was not adequately justified and was flawed under several aspects of administrative law, and would not have provided any additional environmental protection beyond what the states and the oil and gas are already providing.

Mrs. RADEWAGEN. Ms. Lobdell, in discussing the Point Reyes National Seashore litigation, you mentioned Marin County and the ranchers, whose leases are affected by the litigation, are not full participants to the settlement negotiations between the plaintiffs and the National Park Service.

Do you believe that it results in sound policy making when special interest group plaintiffs are able to influence the terms of agreements to a greater degree than the local government and affected leaseholders actually conducting the activities being challenged?

Ms. LOBDELL. Thank you for your question. I do not believe that is sound policy. I think that we are taking well-intended laws to an extreme here. And the result is an incentive structure that encourages constant lawsuits at the expense of the benefits of commercial management, of natural resources, and of rural communities.

Mrs. RADEWAGEN. Ms. Lobdell, what sort of value can state and local governments' potential timber sales purchaser and permit holders provide to the litigation and settlement process when the Department of the Interior is involved? And how does this assist the Department in its cases?

Ms. LOBDELL. These resource users are on the ground. They know the nuances of the landscape, they know their own personal histories, and they have localized knowledge on a fluency level that is localized, both for the facts and the economic impacts to the communities. And they can help the Department of the Interior bring to light those facts to a judge.

They are also, when they are involved in litigation, there to help influence and work with the Department of the Interior in order to move the litigation along, so to speak.

Mrs. RADEWAGEN. So, would you suggest that we improve the process for greater stakeholder involvement in settlement negotiations?

Ms. LOBDELL. I believe there is a fundamental question at root there, and it is involving stakeholders by giving them a right to intervene in lawsuits, so that they can have a seat to the settlement negotiations. So, I don't think we jump straight to the settlement negotiation. That question has a sub-layer, which is, what is their right to participate in a lawsuit?

In the Point Reyes case, they begged and banged at the door, and they are still not considered full parties.

Mrs. RADEWAGEN. Thank you, Mr. Chairman. I yield back.

Mr. JOHNSON. Thank you, and the Chair recognizes Mr. Soto for 5 minutes.

Mr. SOTO. Thank you, Mr. Chairman. Having served in state government for 10 years, we constantly had to balance between the rights of litigants to move our government along with the costs associated with that.

My first question is for Ms. Schiffer. We have the U.S. Fish and Wildlife Service and Endangered Species Act, and we have these specific sections that provide for the ability to have lawsuits. Would you agree it has been, for many years, congressional intent for these private parties to have a say in this process?

Ms. SCHIFFER. I would certainly say that the statutes that Congress has passed are very clear direction to the agency. If a citizen or if somebody petitions, for example, to have a species listed, and there is a specific provision in the statute for that, then the agency is on a strict time schedule that is set out by the statute,

90 days, to evaluate if the science supports going further. Then there is another year to take action.

And Congress put those provisions in for a reason. We are talking about species, critters and species protection, and there is an interest in making a decision about whether they need to be protected.

It is also true that, under the Administrative Procedure Act, and specific provisions of the Endangered Species Act, if the agency is not doing what it is supposed to do—that is, the duty that Congress has given it to do—people can sue to say, “Do what you are supposed to do.” And that is what a lot of the lawsuits are.

The root problem is not the lawsuits. The root problem is that the people and the agencies do not have adequate resources to do everything that they are supposed to do. So, they can tell you at the front end that they are not going to make that deadline, and that putting them under a settlement agreement to meet the deadline helps to give it some priority.

Mr. SOTO. So, Congress underfunds the agencies, then the agencies are not able to do their due diligence and be as efficient in naming some of these species and making some of the other decisions that they need to make. And therefore, these lawsuits are there to hold the agency accountable. Is that fair to say?

Ms. SCHIFFER. That is exactly right. And that really is our checks and balances, three-branch system of government, that if Congress passes a law, the executive branch implements it. If the citizens think it is not being implemented in the way Congress intended, they can go to the courts to get the courts to say, “Agency, you need to implement it, and we are going to hold you accountable for that.”

I will say that sometimes what the settlements have the effect of doing is enabling the citizens and the agency to work out a schedule that is more pragmatic than if the court just says, “We’re going to set the standards.” But it is all carrying out what Congress has specified in the statutes, including the deadlines that Congress has set.

Mr. SOTO. Ms. Lobdell made a good point about local stakeholders who may be affected by it. Maybe they should have an intervening right. What would be the positives and negatives of having some of the local businesses affected by these lawsuits being able to intervene?

Ms. SCHIFFER. Well, there really are two questions that are a part of what you are asking. I am all for having a broad range of interests being able to be taken into account, and the people who are affected having a seat at the table, in general, when agencies are considering action to take.

In terms of when people go to court, can they intervene? The rules for who can intervene are set as part of what are called the Federal Rules of Civil Procedure, which is a rule that the courts make. But my recollection is that that set of rules lays before Congress for a period of time before it goes into place. And then the courts implement those rules.

And they have been in place for a while. The Federal Rules of Civil Procedure are periodically amended, and there is a specific rule providing for intervention of right. And, if not a right, then intervention—

Mr. SOTO. So, you wouldn't have an opposition to intervening, and it is arguably substantive, so it could be in the purview of Congress, in addition to the rules of procedure. There is some common ground on how we could tweak the process a little bit, while still making sure that citizens have the right to push the agencies along to do what they need to do, right?

Ms. SCHIFFER. I think what the Rules of Civil Procedures show is that it is a case-by-case decision based on a set of standards and the rules, and how the courts apply the facts.

Mr. SOTO. So, they have the ability to intervene right now, under the rules?

Ms. SCHIFFER. They have a standard that, if they need it, they may intervene of right as a voluntary, discretionary matter, or to be amicus participants, but it is up to the judge implementing that set of rules. But there is a standard by which citizens now can seek to intervene.

Mr. JOHNSON. Objection, leading the witness. No, I am just kidding.

[Laughter.]

Mr. JOHNSON. The Chair now recognizes General Bergman for 5 minutes.

Mr. BERGMAN. Thank you, Mr. Chairman. And thanks to all of you for being here today.

In my district, which includes the Upper Peninsula of Michigan and northern lower Michigan, we have difficulty in getting affordable and reliable energy to our entire region. It has been my experience that oil and gas operators either cannot build the necessary infrastructure because it is too expensive to comply with both Federal and state regulations, or the ones who can afford to have to charge potentially higher prices just to stay in business.

So, Mr. Barron, can you describe what effect that over-litigation, that we are discussing here today, would have on the potential to a smaller oil and gas operator to come to a rural, less-populated region like the Upper Peninsula?

Mr. BARRON. Thank you for that question, Congressman. Many of the challenges that we have been discussing would apply particularly to that project. Rights-of-way projects are among the most difficult and frustrating projects for operators developing both on and off public lands. When they are on public lands, they are, of course, dealing with the NEPA process that is attendant to any sort of construction project analysis.

But also, for rights-of-way projects, some of these groups have an opportunity to resort to suits under other statutes, including the Endangered Species Act, the Clean Water Act, and those sorts of statutes are applicable, not just on Federal lands, but in the scenario that you are describing, in a rural area where you will find deposits of what might be ephemeral waters, where you will find critters, as Ms. Schiffer mentioned earlier, that potentially could be subject to endangered species challenges.

So, you can develop and manifest a lawsuit over a rights-of-way project pretty much in every single situation. And particularly when those projects involve fossil fuels, they become the preferred challenges for special interest groups.

Mr. BERGMAN. OK. Do you think that if Congress could actually ease this atmosphere of over-litigation, that business, both large and small, but especially small, would be more apt to operate in regions like ours?

Mr. BARRON. I do believe that, yes.

Mr. BERGMAN. OK. This is for all the panel members, and you can either choose to or not choose to answer this. But what, in your opinion, is the next step that this Committee should take to reverse this injuriously negative trend of using—my word, now—frivolous litigation, mean-spirited, in some cases, to delay good policy from being implemented?

Ms. SCHIFFER. Congressman, with all respect, I have issue with the assumptions that you are making, that it is litigation that is delaying, and to me, what would be most effective is to get together the people who have an interest and a stake in what is going on, and to have them talk to each other and see if a policy can be developed that takes into account the full range of interest that Congress has told the Department of the Interior to take into account.

Mr. BERGMAN. Would that include or exclude all the lawyers in the discussion?

Ms. SCHIFFER. Well, I am a lawyer, so you know that I am going to say I think the lawyers help in the decision making.

Mr. BERGMAN. All right, thank you.

Mr. Chairman, I yield back.

Mr. JOHNSON. Thank you, General. The Ranking Member of the Full Committee, Mr. Grijalva, has requested that Ms. Barragán go next. So, I now recognize Ms. Barragán for 5 minutes.

Ms. BARRAGÁN. Thank you, Mr. Chairman. And by the way, Mr. Bergman, I am a lawyer. We are good people.

Thank you, Mr. Chairman. I know this was covered a little bit earlier, but I want to go back to some of the EAJA issues. Signed by President Carter and permanently funded by President Reagan, the Equal Access to Justice Act, or EAJA, was enacted to give citizens the ability to challenge the government, regardless of their social economic status.

Far from being the taxpayer-funded meal ticket or gravy train, as one of our panelists calls it in her testimony, EAJA employs built-in safeguards, along with others that have evolved through case law, to effectively prevent abuse. In fact, under EAJA, parties can recover attorney's fees up to \$125 an hour, but there have to be two conditions met.

One is that, first, the party must have won the lawsuit. Second, the party must prove that the government's position was not substantially justified. This is not an easy standard to meet. There are no exceptions to this rule, and many plaintiffs do not recover attorney's fees, even when they win their cases.

The law also restricts who can recover fees under EAJA. Individuals with a net worth of more than \$2 million or organizations worth more than \$7 million, or with more than 500 employees, cannot recover fees.

Further, there is no evidence that EAJA has fueled environmental litigation, although I know there has been some testimony

that that could be the case. Both industry and non-governmental organizations have been the recipients of EAJA awards.

And, simply put, I think EAJA provides an essential avenue for American taxpayers to use if they have been wronged by the Federal Government, and ensures that our civil justice system does not exclude the most vulnerable among us.

My question, and let me start with the testimony, Ms. Lobdell argued that EAJA is used as an incentive to sue the Department of the Interior and other agencies by individuals who would not have sued otherwise.

Ms. Schiffer, in your experience, have you seen this to be the case?

Ms. SCHIFFER. Congresswoman, I have not seen that to be the case, that EAJA is the reason why people bring lawsuits against the government.

I have two additional observations. There is a Supreme Court case called *Scarborough v. Principi*, where Justice Ginsburg quoted congressional legislative history about the purposes of EAJA. It said it is to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government.

So, that was clearly what was motivating Congress, it was to enable people to vindicate their rights. It was not to somehow create a fund. And, in my experience, that is how it has worked.

I would also note that it is my understanding—though I can't put my finger on the GAO report right now—that the report is that the significant users of the EAJA, people who get funds under it, are people who bring cases against the Veterans Administration and the Social Security Administration. And it really bears paying attention to, that that statute serves important purposes for these citizens who have concerns about what the government is doing.

Ms. BARRAGÁN. And would you agree that the two standards that are met are there to be somewhat of a safeguard against frivolous lawsuits because it is so hard to sometimes meet these two requirements?

Ms. SCHIFFER. Yes, I would definitely agree with that, that there are high burdens under EAJA, and not easy to meet. And I would also note that, under Rule 11 of the Federal Rules of Procedure, people cannot make frivolous claims about it, either.

But it is a significant burden, to show that the government was not substantially justified, and that the person has prevailed.

Ms. BARRAGÁN. And last, would you be able to explain why it is important that the net worth limit makes a distinction between non-profits and individuals?

Ms. SCHIFFER. It makes the distinction between individuals and every other kind of entity. And I am not familiar with how Congress came up with those amounts, but it doesn't make anything special for non-profits. They are just with every other kind of entity, different from individuals.

I think the thinking was we don't want very rich individuals using it, and we don't want rich entities using it, either.

Ms. BARRAGÁN. Great, thank you. I yield back.

Mr. JOHNSON. Thank you. The Chair recognizes Mr. McClintock for 5 minutes.

Mr. MCCLINTOCK. Thank you, Mr. Chairman.

Mr. Jorjani, what is meant by the term "sue and settle"?

Mr. JORJANI. I believe those who use the term "sue and settle," it is the idea that certain groups seek to advance policy initiatives by litigating and then settling to achieve that policy initiative. Beyond that, I don't have a—

Mr. MCCLINTOCK. So, an objective would be, essentially, collusion between litigants and ideological zealots in the bureaucracies to achieve a fore-ordained conclusion by court order that they know they could not get by regulation or by law.

Mr. JORJANI. I wouldn't want to assume certain intentions or characterize others as zealots in this. I think it varies from case to case and matter to matter.

Mr. MCCLINTOCK. Well, is that the practice? Do we end up getting actions by court order that would not have been obtained by regulation or statutory change?

Mr. JORJANI. I would like to thank you for the question. It is an incredibly important issue. We look forward to learning more about this matter, or the issue, generally. But, in theory, if groups are engaging in suing and settling, they are holding different agencies to the terms of specific statutes. And to the extent those deadlines are in the statutes, we look forward to working with this Committee to reform the statutes.

Mr. MCCLINTOCK. Mr. Barron, how much of our regulatory cost delays would you say are caused not by the litigation itself, but by agencies bulletproofing studies to avoid any pretext for litigation?

Mr. BARRON. I would certainly say that that is an issue, that agencies often are so concerned about the potential of being sued in the future, that studies take considerably longer, analysis is delayed in order to try to sure up the paper trail because they know lawsuits are coming, once the final decision is issued.

Mr. MCCLINTOCK. Ms. Lobdell, we were told at this hearing, and we have been told at previous hearings, this is no big deal, there is really not that much litigation that goes on, that attorney's fees are very limited and very reasonable. That is the theory, anyway. Is that the practice?

Ms. LOBDELL. In reality, that is not the practice. A Congresswoman over here had mentioned \$125 an hour under EAJA. When EAJA was enacted, that was the standard rate, which is adjusted for inflation. Last I checked it was \$180; that was some time ago.

But the reality is that is not the rate that we are dealing with here. We are dealing with an enhanced rate because of the specialty of environmental law.

Mr. MCCLINTOCK. How much is that enhanced rate, typically?

Ms. LOBDELL. It varies, based on the particular specialty and the resume, for shorthand, of the environmental lawyer seeking it.

Recently, our firm was involved in a case on a timber sale, and the rate for the attorney was \$450 an hour, and I think that increased at some point during the case, and the law student's rate was \$139 an hour. And these are folks not even admitted to practice law.

Mr. MCCLINTOCK. I had one little community in my old district before reapportionment called Colfax. They were sued by a group of San Francisco environmental law firms, and the legal costs of those San Francisco law firms actually exceeded the budget of this little community.

Is that typical, or at least—let me put it another way. Is that an isolated incident?

Ms. LOBDELL. Is the case I am referencing, those rates, an isolated incident? In my practice, no. These rates are standard from what I usually see and request for attorney's fees.

Mr. MCCLINTOCK. In order to get an award for an attorney's fee, does the plaintiff have to prevail on all of the claims they bring in their lawsuit?

Ms. LOBDELL. No, and to answer the other question asked earlier, what should our first step be? Our first step is to take an honest look at what EAJA incentivizes, and be honest about what the rates are that we are playing with here, how many lawsuits there are, and what the incentive structure is.

The incentive structure is to throw the widest net possible against an agency, and to prevail on any of those "thou-shalts" that I mentioned, which otherwise may or may not exist under the statute, and to do it frequently, so that you can increase your odds of accessing these fees. So, even if you had 10 claims, and you prevailed on 1, in many instances, the environmental plaintiffs argue that claim is so inextricably intertwined with the lawsuit as a whole that we cannot really separate it out.

Mr. MCCLINTOCK. You could sue on 100 different points, win on 1, and get an award?

Ms. LOBDELL. You can get an award. And the question there is the nature and extent of the award. And the argument that comes up is that claim was so connected to the whole, we should get more than just that piece of it.

Mr. MCCLINTOCK. At these hearings, I have often been reminded of Eric Hoffer's line that every great cause becomes a movement that becomes a business that becomes a racket. And that might be making the environmental attorneys rich, but it is killing our forests.

Ms. LOBDELL. It is a well-intended law that, in my opinion, has become the primary fundraiser for many non-profit groups seeking to halt projects and sue the government.

Mr. JOHNSON. Thank you. The gentleman yields back. The Chair now recognizes Mr. Huffman for 5 minutes.

Mr. HUFFMAN. Thank you, Mr. Chairman, and welcome to the witnesses.

Ms. Lobdell, I would like to pick up with you, if I could, please. I noticed in your testimony that you made reference to the Point Reyes National Seashore, a ranching community. I represent those folks.

Ms. LOBDELL. Yes, you do.

Mr. HUFFMAN. And I realize that there is a narrative in this Committee, in this hearing, which is to criticize environmental litigation. There is a similar narrative to pretty much bash the Park Service wherever possible, but it gets a little more

complicated when it comes to ranching at Point Reyes. That is a vexing situation.

I was struck that your testimony criticized both things that that narrative, the Majority, is calling for, you criticized the environmental litigants, but you also said that the Park Service had capitulated to them by granting only 1-year leases, instead of doing what Ken Salazar promised back in, before 2013. I think it was before I got to Congress.

Ken Salazar, though, you and I both recall, promised that there would be 20-year leases. I think you said 10 years in your testimony, but he actually promised 20 years.

Here is where I want to take issue with you a little bit. The idea that the Park Service had somehow capitulated to the environmental litigants is not true. In fact, the reason this environmental lawsuit was brought—and I have been critical of this environmental lawsuit, so in some ways I find myself a bit on your side of this story, in this case. But the reason that it was brought was the Park Service was moving methodically to keep Ken Salazar's promise of granting 20-year leases. In fact, there was a 2013 memo from Director Jarvis specifically delegating authority to move forward with the granting of 20-year leases.

Without objection, Mr. Chairman, I would like to enter that memorandum into the record, just so we can kind of get the facts straight.

Mr. JOHNSON. Without objection.

[The information follows:]

United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street N.W.
Washington, DC 20240

JAN 31 2013

Memorandum

To: Regional Director, Pacific West Region

From: Director Jonathan Jarvis

Subject: Delegation of Authority for Point Reyes National Seashore Agricultural Leases and Directions to Implement the Secretary's Memorandum of November 29, 2012

In accordance with 200 D.M. § 2.2 and 245 D.M. 1.1.A, I hereby delegate to you the park-specific authority provided by 16 U.S.C. §§ 459c-5 and 460bb-2(j) in order to issue agricultural leases/special use permits ("lease/permits") as provided herein. This authority may not be re-delegated.

This delegation authorizes the issuance of lease/permits for the purpose of grazing cattle and operating beef and dairy ranches, along with associated residential uses by the lessees and their immediate families and their employees, and their employees' immediate families, within the pastoral zone of Point Reyes National Seashore and the northern District of Golden Gate National Recreation Area administered by Point Reyes National Seashore. Under this delegation, you may issue lease/permits with terms of up to twenty years. These long-term lease/permits will provide greater certainty for the ranches operating within the national park's pastoral zone and demonstrate the support of the National Park Service (NPS) and the Department of the Interior for the continued presence of dairy and beef ranching operations.

This delegation supersedes and replaces the delegation of authority issued by the Acting Director on February 23, 2009, and it supersedes any general provision of

D.O. 53 or R.M. 53 which would otherwise limit the authority of a Regional Director to issue special use permits for terms of up to twenty years. The Solicitor's Office has also advised that the issuance of such lease/permits under the cited provisions of the park's enabling legislation is not subject to the requirements set forth under the general NPS leasing authority found at 16 U.S.C. 1a-2(k) nor the implementing regulations at 36 C.F.R. Part 18.

In his November 29, 2012, memorandum announcing his decision on the Drakes Bay Oyster Company, the Secretary of the Interior observed that ranching operations have "a long and important history on the Point Reyes peninsula. . . . These working ranches are a vibrant and compatible part of Point Reyes National Seashore, and both now and in the future represent an important contribution to the Point Reyes' superlative natural and cultural resources."

Preservation of cultural and natural resources within the pastoral zone is an important responsibility shared by the NPS and the park ranchers.

This delegation of authority is supportive of multi-generational ranching and dairying within the pastoral zone and is consistent with the above-referenced provisions of the park's enabling legislation. In his November 29, 2012, memorandum, the Secretary directed the NPS to "pursue extending permits for the ranchers within [the] pastoral lands to 20-year terms." This delegation of authority is intended as an initial step to implement the Secretary's directive in a timely and efficient manner.

In order to assure clarity and consistency for all permits, to clarify expectations and commitments, and to allow for operational flexibility inherent to the long-term beef and dairy operations, I direct the park superintendent to review the permit structure to assure that it reflects and protects the interests of ranch operators while meeting NPS responsibilities to protect natural and cultural resources. In the interim, I further direct the park superintendent and her staff to work with the ranchers to assure that current authorizations are continued while the new permit structure is developed and implemented.

Mr. HUFFMAN. So, the Park Service was specifically authorized from the top down to move forward with this, and then they actually began a NEPA process, the Ranch Comprehensive Management Plan, to make good on that promise. The environmental plaintiffs, in their litigation, actually said, and I will quote them, "The Park Service is now proceeding with the ranch plan process to consider issuing of ranching authorizations up to 20-year terms."

So, this was not a Park Service that had capitulated to environmental plaintiffs to grant only 1-year extensions. And I think this may seem like a nuance to many of the folks following this hearing, but to me and the communities I represent, it is a big, big deal.

The Park Service was doing the right thing. And that is one of the reasons this litigation was so frustrating for me, and where I found myself actually in sympathy to those who have criticized it, because environmental plaintiffs were suing the Park Service because they were doing the right thing. I did not agree with that litigation. But I think it is very important that we get our facts straight about it.

Do you want to respond?

Ms. LOBDELL. Thank you for the opportunity to respond. I think we have a fundamental disagreement about the Park Service's role historically here.

Without going into information or attorney-client nuances that I may not be able to share and, as you know, some of the other confidentiality orders that are in place, leave it to say that the pleadings and the briefs on the court record may be able to express where we feel like the Park Service could have been better.

I don't know if you had a question about—saying let's get the facts straight, so are you asking me if I agree with your version? The answer is I think that you and I agree on a lot. I know that this is a case that—you have been so supportive of the ranchers, and there is a large constituent group of the environmental community, as you know—

Mr. HUFFMAN. It is not a large one, it is a couple of groups. And this is another nuance that is very significant. Most of the environmental community, actually, was on my side of this, and was critical of the lawsuit.

Ms. LOBDELL. Well, the reason I brought this case, Congressman, with all due respect, is because the sides collide here. A large part of the environmental community and your constituents, even yourself, and the ranchers—that is why this case is important. Whether we disagree on what the Park Service's role was or not, what this case shows is the inequities.

Even in a case where we have a portion of the environmental community supporting the agricultural use, this case still highlights the inequities and the incentives to sue, and the inertia and paralysis that happens—

Mr. HUFFMAN. In the limited time left, I appreciate that, but just for the record, the capitulation to the plaintiffs, the 1-year—these are factual inaccuracies that I hope you will be a little more careful about, going forward. There will always be lawsuits that we disagree with. But I think it is a bridge too far to say that all environmental groups have this agenda.

The environmental community, for the most part, was critical of this lawsuit. And it is an outlier in many ways, and that is an important point as we think about the broader narrative.

Ms. LOBDELL. It is a case that I have used to illustrate what the inequities are. Thank you for the disagreement on the factual circumstances. With all due respect, I disagree with your version.

Mr. JOHNSON. Thank you both. The Chair now recognizes Mr. Pearce for 5 minutes.

Mr. PEARCE. Thank you, Mr. Chairman. Continuing in this whole discussion of whether or not the environmental groups willingly participate, I would like to listen to the organizers of the groups themselves.

I happen to have here a quote from the guy that founded the Tucson-based Center for Biological Diversity, Mr. Suckling. He says in the August 31, 2013 *Legal News*, "We realize that we can bypass the officials and sue, and that we can get things done in court. Psychological warfare is a very under-appreciated aspect of environmental campaigning. The core talent of successful environmental activists is not science and law, it is campaigning instinct."

CBD has participated in well over 800 lawsuits with purported environmental claims, so I always really appreciate when people are very honest about their intentions coming to court.

Now, to continue the discussion, my friend on the other side of the aisle says that the lawyers are limited to \$125 an hour. That is very practical. Ms. Lobdell, you mentioned \$450 an hour. We have had evidence that it is sometimes \$750 an hour. So, we are taking money from people who make \$31,000 a year average in New Mexico, and paying lawyers to sue our government.

That played out in New Mexico just last September. There was a lease sale—oil and gas is prevalent in New Mexico. The lease sale occurred last September, \$145 million on Federal leases. Of that, the state was supposed to get \$70 million.

This same Center for Biological Diversity, Wild Earth Guardians, both filed protests. The protests were summarily thrown out. But for a time, \$70 million was withheld from New Mexico. And before you think that that is just a number, New Mexico is, at the point, running about \$500 million short on the budget.

So, more than 10 percent of the shortfall is being held up by something that ended up being a frivolous claim, and sometimes our critics on the other side think that we are too harsh. Myself, I don't think so; 70 million is 1 percent, 1.1 percent of New Mexico's annual budget. This is what we get to face by these groups who understand the political aims they can achieve by just bypassing the process: "We will sue and we will stop as much of the process as possible."

Ms. Lobdell, you seem to be somewhat familiar with the process. We have seen in New Mexico where one environmental group will bring the lawsuit and the judge will kick it out. Another one will have the same lawsuit, they will scratch off the name of the first litigant, and they will put their name in there. And it will be tossed out, so they are able to delay, say, harvesting timber after a fire. If you delay more than about 10 months, previous testimony in this Committee says you have lost the value.

Do you ever run across that kind of serial lawsuit business?

Ms. LOBDELL. We do. In my practice, there has been a—if one lawsuit does not succeed, there is another outfit right around the corner to bring a similar one.

Mr. PEARCE. OK, so that is good enough.

Ms. LOBDELL. They are not identical lawsuits, so to speak. Just because we have terms—

Mr. PEARCE. OK, that is clear enough. We will get there. I have 25 seconds.

Ms. LOBDELL. But the systematic delay, it happens, and it hurts resource use, and it hurts the agency's ability to get on the ground and manage the land.

Mr. PEARCE. Yes, so this idea that the law, the EAJA law, is to protect the people with no resources—how much do some of these non-profits have, as actual net worth?

Ms. LOBDELL. I have not done the specific studies on that, so—

Mr. PEARCE. Hundreds of millions, though.

Ms. LOBDELL [continuing]. I would be hesitant. But my understanding is it is well over the millions, and there are multiple outfits.

Mr. PEARCE. Yes, so they are able to skirt around the law, and they still get their settlements, they get their \$450-an-hour settlements, even though it is not supposed to happen, according to the underlying law. But like my friend from California said, it has become a little bit of a racket here.

Mr. Barron, you mentioned that the BLM is not complying with the quarterly lease sales. In 2016, for example, New Mexico had two lease sales, not four. How much do we lose out on when we cut down the number of sales, states like mine?

Mr. BARRON. Thank you, Congressman. In New Mexico, specifically, you are aware that oil and gas revenue represents about a third of the state's—

Mr. PEARCE. It is 40 percent, actually.

Mr. BARRON. Right. And in Fiscal Year 2014, which is the last year that I have the numbers in my head, New Mexico received over \$550 million in Federal royalties. So, it is a—

Mr. PEARCE. Yes, so if you can stop two of those, you can, say roughly \$250 million would be—the amount is half, and then we get half of that, basically, so significant, again, well up into the—

Mr. BARRON. Precisely.

Mr. PEARCE. I see my time has expired, Mr. Chairman. I yield back.

Mr. JOHNSON. Thank you. The Chair now recognizes the Ranking Member of the Full Committee, Mr. Grijalva, for 5 minutes.

Mr. GRIJALVA. Thank you very much, Mr. Chairman.

Ms. Schiffer, we have heard plenty of complaints about litigation against Interior by environmental and public interest groups. We have not heard too much or anything at all about the litigation against Interior filed by, let's say, ExxonMobil, the Western Energy Alliance, Statoil, Koch Brothers Industries, and affiliated funded groups.

From your experience defending the Federal Government, do you think we should change the rules of engagement, legally speaking, so that some have access to the courts and others not?

Ms. SCHIFFER. I do not, Congressman Grijalva. I think that the laws that Congress has passed, and the constitutional system that we have that enabled people to go to court if they think agencies are not complying with the law, helps to give everybody a voice, and that the laws that assure that everybody has a seat at the table really means that we have a much better country. We make much better policy.

It certainly means that it is a challenge for the Interior Department to take into account all of those voices—

Mr. GRIJALVA. Yes.

Ms. SCHIFFER [continuing]. But that is really our democratic system, is that everybody could do it.

I would also like to make one brief point. When there was a discussion about government lawyers being collusive in their lawsuits, and I will say I have fairly substantial experience with quite a wide range of very good public and Federal Government employee lawyers, and they take very seriously their obligations under the Rules of Professional Responsibility to act as lawyers for their clients. And they do not collude.

Mr. GRIJALVA. I am sure, Ms. Schiffer, that the industry would love unfettered, unregulated, full access to whatever extraction, whatever permit they needed, in order to increase their net worth, which is huge, as it is.

But public access to the courts for all is important. I think it is important to the effectiveness of conservation laws and our democracy, in general. And litigation sometimes rights the ship, in terms of where a decision is going, how a statute is being interpreted, how a regulation is being applied.

Could you respond to that, those comments, if you don't mind?

Ms. SCHIFFER. I agree with that. I taught environmental law at Georgetown Law School for quite some time. And what we used to tell our students is that what our system of laws does is patrol the borders of what the Federal agencies do. The agencies have discretion. They have to take into account a lot of interests under the statutes that Congress passes, and that going to court makes sure that that range of discretion that they exercise is within the framework and borders that Congress has set in those statutes.

And enabling a full gamut of interests and citizens to have access to the courts, to patrol the borders that Congress has set, is a very important part of our constitutional system.

Mr. GRIJALVA. Thank you.

Mr. Barron, in your testimony you mentioned, on several occasions, special interests. Define special interests for me, your definition for us to see—and I don't think that definition at this point includes your clients. So, would you define special interests?

Mr. BARRON. Yes. In my testimony, I was specifically referring to, I guess, groups that would classify or characterize themselves as either environmental or conservation groups. I hesitate to apply those adjectives to those groups, because, in my experience, most of these groups act as either specialized law firms or specialized lobbying groups, where, to the extent there is an environmental or conservation program associated with their activities, it is a tangential or a very minor part of their activity.

Mr. GRIJALVA. And because your client base is heavily focused on their industry, and I said to create a more comfortable environmental climate for their business, they don't fit that definition.

Mr. BARRON. Well, certainly, our client base represents mostly a particular industry. Our practice group represents a wide range of folks. It is not just oil and gas operators. We represent a lot of renewable operators. We are an energy-focused practice, not necessarily an oil-and-gas-focused practice.

I kind of disagree with the assessment earlier that we are looking for an unregulated Utopia. Our clients support practical regulation that makes a difference and actually has a commensurate environmental benefit associated with the cost that those regulations impose.

Mr. GRIJALVA. Well, it is good to hear that, because so far the tone and tenor has been what I described. Thank you.

I yield back.

Mr. JOHNSON. Thank you. The Chair recognizes Mr. Gosar for 5 minutes.

Dr. GOSAR. Thank you very much.

Ms. Schiffer, since it is taxpayer money going out, don't you think it should be disclosed publicly, what the settlements are, and the attorney's fees?

Ms. SCHIFFER. Yes, I do, and I believe it is.

Dr. GOSAR. Well, it has been very tough for Congress to get the awards.

You made another comment that government attorneys do not collude. For a future question that you can answer to this Committee, I want you to explain the sale of Uranium One. That would be very interesting to see collusive bodies working in the interest against the United States.

I think a blanket statement that government attorneys do not collude is a false statement, because they are humans, as well. And I think making that assertion is just flabbergasting.

Ms. SCHIFFER. I am not familiar with——

Dr. GOSAR. Mr. Barron——

Ms. SCHIFFER. Excuse me.

Dr. GOSAR. Well, I will let you answer that one, because it is a perplexing question, now that everybody wants to talk about it in regards to how did we sell our uranium to the Russians. It is pretty interesting, and have some complicit acknowledgment from attorneys that had better things on the books to do than to collude. They should have upheld the law.

Mr. Barron, I know we have been talking about this exercise of litigation. This has a prohibitive cost, so as a percentage and dollar amounts, how much do you have to anticipate your industry has to look forward to for excess cost to a project?

Mr. BARRON. I mean that is very difficult to—it really depends on the project.

As I referenced earlier, a situation where we had a master development plan that was challenged in the New Mexico side of the Permian Basin, and there were projects there that were deferred, where the operator had allocated over \$160 million for that project.

I worked on another case in December, where we are talking about delays in permitting in the Uintah Basin in Utah, delays in permitting that would have pushed operations into a non-drilling time period because of endangered species, migratory bird issues. And there were about \$50 million in allocated resources for that particular project.

Developing oil and gas wells is an expensive proposition. When those companies allocate money far in advance for long periods of time, and when projects are delayed, it is not necessarily easy because of equipment and contracting to reallocate it to another project. Sometimes it delays return on investment for significant amounts of money.

Dr. GOSAR. Time is money, right?

Mr. BARRON. Absolutely.

Dr. GOSAR. So, utilizing the passage of time, you cannot measure that.

Mr. BARRON. One of the real difficulties for delays that are caused by litigation is not necessarily that the project will not get to take place at some point in the future, but the actual delay makes investment and financing very difficult.

Dr. GOSAR. How does that apply to the BLM and their statutory applications on timetables? How does that apply there, and how does it delay that?

Mr. BARRON. Well, we have had rulings within the last several months, actually, that those timetables can be, are judicially enforceable, and should be mandated—that the statute actually mandates those timetables, but I can tell you that those timetables are almost never complied with.

Dr. GOSAR. Can you give an example of one that actually was?

Mr. BARRON. I am not familiar—well, for example, under the Mineral Leasing Act, as I mentioned earlier, once a permit application is complete, BLM must act on it within 30 days—not

necessarily grant it, but either say we are going to grant it, or here is why, and here is our estimated timetable.

Right now, the former BLM Director, Mr. Kornze, had testified before this Committee that average processing time for an APD on Federal lands is approximately 200 days.

Dr. GOSAR. So, looking at that application, it doesn't suffice to follow the statute.

Mr. BARRON. They are not following the statute.

Dr. GOSAR. And when you look at the prohibitive aspect of the litigation, it is better to go somewhere else than, in many cases, some of these areas, right?

Mr. BARRON. Absolutely. I think it is undisputed that over the last certainly decade to decade and a half, Federal energy production has grown significantly. But the percentage of that production that occurs on Federal lands has remained the same or diminished during the same time period.

Dr. GOSAR. Got you.

Ms. Lobdell, you are familiar with CBD, I am sure, and some of the wood harvesting down in the Arizona way?

Ms. LOBDELL. I am very vaguely familiar.

Dr. GOSAR. Well, they made the comment that they did not have to do any lawsuits recently, and that is because they did all the lawsuits in the 1970s, 1980s, 1990s, and 2000s, to put almost every business out of business. And that is why we have the catastrophic fires that we have today. And that is why, ecologically, we have huge problems, that when crown fires actually burn they incinerate the soil. And what ends up happening is you have an ecological catastrophe, where nothing grows back in those areas. Some of that mitigation also has to be looked at, don't you think?

Ms. LOBDELL. I absolutely agree, and our water supply is a threat with those fires, as well.

Dr. GOSAR. I ran out of time. Thank you very much.

Mr. JOHNSON. Thank you.

We thank the witnesses for their valuable testimony, and the Members for their questions.

The members of the Committee may have some additional questions for the witnesses, and we will ask them to respond to these in writing. Under Committee Rule 3(o), members of the Committee must submit witness questions within 3 business days following this hearing, and the hearing record will be held open for 10 business days for the responses.

If there is no further business, without objection, the Subcommittee stands adjourned.

[Whereupon, at 11:38 a.m., the Subcommittee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

Rep. Grijalva Submission

WESTERN WATERSHEDS PROJECT,
ARIZONA OFFICE,
TUCSON, ARIZONA

July 3, 2017

*House Committee on Natural Resources,
Subcommittee on Oversight and Investigations,
1324 Longworth House Office Building,
Washington, DC 20515.*

Re: Oversight Hearing on “Examining Policy Impacts of Excessive Litigation
Against the Department of the Interior”

Dear Honorable Committee Members:

I watched the June 28, 2017 hearing, “Oversight Hearing Examining Policy Impacts of Excessive Litigation Against the Department of the Interior” with great interest and I was particularly struck by the inflammatory testimony of the witness, Ms. Caroline Lobdell, regarding the use of the Equal Access to Justice Act (EAJA).

Ms. Lobdell testified to the committee, “EAJA is a taxpayer funded meal ticket for environmental groups” and that it serves as a “gravy train.” She fails to mention that EAJA is also available to compensate industry, a fact with which she should be intimately familiar.

On June 19, 2017, Ms. Lobdell and Western Resources Legal Center (WRLC) filed *Cahill Ranches, Inc. v. Bureau of Land Management* in the United States District Court of Oregon, Medford Division. This case challenges the federal authority to impose grazing restrictions on a public lands grazing allotment and is brought by Ms. Lobdell and WRLC on behalf of private ranchers. The filed complaint concludes with Ms. Lobdell’s request that the court, “Award plaintiff its reasonable costs, litigation expenses, and attorney fees associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. §§ 2412 *et seq.* and/or all other applicable authorities.” That is, Ms. Lobdell is seeking to avail herself of the same compensation she derides in her testimony.

Western Watersheds Project greatly appreciates the comments of Congressman Raúl Grijalva regarding the reality that courts are the remedy of last resort when the agencies are underfunded to carry out their environmental mandates. Ms. Lois Schiffer also added important fact-based testimony. Litigation “rights the ship,” as Mr. Grijalva said, and it’s a critically important part of our constitutional system. It is a tool that Western Watersheds Project uses when its administrative attempts have failed to halt a dangerous or unsustainable project.

Additionally, environmental litigation is only successful when the government has broken the law, and to the extent that the Trump Administration “is bracing for an influx of litigation,” per Mr. Johnson’s opening statement, it speaks to its own intention to push through major energy projects that skirt compliance with our bed-rock environmental laws.

Thank you for adding this letter to the hearing record.

Sincerely,

GRETA ANDERSON,
Deputy Director.

[LIST OF DOCUMENTS SUBMITTED FOR THE RECORD RETAINED IN THE
COMMITTEE’S OFFICIAL FILES]

—Rep. Johnson Submission: Statement on the Hearing from
William L. Kovacs, Senior Vice President, Environment,
Technology & Regulatory Affairs at the U.S. Chamber of
Commerce, dated June 28, 2017.