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THE ROLE OF NEPA IN THE INTERMOUNTAIN STATES

OVERSIGHT FIELD HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

Monday, August 1, 2005, in Rio Rancho, New Mexico

Serial No. 109-28

Printed for the use of the Committee on Resources



Available via the World Wide Web: http://www.gpoaccess.gov/congress/index.html
or
Committee address: http://resourcescommittee.house.gov

U.S. GOVERNMENT PRINTING OFFICE

22-851 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
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OVERSIGHT FIELD HEARING ON THE ROLE OF NEPA IN THE INTERMOUNTAIN STATES

Monday, August 1, 2005

U.S. House of Representatives

NEPA Task Force

Committee on Resources

Rio Rancho, New Mexico

The NEPA Task Force met, pursuant to call, at 10:00 a.m., at Rio Rancho High School, Rio Rancho, New Mexico, Representative Cathy McMorris [Chairwoman of the Task Force] presiding.

Present: Representatives McMorris, Cannon, Tom Udall, and Grijalva.

Ms. MCMORRIS. If you can hear that, we can call the meeting to order. I'm pleased that everyone is here. We're going to start with the Pledge of Allegiance and Kate White, who is the President of the New Mexico Junior Cattle Growers, is going to lead us. So please stand.

[Ms. White leads the Pledge of Allegiance.]

Ms. MCMORRIS. Jim Owen, our wonderful Mayor.

Mr. OWEN. I'm the Mayor of Rio Rancho and I want to welcome all of you to this wonderful facility that this school has allowed us to use for this particular Task Force meeting.

What we have today, obviously, is the Resources Committee, actually, this is a Task Force of that Committee that's going to be taking testimony today and we're grateful to have the opportunity to have them come to New Mexico, in particular, and Rio Rancho specifically. And we are always glad to have somebody in the fastest growing in the United States and so this is something that we're very interested in, obviously. Everything that's going to be talked about today has an impact, not only on the people of Rio Rancho, but the nation.

And so we're grateful to be able to host this and I really appreciate the fact that so many people of the community have come to share with us. So welcome and I want to again congratulate you for picking this wonderful venue. And anything that we can do to host you and to help you out in any way, you just let us know and we'll make it happen.

STATEMENT OF HON. CATHY McMORRIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Ms. MCMORRIS. Thank you. Well, first of all, we're pleased to be in Representative Udall's District and thank you for the invitation to come to New Mexico.

I'll stand up. Thank you all for coming. This is the fourth hearing of the NEPA Task Force. NEPA is the National Environmental Policy Act. We were asked by the Chairman of the Resources Committee to convene and just take a look at this Act and how it's been implemented on the ground. I was thanking Congressman Udall for the invitation to come to New Mexico. We're really pleased to be here and I am pleased that he would agree to be the Ranking Member of this bipartisan task force.

I am Cathy McMorris. I am the Chairman of the Task Force. I am from eastern Washington State. And this is our fourth in a series of six hearings. We've already learned a lot about the NEPA process and the ways that we can make it work better. In our process we have heard from a broad range of people. In Spokane, we heard about some key transportation projects that have been stalled because of time and cost. In Arizona, we heard that NEPA is hurting our ability to keep our forests healthy. In Texas, we heard that it can take 20 years for a project, whether it is a reservoir, an oil refinery, or power plant, can or cannot be built, is a long time for a community to wait for water, gas or electrical power.

Farmers, ranchers, small businesses, tribal leaders, environmentalists and others have had the chance to share their ideas and concerns with the Task Force, either in person or through written comment.

We all share the same goal of clean air, clean water and a healthy environment. We want to focus NEPA to ensure sound environmental decisions instead of endless analysis and litigation take place. We must protect and enhance our wildlife, watersheds and communities and put common sense back into environmental decisionmaking. NEPA shouldn't simply be bureaucracy in action. No one wins in that case.

In this process we want to preserve the intent of NEPA, including the public involvement which is at the heart of this law that was past 35 years ago.

New Mexico and other states represented by our witnesses provide us unique examples of how NEPA works and how it can be improved. The goal of the Task Force is to get out of Washington, D.C., to listen firsthand to the people on the ground, so that we can better understand if NEPA is living up to its intent.

It's no secret that NEPA, as well as other environmental laws, have spurred vast amounts of litigation, has stalled important economic development projects and cost taxpayers millions. Nearly every word in NEPA has been litigated. That doesn't help our economy, and it certainly doesn't help our environment.

The question before this Task Force is can we do better, for our economy and for our environment?

I'd like to now recognize Congressman Udall for any opening remarks, he might want to make.

STATEMENT OF HON. TOM UDALL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW MEXICO

Mr. UDALL. Cathy, thank you very much and let me, first of all, tell you how much I appreciate you coming down to the Third Congressional District and my other two colleagues here, Representative Chris Cannon from Utah and Raul Grijalva from Arizona, it's a pleasure to have all of you here and you'll see the hospitality, I think, of the good people of Rio Rancho. This place is called the City of Vision and it really is a place that has a vision for the future.

I want to really speak for the entire community when I say I'm glad for the opportunity to host this hearing. Let me also welcome our excellent and diverse panel that is before us today. As you know, Madam Chair, congressional hearings are only as good as the witnesses and we have an excellent panel here today before us. I see many old friends and many New Mexicans and people traveling from the far reaches of the Intermountain West. It's wonderful to have Governor Richards Cabinet Secretary Joanna Prukop, Martin Heinrich, who we've worked with on a variety of issues in the Congress; Albuquerque City Counselor, former Lieutenant Governor Walter Bradley, who I had the opportunity to serve in State Government with. Stella Montoya, a farmer and rancher here in New Mexico and Colorado. I see Sterling Grogan with the Middle Rio Grande Conservancy District. And also a representative of the Zuni Tribe and Tweeti Blancett, a rancher from Northwestern New Mexico.

Madam Chair, this series of field hearings is highlighted, the vital role played by NEPA in the development of Federal policy. Too many people seem to think that NEPA is designed simply to protect the environment from harm caused by development, or as some might phrase it, to stand in the way of development.

Testimony already provided to this Task Force, however, has shown that this definition is at best incomplete, and at worst, one sided and inaccurate. The National Environmental Policy Act is important and essential because it sets up a process to protect local citizens from harm caused by uninformed Federal agencies. NEPA is a tool or perhaps it is better characterized as a shield, designed to force unwieldy and sometimes careless Federal bureaucracies to stop and listen to the advice of on-the-ground private Americans.

NEPA mandates only that Federal agencies consider the possibility they might be wrong or too narrowly focused before they charge ahead with plans that could have long-term unintended consequences.

The Intermountain West provides plenty of examples where NEPA has worked to the benefit of people who live and work in this region. Here, in New Mexico, the Act was instrumental in mitigating the damage caused by the massive Sato Grande Fire. In 1999, Los Alamos completed a site-wide environmental impact statement or EIS that examined the risks of wild fire at the labs and spurred a variety of preventive measures, prior to the fire in 2000. As devastating as the fire was, the DOE said that the NEPA process in their words ''reduced the severity of the impacts of the fire and has served to be useful in planning recovery programs.'' DOE admitted, however, that their draft EIS did not analyze a

wildfire accident because initial analysis did not show that the scenario was plausible. They acknowledged the comments provided by the public at the hearing on the draft EIS, focused attention on the issue. As a result, the final EIS included an accident scenario that closely mirrored the actual Sato Grande Fire.

As many in the audience are well aware, the legacy of the now defunct Atlas mine near Moab, Utah is 15 million tons of radioactive mill tailings sitting in a massive pile on the west bank of the Colorado River. The Atlas mine was licensed in the 1950s, prior to NEPA. Is it possible that this dire situation might well have been avoided had NEPA been in place?

NEPA, however, did recently enable the process whereby more than a dozen Federal, state, tribal and local agencies, as well as thousands of local citizens, were able to work together to develop a remediation plan for the Atlas mine site.

Last Monday, the Department of Energy announced plans to relocate the pile, the Federal and state lands some 30 miles from the river. It is not at all certain that such a resolution would have been achieved without NEPA guidance.

Last, regardless, of where you may come down, regarding the expansion of oil and gas development in the West, NEPA at least provides a process whereby individual states and other interested parties are able to voice concerns and pursue adjustments to the Federal Government's plans. Nothing in NEPA provides that those who oppose drilling can stop it. Prior to NEPA, however, Federal agencies would have been able to allow drilling wherever it liked, whenever it liked and without being forced to at least think about local and cumulative impacts to public resources such as ground water and to consider less damaging options.

In each of these instances and many more, the alleged delay caused by NEPA was actually the time it took for States, tribes, local communities and concerned citizens to have a voice in the process and in each case, the final outcome was better for it.

It must be noted, Madam Chair, that the protections afforded by NEPA are available to everyone when they feel an agency has gone too far or not far enough. Conservationists use NEPA to influence government decisions and challenge those decisions in Court when they feel a Federal agency has failed to adequately consider resource protection issues.

Similarly, industry uses NEPA to influence Federal policy and challenge those policies in Court, when they feel an agency has gone too far in limiting resource of development. For example, Boise Cascade and others cited a failure to comply with NEPA as part of their challenge to the Clinton Administration's roadless rule. Many of us who supported the goals of the roadless rule also supported the industry's right to make certain that the Clinton Administration had done its homework.

This hearing provides a similar opportunity to listen to advice from Americans who don't have the fortune or sometimes say misfortune to work for the Federal Government. We will add the insight we gain here in New Mexico to that of the folks who testified in Washington State, Arizona and Texas. Together, we can ensure that NEPA continues working to protect as effectively and

efficiently as possible, the interests of individual citizens and communities. Thank you.

And with that, let me thank all of our witnesses for being here. I want to thank you for your time and effort. This is going to be a little bit of a laborious process, as I see it, Madam Chair, and so we want to thank you in advance for your attention and your patience. Now back to our Chair.

Ms. MCMORRIS. Thank you. Thank you very much. At this time, Mr. Cannon from Utah, for your opening remarks.

STATEMENT OF HON. CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. CANNON. Thank you. In the first place, let me thank the witnesses who are going to be here. You have to sit here while a lot of other people talk around you, but we're looking forward to your individual contributions.

Second, let me thank Congresswoman McMorris for having done a great job in chairing this effort. This is my second hearing outside of the state and it's a pleasure to be here.

Third, let me say to my friend, Mr. Grijalva, that it's been a pleasure working with him on several issues and this is our first hearing on this together, maybe not the first hearing for me, but the first together.

And then finally, let me make a couple of points about my friend, Tom Udall. Tom represents the Third District in New Mexico. I represent the Third District in Arizona and in fact, until we got redistricted recently, our Districts abutted, so we had much in common, including the Atlas tailings. That was a project that I initiated, the moving of those tailings, and here we are eight years later and we're finally making some progress on that.

Tom and I both worked on the Radiation Exposure Compensation Act over a long period of time. I think Tom has taken the lead on the Democratic side. They've taken the lead on the Republican side, largely because of the problems we've had from the mine that produced the tailings on the river.

I am pleased to be here with Tom who is thoughtful and reasonable and who just made an eloquent opening statement that I could have made in large part, with minor exceptions, and I think Tom, that really lays the groundwork for where we're going here. As I came in, I got one of these stickers. "I Support NEPA Democracy in Action." And frankly, I was interested in the story about Los Alamos and the public input meant that the NEPA review they did was a better review. I am 100 percent convinced that there's more IQ in the country than there is in Washington, D.C.

Now, I may be different on that, but among other things, there are a lot of people outside of Washington, D.C. and they actually have practical experience, and the guys who create jobs and the guys who care about the environment say hey, wait a minute, there could be a fire. And so let's plan for it. That kind of input I think dramatically helps the process here.

So what we're dealing with is democracy in action. We appreciate those of you with different points of view who are here. We recognize the people that believe that NEPA does block the development of jobs and there are people who believe that it should block the

development of jobs. We hope that we can come to a new understanding of the Act, and maybe make some improvements. It's been an interesting and important part of our society for a long period of time now and I think it's time that we make some adjustments.

And so let me just finalize by pointing this fact out. The really interesting issues of today, the interesting political issues are not partisan issues. They're not Republican or Democrat. They're not environmental or anti-environmental. They're issues that arise because of the progress we've made in science and technology. How do we do things better? It's not a matter of raping the environment.

I mean Tom and I share a pioneer heritage and no one on earth can make statements more radical about the environment than Brigham Young, the guy who led the Mormons to Utah. And he was what you'd call a radical environmentalist. Our job is to see how we can improve the environment, at the same time make it easier because we have information so that people can develop jobs and do that in a balancing context, rather than in an antagonistic process.

So we appreciate again the panel that's here with diverse views. We'll take those views into account and I hope among ourselves it doesn't become a left, right, Democrat, Republican, environmental, anti-environmental issue, but rather how do we do things better in America because there's lots of opportunities for improvement.

Thank you, Madam Chair and I yield back.

Ms. MCMORRIS. He is really from Utah, even though I think you said at one point Arizona.

Mr. CANNON. I really am from Utah. I love Arizona. I love New Mexico, but the Udall family, historically, is Arizona and that's the connection, although migrating long since and taking those incredible political genes with you.

Mr. UDALL. Don't forget about my grandmother who also was born in the little town of Luna, New Mexico in territorial days, so you know there's roots here, Arizona and New Mexico, Chris.

Ms. MCMORRIS. OK, yes, Mr. Grijalva from Arizona.

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

Mr. GRIJALVA. Thank you very much, Madam Chair, and thank you very much for all the hard work and time and commitment you've made to these hearings. I also want to acknowledge and appreciate being here with my two colleagues from Utah and New Mexico.

Thank you, Madam Chair, I appreciate the opportunity to be here to discuss the National Environmental Policy Act. I welcome the witnesses and look forward to hearing their testimony today.

The intent of NEPA is to compel the Federal Government to shine light on impacts of its action before they happen, before they take place. NEPA assures balance, common sense and a normalism in Federal decisionmaking.

It is an essential tool for citizens to hold the government accountable. It is simply put, democracy. I don't believe there is a need to overhaul or get rid of NEPA because it works to keep big government in check. So far I'm not convinced that the examination of the National Environmental Policy Act has been a legitimate exercise.

Instead, one gets the impression that it's being used to some extent as a pretense for a broader attack on both NEPA and other environmental laws in general.

Many of the projects and examples that some rely upon as supposed horror stories of NEPA's inefficiencies and supposed abuses are grossly mischaracterized and often represent situations where NEPA had little to do with the delay that is being condemned.

In particular, I'd like to set the record state about the Tucson Electric Power Company's proposal to run a transmission line through a national forest in my District to link up a grid system in Mexico. Statements have been made that NEPA has delayed this project for 10 years. This is absolutely untrue. The Arizona Corporation Commission, which approved the routing of transmission lines within the State of Arizona, is also responsible for permitting and making sure rural areas have access to electricity. They directed the power company servicing the border town of Nogales, Arizona to provide backup power to this community in late 1999.

Tucson Electric Power, instead of proposing a small feeder line to the community, a local power plant, or other possible avenues for meeting the ACC mandate, proposed a massive, 345 kv transmission line that crossed the border, link up to the Mexico grid system. Only a very small portion of the power running through that line would have ever been used by the community of Nogales.

TEP proposed several different routes for the transmission line from Tucson to the U.S.-Mexican border. The western route which was proposed to run through the national forest was approved by the state in 2002. At the time, the Forest Service and Department of Energy began the Federal NEPA process. The draft EIS came out in July 2003 and the final EIS was released January 2005.

As should be clear from this time schedule, there has been no 10-year delay. The proposed transmission line would run through one of the last remaining unprotected roadless areas in Arizona and it's flatly inconsistent with the Forest Management Plan which has designated this area as one of high visual and scenic qualities. The Forest Service, to their credit, has been steadfast in upholding the protection of the area and recognized the proposed power line as simply incompatible with its management plan.

NEPA is not the cause of the delay perceived by TEP. Tucson Electric Power is experiencing problems because of its own poor planning, prioritization of their profits over the needs of the community and unwarranted assumptions that they could build this line wherever they wanted to.

The proponents of the project know that a smaller, backup power line could be built, likely without any opposition to serve the community's need. While a massive, bi-national transmission line may please the stockholders of the company, it will have highly negative effects on both local communities and the environment of Southern Arizona.

I believe this is a good example for illustrating how NEPA works effectively. It forced the company to come clean about exactly what was being proposed and also allowed the Forest Service as the land management agency involved to voice its objections to the proposed line. NEPA worked as it was supposed to in this case, giving the

public the information and the opportunity to participate in the process.

With that, I yield back and I look forward to hearing from our witnesses today. Thank you, Madam Chair.

Ms. MCMORRIS. Thank you. I'm pleased that all of you are here. Congresswoman Heather Wilson is not able to join us but with us today is Tito Madrid who is her Outreach Coordinator and Mr. Madrid has some brief comments to share on her behalf.

Mr. MADRID. Thank you, Madam Chairwoman, Congressman Udall and the distinguished members of panel. It's my pleasure and honor to be here on behalf of Congresswoman Heather Wilson to enter her remarks and thoughts into the record.

Dear Task Force Chairwoman McMorris, Ranking Member Udall and Distinguished Members of the Committee. I would like to share a story with you, how the process of implementing NEPA needlessly hindered critically important Bosque rehabilitation in fire prevention projects on the Rio Grande.

New Mexicans all remember two terrifying nights in June 2003 when the Bosque burned through Albuquerque and the fire scare we had in the Bosque just north of Rio Rancho in the town of Bernalillo earlier this month. Non-native invasive species like Russian olive and saltpeter have overrun the riparian areas along the Rio Grande and have made the Bosque unnaturally dense.

We cannot afford to continue to have these non-native species endanger our citizens, harm the fragile Bosque ecosystem, soak up our water and inundate our soil with salt. These invasive species are also highly flammable and have accumulated so significantly in the Bosque area that fires no longer burn at natural temperatures or rates, making them dangerous to fight and difficult to control.

Additionally, approximately 40,000 nonfunctional Jetty Jacks are littered throughout the Bosque. Jetty Jacks contribute to the fire danger because they capture combustible leaves and branches. Jetty Jacks in the open spaced areas of the Bosque also pose a great danger to the fire fighters by making it hard for them to get in and more difficult to get out during fire emergencies.

In May of 2004, Albuquerque Mayor Martin Chavez wrote me to express his frustration about the Bureau of Reclamation and the Corps nonemergency approach to removing nonfunctional Jetty Jacks from the Bosque. I shared his frustration. The delay was because the Corps and the Bureau of Reclamation were required to follow all NEPA-related laws before they could initiate on the ground activities.

While the Corps was able to begin some projects almost immediately, like post-fire aerial photography and high resolution satellite imagery, large scale fuel reduction and replanting activities did not begin until September 2004.

In contrast, state, tribal and local governments were able to begin large fuel reduction and replanting projects almost immediately.

While the intent of the NEPA deserves praise, I think that it should be revised and updated so that we don't needlessly hinder critically important Bosque rehabilitation in fire prevention projects.

I would recommend that we allow an expedited NEPA process like we did for the BLM and Forest Service with the healthy forest legislation of 2003 for higher priority for fuel reduction and post-fire rehabilitation activities administered by the Corps and Bureau of Reclamation so that Federal fire prevention and recovery efforts can keep pace with those on state, local and tribal lands.

Thank you very much. Sincerely, Congresswoman Heather Wilson.

[The letters submitted for the record by Congresswoman Heather Wilson and Albuquerque Mayor Martin Chavez follow:]

HEATHER WILSON
1st District, New Mexico

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Dear Task Force Chairwoman McMorris and Ranking Member Udall,

Thank you for giving me the opportunity to share my comments with the House Resources Committee's National Environmental Policy Act ("NEPA") Task Force. I'm sorry I am unable to meet with you in person but hope the testimony you receive is helpful to your important work.

I would like to share a story with you how the process of implementing NEPA needlessly hindered critically important Bosque rehabilitation and fire prevention projects on the Rio Grande.

New Mexicans all remember two terrifying nights in June 2003 when the Bosque burned through Albuquerque and the fire scare we had in the Bosque just north of Rio Rancho in the town of Bernalillo earlier this month. The 2003 fires left 16,000 people temporarily without electrical power, threatened 600 homes and led to the evacuation of about 1,000 people. These fires also destroyed thousands of native plants and trees and invaluable Bosque wildlife habitat. In response to the devastating 2003 fires, the Army Corps of Engineers provided $3,000,000 for Fiscal Year 2004 and $5,000,000 for Fiscal Year 2005 for Bosque wildfire prevention activities.

Non-native invasive species like the Russian Olive and Salt Cedar have overrun the riparian areas along the Rio Grande and have made the Bosque unnaturally dense. The demands on the Middle Rio Grande are immense and growing. The flows of the Middle Rio Grande serve the biggest city in New Mexico, Albuquerque, many smaller cities, six Indian pueblos, a network of agriculture users, many of whom irrigate the same land as their Spanish ancestors did over 4 centuries ago, and the endangered silvery minnow, which, under a 2003 U.S. Fish and Wildlife Service Biological Opinion, requires 180 miles of continuous minimum river flow in the Middle

Rio Grande. We cannot afford to continue to have these non-native species endanger our citizens, harm the fragile Bosque ecosystem, soak up our water, and inundate our soil with salt.

These invasive species use more water than our native plants and have been part of the problem as we manage scarce river water to meet the needs of growing a city, water fields, and keep the endangered silvery minnow alive. A single Salt Cedar can consume up to 200 gallons of water per day during the growing season. This is more than the average Albuquerque or Rio Rancho household consumes in a day. These invasive species are also highly flammable and have accumulated so significantly in the Bosque that fires no longer burn at natural temperatures or rates, making them dangerous to fight and difficult to control.

Additionally, approximately 40,000 non-functional jetty jacks are littered throughout the Bosque. Jetty jacks contribute to the fire danger because they capture combustible falling leaves and branches. Jetty jacks in open space areas of the Bosque also pose a great danger to firefighters by making it hard for them to get in and more difficult for them to get out during fire emergencies.

In May of 2004, Albuquerque Mayor Martin Chavez wrote to me to express his frustration about the Bureau of Reclamation and Corps' "non-emergency approach" to removing non-functional jetty jacks from the Bosque. I shared his frustration.

The delay was because the Corps and Bureau of Reclamation were required to follow all NEPA related laws before they could initiate on the ground activities. Additionally, the Migratory Bird Treaty Act precludes construction activities in the Bosque during the summer nesting season. While the Corps was able to begin some projects almost immediately, like post-fire aerial photography and high resolution satellite imagery, large scale fuel reduction and replanting activities did not begin until September 2004. In contrast, state, tribal, and local governments were able to begin large fuel reduction and replanting projects almost immediately.

With my support, the 108th Congress passed and the President signed into law the Healthy Forest Restoration Act of 2003. This law streamlined planning for fuel reduction and post-fire rehabilitation projects administered by Forest Service and Bureau of Land Management ("BLM"), but not for projects administered by the Corps or Bureau of Reclamation.

The Healthy Forests Restoration Act provides an expedited NEPA process, particularly in high priority areas, for fuel reduction and post-fire rehabilitation activities administered by the Forest Service and BLM. This legislation also ensures that judges consider long-term risks of harm to people, property and the environment in challenges based on short-term risks of forest health projects.

While the intent of the NEPA deserves praise, I think that it should be revised and updated so, we don't needlessly hinder critically important Bosque rehabilitation and fire prevention projects. I would recommend that we allow an expedited NEPA process, like we did for the BLM and Forest Service, for high-priority fuel reduction and post-fire rehabilitation activities administered by the Corp and Bureau of Reclamation so that federal fire prevention and recovery efforts can keep pace with those on state, local, and tribal land.

Sincerely,

Heather Wilson
Member of Congress

HW: ch

CITY OF ALBUQUERQUE

Office of the Mayor

Martin J. Chávez, Mayor

May 3, 2004

The Honorable Heather A. Wilson
United States Representative
318 Cannon House Office Building
Washington, D.C. 20515-3101

Dear Congresswoman Wilson:

On behalf of the entire City of Albuquerque, I want to again extend our sincere appreciation for the help received from you and the other members of our federal delegation in regards to last summer's Bosque fire. When I called on you, for example, to assist us in managing this disaster there was no hesitation. Once again we need your intervention to help us with the prompt removal of Jetty Jacks in the Bosque woodlands.

The Albuquerque Fire Marshal and the Superintendent of Open Space have recently briefed me on the non-emergency approach that the Corps of Engineers and the Bureau of Reclamation have towards approving and removing the non-functional Jetty Jacks in the Bosque.

To this date, only a few hundred Jetty Jacks out of the 40,000 in the Albuquerque area have been removed. As we approach another very dry summer in New Mexico, the city's expert firefighters are extremely concerned that their efforts to effectively control the spread of a potential fire in the Bosque will be hampered by these Jetty Jacks that continue to impede any needed response and rescue in surrounding residential areas.

Jetty Jacks, as we now know, seriously contribute to the fire danger because they capture falling leaves, branches, and combustible litter blown into them by the wind, trapping increasingly high-fuel loads throughout the windy season. They also pose great danger to the firefighters by preventing necessary access into the open space area.

Your assistance in persuading the Bureau of Reclamation and the Corp of Engineers for the prompt removal of the Jetty Jacks from the Bosque woodlands bordering the Rio Grande is of great importance to Albuquerque, the safety of our constituents and to protect the health of this very special urban forest.

Again, thank you for you're past and continued support.

Best regards,

Martin J. Chávez, Mayor

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New Mexico 87103

martinchavez@cabq.gov

Ms. MCMORRIS. OK, thank you very much. I might just mention, this is a six-month Task Force. We'll have our work concluded in September and we're just over the six months collecting the information and testimony from a whole host of different people. We do have a web site for those who might be interested in submitting comments or thoughts to the web site. It's under the House Resources Committee and we welcome that. We've heard from thousands of people all across the country.

In September, we will be determining from what we've heard as to whether we're going to make recommendations either to the Resources Committee or to the agencies as to how NEPA may be improved. But your testimony is very valuable to us and as you can

see, we have a lot of people here today. So we're going to just start—I'm supposed to swear you in.

It's the policy of the House Resources Committee to swear people in when they give testimony, so I'm going to ask you to stand and raise your right hand.

[The witnesses were sworn.]

Ms. MCMORRIS. Let the record reflect that the witnesses answered in the affirmative.

Thank you. Now you can see we have this little timer here. We've asked each of you to speak for five minutes and then we'll open it up for questions. I'm going to try to keep you as close to five minutes as possible, just to get this done in a decent amount of time, right?

Green means go. I believe the yellow light comes on when you have a minute left. And then when it's red, I would ask you to wrap up. I think that's all I needed.

Mr. UDALL. Statements for the record?

Ms. MCMORRIS. Oh, your statements certainly will be submitted to the record. OK, are you ready?

Ms. Prukop, I'm going to ask you to begin and then we'll just work our way down the panel.

STATEMENT OF JOANNA PRUKOP, SECRETARY OF ENERGY, MINERALS AND NATURAL RESOURCES, OFFICE OF GOVERNOR RICHARDSON, SANTA FE, NEW MEXICO

Ms. PRUKOP. Madam Chairwoman, Congressman Udall, Task Force members and fellow citizens, good morning and on behalf of Governor Richardson, welcome to New Mexico.

My remarks will indeed be brief because I know you will be hearing from a number of panelists this morning. I have submitted a longer version of this speech for the record.

I am delighted to have this opportunity to address the future of the National Environmental Policy Act. Because we are in New Mexico, I'd like to tell the story about monsters and heros that's part of the Native American heritage here. The 1950 discovery of uranium in Grants, New Mexico by a Navajo shepherd named Patty Martinez set off a massive uranium rush in the Colorado Plateau. The Federal Government blessed the event by providing the mining industry with ample financial incentives, including guaranteed ore prices, production bonuses and generous allowances for haulage, mine development, fringe areas and grade premiums. As a result, the mining industry and their operations were quickly established at numerous locations throughout the Southwest. New Mexico alone produced nearly 350 million pounds of uranium oxide from 1948 to 2001. That was some 38 percent of the nation's total production.

The uranium mining boom changed forever the makeup of the industry. Larger and larger leases were needed. There were deeper and deeper mines, more and more facilities and workers and tragically, worse and worse impacts to the environment.

Worst of all, it took a devastating toll on thousands of miners, millers, truckers and their families who were exposed to radiation levels as high as 750 times the 1950 standard. It wasn't long before those unwitting residents became victims of lung cancer,

pulmonary fibrosis, tuberculosis, birth defects, irreversible kidney damage and other diseases.

The Federal Government, the nuclear energy industry and the atomic weapons program proponents pronounced the uranium boom an unqualified boon to America's economy and national security.

In the Southwest, however, the Navajos called it something quite different. They called it and please forgive my pronunciation, Leetso, or Yellow Monster. Like other Native Americans, the Navajos traditionally believed that naming a monster is one of the best ways to defeat it or control it. In addition, they believed that a hero was needed, someone who would gain the wisdom and skills necessary to slay this demon.

I'm telling you this story because even though the uranium boom ended in the 1980s, the catastrophic legacies still haunts us in the form of radioactive mill waste, accidental releases of tailing solutions into major waterways, contaminated open pits and a legacy of human suffering.

Unfortunately, the uranium rush was not an isolated phenomenon. It was just one of a horde of monsters that through the centuries have been set loose on our air, land, water and flora and fauna by individuals and industries, motivated more by profit than by environmental protection. They go by the names of negligence, apathy, greed, short sightedness and expediency over other values.

Naming them, as the Navajo do, is just the first step in confronting them. The second and most important step is finding a hero to vanquish them. By the time the 1960s rolled around, it was obvious a hero needed to be found on the environmental front and NEPA, the National Environmental Policy Act, was conceived. Since its inception in 1969, NEPA has been the best and brightest weapon we've ever had in our fight against the kind of environmental degradation and destruction that was commonplace prior to the Act's inception.

In its own words, NEPA was designed to "encourage productive and enjoyable harmony between man and his environment."

I think we're all in agreement that that goal is indeed admirable, even heroic and worthy of our unqualified support which is why I support the mandate of this Task Force, to ensure that the original intent of NEPA is being fulfilled.

At the same time, there are many here among us who would weaken the power of NEPA to carry out that goal. Their reasons generally fall under one of the following rationales. One, that NEPA is too cumbersome, time consuming and expensive. Two, that the process has evolved into an uncertain litigious ordeal. Three, that the Act is outdated and needs to be modernized. And four, that there is widespread misunderstanding and mistrust about the goal of NEPA itself.

So I am glad that the Task Force is undertaking this comprehensive examination of NEPA. Toward that end I have handed in a longer version of my remarks that have some extensive comments in them about ways to improve it. I also have handed in an appendix to that document that gives very specific recommendations about ways to improve it and they have to do in terms of improving

our process without rewriting or compromising the Act itself. Because if you read the Act itself, it's very well crafted.

In closing, I urge you to listen closely to the entire range of viewpoints expressed here today in a hearing process that in itself is part of the NEPA process. It mirrors it. I think you'll find that witnesses here today all share a common value.

Ms. MCMORRIS. I really need to ask you to wrap up.

Ms. PRUKOP. OK. With that, I just ask you to examine this important act, while at the same time realizing that its underlying intent is to ensure a sustainable economy, not only in this region, but in the country.

[The prepared statement of Ms. Prukop follows:]

Statement of Joanna Prukop, Secretary, New Mexico Department of Energy, Minerals and Natural Resources

Chairman Pombo, Task Force members and fellow citizens: Good Morning.

I'm delighted to have this opportunity to address the future of the National Environmental Policy Act. Before I do that, though, I'd like to talk about monsters and heroes.

The discovery of uranium in the Grants, New Mexico, area by a Navajo shepherd named Paddy Martinez in 1950 set off a massive "uranium rush" in the Colorado Plateau. With the blessing of the federal government, it provided the mining industry with ample financial incentives including guaranteed ore prices, haulage and mine development allowances, production bonuses, and fringe area and grade premium allowances.

As a result, mining operations were quickly established at numerous locations throughout the Southwest. New Mexico alone produced nearly 350 million pounds of uranium oxide from 1948 through 2001—some 38 percent of the nation's total production.

The uranium-mining boom changed forever the makeup of the industry: larger and larger leases, deeper and deeper mines, more and more facilities and workers, and, tragically, worse and worse impacts to the environment.

Worst of all, it took a devastating toll on the thousands of miners, millers, truckers and their families who were exposed to radiation levels as high as 750 times the 1950 standards. It wasn't long before those unwitting residents became victims of lung cancer, pulmonary fibrosis, tuberculosis, birth defects, irreversible kidney damage and other horrific diseases.

The federal government, nuclear energy industry and atomic weapons program proponents pronounced the uranium boom an unqualified boon to America's economy and national security.

The Navajos called it something quite different, though. They named it—please forgive my pronunciation—Leetso (lih-ZHO) or "yellow monster." Like other Native Americans, the Navajos traditionally believed that naming a monster is one of the best ways to defeat it. In addition, they believed a hero was needed—someone who would gain the wisdom and skills necessary to slay the demon.

I'm telling you this story because, even though the uranium boom went belly up in the 1980s, its catastrophic legacy still haunts us in the form of radioactive mill wastes, accidental releases of tailings solutions into major watercourses, contaminated open pit mines and a shameful legacy of human suffering.

Unfortunately, the uranium rush was not an isolated phenomenon. It was just one of a horde of monsters that through the centuries have been set loose on our air, land, water, flora and fauna by individuals and industries motivated more by profit than by environmental protection. They go by the names of greed, negligence, apathy, short-sightedness and expediency.

Naming them is just the first step in confronting them, though. The second, and most important step, is finding a hero to vanquish them. I'm here to say that hero is NEPA, the National Environmental Policy Act.

Since its inception in 1969, NEPA has been the best and brightest weapon we've ever had in our fight against the kind of environmental degradation and destruction that was commonplace prior to the Act's implementation. In its own words, NEPA was designed to "encourage productive and enjoyable harmony between man and his environment."

I think we're all in agreement that goal is, indeed, admirable. Even heroic. And worthy of our unqualified and ongoing support. Which is why I support the mandate of this Task force, "to ensure that the original intent of NEPA...is being fulfilled."

At the same time, there are many here among us who would weaken the power of NEPA to carry out that goal. Their reasons generally fall under one of the following rationales:

1. NEPA is too cumbersome, time-consuming and expensive;
2. The process has evolved into an uncertain, litigious ordeal;
3. The Act is out-dated and needs to be modernized; and
4. There is widespread misunderstanding and mistrust about the goal of NEPA itself.

Let me address those criticisms one at a time.

First, that NEPA is too cumbersome and time-consuming. Yes, the process is lengthy and complicated. But it couldn't be any other way. Public involvement takes time. Agency coordination takes time. Examination of alternatives takes time. Plain and simple, if we're going to stay true to the democratic heart of the Act, we've got to allow sufficient time for the process to take place.

Is it overly cumbersome? Perhaps—but not because of the nature of the Act itself or the essential NEPA process. The real culprits are lack of cooperation among the players—public, industrial and governmental—and lack of transparency in the process, along with underfunding and understaffing.

Regarding the first two points, everyone wins if everyone works together openly and fairly from the outset. NEPA fosters this kind of transparency by serving as a disclosure law, requiring agencies to present a range of alternatives and disclose the potential impacts of federal projects on the human environment. The process then allows the public to voice their concerns before a preferred alternative is selected or the project is approved. This process saves time and money and helps prevent litigation after the fact.

Regarding the underfunding/understaffing issue, if you've got enough people on the ground conducting the investigations and facilitating the paperwork, the process will be expedited in a more timely and efficient manner.

These cornerstone elements of public involvement—cooperation, proper funding, sufficient staff, common sense and public transparency—make NEPA function as intended by its framers, in a way that honors the intent of the act, keeps the process immune to short-term political agendas, and protects the legal rights of the public.

Secondly, that NEPA has become overly litigious. Well, that's why we have laws and courts in the first place: to clarify acceptable behavior and to penalize those who circumvent the law. Unfortunately, there always have been and probably always will be those who try to get around the laws of the land. In this democratic society, we the people have the right and responsibility to take them to task—and to court—if necessary. NEPA doesn't create these conflicts; it just provides a process for resolving them. If NEPA didn't exist, the conflicts wouldn't go away, they would just reappear elsewhere.

Some would say the sheer volume of litigations resulting from the NEPA process is proof positive that the process is working. That is, if we weren't taking the lawbreakers to court, they'd be getting away with murder, environmentally speaking.

Third, that the National Environmental Policy Act is out-dated. Since when is something useless simply because it's old? The Bill of Rights seems to work pretty well, and it's a good deal older than NEPA. Does it need modernizing? Probably. But not simply because it is 35 years old or because it no longer serves its original purpose. If we're going to update NEPA, we should look at how improved knowledge, science and technology could help make the process more effective and efficient, not how they can be used to circumvent the Act or render it obsolete.

Other improvements undoubtedly can and should be made to the NEPA process. But they are fine-tuning items, not wholesale changes. After all, we've now got 35 years of experience under our collective environmental-protection belt, and we all will benefit by applying those lessons to making the process more efficient and effective. That's why we're here today.

Finally, that NEPA is misunderstood and mistrusted. To that criticism, I can only say that the solution lies in better telling our story, not in dumbing it down. People fear what they don't understand, so let's help them better understand NEPA. If we undertake a national effort to better educate the public on the requirements and benefits of the NEPA process, I guarantee they will be more involved in and supportive of the process. And that will result in environmental decisions that will more fully represent a consensus among citizens, industry and government. And isn't that the whole point of NEPA—to serve the common good of the country, its people and its resources?

I'm glad this Task Force is undertaking this comprehensive examination of NEPA. Toward that end, I'm providing you a white paper outlining a number of specific recommendations. I'll leave this behind for you to consider as time allows. I urge you to listen closely to the entire range of viewpoints expressed here today. I think you'll find that they all share a common value: let's live our lives and conduct our business on this planet in a way that, as NEPA says, encourages productive and enjoyable harmony between us and our environment. That's the NEPA way. That's the democratic way. That's the right way.

There are still monsters lurking in the shadows. Leetso still lives underground.

The uranium industry once again is gearing up to launch a major mining effort in New Mexico and beyond. The market is strong, the incentive is there. The world's nuclear reactors require 70,000 metric tons of uranium oxide, and future demand could double that figure. Current world production is only around 60,000 metric tons, and national stockpiles are dwindling. The mineral's current market price stands at $29 a pound, the highest it's been since the 1970s, and it, too, could double in the near future.

Uranium producers have been doing the math and at least 10 of them reportedly are looking into uranium leases in the state. Extraction could begin as soon as 2008. If monitored properly—that is, using the tools provided for us by NEPA—this renewed industry again could provide an economic bonanza for the State of New Mexico. Uranium extraction doesn't need to be a monster, spreading death and destruction as in the past.

But we must stay vigilant. We simply cannot allow the uranium mining industry to write its own ticket and promise to police itself; we've seen what happens without an oversight mechanism such as NEPA. We must slay—or at least regulate—all those environmental monsters if we are going to protect our environment and provide future generations with the resources to restore and protect nature's balance and harmony.

To do that, we need a hero. I say NEPA is that hero. I say let's sharpen NEPA's sword, not disarm it in the name of greed, negligence, apathy, short-sightedness or expediency.

Thank you.

Recommendations by Joanna Prukop, Secretary,
New Mexico Department of Energy, Minerals and Natural Resources

The State of New Mexico supports the National Environmental Policy Act (NEPA) as a tested and successful tool for fulfilling the needs of human society by protecting environmental quality, ensuring coordination among federal, state and private interests, and improving project planning, design and development.

NEPA is the primary federal law that allows the public to be involved in reviewing and commenting on federal land management and natural resource management projects. It serves as a disclosure law by requiring agencies to disclose the potential impacts of federal projects on the human environment.

NEPA was a landmark legislative action and continues to be the cornerstone of proactive environmental national policy for a sustainable and enhanced future for all Americans.,

While we believe there could be improvements made in the ways in which NEPA is implemented (see below), the State of New Mexico does not support modification or repeal of the Act itself. We recognize that this is not the focus of this Task Force, yet we are concerned by recent efforts to exempt certain actions from NEPA compliance. Such proposed exemptions include planning documents (USFS), oil and gas development (the Energy Bill), and wild land/urban interface projects (Healthy Forest Initiative). We think these actions will serve to degrade and weaken not only the spirit and intent of NEPA, but potentially the human environment itself for generations to come.

Let me make it clear that we do not oppose per se these specific projects or activities, but we are opposed to allowing them to be implemented without adequate review. Exempting such potentially harmful activities from full environmental review and compromising the comment and appeal process would serve to impede both governmental and public participation.

We applaud the Task Force for addressing the obstacles to efficient and effective implementation of NEPA. We concur that the complex implementation process can discourage the very public participation and review it was intended to advance. We therefore support actions that would help expedite the process and provide consistent application of NEPA whenever and wherever possible.

To that end, we recommend the following improvements to the NEPA implementation process:

1. Standardize agency implementation. There are significant differences among agencies on how they apply NEPA, with each federal agency essentially implementing its own regulations, rules and policies for the application of the NEPA process. To solve this problem, major aspects of these processes should be standardized to ensure consistency while still allowing for flexibility in the more minor aspects of the process.

   In New Mexico, we experience these procedural problems on a daily basis in our work with federal agencies. This problem goes beyond the agency administrative level. Varying interpretation and implementation of NEPA also exists at the field office level. Specifically, there is great confusion in the application of categorical exclusions; decisions regarding development of Environmental Assessments (EAs) or Environmental Impact Statements (EISs); scoping methodologies; use of Proposed Actions in lieu of draft EAs; the timeframes for submitting comments; and the clear definition of what initiates a federal nexus.
2. Define categorical exclusions. The precise definition of categorical exclusions is confusing and, as a result, the exclusions themselves vary widely between agencies. Efforts to define broad categories of categorical exclusions should be made while allowing agencies the flexibility to identify and specify those exclusions that are unique to their mandates.
3. Release adequate project information during the scoping phase. One of the most valuable aspects of NEPA is the scoping process whereby project proponents invite the public to identify issues and concerns prior to project design and implementation. It is at this early stage that public input is most valuable to agencies as they undertake development of EAs or EISs.

   More often than not, though, the information released on the project during the scoping phase is inadequate to allow the public to make substantive comments. A glaring example of this is that the public is all too often presented with only a preferred alternative for a project, rather than the recommended range of alternatives. When this happens, everyone loses. Agencies sometimes are forced to go back to the drawing board because they have not presented viable alternatives. The public loses because they are excluded from exercising their rightful say in choosing from among the alternatives. And the entire NEPA process loses because it engenders a public perception that the process is a mere formality in which the outcome is a foregone conclusion. Such short-cutting of the process greatly weakens the decision-making tool and frequently adds to the overall project cost and timeline, as agencies are forced to backtrack to make up for the steps they skipped earlier in the process.

   We recommend that this aspect of the NEPA process undergo thorough review to ensure the inclusion of adequate information to encourage the substantive comments agencies seek during this point of project development.
4. Define "reasonable" project evaluation. In an effort to avoid what they perceive as overly detailed or otherwise unreasonable project evaluations, it appears some agencies are using NEPA as an excuse to not evaluate projects beyond a cursory level. This hurts the overall quality of the evaluation and short-changes the public in their effort to learn all the pertinent information regarding a project. The cost of the process to the agency is certainly one factor contributing to this practice. But we believe a significant part of these costs is related to the public perception that 100 percent of project impacts must be disclosed. This is not the intent of NEPA.

   All NEPA requires is a "reasonable" level of project evaluation. Once this level is clearly defined, agencies will be free to provide the evaluation without feeling like they need to either bend over backward to satisfy overly demanding publics. When this standard is in place it will improve the efficiency and cost-effectiveness of NEPA preparation.

The State of New Mexico urges the Task Force to implement these process-related recommendations. We believe that the National Environmental Policy Act was well-crafted in its original form and that these recommendations will make it even more effective in its goal to "encourage productive and enjoyable harmony between man and his environment."

Above all, the spirit and intent of NEPA must be retained.

Ms. MCMORRIS. Thank you.

Mr. Lance.

STATEMENT OF RYAN LANCE, ENDANGERED SPECIES POLICY ACT COORDINATOR, OFFICE OF GOVERNOR FREUDENTHAL, CHEYENNE, WYOMING

Mr. LANCE. Madam Chairwoman, Ranking Member Udall and Members of the Committee, my name is Ryan Lance and I serve as the Endangered Species Act Policy Coordinator and as a natural resources policy analyst for Governor Dave Freudenthal of Wyoming.

The Governor thanks you for the opportunity to provide testimony regarding the State of Wyoming's thoughts on the National Environmental Policy Act. As a state that is comprised of 50 percent Federal land, we have a vested interest in the processes that guide Federal land management and environmental decisions and therefore would like to take this time to share with you a few of our thoughts on NEPA's current application as well as areas that we feel should be improved.

A growing number of opportunities for the participation of state, local and tribal governments, known as cooperating agency status, have become a reality in Federal land planning and management in Wyoming. In his January 30, 2002 Memorandum for the Heads of Federal Agencies, James Connaughton, Chairman of the Council Environmental Quality stated that: "The benefits of enhanced cooperating agency participation in the preparation of NEPA analyses include: disclosing relevant information early in the analytical process; applying available technical expertise and staff supports; avoiding duplication with other Federal, state, tribal and local procedures; and establishing a mechanism for addressing intergovernmental issues. Other benefits of enhanced cooperating agency participation include fostering intra- and intergovernmental trust and a common understanding and appreciation for various governmental roles in the NEPA process, as well as enhancing agencies' ability to adopt environmental documents."

Wyoming has been the proving ground for increasing levels of cooperation between Federal agencies, state agencies and local governments relative to the Federal planning process using cooperating agency status. The number of Federal projects in Wyoming that have included cooperators is steadily increasing. Through cooperating agency status, we have been able to work with Federal agencies to craft documents that a more amenable to a wider range of stakeholders. Although cooperating agencies status has been viewed as a very positive step, there is room for improvement. While Federal agencies have become more agreeable to working with cooperators in recent years, there is occasionally a power struggle.

Historically, Federal planning has been confined to the offices of the Federal agency undertaking the planning effort, at least until the plan was released for public comment. Cooperating agencies status has opened the system somewhat which Wyoming believes has resulted in more informed decisionmaking. Even so, at least concerning the BLM and several other agencies, the withholding of information from the general public until the public comment period, under the guise of the pre-decisional information label, leads to public distrust and, in our view, is an unnecessary precaution. By opening the planning process to the public, even before

the public comment phase, distrust and apprehension will relax as the public will have a better understanding of the reasoning behind certain decisions.

Wyoming State Planning Office, under the direction of Governor Dave Freudenthal, is working on ways to improve cooperating agency status in Wyoming. We have held several well-attended trainings for state agencies and local government officials to educate them on NEPA, Forest Service and BLM planning rules and regulations, and cooperating agency guidelines. We continue to work to be involved as early as possible and to have increased opportunities to provide comments, feedback and technical information.

In sum, Wyoming applauds Federal, state and local governments for their mutual efforts under the auspices of cooperating agency status. We have made great strides and our proud of Wyoming's role as the leader in defining the future of cooperative planning and look forward to even further innovation in this regard.

The Federal Government's role in planning, the incumbent disclosure of impacts through the NEPA process and the state and local governments' regulatory roles are intertwined. As a result, the NEPA process must account for state and local agencies and their needs to fulfill their regulatory missions. As responsible managers of Wyoming's air, water and wildlife, state and local governments continue to push the BLM and other Federal agencies for a greater level of specificity in their resource management plans which result from NEPA analysis. Without specificity for planned or allowable uses on Federal land, Federal managers have no defined course and hence are not made to be accountable, which leaves local authorities in an awkward position. Thus, Wyoming has been steadfast in its call for quantifiable and measurable objectives in the various Federal agency land management plans, which has resulted in some change in these planning documents. We will continue in our efforts. Regardless, without funding, these words will not convert to action. As such, Congress must do its part to fund the ongoing monitoring and implementation of those plans that proceed from the underlying NEPA analysis.

While implementation and monitoring are somewhat separate from NEPA, dedication to cogent implementation and monitoring strategies is an underlying assumption to Federal, state and local participation in the NEPA process.

In Wyoming, we have learned that the BLM intends to develop "Implementation Plans" for its land use plans. The U.S. Forest Service employs a similar tool in its implementation efforts. But plans alone are not enough. A Federal dedication at the agency level to ongoing implementation is essential. The same is true with regard to monitoring.

Ms. MCMORRIS. Would you please summarize now?

Mr. LANCE. I can do that. In my prepared remarks, you'll also note I highlighted the need for greater socio-economic analysis and a greater expediency in the NEPA process as that process has become somewhat protracted in Wyoming with planning efforts taking over two to four years with which the current time value of money for energy development is hampering us.

To conclude my remarks, NEPA, like the Endangered Species Act and other Federal environmental laws which influence NEPA's application is noble in purpose, but has become somewhat feeble in its application. States and local governments can help to bolster their Federal counterparts and have through the Federal policy of a cooperating agency status. But beyond NEPA disclosure lays the mostly fallow ground of implementation and monitoring. The State of Wyoming would ask that these important aspects of Federal management move higher in the priority chain in terms of Federal dedication and funding.

Additionally, we would ask that greater attention be paid to socioeconomic impacts and those mitigation impacts when and where appropriate.

Thank you for the opportunity to supply testimony today.

[The prepared statement of Mr. Lance follows:]

Statement of Ryan Lance, Endangered Species Act Policy Coordinator, Office of Governor Dave Freudenthal

Honorable Members of the Committee on Resources:

Thank you for the opportunity to provide testimony regarding the State of Wyoming's thoughts on the National Environmental Policy Act (NEPA). As a state that is comprised of 50 percent federal land, we have a vested interest in the processes that guide federal land management and environmental decisions and therefore would like to take this time to share with you a few of our thoughts on NEPA's current application as well as areas that we feel should be improved.

Cooperating Agency Status

A growing number of opportunities for the participation of state, local and tribal governments, known as cooperating agency status, have become a reality in federal land planning and management in Wyoming. In his January 30, 2002 Memorandum for the Heads of Federal Agencies, James Connaughton, Chairman of the Council of Environmental Quality (CEQ) stated that:

"The benefits of enhanced cooperating agency participation in the preparation of NEPA analyses include: disclosing relevant information early in the analytical process; applying available technical expertise and staff supports; avoiding duplication with other Federal, State, Tribal and local procedures; and establishing a mechanism for addressing intergovernmental issues. Other benefits of enhanced cooperating agency participation include fostering intra-and intergovernmental trust and a common understanding and appreciation for various governmental roles in the NEPA process, as well as enhancing agencies' ability to adopt environmental documents.

The importance of cooperating agency status is highlighted by its prominence in the National Environmental Policy Act and the Council of Environmental Quality regulations (see NEPA, Title 1, Section 102 (E) and CEQ regulations 1501.1 (b), 1501.2(c), 1501.6(a)(2), 1502.2(f)). Beyond NEPA and CEQ direction, there have been several other policy directives regarding cooperating agency participation. For example, the Bureau of Land Management (BLM) issued an instructional memorandum on August 20, 2004 (IM No. 2004-231) titled, "The Scope of Collaboration in the Cooperating Agency Relationship." Cooperating agency status has also been defined in a BLM proposed rule posted in the Federal Register on July 20, 2004 (RIN 1004-AD57). Certainly, these efforts are highlights in the federal governments attempts to meet President Bush's August 26, 2004 Executive Order of Cooperative Conservation.

Wyoming has been the proving ground for increasing levels of cooperation between federal agencies, state agencies and local governments relative to the federal planning process using cooperating agency status. The number of federal projects in Wyoming that have included cooperators is steadily increasing. Through cooperating agency status, we have been able to work with the federal agencies to create documents that are more amenable to a wider range of stakeholders. Although cooperating agency status has been viewed as a very positive step, there is room for improvement. While federal agencies have become more agreeable to working with cooperators in recent years, there is occasionally a power struggle.

Historically, federal planning has been confined to the offices of the federal agency undertaking the planning effort—at least until the plan was released for public

comment. Cooperating agency status has opened the system somewhat, which Wyoming believes has resulted in more informed decision making. Even so, at least concerning the BLM and several other agencies, the withholding of information from the general public until the public comment period, under the guise of the predecisional information label, leads to public distrust and, in our view, is an unnecessary precaution. By opening the planning process to the public, even before the public comment phase, distrust and apprehension will relax as the public will have a better understanding of the reasoning behind certain decisions.

The State Planning Office, under the direction of Governor Dave Freudenthal, is working on ways to improve cooperator agency status in Wyoming. We have held several well-attended trainings for state agencies and local government officials to educate them on the National Environmental Policy Act, Forest Service and BLM planning rules and regulations, and cooperating agency guidelines. We continue to work to be involved as early as possible and to have increased opportunities to provide comments, feedback and technical information.

In sum, Wyoming applauds federal, state and local governments for their mutual efforts under the auspices of cooperating agency status. We have made great strides and are proud of Wyoming's role as the leader in defining the future of cooperative planning and look forward to even further innovation in this regard.

The Need for Specificity

The federal government's role in planning, the incumbent disclosure of impacts through the NEPA process and the state and local governments' regulatory roles are intertwined. As a result, the NEPA process must account for state and local agencies and their needs to fulfill their regulatory missions. As responsible managers of Wyoming's air, water and wildlife, state and local governments continue to push the BLM and other federal agencies for a greater level of specificity in their resource management plans, which result from NEPA analysis. Without specificity for planned or allowable uses on federal land, federal managers have no defined course and hence are not made to be accountable, which leaves local authorities in an awkward position. Thus, Wyoming has been steadfast in its call for quantifiable and measurable objectives in the various federal agency land management plans, which has resulted in some change in these planning documents. We will continue in our efforts. Regardless, without funding, these words will not convert to action. As such, Congress must do its part to fund the ongoing monitoring and implementation of the plans that proceed from the underlying NEPA documentation.

Implementation and Monitoring

While implementation and monitoring are somewhat separate from NEPA, dedication to cogent implementation and monitoring strategies is an underlying assumption to federal, state and local participation in the NEPA process.

In Wyoming, we have learned that the BLM intends to develop "Implementation Plans" for its land use plans. The U.S. Forest Service employs a similar tool in its implementation efforts. But plans alone are not enough. A federal dedication at the agency level to ongoing implementation is essential. Furthermore, as in the NEPA process, state and local participation in implementation is also critical. So too is funding.

Similar to implementation planning, there are often intricate monitoring plans defined under NEPA documents. Unfortunately, these monitoring directives are not always reduced to action. In turn, state and local regulatory agencies, such as the Wyoming Department of Environmental Quality Air, Water and Land Quality Divisions, are left with little information to direct future management and regulation, which could potentially compromise energy and other development. Again, dedication to the process, state and local involvement and funding are critical to federal agency efforts to monitor. This is especially true when speaking in terms of adaptive management, which is making inroads into many planning efforts. For adaptive management to work, agencies must have baseline and ongoing monitoring data so we know what we are adapting to; without both, adaptive management is useless.

Socioeconomic Concerns

Appropriately, ecological concerns remain the main focus of most NEPA analysis. Today, socioeconomic impacts are becoming more and more important to states and local governments, especially as those impacts relate to community sustainability. As Western cities, towns, counties and states rely on federal lands to feed their economies, especially in terms of energy developments, the impacts of federal decisions on these economies must be fully understood, to allow government and private industry to respond accordingly.

Expediency

It takes an incredible amount of time to complete environmental impact statements. The state of seemingly perpetual delay has serious impacts, given the time value of money, especially relative to energy development. Oftentimes these delays are derived from the fact that the federal agency employees working on the document remain responsible for their "day jobs" on top of writing complicated environmental documents.

The State of Wyoming suggests expediting and segregating NEPA processes in areas of high energy development. As one suggestion, federal agencies could bring in a group of agency specialists as a core team that is tasked with nothing other than to work with the field offices to develop environmental documents. While much has been made of federal NEPA private contractors, who are tasked with writing NEPA documents and providing technical insight, they have only provided marginal efficiency gains while adding the burdens of oversight. The key is to provide internal, rather than external, support.

Conclusion

To conclude my remarks, NEPA, like the Endangered Species Act and other federal laws, is noble in purpose but has become somewhat feeble in application. States and local governments can help to bolster their federal counterparts and have through the policy of cooperating agency status. But beyond NEPA disclosure lays the mostly fallow ground of implementation and monitoring. The State of Wyoming would ask that these important aspects of federal management move higher in the priority chain in terms of federal dedication and funding. Additionally, we would ask that greater attention be paid to socioeconomic impacts and mitigation of those impacts when and where appropriate. Finally, Wyoming would ask for a stepped-up pace of the development of NEPA documents. Thank you for allowing us to supply testimony today.

Response to questions submitted for the record by Ryan Lance, Endangered Species Act Policy Coordinator, Office of Governor Dave Freudenthal

1. *Question: You recommend a "stepped up pace" for NEPA documentation. Do you think if there were timelines designed to expedite the preparation of NEPA documents that the intent of NEPA could still be fulfilled?*

Answer: The intent of NEPA was not to create a process that was so time and resource intensive that it prohibits the beneficial work of the federal government. The purpose of the National Environmental Policy Act of 1969 as defined in Sec. 2 is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation."

Implementation of NEPA means compliance with Sec. 102 of the Act which defines how federal agencies are to proceed in implementing the purpose. Complying with Sec. 102 was never intended to actually cause a delay or to impede federal agency attempts to achieve the defined purpose of the act. The mention of a "stepped up pace" to NEPA documentation in the Governors Office's comments was mainly aimed at some of the more egregious examples of delay that we have experienced in Wyoming, which have ranged from three to six years in some instances.

2. *Question: I agree that cooperating agencies play an important role in the NEPA process. Can you suggest some criteria to ensure that the appropriate entities, not just anyone with an interest, are afforded cooperating agency status?*

Answer: CEQ has set parameters for who should be considered a cooperating agency. That list includes: "any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in Sec. 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency." This definition is adequate and clearly sets an appropriate criteria for who can and should be afforded cooperating agency status. Regardless of who is considered to be cooperating agency, the development of NEPA documents, particularly within the Bureau of Land Management, should be more open and less constrained

by the overly burdensome proscriptions related to the dissemination of "pre-decisional information," as discussed in the Governors Office's previous comments.

3. Question: Before the planning process is opened up, isn't it necessary to address issues such as litigation?

Answer: It is necessary to address the possibility of litigation, however federal agencies should not be hampered by a fear of litigation. There will never be a point at which litigation is absent from federal actions. However, Resource Management Plans and Forest Plans that adequately address potential impacts and cumulative impacts and provide for a reasonable level of assurance as to how proposed actions will take place on the ground go a long way to reduce potential litigation. Doing projects right the first time by making them a priority and allowing for direct input from cooperating agencies and the general public is the best option to curtail litigation in the future. Openness of such process has served the Forest Service well in Wyoming. A similar template should be employed by the BLM.

Ms. MCMORRIS. Thank you.

Mr. Heinrich.

STATEMENT OF MARTIN HEINRICH, ALBUQUERQUE CITY COUNCILOR, ALBUQUERQUE, NEW MEXICO

Mr. HEINRICH. Thank you, Madam Chairwoman. Thank you for this opportunity to testify regarding the National Environmental Policy Act. My name is Martin Heinrich and I'm currently a City Councilor in Albuquerque, New Mexico and I'm the Vice Chair of the Albuquerque-Bernalillo County Water Utility Authority. I was formerly the Executive Director of the Cottonwood Gulch Foundation, where I managed considerable property adjacent to the Cibola National Forest and I was responsible for educational activities permitted on Federal public land. I'm also an active user of our Federal public lands for hiking, hunting and camping.

Because of this background, I'm been acutely aware of the NEPA process for about 10 years now. I participated in scoping and comment periods and I have often relied upon NEPA to keep me abreast of Federal management activities and projects that impacted places where I worked or recreated. As a councilor, I see NEPA as an important avenue of communication between local government and the Federal Government.

In my written testimony, I elaborate extensively on how NEPA was used effectively and successfully to plan a major drinking water project for the Albuquerque area. Without NEPA, I hear that many important constituencies, including farmers and conservationists would not have had an adequate seat at the planning table. The NEPA process engendered community buy in for an inherently controversial and difficulty project. The final outcome was of the higher caliber, due to this process.

I consider NEPA to be primarily a planning tool. This law gives us a clear and predictable planning framework that citizens and communities can use in order to participate in decisions affecting local public lands and these decisions have a huge impact on local economies and cultural and recreational resources. Many citizens and local governments rely upon the structure that NEPA provides to understand the impacts and alternatives associated with a nearby federally funded project.

Under NEPA, a citizen or local government can advocate for or against a proposal, but more importantly, we can provide substantive information or knowledge that can help the Federal

agency make a better decision. As an elected official, I have often seen citizens offer very innovative solutions and I have witnessed legislation amended or rewritten because of the public testimony that was provided. NEPA provides that feedback avenue for Federal projects.

This participation in the public process is the democratic discourse that we should always strive to encourage in government. NEPA usually works so well that most elected officials are not aware of it. I know that some projects have been delayed during the NEPA process, but challenges to actions sought under NEPA are typically only successful when NEPA is not followed, such as if an agency refused to consider viable alternatives or does not consider pertinent information. You cannot successfully challenge the outcome of a NEPA process simply because you disagree with the final decision. When our citizenry and our local governments are provided quality information, and accurate analysis of potential impacts, real alternatives and an opportunity to offer their unique perspective, then challenges are rarely mounted and are typically not successful.

NEPA should not be streamlined. A reduction or elimination in the mandatory public comment periods, for example, would result in more frustration, increased litigation and the elimination of the most important part of this law, the involvement of our citizenship and local communities in the Federal decisionmaking process.

If there is a problem with NEPA that problem lies more in NEPA's implementation than within the Act itself. I believe that more consistent application, better training of agency personnel responsible for that implementation, better and more consistent use of technology to increase the public participation, and resources for citizens and local governments who are involved in the NEPA planning process would be the most prudent improvement of this act. My opinion on this matter is not altogether inconsistent with the findings of the NEPA Task Force which was formed by the President's Council on Environmental Quality, or CEQ, in 2002 and 2003. Their analysis included a series of regional roundtable discussions where the CEQ consulted with representatives of state and local government, tribes, industry and citizen groups with the goal of gathering more input on NEPA, much like the stated intent of today's Task Force. And I trust that you will review their findings.

To conclude, I believe NEPA is among our best tools for planning Federal projects. It gives voice to our citizenry and provides a predictable avenue for democratic involvement and our government. While I would advocate for more consistent implementation and better resources for those involved in the NEPA process, I do not see the need for wholesale changes within the law.

Thank you for this opportunity to testify on the National Environmental Policy Act.

[The prepared statement of Mr. Heinrich follows:]

Statement of Martin Heinrich, City Councilor, District 6—Albuquerque, New Mexico

Madame Chairwoman, thank you very much for inviting me to testify on the role of the National Environmental Policy Act (NEPA). My name is Martin Heinrich. I am currently a city councilor in Albuquerque, New Mexico and I am also the Vice

Chair of the Albuquerque-Bernalillo County Water Utility Authority. In addition, I was formerly the Executive Director of an educational program called the Cottonwood Gulch Foundation, where I managed considerable property adjacent to the Cibola National Forest and where I was responsible for planning and managing educational activities permitted on federal public land. Finally, I am an active user of our federal public lands for recreational purposes, including hiking, hunting and camping.

Because of my personal history, I have been acutely aware of the NEPA process for about ten years now. I have participated in scoping and comment periods and I have often relied upon NEPA to keep me abreast of federal management activities and projects that could impact places where I worked or recreated. More recently, as a councilman NEPA has helped keep me informed of federally funded projects that impact the City of Albuquerque. Typical examples of federal activities that I would have an interest in through my elected role could include Army Corps of Engineer management activities in the Rio Grande and federally funded water projects that are related to our drinking water supply.

I consider NEPA to be primarily a planning tool. This law gives us a clear and predictable planning framework that citizens and communities can use in order to participate in decisions affecting local public lands-decisions having a huge impact on local economies as well as cultural and recreational resources. Many citizens and members of local government rely upon the structure that NEPA provides to understand the possible impacts of a nearby federally funded project and what alternatives may exist. Under NEPA, a citizen or local government can advocate either for or against a proposal, but more importantly we can provide substantive information or knowledge that can help a federal agency make a better decision. As an elected official, I have often seen citizens offer solutions that had not occurred to me or my colleges. I have more than once witnessed legislation changed, completely reworked, or amended based on information provided from public testimony. NEPA provides that public feedback avenue for federal projects. It is a well defined avenue whereby information from citizens and local government can affect how our federal tax dollars are spent and what occurs on our federal public lands. This allows citizens to actively participate in their government and their environment. That participation in the public process is the democratic discourse we should always strive to achieve in government.

I believe it is important to note that the planning process NEPA provides for is content neutral. If a proposal has serious environmental impacts or if a majority of the comments about a proposal object to the proposed action, that in no way guarantees that the proposed action will be stopped or even delayed. NEPA does ensure that alternative actions were considered and that the potential impacts of the proposed action are shared with our citizenry. Local citizens have a right to understand what the federal government is proposing in their back yard, and what the consequences of those proposals will be.

In my experience, NEPA typically works so well that even most elected officials are not aware of it. I know that some projects have been delayed during the NEPA process, but it is my understanding, and I freely admit that I am not lawyer, that challenges to actions sought under NEPA are typically only successful when NEPA was not followed. For example when an agency refuses to consider viable alternatives or does not consider pertinent information. You cannot successfully challenge the outcome of a NEPA process simply because you disagree with the final decision that was made. When our citizenry and local governments are provided quality information, an accurate analysis of potential impacts, real alternatives, and an opportunity to offer their unique perspective, then challenges are rarely mounted and are typically not successful.

If there is a problem with NEPA, I would suggest that it lies more in its implementation than within the Act itself. I believe that more consistent application, better training of agency personnel who are responsible for implementation, better and more consistent use of technology to increase public participation, and resources for citizens and local governments who are involved in the NEPA process, would be the most prudent courses of action to improve the process of implementing federal projects. I believe that my opinion in this matter is not altogether inconsistent with the findings of the NEPA Task Force which was formed by the President's Council on Environmental Quality, or CEQ, in 2002 and 2003. Their analysis process for NEPA included a series of regional roundtable discussions. During these, the CEQ consulted with representatives of state and local government, tribes, industry, and citizen groups with the goal of gathering input on NEPA that is much like the stated intent of today's Task Force. I trust that this Task Force has reviewed or will review the findings of those groups.

I'd like to end my testimony with a local example where I think NEPA provided the best possible framework from which to plan a difficult project that had serious environmental consequences, was controversial and expensive, and which would impact large numbers of highly diverse stake holders. NEPA was the planning framework for the implementation of the San Juan Chama drinking water diversion project that is designed to transition the Albuquerque Bernalillo County Water Utility Authority away from complete reliance on a shrinking aquifer through the utilization of surface water rights. This required the construction of a new diversion dam on the Rio Grande River. While this diversion structure is located within Albuquerque's city limits, it is important to realize it is also within one of the most productive irrigated farm districts in the state and is on a desert river that is home to several endangered species and has a strong public constituency of its own. Consequently, this project had the potential to impact every drinking water customer in Albuquerque and the water utility served portion of Bernalillo County, a large number of farmers, considerable wildlife including two endangered species, and thousands of local citizens who value the river for its wildlife, recreational and scenic values.

In a project of this magnitude and difficulty there is no perfect outcome. Some stakeholders will not be happy with the end result, no matter what it ends up being. That said, I can say in all honesty that we have a better product because of the NEPA planning process and I cannot offer an alternative process that would have yielded better results or any additional consensus. And while some citizens would still prefer that this diversion was not built, their influence on the structure that was built helped ensure that it is among the most flexible, safe and wildlife friendly structures of its kind. I feel strongly that it is a positive thing to hold meetings where you must listen to the concerns of ordinary citizens, farmers, conservationists and utility ratepayers. NEPA provided a very predictable and well defined process for us to gather that public input and to respond to it. I believe we have a better result today because we listened to everyone's concerns. I also believe that we have considerably more community "buy in" for the project because we went through this planning process.

To conclude, I believe NEPA is among our best tools for planning federal projects. It gives voice to our citizenry and provides a predictable avenue for democratic involvement in our government. While I would advocate for more consistent implementation and better resources for those involved in a NEPA process, I do not see the need for any wholesale changes to the law. The only way to dramatically streamline NEPA would be to reduce or eliminate the mandatory public comment periods. This would result in more frustration, more litigation, and the elimination of the most important part of this law, the involvement of our citizenry in our federal decision making process.

Thank you this opportunity to offer testimony on the National Environmental Policy Act.

Ms. MCMORRIS. Thank you.

Mr. Brown.

STATEMENT OF DAVID R. BROWN, REGIONAL REGULATORY ADVISOR, BP AMERICA, INC., DENVER, COLORADO

Mr. BROWN. Good morning, Chairwoman McMorris and members of the Task Force, I am Dave Brown, Regulatory Advisor for the Rocky Mountain Region for BP America.

Thank you for the opportunity to appear before you today to discuss the many facets of NEPA.

BP is the largest producer of oil and natural gas in the United States. As one of the leading Federal leaseholders and gas producers in the Rocky Mountains, Wyoming, Colorado and New Mexico, BP supplies roughly 6 percent of the nation's daily natural gas needs from this region. Here in New Mexico, BP produces over 400,000 cubic feet of natural gas per day from some 2,200 wells, most of which are located in northwest New Mexico near Farmington. We have a work force of roughly 500 employees and

contractors and we are grateful for the work they do every day to provide this viable resource for the nation.

BP and its predecessor companies have been active participants in numerous NEPA analyses ranging from environmental assessments to project-level environmental impact statement throughout the Rocky Mountains and we also participate in the Federal land use planning process.

For the record, we believe the NEPA statutory framework is sound. However, the current system is mired in procedural and legal obstacles which must be addressed to ensure the objectives of NEPA are met in a timely and effective manner.

I personally have been involved in the NEPA process since the 1970s when the CEQ regulations were issued. During that time I've seen a trend of increased complexity with the analysis, voluminous text, endless litigation, Court decisions that impose a continuous stream of changing procedural requirements and escalating costs. I've also found that project proponents and agency staff are overwhelmed with trying to simply manage the NEPA process. All of this requires us to ask a fundamental question: is the current NEPA process really effective in determining whether the quality of the human environment is being significantly affected by Federal agency decisions? My written comments go into much more considerable detail I have previously provided. However, this morning I will try to summarize a few of my points.

First, I would like to talk about how alternatives are chosen for analysis in a NEPA document. CEQ regulations require that agencies present the environmental impacts of the proposal and ''reasonable alternatives''. It also requires that appropriate mitigation be addressed. Too often, we see alternatives presented that are technically and economically unachievable. Alternatives need to be based on mitigation measures that can actually be achieved, taking into consideration economic and technical aspects.

Another area that requires improvement is the agency's concern of working with the project proponents or consulting with stakeholders. During the NEPA process especially this is a problem because the Federal agencies believe that these ex parte communications must be strictly adhered to. This approach is leaving stakeholders out of the NEPA process for extended periods of time while the analysis is underway and this can extend for months and possible a year and beyond.

Because of the absence of interaction between stakeholders and the agency for extended periods, the NEPA analysis can become severely out of date or not reflect the interest of the stakeholders. When the draft document comes out, and it's out of date or not current, with the best information available, it must be reworked, supplemented or in some cases started over. To address this issue, we recommend the NEPA analysis be exempt from ex parte communications to ensure the validity of data and to acquire new information as necessary.

Another area of concern is litigation in the context of NEPA. I have several recommendations in my detailed comments, but essentially the burden of proof should be shifted to the appellants from the agency to prove the analysis was not conducted using the best available science.

Finally, I will highlight an area of concern that I know is familiar to you as funding of agency staff. All too often project proponents are asked to pay for the cost of preparing EAs and EISs. While in some cases, this is a voluntary commitment by the project proponents, there's still a significant delay in getting a third party contractor analysis through the process, mainly because the agencies have so many other responsibilities to fulfill with a limited number of resource specialists.

Some of the ideas that could be used to address this could be a temporary detail, a NEPA coordinator from a less busy agency office. It also may make sense for an agency to have a central NEPA coordination office to help facilitate larger NEPA projects.

Finally, allow project proponents who wish to voluntarily fund a NEPA position, allow that to take place, but ensure the individual is clearly accountable in writing to the agency and not the applicant.

Chairwoman McMorris and the members of the Task Force, thank you again for the opportunity to participate in this hearing. I fundamentally believe that if we have the clear and predictable process for energy development, it will encourage investment and create the attendant economic and environmental benefits.

Thank you.

[The prepared statement of Mr. Brown follows:]

Statement of Dave Brown, Regional Regulatory Advisor (Rocky Mountain Region), BP America, Inc

Good morning, Chairwoman McMorris and members of the Task Force. I am Dave Brown, Regulatory Advisor for the Rocky Mountain Region for BP America.

Thank you for the opportunity to appear before you today to discuss the many facets of NEPA.

Before I get into the substance of my remarks, I would like to provide a bit of context about BP.

BP is the largest producer of oil and natural gas in the United States. As one of the leading federal leaseholders and gas producers in the Rocky Mountains—Wyoming, Colorado and New Mexico—BP supply's roughly 6 percent of the nation's daily natural gas needs from this region.

BP and it's predecessor companies have been active participants in numerous NEPA analyses ranging from Environmental Assessments to project-level Environmental Impact Statements throughout the Rocky Mountain region.

For the record, BP believes the NEPA statutory framework is sound. Subsequent fine-tuning found in the Council of Environmental Quality (CEQ) regulations from the late 1970's was also beneficial, but that process has only taken place one time. While many would agree that wholesale changes to NEPA are needed, we believe it is also advantageous to focus on updating and revising the Council of Environmental Quality (CEQ) regulations. CEQ has been conducting an ongoing review of their regulations for several years and we would urge the Committee to assess the status of those efforts and strongly encourage the CEQ to update and revise their regulations to address current issues.

The current system is mired in procedural and legal obstacles which must be addressed to assure that the objectives of NEPA are met in a timely and effective manner.

I have personally been involved in the NEPA process since the 1970's when the CEQ regulations were issued. During that, there has been a trend of increased complexity with the analyses, voluminous text, endless litigation, court decisions that impose a continuous stream of changing procedural requirements, and escalating costs. Project proponents and agency staff are overwhelmed with trying to simply manage the NEPA process. All of this requires us to ask a fundamental question: Is the current process really effective in determining whether the quality of the human environment is being significantly affected by federal agency decisions? Our comments below address this particular question and what improvements could be made to enhance the process while still meeting the basic objectives of NEPA.

Specific Recommendations:

IMPROVING HOW ALTERNATIVES ARE DEVELOPED: One area that is in need of refinement is how alternatives are chosen for analysis in a NEPA document. CEQ regulations at 40 CFR 1502.14 require that agencies present the environmental impacts of the proposal and "reasonable alternatives" for comparative analysis. It also requires that appropriate mitigation be addressed in the proposed action and the alternatives. While public scoping is an integral part of the NEPA process, too often we see alternatives presented that are technically and economically unachievable. Too many alternatives outside the realm of "reasonable" are suggested and analyzed on the pretext of providing an acceptable "range of alternatives". CEQ regulations allow agencies to eliminate alternatives if they also provide an explanation as to why those alternatives were not analyzed in detail. Agencies should adopt an additional qualifier for "reasonableness" that includes economic and technical feasibility. This would encourage a healthy dialogue among the agency, the public and the project proponents. Alternatives would be better focused on mitigation measures that can actually be achieved, taking into consideration economic and technical aspects that are critical to achieving the goal of balancing the development of natural resources and environmental protection.

RECOMMENDATION: Require an "economic and technical feasibility" test as part of developing alternatives for NEPA analysis.

Conversely, a new problem has arisen regarding the lack of a reasonable range of alternatives in recently initiated BLM land use planning efforts. Due to budget constraints, the range of alternatives has been limited to four management options—(1) no action (current management), (2) no or few restrictions, (3) a purportedly "balance-driven" alternative, and (4) a "preservation" alternative. While this appears reasonable, this approach serves to severely limit the creation of a reasonable alternative that incorporates both protection and conservation, at least in the draft environmental impact statement. While the agency claims it can mix and match aspects of the four alternatives into a new "preferred alternative" in the final EIS, this has not been our experience over the last two planning cycles. Moreover, it forces the public, which is largely unaware of the land use planning process, to pick discreet pieces of each alternative to formulate an alternative they support. When this occurs, there is confusion and frustration about the alternatives the public can support.

RECOMMENDATION: Agencies must be required to include an adequate range of alternatives that will allow the public to clearly identify a preferred management approach.

ENHANCING COMMUNICATION WITH STAKEHOLDERS: Another area that requires improvement is agency consultation with stakeholders. Federal agencies are going overboard to prevent what they believe to be ex parte communication. This approach is leaving stakeholders out of the NEPA process for extended periods while the analysis is underway. This is a critical flaw in the current NEPA process that must be corrected if a timely and thorough NEPA analysis is to be achieved in a cost effective manner. Ex parte communication is any written or verbal communication initiated outside of regularly noticed public comment period between an official with decision making authority and one or more of the parties concerning subject material which is under consideration by that official. While ex parte communication is an important issue that must be considered, federal agencies have taken the concept to a new level for EIS preparation. Agencies now typically restrict communication with interested parties during preparation of an EIS after public scoping is completed. This eliminates a healthy and productive dialogue between the agency and stakeholders which sometimes extends into many months, and sometimes years. Because of the absence of interaction between stakeholders and the agency for extended periods, the NEPA analysis can be become severely out of date or not reflect the intentions of the stakeholders, especially a project proponent. Not only do economics change, but technological advancements are dynamic and may not be brought forward until the next public input scenario occurs, which will be when the public review of the draft document occurs. When the draft document becomes out of date or is not current with the best information available, it must be reworked, supplemented, or in some cases, started over. This isolation of stakeholders also increases the volume of public comments during the draft review which adds more time to generating a Final EIS since those comments must be responded to as part of the process. Thus this overly-restrictive definition of "ex parte" communication causes undue delays and is unnecessarily expensive.

RECOMMENDATION: Exempt NEPA analysis from ex-parte provisions or require the agencies to periodically consult with interested parties to ensure the validity of data or to acquire new information. Allowing constructive dialogue with those

who have information during preparation of any NEPA document is a positive approach that would benefit the process.

CATEGORICAL EXCLUSION REVIEW: We recommend that an expedited review of certain actions with little or no environmental impact be implemented as part of the NEPA process. The use of a "categorical exclusion" is provided for in NEPA. Granting a categorical exclusion does not mean an agency ignores environmental aspects of a project; rather, this is a mechanism whereby an agency VERIFIES that impacts associated with the proposed action are minimal or non-existent. If the exclusion criteria are met, no detailed analysis would be required. If the criteria are not met, the project would be taken to the next level of NEPA analysis—an Environmental Assessment as provided for in the CEQ regulations. This process would work well with the permitting process for federal actions since virtually all new land disturbances, particularly those involving oil and gas, require a permit. Integrating categorical exclusions into the permitting process would allow an expedited review of projects that are typically routine and have little or no environmental impact. There are any number of land use activities and approvals related to oil and gas that could be subject to categorical exclusion provided that site conditions or resource concerns support exclusion, including:

- Issuance and modifications of regulations, orders, standards, notices to lessees and operators, and field rules, where the impacts are limited to administrative, economic or technological effects and the environmental impacts are minimal.
- Establishment of terms and conditions in Notices of Intent to conduct geophysical exploration of oil and gas pursuant to 43 CFR 3150 where road building and long term (greater than one year) surface damage is not expected.
- Approval of an Application for Permit To Drill (APD) in the following circumstances: 1) re-entry or modification of an existing well bore, 2) approval of a new well drilled from an existing well pad, and 3) approval of an in-field development well where multiple prior environmental assessments (EAs) have found no significant impacts and the well is within the scope of an existing Reasonable Development Scenario (RFD).
- Approval of on-lease linear facilities (e.g., when placed in existing corridors or areas of prior disturbance).
- Exceptions to lease terms or conditions of approval that do not result in or involve significant new surface disturbance.

RECOMMENDATION: Provide for the use of categorical exclusions for actions when the size or the nature of the proposal will not have significant impacts requiring the need for an Environmental Assessment.

TIMELY UPDATING OF LAND USE PLANS: A priority to better maximize NEPA-related project analysis is to allow tiering these analyses when plan updates are required. Agencies are not currently utilizing existing NEPA analyses when they begin plan revisions. Rather, they are essentially beginning from scratch, which is an unfortunate waste of time and resources. For example, today's land use management plans must include a "Reasonably Foreseeable Development" for future projects. If a new project does not fall within the anticipated future scenarios, which is likely with older, dated land use plans, the land use management plan must first be amended before a new project-level analysis is approved It would make much more sense in terms of time and cost for agencies to allow project-level documents to be used to update land use plans. This approach would require an EIS to be prepared for all major projects, evaluating the cumulative effects of the proposed activity and outlining mitigation measures to ameliorate potential adverse impacts. This would allow more efficient use of agency resources and allow projects to proceed based on a project-level environmental analysis. In those cases where the land use plan must be amended to reflect the project-level analysis, that process should be competed as soon as practicable.

RECOMMENDATION: Use project-level NEPA analysis to update land use plans, particularly for reasonable and foreseeable development aspects of the land use plan.

TIME FRAME ACCOUNTABILITIES: Excessive time to prepare NEPA analyses must be addressed, particularly for Environmental Impact Statements and the extraneous text linked to those Statements. Presently, there is no specific time frame for preparing a NEPA analysis, nor is there a required time frame for completion of project-level NEPA documents. Even a routine Environmental Assessment can take 6 months to a year. An Environmental Impact Statement typically, requires in excess of 3 years, based upon our experience. One reason for this appears to be the agency's concerns about writing documents that are litigation/appeal proof. Too often, to achieve this objective, documents are being written with an apparent emphasis on quantity, which some believe equates to quality that will defend the analysis against legal challenge. CEQ regulations developed in the 1970s were

intended to avoid exactly what occurs now, large voluminous documents unfriendly to all who read them and especially to those who must apply their provisions. What took maybe a hundred to a few hundred pages to analyze in an EIS in the early 1980s now is trending toward 2 volumes and a thousand pages of text. The CEQ regulations state that an EIS should be between 150 pages and 300 pages long. Today, opening chapters that address the purpose, combined with the needs statement and project description, are often more than 150 pages long. Thus it is not surprising that so much time is taken in preparing NEPA analyses. BP recommends:

1) NEPA analysis should return to the original intent described in the CEQ regulations for both EA's and EIS's.
2) Specific time frames should be incorporated into CEQ regulations governing preparation of an EA or EIS.
3) Portions of NEPA documents that add little value to impact determination should be eliminated or combined. For example, the "Affected Environment" describes current conditions. While this information is useful, it is often voluminous and does not need to go into the detail currently required in NEPA documents. Instead, it could be combined and summarized within the Environmental Consequences and Cumulative Impact portion of a NEPA document, significantly reducing the volume of the document.
4) CEQ should be established as a clearinghouse for monitoring court decisions that affect procedural aspects of preparing NEPA documents. If a judicial proceeding or agency administrative decision mandates certain requirements, CEQ should be charged with the responsibility of analyzing its effects and advising appropriate federal agencies of its applicability.
5) More strenuous standards should apply to litigants of NEPA analyses as described below.
6) Agencies should use the best scientific evidence AVAILABLE to conduct an analysis. Agencies should not need to generate new information to "bullet proof" their analyses in an attempt to avoid litigation/protests. Our experience is that generating such new information has done nothing to prevent litigation but adds significant time and costs to the preparation of a NEPA document.
7) When preparing Environmental Assessments, avoid increasing the level of analysis to that required for an Environmental Impact Statement. EAs should be written to determine whether an EIS is warranted, not just simply as an abbreviated version of one. EAs should address selected resource concerns and disclose mitigation measures in a brief and concise manner.

RECOMMENDATION: Establish accountability for time frames and implement measures that avoid long drawn-out analyses and voluminous documents.

FUNDING OF AGENCY STAFF: Congress needs to provide adequate funding for federal agencies to prepare NEPA analyses. The ability to timely complete a NEPA analysis hinges on resources to complete the process. All too often, project proponents are asked to pay for the costs of preparing EAs and EISs. While in some cases this is a voluntary commitment by project proponents, there is still a significant delay in getting a third party NEPA analysis through an agency, often because the agency has so many other responsibilities to fulfill with a limited number of resources specialists—many of whom are responsible for reviewing the work of the third party contractor—that hinders any real progress that might be gained by using third party contractors. Congress must provide adequate funding for staffing not only for actual preparation of NEPA analyses instead of using outside contractors, but also allowing sufficient agency staff to manage third party arrangements. If the agency staff charged with NEPA responsibilities are carrying a full work load, temporarily detailing a NEPA coordinator from a less busy office should also be considered. It would even make sense for each agency (or a group of agencies) to have a central NEPA coordination staff to help facilitate NEPA projects. This group could resolve conflicts between contractors and the agency and provide guidance on how the agency is to proceed. Further, if project proponents want to voluntarily fund a NEPA position working directly for the agency, this should be allowed provided the individual is clearly accountable in writing to the agency and not the applicant.

RECOMMENDATION: Congress should strive to ensure adequate funding exists for federal agencies to meet the requirements of NEPA.

UNENDING LITIGATION: Legal appeals of NEPA analyses are a reality of the current process. We believe the right to appeal an agency decision must be preserved, but changes are required to minimize frivolous appeals. The following recommendations, which could require amendments to the NEPA statute, might be considered:

- Currently, the burden of proof is placed on the agency to prove the analysis conducted was thorough and complete. An improvement in the law would require

appellants to prove that the evaluation was not conducted using the best available information and science.

- Require appellants to post bonds to cover the cost of legal fees and administrative costs of agency employees who must respond to litigation as part of the process. The bond, or a prorated portion of it, would be forfeited if the appellants are unsuccessful.
- Provide a streamlined process to review litigation, possibly including a requirement that litigation is required to be reviewed within a certain time frame, particularly for projects of national importance such as energy/utility projects.

RECOMMENDATION: Shift the burden of proof to the litigants/appellants when a NEPA analysis is challenged and provide for a streamlined judicial process when litigation occurs.

PROVIDE CONSISTENT PROCEDURES FOR THIRD PARTY CONTRACTORS: It is important to develop NEPA templates for third party contractors when preparing EAs and EISs. The use of third party contractors can be efficient and should save money and many hours of time for agency employees. Unfortunately, this process is being hindered by changes in format and content requirements—not surprising considering the amount of judicial and administrative reviews to which NEPA analyses can be subjected. The judicial and administrative reviews often lead to new policies for meeting NEPA requirements. If these new expectations are not clearly communicated to the third party contractor, the analysis can be embroiled in multiple re-revisions which are wasteful and costly. Agencies should develop templates for third party contractors showing what should be included in a NEPA analysis based upon the ongoing inevitability of judicial and administrative decisions and agency policies.

RECOMMENDATION: Federal agencies should develop templates for third party preparation customized to the agencies' need to meet NEPA standards with input from the CEQ if deemed necessary by the federal agency.

INCONSISTENT NEPA STANDARDS: Inflated NEPA standards frequently occur when a project proponent is paying for a project-level NEPA analysis. A common practice when proposing a new project is to review and incorporate existing NEPA format and content that have been prepared by the agency. Many times the existing documents can provide valuable insight into the expectations that must be met to prepare an acceptable NEPA analysis. However, it can be frustrating, particularly if the project proponent elects to use a third party contractor, to suddenly learn that the "bar has been raised" and the privately-funded analysis must meet significantly higher standards than is required of a publicly-funded analysis. BP is more than willing to fund the appropriate level of environmental analysis when a third party contractor option is exercised; however, the analysis and level of detail should be consistent with internal agency documentation and analyses that have previously been deemed acceptable.

RECOMMENDATION: The level of NEPA analysis for private sector projects, regardless of whether a third party contractor is used, must be commensurate with that required for internal agency analyses when the projects are relatively identical.

Chairwoman McMorris and members of the Task Force, thank you again for the opportunity to participate in this hearing. I want to applaud you and the Congress for taking valuable time to focus on this important matter. We are at an important cross-road with regard to energy supply and demand in the United States. I fundamentally believe that if we have a clear and predictable process for energy development, it will encourage investment and create the attendant economic and environmental benefits. I hope the examples that I have highlighted give you a better sense of how this well-intentioned statute and regulatory framework is being applied today and some ways to enhance the process for the future. I wish you the best with the rest of your hearings and I look forward to the Task Force findings.

Ms. MCMORRIS. Thank you very much.

Ms. Blancett.

STATEMENT OF TWEETI BLANCETT,
AZTEC, NEW MEXICO.

Ms. BLANCETT. Buenos dias y bienvenidos. Welcome to New Mexico. We're glad to have you and thank you for asking me to participate.

I'm Tweeti Blancett. I'm a member of a sixth generation ranching family in northwest New Mexico. I am a New Mexican, an American, a Republican, and a conservative.

Conservative means to conserve.

As a good American rancher on Federal lands, our role has always been to protect the land. I challenge anyone to find a better watchdog for our Federal grazing lands than the American rancher. Shutting ranchers and farmers out from having meaningful input, by weakening NEPA is unacceptable.

NEPA was enacted to protect the environment with the human aspect as one of the most important parts of the Act. NEPA in Northwest New Mexico has been ignored by the Bureau of Land Management and industry, as it relates to the cumulative impacts to the air, to the water, to the wildlife and the people of the largest producing natural gas field in North America.

I would like you to look at this map that I've provided. It's in the white notebook. The map tells the story of our ranch which due to oil and gas development has had the greatest impact to the surface of any grazing allotment in the entire United States. BLM has allowed 35,000 wells in the San Juan Basin and thousands more wells will be permitted and drilled in the next 20 years. Yearly, we send billions of dollars to the state and the Federal coffers from San Juan County and billions more in record profit for energy corporations.

Yet, to date, no one has looked at the long term impacts to the land that have already occurred and will continue to occur for generations to come. Or how to clean up the contamination, repair the roads, fix the erosion, tackle the epidemic of noxious weeds while the energy companies are here to aid in the cleanup.

NEPA has not been followed in Northwest New Mexico. The Administration, Congress, BLM and industry are responsible for allowing the damage and impacts to the land, to the water, to the wildlife and the ways of life across the Rocky Mountain West and they're responsible for the cleanup.

Sacrifice areas have been created by ignoring NEPA across the Rocky Mountain West, Northwest New Mexico and Southwest Colorado and our ranch in the San Juan Basin. In Wyoming, you have the Parachute and in Colorado you have the Parachute and the Silt Area. And in Wyoming, you have the Anticline, the Jonah Field, and the Powder River Basin.

They're impacted terribly by the consequences of not following the rules that are in place. Multi-use and split estate concepts are not working. NEPA must be broadened to include regulations to plan and protect our special places. In New Mexico, the Otero Mesa and the Valle Vidal; in Colorado, the Roan Plateau and the HD Mountains; and in Wyoming, the Upper Green River Basin and Montana's Rocky Mountain Front Range.

Many sitting in this room today and across the West are no longer Republicans and Democrats first; liberals and conservatives, environmentalists or ranchers. We're Americans who want our lands protected. We are forming alliances with those we have not always agreed with and we're standing up and we're speaking out.

I extend an invitation to each of you to view our ranch first hand and see what the rest of the Intermountain West will look like if

we don't strengthen, enforce and utilize NEPA and our other regulations in the manner in which they were intended.

Thank you.

[The prepared statement of Ms. Blancett follows:]

Statement of Treciafaye "Tweeti" Blancett, Blancett Ranches, Aztec, New Mexico

Thank you for the opportunity to speak on "The Role of NEPA in the Intermountain States".

I am Tweeti Blancett, a member of a 6th generation ranching family in northwest New Mexico. I am a New Mexican, an American, a Republican, and a Conservative.

Conservative means to conserve.

As a good American Rancher on Federal lands, our role has always been to protect the land. I challenge you find a better watchdog for our Federal Grazing Lands than the American Rancher. Shutting ranchers and farmers out from having meaningful input, by weakening the NEPA process is unacceptable.

NEPA was enacted to protect the environment with the human aspect as one of the most important part of the ACT. NEPA in Northwest New Mexico has been ignored by BLM and Industry, as it relates to the cumulative impacts to the air, land, water, wildlife, and people of the largest producing natural gas field in North America, the San Juan Basin.

The map you have tells the story of our ranch, which, due to oil and gas development, has the greatest impact to the surface of any grazing allotment in the United States.

BLM has allowed 35,000 wells in the San Juan Basin and thousands more wells will be permitted and drilled in the next 20 years. Yearly we send BILLIONS OF DOLLARS to Federal and State coffers from San Juan County and Billions more in record energy corporate profits.

Yet, to date NO ONE has looked at any of the long term impacts to the land surface that have already occurred and will continue occur for generations to come. Or how to clean up the contamination, repair the roads, fix the erosion, and tackle the epidemic of noxious weeds while the energy companies are here to do the cleanup.

The Administration, Congress, BLM, and Industry are responsible for allowing the damage and impacts to the land, water, wildlife, and ways of life across the Rocky Mountain West and they are responsible for the cleanup.

Sacrifice areas have been created by ignoring NEPA across the Rocky Mountain West: northwest New Mexico and southwest Colorado—the San Juan Basin the largest natural gas producing field in North America and our 6 generation ranch, in western Colorado—the Parachute/Silt Area, in Wyoming—the Anticline, Jonah Field, and The Powder River Basin.

The multi-use and split estate concepts are NOT WORKING. NEPA must be broadened to include regulations to PLAN and PROTECT our special places that are not yet impacted but threatened—Otero Mesa and the Valle Vidal in New Mexico, the Roan Plateau and HD Mountains in Colorado, the Upper Green River Basin in Wyoming and Montana's Rocky Mountain Front. Other wise you will see other special landscapes come to look like the one on the map you are holding of our ranch.

Many sitting in this room and across the West are no longer Republican and Democrats, Liberals or Conservatives, Environmentalist or Ranchers first. WE are Americans who want our lands protected. WE are forming alliances with those we have not always agreed with.

WE are standing up and speaking out.

WE may not have the money, but WE do have the votes.

I extend to each of you an invitation to view our ranch first hand see what the rest of the Intermountain West will look like if we don't strengthen, enforce, and utilize NEPA and our other regulations in the manner they were intended.

Thank you for this opportunity.

Ms. MCMORRIS. Thank you.

STATEMENT OF WALTER BRADLEY, FORMER LIEUTENANT GOVERNOR OF NEW MEXICO, CLOVIS, NEW MEXICO

Mr. BRADLEY. Thank you, Madam Chairwoman, members of the Committee and especially Congressman Udall for having this

hearing today in the great State of New Mexico and giving us this opportunity.

I believe that of all the people throughout the country that you've had before you, I think I bring a very unique and I'm quite certain unheard story about the process of NEPA and I propose a couple of simple solutions that I believe will eliminate most of the disagreements and the lawsuits that seem to be attracted through this act.

You see, as Lieutenant Governor of the State of New Mexico, I believe I'm the only agency in the Nation who has had the opportunity to have joint lead with a Federal agency on environmental impact statements. I don't believe any other state has ever taken this on. I know at the Lieutenant Governors Conference we polled all of the states, none of them had ever done it. It is a part of the regulations. It is certainly implied in the Act and to date, since no one took it on, I just thought it would be a great idea, but I will tell you that when I did ask for that permission I was denied, more than once. And it took quite a bit of pressure to finally get it taken.

My written remarks will tell you about the MOU and how we did that, but historically the Federal agencies have always run the EISs and EAs themselves internally. And then, of course, during the comment periods and at the conclusion of the comment period, we lobbed grenades at it and we questioned every single piece of data and how did this happen and where did you get this, and what happens?

You see, there's a shroud that's already been alluded to by previous witnesses. There is a shroud of hidden agendas maybe where some of that data may have come from and may not. The project that I took joint lead on on behalf of the State of New Mexico and it was run through my office was Rangeland Management. It was the grazing guidelines for the State of New Mexico and it did include all aspects, water, everything, economics, etcetera.

We entered into the MOU. We recognized that the Secretary of the Interior had the final say, but we also agreed in that MOU that at the conclusion, if there was a disagreement, we could make on behalf of the state an official disagreement of what that finding was. In this case, and it was a long drawn out affair, took about two years to complete the project, during that process, when we ended up, we only had one major disagreement that we concluded with. We formed a panel of all the shareholders. They worked throughout the whole process. I was co-chair with the Secretary and we both had our people that stood for it. But I have to tell you that that experience gave us a great eye opener and it brought all of the shareholders and it opened up all of the data that everybody was questioning.

So I would propose to you my first action that I think you should take is in the Act itself where it says, it alludes to the cooperation of states, I would recommend that any state that requests joint lead for an environmental impact statement should be granted that request, not a permissive clause, but a mandatory clause that if they ask for it, they'll get it. That allows us to also open up the cooperating agency status that is sometimes been held tightly by the Federal agencies. In our own case, they did not want to allow county, each and every county to have the opportunity, but we

insisted and won. They wanted to just go with the county association. So it opens up a lot of doors and eliminates a lot of problems.

The biggest discrepancy that we're going to run into and I know you do is in the science. I have to tell you that the science is the biggest question. I've given you many examples. The first one I ran into was the Mexican wolf. That is one of your attachments. How in the world did the State of New Mexico end up from this map showing the lobo, I'm sorry, the lobo territory being in the southern half to this map that says it covers half the State of New Mexico with no supporting science to make that happen?

We also had in the process of the grazing guidelines, I was approached to do—put gates on every fence line, two foot wide, and have open gates for the migration of wildlife. The data that was provided ended up being an OVR, and that OVR was two pages long and all it said was and I asked what OVR meant, it's ocular vehicular reconnaissance, is who did that. In my business in real estate they call that a curb size appraisal and that's exactly what this was, so it was thrown out. It wasn't used. We don't put gates on fence lines.

I would ask you that we more clearly define science. It is also in the act. It is also in the regulations. But it is very broad and I would recommend to this Committee that you look at inserting the words "sound, peer-reviewable science," not some data that was used on the silvery minnow, as an example, that the Court had to order that came out to be a master thesis by someone who didn't even go on to become a doctorate. That is also in your package.

Ms. MCMORRIS. Mr. Bradley, would you summarize, wrap up?

Mr. BRADLEY. I certainly will. In summation, I believe that when a true partnership through joint lead is created between the states and the Federal Government and decisions are based on sound, peer-reviewable science, most all of the arguments and disagreements and most importantly the costly litigation that has, in reality, harmed the environment becomes moot.

Unfortunately, to date, neither of these two items are the normal practice within Federal agencies, so I hope you will make these changes for the betterment of our environment and our country.

Thank you very much for this opportunity.

[The prepared statement of Mr. Bradley follows:]

Statement of Former Lieutenant Governor Walter D. Bradley, Clovis, New Mexico

Madam Chairwoman, members of the Task Force and Committee, and especially Congressman Tom Udall, thank you for holding a field hearing in New Mexico on this issue so vital to our rural economies and families in the West, and for the opportunity to testify before you.

As the Lieutenant Governor of New Mexico from 1995 through 2003, I had the unique opportunity to lead our state through an Environmental Impact Statement (EIS) process under the National Environmental Policy Act (NEPA) as "Joint Lead" with the U.S. Department of the Interior (DOI). Although Joint Lead status is most certainly implied in NEPA and is defined in the implementation regulations 40 CFR parts 1500-1508, it has seldom, if ever, been used until the late 1990's. In fact I was told New Mexico was the first state ever to be granted official Joint Lead by a federal agency.

The project was to prepare federal Grazing Guidelines for New Mexico and covered all aspects of grazing including water, contamination, endangered species, wildlife, historical and cultural effects as well as economics, all of which are required by the Act. The State of New Mexico entered into a MOU (memorandum of understanding) with the DOI recognizing the State as co-leader and sharing all data and

resources available on all subject matter and co-operate in a totally open atmosphere. We recognized that the Secretary of the Interior had the authority to make final decisions, but if there was disagreement by the State, then the State could make those disagreements known as a part of the official final finding.

I recommend for your consideration an amendment to the National Environmental Policy Act the following: "Any state that requests Joint Lead for an Environmental Impact Statement (EIS) or Environmental Assessment (EA) to be conducted in their state will be granted such request.:

There are various places such language could be inserted, some are:

- Title I section 101 [42 USC 4331] Item A, middle of the paragraph, sentence discussing Ain cooperation with state and local governments.@
- Create a new subsection (b) and reorder as needed.

This action by Congress was supported by a resolution adopted by the National Conference of Lieutenant Governors in July, 2000 (Attachment A).

During my years as Lieutenant Governor I encountered many complaints about numerous endangered species. The one consistent discrepancy with every issue was the source of data; "the science."

NEPA implies that science is to be used and the regulations under 1502.1, Purpose, and 1502.24, Methodology and Scientific Accuracy say it will be used, but the language leaves too much discretion.

Some examples:

- The Mexican Wolf territorial maps. When, as Lieutenant Governor, I questioned the proposed release area for the animals based on the historical territory maps, the U.S. Fish & Wildlife Service simply altered the map. (Attachment B)
- The Silvery Minnow in the Rio Grande. The U.S. Federal District Court demanded the scientific basis for the decisions affecting the fish. All that was ever produced was a much dated master thesis by a student who never even completed his or her doctorate.
- A migration plan for wildlife proposing to require open gates in every fence line, which would have serious impact on livestock production. I learned that the basis for this requirement was a "drive by" report titled OVR (Ocular Vehicular Reconnaissance).
- The Bluntnose Shiner in the Pecos River. Random samplings taken by the New Mexico Department of Game & Fish were used propose to altering the release of water.

When the real peer-reviewable science is applied, most of the arguments and court cases disappear. I respectfully recommend for your consideration the insertion of the specific wording "sound peer-reviewable science" in the NEP Act. This language can easily be added in section 102 [42 USC 4332] subsections (A), (B) or (C).

In summation, I believe when a true partnership is created between the states and the federal government and decisions are based on sound peer-reviewable science, most all arguments and thus costly litigation that has in reality harmed the environment becomes moot. Unfortunately, to date neither of these two items are the normal practice within federal agencies. I hope you will make these changes for the betterment of our environment and our country. Thank you for your time today and your careful consideration of these recommendations.

Attachments:

A. National Conference of Lieutenant Governors in July, 2000 Resolution

B. Mexican Wolf 1988 and 1995 historical range maps

NOTE: Attachments have been retained in the Committee's official files.

Ms. MCMORRIS. Ms. Montoya.

STATEMENT OF STELLA MONTOYA, NEW MEXICO FARM AND LIVESTOCK BUREAU, LA PLATA, NEW MEXICO

Ms. MONTOYA. Madam Chairwoman, members of the Task Force Committee, and especially my Congressman Tom Udall, on behalf of the membership of the New Mexico Farm Bureau and everyone affected by the National Environmental Policy Act, thank you for holding a field hearing in New Mexico and in our area and giving us the opportunity to testify before you.

My name is Stella Montoya. My family has ranched in the Northwestern New Mexico area and in Colorado and New Mexico for seven generations. My grandfather was a territorial senator before

New Mexico was admitted into the Union. Today, two of my sons and I run a cattle ranch in northern New Mexico and Colorado. We have Federal, state and private lands in both states and I have 13 grandchildren and 5 great grandchildren and I hope to be able to continue to live on the land as we have for more than the past century.

While the National Environmental Policy Act has not directly affected our operation, I know that it has had tremendous impact on many of the 17,000 farmers and ranchers in New Mexico, represented by the Farm Bureau.

There are numerous areas of NEPA that need work, but the livestock producers' perspective there are three areas that we believe to be—that would benefit the most.

The first is the definition of "major Federal action." We fail to see how the renewal of a livestock grazing permit where grazing has taken place for literally hundreds of years, predating the Federal land management agencies as well as NEPA, is a "major Federal action." We are simply doing business as usual out here on the ground. That we are still ranching in a healthy environment for hundreds of years and more wildlife population is a testimony to that fact. At the very least, grazing should fall under the categorical exclusion for NEPA analysis. If grazing is to be analyzed, that analysis should be on the over-arching use of the land and not micro managing items like the seasons and the use of the grazing methods and animal numbers.

I can give you an example. We run cattle, like I said, in Colorado and New Mexico and there are years where there's too much snow in Colorado and it's cold up there and the grass doesn't come in like it normally should. And so if we have a certain date that we have to be in the mountains and get out of our land in New Mexico, it's not feasible. So if we could—and we have been able to work with both agencies so that if we have to delay getting out and getting into the mountains later, it works better. Or in the fall, if there's a drought in New Mexico, and we can stay longer in Colorado, and utilize the grasses up there, it makes it a lot better for us.

The second area of concern to ranchers and Federal allotment owners is the misuse of NEPA process to justify arbitrary decisions arrived at before NEPA is ever initiated. One New Mexico county has lost well over 2,000 AUMs of grazing over the past two years. Much of that dictated during the NEPA on the U.S. Forest Service allotments. As I understand it, as a Federal law, NEPA is intended to provide a forum for public participation in Federal decisions affecting the natural environment, taking into account impacts on the human environment. In New Mexico, ranches and allotment owners are that human environment.

It is also the understanding of NEPA that the process is to be used to involve the public and gather the data to reach a sound decision for sustainable resource management. That has not necessarily been our experience. Instead, we find that agencies are reaching a decision and using the NEPA process to justify it with little or no data to base these decisions on.

Finally, ranchers and allotment owners must be involved in the NEPA process at the onset and throughout the process. These are

the people that are on the ground every day and they know what's going on and are the most likely to have pertinent data. They are the ones who must live with the consequences of our decisions.

We have an example in Colorado again. We live in a dry river——

Ms. MCMORRIS. I need you to just summarize.

Ms. MONTOYA. The Bureau of Reclamation has planted 700 cottonwood trees in that area to make a wetland. The ranchers and the allotment owners' continual involvement must carry over into the areas of energy of expiration and development as well. The ranching industry is not anti-energy. We depend on it every day and fully understand the need for the domestic energy supply. We also firmly believe in and support the multiple-use mission of our Federal lands. However, as energy development intensifies ranchers and allotment owners must be the major consideration. Issues on such cumulative impacts of multiple well locations must include the people who have been stewards of the land here in New Mexico for over 400 years and advise better places to put it.

Thank you very much for your attention.

[The prepared statement of Ms. Montoya follows:]

Statement of Stella Montoya, La Plata, New Mexico

Madam Chairwoman, members of the Task Force and Committee, and especially my Congressman Tom Udall, on behalf of the membership of the New Mexico Farm & Livestock Bureau (NMFLB) and everyone affected by the National Environmental Policy Act (NEPA), thank you for holding a field hearing in New Mexico on this issue so vital to our livelihoods and futures, and for the opportunity to testify before you.

My name is Stella Montoya. My family has ranched in Northwestern New Mexico and Southwestern Colorado for seven (7) generations. My father-in-law was a territorial senator before New Mexico was admitted to the Union. Today, two of my sons and I run cattle on private, state and federal land in both states. I have 13 grandchildren and five great grandchildren that I hope will be able to continue to live on the land as we have for more than the past century.

While the National Environmental Policy Act (NEPA) has not directly affected our operation, I know that it has had tremendous impact on many of the 17,000 farm and ranch families in New Mexico represented by Farm Bureau.

There may be numerous areas of NEPA that need work, but from a livestock producers' perspective there are three (3) areas that we believe would be of most benefit.

The first is the definition of "major federal action." We fail to see how the renewal of a livestock grazing permit where grazing has taken place for literally hundreds of years, predating federal land management agencies as well as NEPA, is a "major federal action." We are simply doing business as usual out here on the ground. That we are still ranching in a healthy environment after hundreds of years and having increased wildlife populations is testimony to that fact. At the very least, grazing should fall under a categorical exclusion for NEPA analysis. If uses, such as grazing, are to be analyzed that analysis should be on the overarching use of the land, not micro managing items like seasons of use, grazing methods, and animal numbers.

The second area of concern to ranchers and federal grazing allotment owners is the misuse of the NEPA process to justify arbitrary decisions arrived at before NEPA is ever initiated. One New Mexico county has lost well over 200,000 Animal Unit Months (AUMs) of grazing over the past decade, much of that dictated during the NEPA process on U.S. Forest Service Allotments. As I understand it, as a federal law NEPA was intended to provide a forum for public participation in federal decisions affecting the natural environment, taking into account impacts on the human environment. In New Mexico, ranchers and allotment owners are that human environment.

It is also my understanding of NEPA that the process is to be used to involve the public and gather the data to reach a sound decision for sustainable resource management. That has not necessarily been our experience. Instead, we find that

agencies are reaching a decision and then using the NEPA process to justify it with little or no data to base these decisions on.

Finally, ranchers and allotment owners must be involved in the NEPA process at the onset and throughout the process. These are the people that are on the ground every day. They know what is going on and are the most likely to have pertinent data. They are the ones who must live with the consequences of decisions.

That rancher and allotment owners early and continual involvement must carry over into the area of energy exploration and development as well. The ranching industry is not anti-energy. We depend upon it every day and fully understand the need for a domestic energy supply. We also firmly believe in and support the multiple-use mission on our federal lands.

However, as energy development intensifies, ranchers and allotment owners must be a major consideration. Issues such as the cumulative impacts of multiple well locations must include the people who have been stewards of the land here in New Mexico for over 400 years. Ranchers and landowners should not and cannot bear the total adverse impacts of energy production.

Thank you once again for your time and interest. I hope that together we can create a law that achieves the noble goal of environmental sustainability without harming people like me and my family.

Ms. MCMORRIS. And we'll have your entire testimony in the record. Thanks for being here.

Ms. Budd-Falen.

STATEMENT OF KAREN BUDD-FALEN, ATTORNEY, BUDD-FALEN LAW OFFICES, LLC, CHEYENNE, WYOMING

Ms. BUDD-FALEN. Thank you. I'm honored that you have invited me to share my thoughts on NEPA. My name is Karen Budd-Falen. I am a fifth generation rancher from Big Piney, Wyoming. As I was growing up, my father decided if he wanted to have six generations on the land, he needed to have daughters that were either a lawyer, a vet and a banker and he got all three.

NEPA applies to all major Federal actions significantly affecting the environment. I believe and the congressional record shows that Congress chose those terms, "major Federal action significantly affecting the environment" very carefully. Yet, over the years the Courts and the CEQ regulations have greatly expanded those words so that Federal agencies believe that NEPA applies to all actions, not just major and significant actions.

Behind me are six bankers' boxes of EAs of grazing allotments for simply two years in New Mexico. These documents control the livelihoods of ranchers grazing on Federal land. These are not land use planning documents where you consider whether grazing should occur and how multiple use should be determined. These are documents that look at whether you should put in a mile of fence somewhere, or whether someone should put in a livestock tank to better distribute livestock.

That's entirely different than the suggestions and the examples that the Congressman talked about in their opening remarks where they talked about huge projects with major actions, significantly affecting hundreds of thousands of people or hundreds of thousands of acres of land. My question to you and my question that the NEPA Task Force should answer is whether the same process should apply to both, whether you're talking about the Tucson Power Line or oil and gas development on hundreds of thousands of acres versus some grazing allotment putting in one water tank or a mile of fence.

The documents on the table in front of me are environmental assessments and environmental impact statements that need comments in the next two weeks. These were received by the New Mexico Cattle Growers and deal only with grazing issues. New Mexico Cattle Growers has a staff of three members. There is simply no way they can read and produce comments on all of these documents. The top two documents are documents that were published in the Federal Register and affect large areas of land, but all the documents on the bottom again are EAs for grazing allotments that have already been through a NEPA process when the Bureau of Land Management of the Forest Service created their land use plan.

Again, the question is should the same process apply for these minor actions which the Court now require a NEPA on as for major Federal actions?

Initially, if you look at the Court cases and my testimony goes through this in great detail, the Courts were very careful in saying that NEPA only applied to major Federal actions, yet over the years the Courts have expanded the definition of a Federal action to include actions by state and private parties, even if the Federal Government has a very minor role. They still have to have a NEPA compliance component.

Additionally, the Ninth Circuit Court said that "NEPA applies to actions which only may affect the environment." But if you read the initial language in NEPA, there's nothing in there that says "may affect". NEPA says "major Federal actions that affect." Yet, the Ninth Circuit Court has expanded those definitions.

And just where have these determinations led to expand the definition of major Federal action to include minor actions? Assuming that the 30 NEPA-related notices in last week's Federal Register are typical, the public had the opportunity in the last year to review 46,800 NEPA documents. And again, that's not all of the NEPA documents that are produced. It's also produced huge amounts of litigation. According to a very cursory web search that I did to prepare for this testimony in 2005, looking at environmental groups' litigation in their websites, just in 2004 and 2005 alone, well only 100 cases were filed, only in the Ninth and Tenth Circuits alleging violations of NEPA.

Based upon this analysis, my suggestion is that Congress really needs to determine what NEPA should apply to. It looks to me like the Courts have expanded the original congressional intent and if that's what Congress intends, then at least Congress should be clear that that's where it is going.

I would urge Congress to revisit the original intent of NEPA. Thank you very much.

[The prepared statement of Ms. Budd-Falen follows:]

Statement of Karen Budd-Falen, Esq., Cheyenne, Wyoming

My name is Karen Budd-Falen. I am both a rancher and an attorney who represents ranchers, farmers, private citizens and local governments who are either dependant upon the use of the federal lands or who are impacted by some aspect of federal agency decision-making. In fact, anyone who is impacted by any decision made by any federal agency is impacted by the National Environmental Policy Act ("NEPA"). In only one week, the Federal Register contained notices and requested comments on 30 documents analyzing or discussing actions that were determined to be "major federal actions, significantly effecting the quality of the human

environment under NEPA." The purpose of my testimony is to discuss with you the evolution of the federal courts' interpretation of what types of decisions constitute a "federal" action that is "major" and "significant" and to propose that the original intent of NEPA was not so expansive to include all types of decisions as are covered today.

NEPA was adopted in 1969. Among the purposes of NEPA, 42 U.S.C. §§ 4321-4370f, are to "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." See 42 U.S.C. § 4321. Accordingly, NEPA requires, to the fullest extent possible, that all agencies of the Federal Government:

[I]nclude in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on "

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

See 42 U.S.C. § 4332(2)(C) (emphasis added).

NEPA is one of our most important tools for ensuring that all federal agencies take a "hard look" at the environmental implications of their actions or non-actions. See Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). However, unless a project involves a "major federal action,"' NEPA does not apply. See Macht v. Skinner, 916 F.2d 13, 16 n.4 (D.C. Cir. 1990).

NEPA is procedural in nature and does not require "that agencies achieve particular substantive environmental results," but it is "action-forcing" in that it compels agencies to collect and disseminate information about the environmental consequences of proposed actions that fall under their respective jurisdictions. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). NEPA's focus is to ensure that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts. See Goos v. Interstate Commerce Commission, 911 F.2d 1283, 1293 (8th Cir. 1990).

NEPA requires federal agencies—not states or private parties—to consider the environmental impacts of their proposed actions. See Macht v. Skinner, 916 F.2d at 18. "[F]or any major Federal action funded under a program of grants to States," however, NEPA requires a state agency to prepare an Environmental Impact Statement for a federal agency if certain conditions are met. See 42 U.S.C. § 4332(2)(D). NEPA thus focuses on activities of the federal government and does not require federal review of the environmental consequences of private decisions or actions, or those of state or local governments. See Goos v. Interstate Commerce Commission, 911 F.2d at 1293. Regardless of whether the environmental impact statement ("EIS") is prepared by a federal or state agency, the twofold purpose of NEPA is "to inject environmental considerations into the federal agency's decision-making process," and "to inform the public that the [federal] agency has considered environmental concerns in its decision-making process." See Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139, 143 (1981) (emphasis added).

Federal agencies may also be bound by NEPA to perform additional environmental review of non-federal projects, notwithstanding the fact that the project is not federally funded. According to the regulations promulgated by the Council on Environmental Quality "("CEQ"), situate in the Executive Office of the President, major federal actions "include actions with effects that may be major and which are potentially subject to Federal control and responsibility." See 40 C.F.R. § 1508.18. These actions may be "entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." See 40 C.F.R. § 1508.18(a).

The regulation, 40 C.F.R. § 1508.18, further provides that "major federal actions" tend to include the "[a]pproval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities." See 40 C.F.R. § 1508.18(b)(4). These regulations are due substantial deference from reviewing courts. See Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

The regulations clearly indicate that "major federal actions" need not be federally funded to invoke NEPA requirements. See 40 C.F.R. § 1508.18(a); see also

Southwest Williamson County Community Association, Inc. v. Slater, 243 F.3d 270, 279 (6th Cir. 2001); Save Barton Creek Association v. Federal Highway Administration, 950 F.2d 1129, 1134 (5th Cir. 1992); Macht v. Skinner, 916 F.2d at 18; Historic Preservation Guild of Bay View v. Burnley, 896 F.2d 985, 990 (6th Cir. 1989); and Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d 1039, 1042 (4th Cir. 1986). Of course, federal funding is a significant indication that a project constitutes a major federal action; however, the absence of funding is not conclusive proof of the contrary. See Southwest Williamson County Community Association, Inc. v. Slater, 243 F.3d at 279; and Historic Preservation Guild of Bay View v. Burnley, 896 F.2d at 990.

In addition, it is apparent that a non-federally funded project may become a major federal action by virtue of the aggregate of federal involvement from numerous federal agencies, even if one agency's role in the project may not be sufficient to create major federal action in and of itself. See 40 C.F.R. §§ 1508.25(a)(3) (noting that agencies "may wish to analyze these actions in the same impact statement."); and 1508.27(b) (noting that "more than one agency may make decisions about partial aspects of a major [Federal] action."); see also Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d at 1042 (holding that "[b]ecause of the inevitability of the need for at least one federal [agency] approval,... the construction of the [state] highway will constitute a major federal action."). Thus, a federal agency's argument that it was only involved in one aspect of the non-federal project's design and approval process, does not necessarily serve to defeat a claim that the pervasiveness of federal activity required to complete the project converts the project into a "major federal action." See Southwest Williamson County Community Association, Inc. v. Slater, 243 F.3d at 279.

"[N]o litmus test exists to determine what constitutes "major Federal action." See Save Barton Creek Association, 950 F.2d at 1134. Federal courts have not agreed on the amount of federal involvement necessary to trigger the applicability of NEPA. See Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477, 1480 (10th Cir. 1990). In order to determine whether a non-federal project is or is not a "major federal action" within the meaning of 42 U.S.C. § 4332(2)(C), courts shall consider the following factors: first, whether the project is federal or non-federal; second, whether the project receives significant federal funding; and finally, when the project is undertaken by a non-federal party, whether the federal agency must undertake "affirmative conduct" before the non-federal party may act. See Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 54-55 (D.D.C. 2003), citing Macht v. Skinner, 916 F.2d 13 (D.C. Cir. 1990). No single factor of these three is dispositive, however, a non-federal project is generally considered a "major federal action" if it cannot begin or continue without prior approval of a federal agency. See Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d at 1042, citing Biderman v. Morton, 497 F.2d 1141, 1147 (2nd Cir. 1974); Foundation on Economic Trends v. Heckler, 756 F.2d 143, 155 (D.C. Cir. 1985).

"Typically, a project is considered a major federal action when it is funded with federal money." See Mineral Policy Center v. Norton, 292 F.Supp.2d at 5 n.30, citing Southwest Williamson County Committee Association v. Slater, 243 F.3d at 278; see also Indian Lookout Alliance v. Volpe, 484 F.2d 11, 16 (8th Cir. 1973) (stating that "any project for which federal funds have been approved or committed constitutes a major federal action bringing into play the requirements of NEPA.").

However, where the federal financial assistance to the planning process in no way implies a commitment by any federal agency to fund any project(s) or to undertake, fund or approve any action that directly affects the human environment, the non-federal project receiving the financial assistance is not a "major federal action." See Macht v. Skinner, 916 F.2d at 16-17 (holding that the Federal funding of preliminary studies is not the firm commitment that could transform an entirely state-funded project into major federal action affecting the environment within the meaning of NEPA); see also Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission, 599 F.2d 1333, 1347 (5th Cir. 1979) (holding that development of regional transportation plan is not major federal action). An adequate Environmental Impact Statement would, of course, be a necessary prerequisite for the expenditure of federal funds on the project itself. See id. at 17.

In most cases in which a federal agency makes a direct grant for a non-federal project, the use of federal funds for the project is sufficient to bring it under NEPA if the federal financial commitment is clear. See Daniel R. Mandelker, NEPA Law and Litigation § 8:20 (2nd ed. 2004). However, a court may find a project is not federalized if federal funding is minimal. See id., citing Ka Makani "O Kohala Ohana Inc. v. Department of Water Supply, 295 F.3d 955 (9th Cir. 2002) (federal funding 1.3% of project); and Friends of Earth, Inc. v. Coleman, 518 F.2d 323 (9th Cir. 1975)

(federal funding 10% of project). Finally, a project is not federalized if a federal funding commitment has not been made. See id.

Federal participation sufficient to make a non-federal action "federal" arises most clearly when a federal agency takes an action that authorizes a non-federal entity to undertake an activity or a project. In order for NEPA to apply to non-federal projects, the federal agency must engage in some "affirmative conduct." See Mineral Policy Center v. Norton, 292 F.Supp.2d at 5 n.31, citing State of Alaska v. Andrus, 429 F.Supp. 958, 962-63 (D. Alaska 1977). Federal permits, leases, and other approvals in federal agency programs are the typical examples. "If...the agency does not have sufficient discretion to affect the outcome of its actions, and its role is merely ministerial, the information that NEPA provides can have no effect on the agency's actions, and therefore, NEPA is inapplicable." See Mineral Policy Center v. Norton, 292 F.Supp.2d at 5 n.31, citing Citizens Against Rails-to-Trails v. Surface Transp. Bd., 267 F.3d 1144, 1151 (D.C. Cir. 2001); see also Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d at 1042 (stating that a "non-federal project is considered a "federal action" if it cannot begin or continue without prior approval of a federal agency."); South Dakota v. Andrus, 614 F.2d 1190, 1193 (8th Cir. 1980) (holding that "ministerial acts...have generally been held outside the ambit of NEPA's EIS requirement."); Minnesota v. Block, 660 F.2d 1240, 1259 (8th Cir. 1981) (stating that because "the Secretary has no discretion to act, no purpose can be served by requiring him to prepare an EIS, which is designed to insure that decision-makers fully consider the environmental impact of a contemplated action."); and Sierra Club v. Hodel, 848 F.2d 1068, 1089 (10th Cir. 1988) (stating that the "EIS process is supposed to inform the decision-maker. This presupposes he has judgment to exercise. Cases finding "federal" action emphasize authority to exercise discretion over the outcome.").

Additionally, when the non-federal project restricts or limits the statutorily prescribed federal decision-makers' choice of reasonable alternatives, the non-federal project must be considered a "major federal action." See Southwest Williamson County Community Association, Inc. v. Slater, 243 F.3d at 281.

If the federal participation in the project is substantial, then the state should not be allowed to move forward until all of the federal approvals have been granted in accordance with NEPA. See Macht v. Skinner, 916 F.2d at 18-19. For example, Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d 1039 (4th Cir. 1986) involved an attempt to enjoin construction of a county highway designed to pass through a state park. The court found that the county highway project involved "major federal action," because (1) the highway crossed a state park that had been purchased with a substantial federal grant; therefore, the county needed the approval of the Secretary of the Interior to convert the park land to other than recreational use; (2) the county needed a § 404 permit from the Army Corps to dredge wetlands; and (3) the county might need the approval of the Secretary of Transportation to use park land for a transportation project. See Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d at 1042. On these facts, the Fourth Circuit Court of Appeals held that the district court should have considered the motion to enjoin the county's construction until the federal officials complied with NEPA. See id. at 1043.

Importantly, the court in Gilchrist did not hold that the state had to comply with NEPA because the approval of several federal agencies was a necessary precondition to the state project. Instead, Gilchrist held that because the state needs permits and discretionary approval from several federal agencies in order to build a substantial part of the highway, the state could not construct any portion of the highway until the federal agencies had approved the project in compliance with NEPA.

Furthermore, in general, "a non-federal project is considered a "federal action" if it cannot begin or continue without prior approval by a federal agency and the agency possesses authority to exercise discretion over the outcome." See Sugarloaf Citizens Association v. Federal Energy Regulatory Commission, 959 F.2d 508, 513-14 (4th Cir. 1992). The mere approval by the Federal Government of an action by a state/private party, where that approval is not required for the non-federal project to move forward, will not constitute a "major federal action" under NEPA. See Mayaguezanos Por La Salud Y El Ambiente v. United States, 198 F.3d 297, 301-02 (1st Cir. 1999) (held that voluntary notification of the Coast Guard by shippers of nuclear waste pertaining to transit through territorial waters did not constitute major federal action; the United States has chosen not to regulate shipments of nuclear waste through its territorial waters—there are no requirements that it do so, nor is it immediately evident that it would have that authority if it so chose); see also Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Commission, 59 F.3d 284, 292-93 (1st Cir. 1995) (found major federal action where a federal agency approved the release of funds from a trust held by the agency that were

necessary for a project to go forward; the effect of this action was explicitly to permit the private actor to decommission a nuclear facility).

When the federal government has actual power to control a non-federal project (i.e., the federal agency's action must be a legal condition precedent that authorizes the other party to proceed with the action), the project constitutes a "major federal action." See Ross v. Federal Highway Admin., 162 F.3d 1046, 1051 (10th Cir. 1998); Ringsred v. City of Duluth, 828 F.2d 1305, 1308 (8th Cir. 1987); and NAACP v. Medical Center, Inc., 584 F.2d 619, 628 n.15 (3rd Cir. 1978). If federal approval is the prerequisite to the action taken by the state/private parties, or if the federal agency possesses some form of authority over the outcome, then the non-federal project constitutes "major federal action." See Mayaguezanos Por La Salud Y El Ambiente v. United States, 198 F.3d at 301-02 (held no major federal action under NEPA, because United States was not assigned a role, nor had any control, over the shipment of nuclear waste through its territorial waters); see also United States v. South Florida Water Mgmt. Dist., 28 F.3d 1563, 1572 (11th Cir. 1994) (holding that the touchstone of a major federal activity constitutes a federal agency's authority to influence non-federal activity); and Save Barton Creek Association v. Federal Highway Administration, 950 F.2d at 1134 (stating that the "distinguishing feature of "federal" involvement is the ability to influence or control the outcome in material respects.").

Moreover, the need for a federal license or approval could sometimes trigger NEPA, but not where the approval did not involve close scrutiny of the action or anything more than notice for safety purposes. See Citizens for Responsible Area Growth v. Adams, 680 F.2d 835, 839-40 (1st Cir. 1982) (held that construction of an airport hangar by private parties with private monies was not federal action for NEPA purposes, and that the mere appearance of the proposed construction on a federally approved Airport Layout Plan did not create sufficient federal involvement to require an Environmental Impact Statement).

Finally, if no federal agency has jurisdiction over the non-federal project, the federal agency lacks sufficient control or responsibility over the non-federal project to influence the project's outcome. See Southwest Williamson County Community Association, Inc. v. Slater, 243 F.3d at 284. Stated another way, whether an agency action or project is part of some other concededly "major federal action" depends largely on whether the agency exercises legal control over the allegedly non-federal action or project. See Goos v. Interstate Commerce Commission, 911 F.2d at 1294. In determining whether a federal agency exercises legal control, a court must consider whether some federal action "is a legal condition precedent to accomplishment of an entire non-federal project." See id., citing Winnebago Tribe v. Ray, 621 F.2d 269, 272 (8th Cir. 1980). A "major federal action" occurs when a federal agency has discretion in its enabling decision to consider environmental consequences and that decision forms the legal predicate for another party's impact on the environment. See id. at 1295, citing NAACP v. Medical Center, Inc., 584 F.2d at 633. In such a situation, it is fair to say that the agency has significantly contributed to the environmental impact. See id.

It is well settled that non-federal parties may be enjoined, pending completion of an Environmental Impact Statement, where those non-federal entities have entered into a partnership or joint venture with the Federal Government to obtain goods, services, or financing. See Biderman v. Morton, 497 F.2d 1141, 1147 (2nd Cir. 1974). A joint venture between a state/private party and the Federal Government to obtain goods or services from a Federal agency clearly constitutes a major federal action subject to NEPA. See Sierra Club v. Hodel, 544 F.2d 1036, 1044 (9th Cir. 1976) (holding that construction of hydroelectric power plant may be enjoined until federal agency prepared Environmental Impact Statement, because the Bonneville Power Administration federalized the project by contracting to construct a transmission line and supply power to the plant).

Once it has been determined that the action is federal, the next question is whether the action is "major." There are two views on what is a "major" action. The minority view holds that a "major federal action" is one that requires substantial planning, time, resources, or expenditure. National Resources Defense Council v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972). Another court held that "major actions" were ones projects with federal funding usually over $1,000,000, large increments of time for planning or construction, the displacement of many people or animals, or the reshaping of large areas of topography." Township of Ridley v. Blanchette, 421 F. Supp. 435 (E.D.Pa. 1976). That court went on to state:

> In sum, "major" is a term of reasonable connotation, and serves to differentiate between projects which to not involve sufficiently serious effects to justify the costs of completing an impact statement and those projects with

> potential effects which appear to offset the costs in time and resources of preparing a statement.

Id. at 446.

In more prominent view, however, the term "major" has received less attention and in some cases, has been simply collapsed with the term "significant." The leading case in adopting this collapsed definition is Minnesota Public Interest Research Group v. Butz (I), 498 F.2d 1314 (8th Cir. 1974). In that case, the court held that NEPA's policies would be better served with a collapsed view of "major" and "significant" so that a "minor" federal action significantly effecting the environment would still be subject to NEPA. Based upon that court case, the CEQ revised its regulations defining "major" to state that "major reinforces but does not have a meaning independent of "significantly." 40 C.F.R. § 1508.18.

Given that the term "major" has been essentially eliminated from the consideration in whether to prepare a NEPA document, the CEQ regulations and court cases focuses on the term "significant." According to the CEQ regulations, the term "significant" is to be measured in terms of both context and intensity. Context has been very broadly defined to include short-term and long-term effects to the society as a whole, the affected region, the affected interests or the locality. See Simmons v. Grant, 370 F. Supp. 5 (S.D.Tex 1974). Intensity relates to the severity of the impact, both beneficial and negative. Such intensity is usually determined by comparing the potential project to the baseline. In an example often used by the courts, one more polluting factory in an industrial area "may represent the straw that breaks the back of the environmental camel." Hanly v. Kleindienst (II), 471 F.2d 823, 830-31 (2nd Cir. 1972). Other circuit courts have held that an action can be significant even though the environmental impact is limited. National Resources Defense Council v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972). The 9th Circuit Court has an even more expansive view holding that an impact statement must be prepared if an agency's action "may" have a significant impact on the environment. See e.g. National Parks and Conservation Association v. Babbitt, 241 F.3d 722 (9th Cir. 2001) and the other 85 cases with the same holding.

And just where have these determinations lead? Assuming that the 30 NEPA related notices in last week's Federal Register is typical, in the last year, the public was given the opportunity to review 46,800 NEPA notices. With regard to individual environmental impact statements ("EIS") and environmental assessments ("EA"), according to the Federal Register website, 50 EISs and 50 EAs have been published since January, 1, 2005. Importantly, not all EAs or EISs are published in the Federal Register. Thus, there is really no way to ascertain the number of NEPA documents published each year. According to the CEQ, in 1997, 498 EISs alone were completed by the federal agencies. Litigation against 102 of those NEPA documents were filed. Over one-half of those suits were filed by "public interest organizations." A very cursory review of the 2005 websites for the Forest Guardians, Southwest Center for Biological Diversity, National Wildlife Federation and Earthjustice shows that this litigation alleging violation of NEPA have increased exponentially. According to this web search, in 2004 and 2005 alone, at least 65 cases were filed which included at least some cause of action involving the National Environmental Policy Act.

Based upon this analysis, my suggestion is to revisit the reason that NEPA was adopted—to force consideration of "major" actions "significantly" impacting the environment. I strongly agree with those who advocate for public involvement in agency decision making processes. However, in today's rampant environmental litigation environment, it is extremely difficult to imagine that ANY federal decision or action can escape NEPA review. This includes actions that simply have no impact, such as putting in a water trough, or building a temporary fence. Although the CEQ has changed the regulations to subsume "major" into "substantially," Congress used both modifiers to inform the federal agencies when NEPA compliance is necessary. I would argue that Congress should again revisit the original intent of the NEPA litigation.

Ms. MCMORRIS. Thank you.

Mr. Fraley.

STATEMENT OF RICHARD FRALEY, VICE PRESIDENT, SAN JUAN DIVISION, BURLINGTON RESOURCES, FARMINGTON, NEW MEXICO

Mr. FRALEY. I'd like to thank you for allowing me to provide testimony today and I especially thank Representative Udall for arranging to have this Task Force here in New Mexico. I'm Richard Fraley with Burlington Resources. Burlington is the largest producer of natural gas in New Mexico. In addition, we have lands throughout the Rockies, so obviously NEPA is something of interest to us.

My starting point is that we also agree that is very good policy in what we think should happen as we look for ways to improve and administer the policy and implementation to policy. I'd like to address three points today.

First is the NEPA impact of obtaining a new application permit to drill a well. Second, how the NEPA process has expanded in the last 20 years and third, offer a few recommendations.

Burlington Resources obtained EAs on about 200 projects annually in the San Juan Basin and I'll reference four wells that are representative of the projects we currently permit. Each well will temporarily disturb three to four acres of land including the well pad access road and pipeline tie. Post-drilling, the unreclaimed disturbed surface will be about one to one and a half acres for the producing life of the well. These four wells took nearly two years to permit and receive the final NEPA analysis. For details you can see my written testimony.

While some EA projects are more intensive than others because they're located in areas of critical concern or special management areas as defined by the Department of the Interior, these four wells are located in the Carson National Forest outside of an ACEC. The EAs ultimately all concluded a recommended action of no significant impact.

As I mentioned, all the lands will be fully reclaimed, once depletion of a well and all but one to one and a half acres will be reclaimed once the well is ready to produce. During reclamation of the land, our standard practice includes recontouring and revegegation of disturbed lands so that about only an acre of land remains disturbed for the producing life of the well. The process involves draining and backfilling the drilling reserve fill, tilling and seeding the drill site and placing straw mulch over the reseeded areas. Photos are included in my written testimony.

This process has been identified as the best management practice by the BLM and is cited in a New Mexico State University Study done by Professor Richard N. Arnold.

Let's talk about the EA process that we are involved in with wells. This process commences after we've conducted an onsite inspection of the surface with the Federal land managers. It's critical in our plans that we account for seasonal closings of Federal lands. Much of the Federal lands in the West are subject to said seasoning closures including about 30 percent of the land administered by the Farmington Field Office of the BLM. As for our operations, about 65 percent of our operations are subject to seasonal closures.

The time it took for preparation of the EAs for these four wells was 261 days on average. In most cases, a third party

environmental firm paid for by the operator, gathered data and drafted the EA. Once the EA was submitted, the Federal agencies took nearly 200 days to review the EA and approve the APD.

The NEPA impact has dramatically increased APD process time since the late 1980s. In the 1980s, the Federal land managers were able to comply with the well site NEPA documentation and analysis in a routine and succinct manner. The EA was actually part of the permit to drill and was about a half a page in length. Today, the time it takes to obtain an APD is doubled and the environmental assessment has grown 11,500 percent, to approximately 60 pages of research and review. During this time, the NEPA statute and Federal regulation have not changed.

Ironically, this has occurred at a time when industry has been making great improvement in reducing the surface disturbance of our operations. During the 1980s, surface disturbance for a well site was about 6.3 acres, reclaimed to about 4.5 acres, compared to today's impact of 3.5 acres reclaimed to an acre and a half or so. Despite dramatically less disturbance, the time to complete an APD has doubled with the industry funding the expense of the EA.

During my brief oral testimony, it doesn't include the impact to consumers, but we do conclude that NEPA constraints inhibit the production of natural gas, thereby limiting the supply and impacting the cost of living for all Americans, especially those on the lower economic earning level.

In conclusion, just a few changes to the way NEPA is managed, could have a positive impact on gas supplied to the American consumer. Some of these changes are addressed in part by provisions of the recently passed Energy Policy Act of 2005 and we're evaluating the potential positive effects. But it's essential that eventually we have clear authority and direction in several areas.

We recommend, one, allowing Federal land managers the ability to rely on their source management plans, forest plans and the associated environmental impact statements to assess cumulative impact.

Two, utilization of categorical exclusions for well sites that require less than five acres of new temporary disturbance.

And three, additional funding to BLM Field Offices with high oil and gas activity to provide a sufficient number and quality of staff, including field inspectors to handle NEPA-related tasks. Our recommendation changes, along with changes that have been suggested by others will assist in removing the backlog of pending APDs and will help move gas more quickly to the American public.

Thank you for your time and consideration of these points.

[The prepared statement of Mr. Fraley follows:]

Statement of Richard E. Fraley, Vice President, San Juan Division, Burlington Resources

Honorable Members of Congress and staff working on the House Resource Committee Task Force on Improving the National Environmental Policy Act, I thank you for allowing me to provide written and oral testimony and especially thank Representative Udall for arranging to have the Task Force Hearing in New Mexico.

I am Richard Fraley, Vice President of Burlington Resources' San Juan Division, located in Farmington, New Mexico.

Burlington is the largest producer of natural gas in New Mexico, operating nearly 6,500 wells in the State and producing between 700-730 million cubic feet per day (mmcf/d). We drill about 200 new wells annually. In addition, Burlington operates

and explores for oil and gas in numerous basins in the Rocky Mountain West. Obviously, NEPA and NEPA reform is important to our company and other producers on federal lands.

I would like to address the following points regarding NEPA:

1) The timing for permitting wells and the NEPA impact on obtaining a new Application For Permit To Drill (APD).
2) How the NEPA process has expanded in the last 20 years.
3) What NEPA means to the American family.
4) To offer a few recommendations for streamlining NEPA's impact on oil and gas.

To give you an understanding of how the NEPA process is currently impacting oil and gas development, I will review a snapshot of four wells Burlington has permitted in 2005, and the process of Environmental Assessment (EA) which directly impacts the procurement of new drilling permits.

Exhibit 1 details four wells on which Burlington received APDs in 2005. Each well will disturb less than 4 acres of land, including the well pad, access road and pipeline tie. Post drilling, our production operations utilize about 1.5 acres for the producing life of the well. Yet, these four wells, like many we drill, took nearly two years to permit and receive the final NEPA analysis.

The EA cost of $2,500 to $2,700 represents only the portion of the bill paid to the third party consultant and does not account for the countless hours of time for our employees and Federal land management staff.

Exhibit 2 reflects the actual dates of the four wells cited and are representative of the NEPA process Burlington conducts on over 200 projects annually in the San Juan Basin. While some EA projects are more intensive than others because they are located in Areas of Critical Concern (ACEC) or Special Management Areas (SMA), as defined by the Department of Interior, these four wells are located in the Carson National Forest outside of an ACEC.

The EA's all conclude a recommended action of "no significant impact".

Exhibit 3 lists the actual disturbance on a well-by-well basis. Keep in mind, all the land will be fully reclaimed upon depletion of the well (40-50 years), and all but about 1.0 to 1.5 acres per well will be reclaimed once the well is ready to produce.

Exhibit 4 photographs represent Burlington's standard post drilling or interim reclamation program. As can be identified in the photographs, the typical three acre drilling pad is recontoured and revegetated to a site of about an acre in size. The process involves draining and back filling the drilling reserve pit, tilling and seeding the drill site and placing straw mulch over the reseeded areas. The photos herein show the current process of reseeding the entire drilling site except for the access keyhole road and the actual production facilities. The Bureau of Land Management (BLM) identifies this reclamation process as a "Best Management Practice".

Exhibit 5 is a portion of a study conducted in 2004 by Associate Professor Richard N. Arnold of New Mexico State University which states, "...dry weight yields were approximately two to six times higher on the seeded well sites as compared to the undisturbed off well sites." This is an independent verification of our reclamation process.

Exhibit 6 is an analysis of the time it takes to actually prepare an EA for each of the four wells, being 261 days on average. This includes the time for the Federal land managers, or in most cases, a third party environmental firm paid for by the Operator, to gather data and draft the EA. Once the EA is completed and submitted, the Federal agencies (BLM, USFS) take nearly 200 days to review the EA and finalize the APD approval. The EA process commences after we have conducted an actual on-site inspection of the surface with Federal land managers. As shown in the "green" portion of these bar charts, it is critical to plan our work accounting for seasonal closings of federal lands. The Peggy Cole #1 and Mike McKinney #1 wells were staked in the Fall, but before the on-site could be conducted, the locations fell into winter closure and we could not commence permitting until Spring of the following year, which added 200 days to the process. Much of Federal lands in the west are subject to seasonal closures, including large portions of the San Juan Basin.

Exhibit 7 shows the areas of seasonal closure in the San Juan Basin which are reflected in the "colored" or "hatched" areas on the map. This represents the 800,000 acres, or 30%, of the 2.6 million acres, under the jurisdiction of the BLM Farmington Field Office, that are subject to timing limitations. For Burlington, 65% of our operations are subject to seasonal closures.

Exhibit 8 details the changes in the NEPA process since the 1980s. In the 80s the Federal land managers were able to comply with well site NEPA documentation and analysis in a routine and succinct manner. The EA was actually about a half

page in length and part of the APD and currently APDs run to 60 pages, or more, in length.

Ironically, the expansion of the NEPA documentation to obtain an approved APD comes at a time when industry has been making great improvement in reducing the temporary disturbance of our operations on the surface.

The three 1980s vintage APDs reviewed in this Exhibit had an original field impact of 6.3 acres reclaimed to 4.5 acres, compared to today's impact of 3.5 acres reclaimed to 1.5 acres. This reduced surface disturbance is evident in the photographs in Exhibit 4.

Exhibit 9 provides a graphical representation of how modern oilfield practices have reduced the temporary disturbance of our operations.

Exhibit 10 outlines NEPA's impact on the American consumer. Department of Energy data indicates the average American household uses about 70 thousand cubic feet (mcf) of natural gas per year. A typical well in the San Juan Basin, like the ones we are attempting to permit, may average about 500 mcf/d, or enough gas to supply fuel for heating and cooking for about 2,600 American families.

In June 2005, the BLM Farmington Field Office disclosed they had in excess of 500 pending APDs. Much of the backlog is likely due to the EA process and NEPA requirements. This pent up gas supply amounts to the annual natural gas fuel use for over 1.3 million American homes.

Exhibit 11 details the financial impact to families based on income. Lower income households pay a substantially higher portion of their income for energy, than higher income households. A household with an income of less than $20K annually, pays 2.1% of their gross income for natural gas as opposed to a household earning over $75K annually, which pays about 0.8% of their gross income for natural gas.

We conclude that NEPA constraints inhibit the production of natural gas thereby limiting the supply and impacting the cost of living for all Americans, especially those on the lower economic earning level.

In conclusion, just a few changes to the way NEPA is managed could have a positive impact on gas supply to the American consumer. Some of these changes are addressed in part by provisions of the recently passed Energy Policy Act of 2005, and we are evaluating their potential positive effects, but it is essential that eventually we have clear authority and direction in several areas. We recommend,

i) Allowing Federal land managers the ability to rely on their Resource Management Plans, Forest Plans and associated Environmental Impact Statements to assess cumulative impact.

ii) Utilization of Categorical Exclusions for well sites that require less than five (5) acres of new temporary disturbance.

iii) Provide additional funding to BLM Field Offices with high oil and gas activity to provide a sufficient number and quality of staff including, field inspectors to handle NEPA related tasks.

Our recommended changes along with those which have been made by others, will assist in removing the backlog of pending APDs from the desks of the Federal land managers and will help move gas more quickly to the American Public.

Thank you for your time and consideration of these points.

NOTE: Attached exhibits have been retained in the Committee's official files.

Mr. CANNON. [Presiding.] Thank you, Mr. Fraley.

Could I just briefly, on the sites that you recommended, do you have multiple wells or are they single well sites?

Mr. FRALEY. We use multiple well sites when we can and existing disturbance where we can. But some of these include new disturbances as well.

Mr. CANNON. Thank you. And when you have multiple wells on a site, you're reclamation is down to about an acre and a half, right?

Mr. FRALEY. Yes.

Mr. CANNON. Thank you. I apologize. I won't ask many questions, but I just wanted to follow up on that one thing.

Mr. Frost, you're recognized for five minutes.

STATEMENT OF CLEMENT J. FROST, CHAIRMAN, SOUTHERN UTE INDIAN TRIBAL COUNCIL, IGNACIO, COLORADO

Mr. FROST. Good morning, Madam Chair and members of the Task Force. I am Clement Frost, Chairman of the Southern Ute Indian Tribal Council. I'm honored today to appear before you. My written testimony has already been submitted to you and I hope you will consider it. The written testimony outlines in some detail the difficulties that we have with NEPA.

Today, I would like to emphasize several of those points in that testimony. First, our tribal lands are not public lands. Although the United States may hold legal title to trust lands, it does not do so in behalf of the public. As trustees, the United States holds title to the trust lands for the benefit of tribes.

Decisions regarding our land generally involve two parties. First, the Tribal Council, the tribe's governing body evaluates options, considers the needs of membership of the tribe, and then makes a decision. Second, when Federal law requires the Secretary of the Interior or her delegate must review and approve the action in deciding whether to take an action, the Tribal Council is concerned about the needs of the tribe as we should be. In acting as a trustee in deciding whether to approve a Tribal Council decision the Secretary also should be considering the needs of the tribe and the tribe's best interest, even if those interests appear to conflict with the wishes or best interests of some members of the public.

To the extent that NEPA required the Secretary to delay approval of tribal actions or imposes a structure that second guesses our decision, NEPA compromises our sovereignty.

Second, the Federal approval process, the NEPA review can result in real unfairness to tribes. Our reservation is a checkerboard of ownerships, the tribe, individual, allottees and non-Indians all have land within the boundaries of the Southern Ute Indian Reservation. If one of our non-Indian neighbors wants to enter into an oil and gas lease, all he has to do is sign the oil and gas lease. No Federal approval is required. No NEPA analysis is imposed. No notice is required or given to the tribe.

Suppose the company on our neighbor's land wants to drill a well? The company must obtain a well permit through the State Commission or tribe. We'd probably receive notice of that application, but we'd also probably not have any reason to object and the permit would be granted. Once the well was drilled and produced, it is very possible that that well could be draining oil and gas for more lands. If our Tribal Council again wanted to protect the tribe and enter into a mineral lease, we could use either the 1938 Indian Mineral Lease Act or the 1982 Indian Mineral Development Act. Under the 1938 Act, there would be legal publication and bidding. Under the 1982 Act, we would negotiate directly with the company. Under both Acts before the signed leases could be approved by the Secretary, a NEPA analysis of some kind would be required.

There is no statutory timeframe for completing NEPA reviews and the Department of the Interior is backlogged. How long do we have to wait to protect our interest? Let's suppose a local citizen group doesn't like oil and gas drilling. Their opportunities to challenge that activity on our neighbor's land are pretty small, but as to our land, NEPA allows them to sue the Secretary and challenge

the sufficiency of the NEPA analysis. And in light of our Tribal Council's deliberations and decisions, why should the Secretary be required to consider the no action alternative or any alternatives? Shouldn't the Secretary's review and approval be limited to whether our decision is reasonable and a prudent decision?

Madam Chair, these are some of the questions that we have had for several years working with the House Committee on Resources and the Senate Indian Affairs Committee to address these questions. We are pleased that the Committee on Resources supported the Indian Title in an Energy bill. The Indian Title has a new optional program that may allow some tribes the chance to replace the Secretary's approval NEPA process with a tribal process. The tribal process envisioned in the Energy bill will provide for public notice and comment, but will leave the decisionmaking about tribal land, where it belongs, with the tribe.

In conclusion, Madam Chair, we appreciate being asked to participate in this process. We thank you for this opportunity and any time that you would like to come visit our reservation, you are welcome to join us. We will be very proud to show what our tribe has accomplished. Thank you very much.

[The prepared statement of Mr. Frost follows:]

Statement of Clement J. Frost, Chairman of the Tribal Council, Southern Ute Indian Tribe

I am Clement J. Frost, Chairman of the Southern Ute Indian Tribal Council. On behalf of the Southern Ute Indian Tribe ("Tribe"), I am honored that the Task Force has invited our Tribe to present testimony on ways in which the National Environmental Policy Act ("NEPA") affects the Tribe and its members.

The main purpose of NEPA when it was passed in 1970 was to help preserve public lands from unnecessary environmental damage. NEPA requires federal agencies to evaluate the impacts of their proposed actions. Whenever a federal agency determines that its actions might have a significant impact on the environment, NEPA directs that the public be notified, that alternatives to the proposed action be identified, and that the impacts of such alternatives be weighed in an environmental impact statement ("EIS"). NEPA encourages members of the public, local governments and sister agencies to comment upon those reports, but leaves final decision-making up to the lead federal agency. A complex web of regulations and court decisions govern the content of an EIS and the scope of alternatives to be considered by the federal agency.

Separate and apart from NEPA, Congress has statutorily delegated to the Secretary of the Interior the responsibility and power to supervise a multitude of activities that occur on Indian trust lands. This federal delegation of approval authority is part of the historic federal trust responsibility between the United States and Indian tribes. Many of the federal-approval statutes have been on the books for more than one hundred years. For example, federal approval is required before a mineral lease between a Tribe and an oil and gas company can become lawfully effective. But such federal approval is not limited to mineral leasing, rather it affects many tribal decisions. Even changes to tribal constitutions may require federal approval. Because federal approval is a federal action, any such request for approval theoretically triggers some level of NEPA analysis.

The history of the trust relationship between the United States and tribes is important in understanding the unique difficulties that NEPA raises in Indian Country. Congress and the federal courts have long recognized the sovereignty of Indian tribes and the power of tribes to make decisions affecting their internal affairs. Unless limited by Congress, tribes have the inherent authority to regulate their lands. Importantly, Indian lands are not public lands; generally they are lands promised to tribes in treaties, executive orders or legislation. While the United States may hold legal title to such lands, Indian lands are intended for the exclusive use and benefit of tribes and their members.

Since 1934, when Congress passed the Indian Reorganization Act ("IRA"), Indian tribes have been encouraged to pursue a path of self-determination. The IRA promised to participating tribes, including our Tribe, that no use, taking, lease or

encumbrance to tribal lands would be permitted in the future without the consent of the tribal council or governing body of the tribe. In 1938, Congress passed the Indian Mineral Leasing Act, which outlined the process for securing the consent of tribes and the approval of the Secretary for the leasing of tribal lands for mineral development. In 1948, Congress enacted similar legislation regarding rights-of-way across Indian lands. In 1982, Congress passed the Indian Mineral Development Act, which authorized tribes to enter into direct negotiations with companies and encouraged tribes and industry to customize their business dealings based upon the specific circumstances of the tribe. Simultaneously, Congress empowered tribes to establish their own environmental regulatory programs consistent with standards established in the Clean Water Act and the Clean Air Act. Congress also appropriated funds to strengthen tribal court systems, law enforcement programs, and governmental institutions. In 2000, Congress removed some of the extremely restrictive approval requirements related to entering into contracts with tribes. With those changes, we could hire legal counsel without Secretarial approval, and could enter into service contracts involving our lands without Secretarial approval, so long as the duration of the contract was less than seven years. All of these programs evidenced an underlying premise that tribes should be the decision-makers on their own lands, subject only to the oversight that Congress chose to retain in maintaining its trust obligations.

Significantly, Congress has recognized that the decisions reached by tribes in developing their lands and resources are not public decisions. For example, the Indian Mineral Development Act ("IMDA") expressly directs the Secretary to maintain as privileged and proprietary information "all projections, studies, data or other information possessed by the Department of the Interior regarding the terms and conditions of [a] Minerals Agreement, the financial return to the Indian parties thereto, or the extent, nature, value or disposition of the Indian mineral resources, or the production, products or proceeds thereof..." 25 U.S. C. § 2103 (c). While such information may be reviewed by the Secretary in deciding whether to approve such an agreement, any such information submitted for Secretarial consideration is statutorily non-public and proprietary to the tribe. In the same Act, however, Congress also directs the Secretary to employ the NEPA impact and alternatives analyses in considering whether or not to approve an IMDA Minerals Agreement. While, we believe that it may be beneficial for the Secretary to analyze the potential environmental impacts of an IMDA Minerals Agreement, we do not believe that Congress intended NEPA to be applied in way that would permit public citizen groups to second-guess our objectives, the substance of our negotiations, or the balancing of development and environmental interests implicit in the tribe's legislative decisions about its own non-public lands.

Our Reservation consists of approximately 750,000 acres in southwestern Colorado. Our Reservation, which is a checkerboard of tribal, allotted, and fee lands, is located in the northern San Juan Basin, one of the most prolific natural gas basins in the lower forty-eight. Oil and gas leasing on our Reservation began in the late 1940's, and modest royalty income from tribal leases was almost our sole source of revenue throughout the 1970's. For several decades our tribal leaders have actively pursued the promise of tribal self-determination. In 1974, we placed a moratorium on all future mineral leasing of our lands so that we could evaluate the best ways to proceed with subsequent development. In 1980, we formed our own Energy Department so that we could monitor lease compliance and develop information and strategies about future prudent development.

We also developed systems for monitoring environmental impacts from such development. For example, we were the first entity in our region to set up air quality monitoring stations. We led the fight to ensure that water produced during natural gas exploration be disposed of safely and at sufficient depths to avoid domestic water tables. Our non-Indian neighbors appreciated our vigilance in these areas.

Following passage of IMDA, and after compiling decades worth of data, we resumed energy development through negotiated agreements. Instead of just collecting royalties, we also formed our own oil and gas operating company. Together with industry, we have continued to produce conventional gas resources, and our operating company, Red Willow Production Company is a leading producer of coalbed methane. Red Willow is now the fourth largest natural gas producer in Colorado. We are also majority owners of a major intrastate gathering and treating company that operates on our Reservation. Volumes equal to approximately 1% of the Nation's daily natural gas supply go through our gathering and treating system. Success in this area has led to success in diversified investments. We now have approximately 60 different companies with active operations or investments in approximately 8 States, the Gulf of Mexico and Canada. We are the largest employer in the Four Corners Region, and our staff includes skilled geologists,

petroleum engineers, computer programmers, title specialists, financial analysts, and environmental compliance specialists.

Our progress has contributed significantly to the well-being of our members. Our revenues from these and other investment activities fund a variety of programs and services. In addition to direct distributions to tribal members, we provide an elder retirement pension program, extensive scholarships, operate our own school and Head Start Program, operate a regional recreation center, provide utility services to tribal members and non-Indian communities in our region, participate, maintain our own law enforcement department and judicial system, and participate in wellness and health service programs. Through our contributions to local governments and organizations, including sizeable financial contributions, we have also improved the lives of our neighbors.

Our accomplishments have often involved administrative assistance from the Department of the Interior, but on many occasions, we have succeeded despite administrative delays imposed by bureaucratic laws and regulations related to Indian tribes. Both in expertise and numbers, our staff far exceeds that available within the Bureau of Indian ("BIA"). The delays associated with obtaining BIA approval of contracts or activities is stifling, even when dealing with officials who want to cooperate. Concern on the part of the BIA and the Department of the Interior about potential liability in administering the federal trust responsibility has made decisive action even more difficult to obtain in the Cobell era.

NEPA review adds delay to the federal approval of tribal leases, rights-of-way, and land-related transactions. Additionally, NEPA and the National Historic Preservation Act have become the tools of choice of public citizens groups to block the decisions of federal agencies, not just as to public lands, but also as to tribal lands. We know this from personal experience, both with respect to settlement of our water claims and with respect to energy development.

Congress approved settlement of our water rights claims with the State of Colorado in 1988. That settlement involved construction of the Animas-La Plata Project. Following congressional approval, the Fish and Wildlife Service altered its non-jeopardy opinion under the Endangered Species Act and concluded that construction of the project would alter the critical habitat of endangered fish. For more than a decade, settlement proponents and project sponsored worked to modify the project and complete supplemental environmental impact statements. In 2000, Congress approved amendments to the settlement act that have allowed the Animas-La Plata Project to go forward. We are grateful that Congress approved the amended settlement, but the costs of delay amounted to millions of dollars.

In the mid 1990s, after several years of coalbed methane development on our Reservation, our staff recognized that increased well density would be needed to increase ultimate recovery of gas reserves from our mineral lands. We discussed this matter with the BIA, the Bureau of Land Management ("BLM") and representatives of the Colorado Oil and Gas Conservation Commission, with whom we had cooperative jurisdictional agreements. Oil and gas development on our reservation had already been evaluated under a comprehensive NEPA Environmental Assessment. Infill oil and gas development on any Indian Reservation, however, had never previously been the subject of a programmatic EIS. We felt that infill development on the Reservation might be attacked if a programmatic EIS was not prepared. Accordingly, we entered into an agreement with the federal agencies so that such an EIS could be performed. The EIS cost our Tribe more than $1 million and took more than five years to complete. In the meantime, we worked with industry, the BLM, the BIA, and the Colorado Oil and Gas Conservation Commission to obtain a spacing order designating increased well density, subject to individual agency approval of any specific drilling permit, which itself also triggers NEPA analysis.

Before the EIS was completed, in February, 2000, two citizen groups filed a lawsuit in the United States District Court in Colorado against the Secretary challenging NEPA compliance. Among other relief, the Plaintiffs requested that no more coalbed methane wells be drilled on our Reservation lands until completion of a comprehensive EIS addressing coalbed methane development on all lands within the entire San Juan Basin. We intervened in the case to protect the Tribe's interests. No preliminary or injunctive relief was obtained. After our programmatic EIS was completed and the administrative record of decision entered, the plaintiffs amended the complaint in federal court to challenge the adequacy of the EIS. The case is still pending.

Several years ago, the New Mexico BLM completed a similar programmatic EIS for public lands in New Mexico within the San Juan Basin. One of the same citizen groups and the Natural Resource Defense Council filed a lawsuit in U.S. District Court in the District of Columbia challenging the adequacy of that EIS. Among other relief, the Plaintiffs again requested to no additional wells in the San Juan

Basin be drilled, including lands on our Reservation, until a Basin-wide EIS was completed. We intervened in that case, as well, which has since been transferred to the federal court in New Mexico. That case also remains pending.

In our view, we went the extra mile in attempting to comply with NEPA with respect to our oil and gas development decisions on our lands. The cost of that compliance was not cheap. Because public citizens groups want to treat Indian lands like public lands, we have had to participate in two protracted federal lawsuits. Fundamentally, we believe that our Tribal Council, not the Natural Resources Defense Council, and, frankly, not the Secretary of the Interior, should have decision-making authority on our lands.

For the reasons set forth above, we have been strong advocates of the Indian Title contained in the Energy Bill recently passed by the House and the Senate. That legislation contains provisions that will permit tribes who so desire to remove themselves from the Secretarial approval process for mineral leases, business contracts and rights-of-way affecting their lands. As a condition to such removal, a tribe will be required to first enter into a comprehensive procedural agreement, a Tribal Energy Resource Agreement ("TERA"), with the Secretary. Only tribes with proven track records of successful decision-making and effective tribal environmental programs will be permitted to enter into a TERA. Further, a TERA will require that the process of tribal decision-making on subsequent development contracts include an opportunity for notice and comment by local governments and the public. Once a TERA is approved, and so long as the tribe complies with the TERA, no Secretarial approval will be required. Also following entry into a TERA, no federal action will be involved in the tribe's decision to approve a lease, right-of-way or contract. Thus, as to contract approval, NEPA will not be triggered. We believe the Indian Title provides an important opportunity to evaluate alternatives to NEPA on tribal lands, that allow for some public involvement, but preserve the primacy of tribal decision-making.

In conclusion, the Tribe appreciates this opportunity to testify. I am accompanied today by Thomas Shipps, who has served as one of our attorneys since 1979. He has been directly involved in the matters I have discussed, including participation in the discussions and drafting that led to proposals in the Indian Title of the Energy Bill. We are willing to assist the Task Force and the Committee as it reviews these matters in the future. Finally, we invite members of the Task Force and the Committee to visit our Reservation, and, witness first hand, our accomplishments in improving the lives of our members and of our neighbors on our Reservation.

Ms. MCMORRIS. [Presiding.] Thank you very much.

Mr. Shipps.

STATEMENT OF THOMAS H. SHIPPS, LEGAL COUNSEL TO CHAIRMAN FROST

Mr. SHIPPS. Madam Chairwoman, I'm here as legal counsel for Chairman Frost. If there are questions later and I can assist Chairman Frost to answer any, I'd be glad to.

Ms. MCMORRIS. Thank you.

Mr. Grogan.

STATEMENT OF STERLING GROGAN, BIOLOGIST AND PLANNER, MIDDLE RIO GRANDE CONSERVANCY DISTRICT, ALBUQUERQUE, NEW MEXICO

Mr. GROGAN. Madam Chairwoman, Ranking Member Udall, other members of the Committee, thank you for this opportunity to speak with you. I did submit written comments.

I would like to just briefly mention one problem that we have with NEPA. I am the biologist and planner of the Middle Rio Grande Conservancy District which is a political subdivision of the State of New Mexico. NEPA is an important fact of life for any non-Federal agency such as ours that deals with Federal agencies, Federal laws and Federal money. The Conservancy District, as a founding member of the Middle Rio Grande Endangered Species

Collaborative Program has been involved in what has become a multi-year process of developing an environmental impact statement for this program. The program will likely be authorized the Congress in 2006 and the Federal agencies in good faith initiated the NEPA process in 2003, in part, to make sure that all important Federal funding would continue to be available for habitat rehabilitation and research to protect and recover the endangered Rio Grande silvery minnow and Southwestern willow flycatcher in central New Mexico where our irrigation district serves about 11,000 people.

Although Federal agencies have evolved rules to make NEPA's as productive as possible, the Conservancy District views much of what NEPA itself now requires as largely irrelevant to effective environmental decisionmaking. Specifically, with respect to the Endangered Species Collaborative Program in the Middle Rio Grande, the NEPA process has been for them in some part unproductive and has consumed resources in an administrative procedure, thus preventing those same resources from being used to protect and recover endangered species.

I'd like to make three recommendations for revising NEPA. First, we believe that NEPA should be revised so that Federal agencies are not only allowed, but encouraged to conduct the important environmental analyses required by NEPA in the same incremental manner that projects are designed and that decisions are made.

As it now stands, NEPA analyses are artificially restricted to a certain time limit. By the time the analysis is complete, it's out of date in many cases. We support in this context the comments of Mr. Lance earlier which we believe would facilitate this change.

Second, we think NEPA should be revised to provide a screening method to allow exclusion from the NEPA process for Federal decisions that support mandatory environmental programs such as those—such as the recovery of endangered species, along the Middle Rio Grande, and we think that instead, those programs ought to have established for them a more flexible and expeditious analytical framework that is predicated upon the use of the best science currently available, but does not involve the long, drawn out analysis that is currently the way that NEPA is managed.

Third, we suggest that policy acts from other countries should be examined to see if some of their procedures could be incorporated into NEPA to make it more reasonable and flexible. For example, Canada requires environmental analyses in an incremental fashion, during the development of a project or during the genesis of a decision. There are other environmental policy acts in Germany, The Netherlands and Great Britain that also might offer some useful changes for NEPA.

Thank you very much.

[The prepared statement of Mr. Grogan follows:]

Statement of Sterling Grogan, Biologist/Planner, Middle Rio Grande Conservancy District

Good morning Madam Chairman and Task Force members. Thank you for this opportunity to share with you some thoughts about how the National Environmental Policy Act (NEPA) might be strengthened and improved.

First, I would like to give you a brief history of the Middle Rio Grande Conservancy District, where I have served as biologist/planner since 1997. The

Conservancy District is a political subdivision of the State of New Mexico, formed in 1925 as a direct result of the earlier efforts of Aldo Leopold and many others to cope with the flooding and waterlogged soils that damaged tens of thousands of acres of previously productive farmland along the Rio Grande. The Conservancy District now supplies irrigation water, flood control, and drainage services to some 277,000 acres of land, of which about 60,000 is irrigated. We serve about 11,000 farmers, including members of six Indian Pueblos. The oldest canal in our system has been in continuous use since about 1700, and archeologists tell us that irrigated agriculture has been practiced in the middle Rio Grande valley for at least 800 years.

NEPA is an important fact of life for any non-Federal agency, such as ours, that deals with Federal agencies, Federal laws, and Federal money. The Conservancy District, as a founding member of the Middle Rio Grande Endangered Species Collaborative Program, has been involved in what has become a multi-year process of developing an Environmental Impact Statement for this Program. The Program will likely be authorized by Congress in 2006, and the Federal agencies in good faith initiated the NEPA process in 2003, in part to make sure that all-important Federal funds would continue to be available for habitat rehabilitation and research to protect and recover the endangered Rio Grande silvery minnow and southwestern willow flycatcher in central New Mexico.

Although Federal agencies have evolved sophisticated rules to make NEPA as productive as possible, the Conservancy District views much of what NEPA itself now requires as largely irrelevant to effective environmental decision-making. Specifically with respect to the Endangered Species Collaborative Program, the NEPA process has been for the most part unproductive, and has consumed resources in an administrative procedure, thus preventing those resources from being used to protect and recover endangered species.

There are three reasons for this unfortunate situation.

1. NEPA dictates that environmental analysis be artificially restricted to a limited time period, so that developments after some arbitrary cutoff date cannot be considered. This is unrealistic because it ignores the fact that human thinking and planning proceeds incrementally. No Federal project is constructed precisely as it is initially envisioned; changes in design and specifications are continuous, right up until construction begins. Likewise, no Federal decision is made without taking into consideration developments that occur right up until the moment the decision is final. But NEPA cannot cope with incremental change, or new information, or with changes in scope or facts or partners that come after the arbitrary cutoff date.

Recommendation: Revise NEPA so that Federal agencies are not only allowed, but encouraged, to conduct the important environmental analyses required by NEPA in the same incremental manner that projects are designed and that decisions are made.

2. The way NEPA is structured, and the way it is currently applied, seems to assume that all Federal decisions are bad for the environment, and that the only way to offset the bad is to spend money to describe the resources that those bad decisions will damage. While this reasoning may be appropriate for an armored vehicle proving ground, or a decision to dispose of radioactive waste, it is fundamentally flawed when applied to a Federal decision to protect and recover endangered species. While it is reasonable to expect that Federal agencies would professionally evaluate the consequences of such a decision, it is not reasonable to force such an analysis into the straight jacket that is the current NEPA process.

Recommendation: Revise NEPA to provide a screening method to allow exclusion from the NEPA process for Federal decisions that support mandatory environmental programs (such as the recovery of endangered specie), and establish for those decisions a more flexible and expeditious analytical framework that is predicated upon use of the best science currently available.

3. NEPA originally needed to be comprehensive, because there were few precedents. Now, some thirty years later, there are many alternative strategies for achieving the same environmental objectives, and NEPA should be adaptively revised (e.g., using principles of adaptive management) to incorporate what society has learned in the interim and to eliminate those among the original requirements that are no longer necessary or appropriate. For example, Canada developed an approach to NEPA-like analyses that has some worthwhile features, such as the way they deal with incremental project planning and development. Other examples from Germany, The Netherlands, and Great Britain may also provide appropriate alternatives.

Recommendation: Review environmental policy acts from other countries to see if some of their elements could be adopted in a revised NEPA to meet current U.S. environmental policy objectives.

Response to questions submitted for the record by Sterling Grogan, Biologist/Planner, Middle Rio Grande Conservancy District

1. *Question: I think you are right that the current state of NEPA is that it suggests that the federal decision will have a negative impact and that the agency starts by defending that false premise. How can NEPA be changed to at least get the agency started from a neutral position.*

Answer: Clarify, and possibly expand through rulemaking, the use of the "Categorical Exclusion" provisions of NEPA, so that Federal decisions that create or support important environmental improvement efforts (e.g., creating habitat for endangered species, or doing research to support the protection and recovery of endangered species) can be excluded from the requirements of NEPA.

2. *What are some of the factors that have made NEPA irrelevant and unproductive, as you suggest?*

Answer: Many Federal agencies are unwilling to risk using the Categorical Exclusion provisions of NEPA because they fear they will loose if the issue is litigated. This could be remedied by rulemaking (especially CEQ rules changes) that clarify and strengthen the authority of Federal agencies to exclude from NEPA requirements those actions that are clearly intended to have only positive environmental outcomes, such as many actions related to the protection and recovery of endangered species.

3. *Do you think the 35 years of precedent have made Federal agencies "smarter" or at least better at decision making?*

Answer: In general, yes. But some Court decisions in some NEPA cases (as was made clear in other testimony at the August 1 hearing) have made NEPA less flexible and more burdensome. One result is that Federal agencies, being appropriately conservative and risk-averse by nature, tend more often than not to err on the side of extreme caution. One result of that is their reluctance, often without substantial justification, to use the Categorical Exclusion provisions of NEPA.

Ms. MCMORRIS. Thank you.

Mr. Zavadil.

STATEMENT OF DUANE ZAVADIL, VICE PRESIDENT FOR GOVERNMENT AND REGULATORY AFFAIRS, BILL BARRETT CORPORATION, DENVER, COLORADO

Mr. ZAVADIL. Madam Chairman and members of the Commission, thank you for the opportunity to testify about NEPA today. My name is Duane Zavadil. I work with the Bill Barrett Corporation, an independent natural gas exploration and production company headquartered in Denver, Colorado. Our business is to explore and develop clean natural gas resources on Federal lands in the Rocky Mountain region. I'm the Vice President of Government and Regulatory Affairs for Bill Barrett Corporation and NEPA compliance is my responsibility. We have operations in eight western states under the jurisdiction of five United States Forest Service offices and 10 Bureau of Land Management field offices.

The National Environmental Policy Act is a vitally important statute with the noblest of goals. Bill Barrett Corporation is a company which embraces those goals as part of its corporate ethic to protect the environment, and we welcome the "guidepost" that NEPA was intended to provide. But I believe NEPA is a statute that can miss the mark in terms of fulfilling its promise. The sad fact of the 30-plus years of history of NEPA implementation has shown that the permitting process associated with NEPA compliance has become vastly longer and more cumbersome than it needs

to be to accomplish the environmental protections that are sought. Further, given its complex and overly prescriptive nature, it is a process that also invites costly litigation. The end result if often unnecessary degradation to the environment itself, but also the delayed production of the important and clean natural gas resources that our country so desperately needs.

Let me cite a particular example of the unnecessary burden that NEPA has been to the Bill Barrett Corporation. These days, the first step in any exploration project is to conduct a #D geophysical survey over the prospect, commonly known as a seismic shoot. These surveys are used to determine the areas that are most likely to contain natural gas. They have also been proven to have absolutely no environmental impact. Nonetheless, extensive NEPA analyses are being prepared prior to conducting these surveys. Prior to the enactment of NEPA requirements and for that matter, until a few years ago, permits could be obtained in a matter of days. But for our project in the Utah Basin, the process took over two years and a NEPA lawsuit caused further delay. Finally, after much wasted time and money, the permits were issued, the surveys were done, and as expected natural gas resources were discovered and are being developed. But precious time was lost and money was unnecessarily wasted.

Now I say that time and money was wasted because the NEPA process for this simple project could have been conducted in a matter of months, not years. The delays added no value in terms of environmental protection to the project, the delays, I'm emphasize that. We're a believer in NEPA. My written testimony will provide more examples of the unnecessary cost and delay for the record.

To summarize, for all of its value, NEPA has become in some cases cumbersome and fraught with delays. These delays are costing consumers and the economy.

Thank you, Madam Chairwoman for the opportunity to be here today and we welcome the Task Force to the West and look forward to being part of the dialog for ways to improve NEPA.

[The prepared statement of Mr. Zavadil follows:]

Statement of Duane Zavadil, Vice President—Government and Regulatory Affairs, Bill Barrett Corporation

Madame Chairman and members of the Committee, thank you for the opportunity to testify about NEPA today. My name is Duane Zavadil. I work with Bill Barrett Corporation, an independent natural gas exploration and production Company headquartered in Denver, Colorado. Our business is to explore and develop clean natural gas resources on federal lands in the Rocky Mountains. I am Vice President of Government and Regulatory Affairs for Bill Barrett Corporation and NEPA compliance is my responsibility. We have operations in eight western states under the jurisdiction of five United States Forest Service offices and ten Bureau of Land Management Field Offices.

The National Environmental Policy Act (NEPA) is a vitally important statute with the noblest of goals. Bill Barrett Corporation is a company which embraces NEPA's goals as part of its corporate ethic to protect the environment, and we welcome the "guidepost" of federal guidance that NEPA was intended to provide. But I believe NEPA is a statute that has missed the mark it terms of fulfilling its promise. The sad fact of the 30-plus years' history of NEPA implementation has shown that the permitting process associated with NEPA compliance is vastly longer and more cumbersome than it needs to be. Further, given its complex and overly prescriptive nature, it is a process that also invites costly litigation. The end result is often unnecessary degradation to the environment itself, but also the delayed production of the important and clean natural gas resources that our country so desperately needs.

Let me cite a particular example of the unnecessary burden that NEPA has been to the Bill Barrett Corporation. These days, the first step in any exploration project is to conduct a 3D geophysical survey over the prospect, commonly known as a seismic shoot. These surveys are used to determine areas that are most likely to contain natural gas; they have also been proven to have absolutely no environmental impact, nonetheless, extensive NEPA analysis are being prepared prior to conducting these surveys. Prior to the enactment of NEPA requirements, permits could be obtained in a matter of days. But for our project in the Uintah Basis, the process took over two-and-a-half years. And a lawsuit caused further delay. Finally, after much wasted time and money the permits were issued, the surveys were done and, as expected, natural gas resources were discovered and are being developed. But precious time was lost and money was unnecessarily wasted. I will be providing more examples of unnecessary cost and delay for the record.

Thank you Madame Chairwoman for the opportunity to be here today. We welcome the Task Force to the West and look forward to being part of the dialogue to explore ways to improve NEPA.

I'll be pleased to answer any questions.

Ms. MCMORRIS. Thank you.

Ms. Kupillas.

STATEMENT OF SUE KUPILLAS, EXECUTIVE DIRECTOR, COMMUNITIES OF HEALTHY FORESTS, MEDFORD, OREGON

Ms. KUPILLAS. Good morning Task Force Chairwoman McMorris, Ranking Member Udall and members of the Task Force. My name is Sue Kupillas and I am Executive Director for Communities for Healthy Forests, a nonprofit based in Roseburg, Oregon.

Communities for Healthy Forests mission is ''to realize the prompt restoration and recovery of the conifer forest in the aftermath of fire and other catastrophic events ensuring the presence and vitality of forest lands for future generations.''

We have two goals. The first is to educate communities and grass roots organizations across the United States about current conditions of forests that have experienced catastrophic events. The second is to work for changes in regulation so restoration can begin soon after the catastrophic event.

Two years ago, community leaders in Roseburg, Oregon, looked at a burn that occurred in 1996. Because of that tour, community leaders decided that they would do something about the intolerable situation that the forest had been totally walked away from. They formed Communities for Healthy Forests. It's an organization of liberal and conservative, large and small businesses including a former school board member; Chair Bruce Klein eight Papa Murphy's Pizzas; Lee Patterson, the superintendent of schools; a local Judge; the Cow Creek Tribes, unions and many other organizations who come together around the common interest of the need to restore forests. Communities for Healthy Forests is funded by local business, unions, the Cow Creek Tribes, and county funds.

We believe that the largest impediment to restoration of forests in a timely manner is the NEPA regulation. Healthy Forest Restoration Act has helped with improving forest conditions in a green forest before a fire, but does not address blackened forest restoration.

At issue is the time it takes to complete an environmental impact statement which could be up to three years with consultations and analysis and comments. Then the EIS can be appealed. Time becomes the weapon. As standing dead trees deteriorate and become

bug-infested while the Courts and lawyers debate each issue. Appeals that stretch this cumbersome process out another year guarantee so much loss of value that the sales are not bid because there is no incentive to recover the dead material.

The NEPA problem is the same whether it occurs in Arizona, New Mexico, Oregon or Pennsylvania. In the year 2002, the largest fire in the nation, the Biscuit Fire in Oregon burned 500,000 acres in the Rogue Siskiyou National Forest in my backyard. On the Biscuit Fire, there are estimates that 7 to 10 billion board feet of timber was lost.

Today, three years later, one percent of the Biscuit is being salvaged, with new protesters coming in almost every week. It took over one and a half years to complete the EIS and get a Record of Decision. The Biscuit had 23,000 comments which had to be analyzed, many of which were boilerplate e-mails. Specialists in soils, fisheries, water quality, wildlife and silviculture had to comment on the effects of the proposed actions. There's lots of duplication in the analyses of specialists. Standardizing the analysis could simplify and eliminate some of the duplication.

On the Biscuit Fire site as 67 million board feet of the proposed 350 million board feet is hauled out this summer, the value is questionable. No old growth trees have been harvested and no roads built in roadless areas yet these are still the claims of the radical groups which continue to protest. The rest of the volume is tied up in lawsuits and red tape.

If modifications of NEPA were made today, they would not help recover losses from the Biscuit or any of the 2002 fires, but if we do something now, future burned areas can be treated.

Here's what The Oregonian said. It's the largest newspaper in Oregon. "It's not just all the charred trees chewed up by insects, it's all rotten: The millions of dollars and hundreds of hours spent writing plans for salvage and restoration projects, many of which will never happen; the endless lawsuits; the dueling scientists; the cynical politics; the breathless protests. Nearly all of it looks like a big waste."

While the primary focus of Communities for Healthy Forests is education about post catastrophic event treatment in forests, CHF also supports administrative rule changes that will serve to expedite restoration. The do nothing alternative should be examined in the process without action in most cases. Habitat streams and soils deteriorate. Fuels are still there to burn and the result moves forests away from stated goals. Do nothing has consequences and in many cases undesirable consequences. That should be done in the planning process up front.

To conclude, the effects of a broken NEPA process on our rural communities and our schools is catastrophic. Here in the U.S. we are wasting resources, throwing away family wage jobs, not adequately funding schools and allowing remaining mill infrastructure to be dismantled. In a time of Federal deficit spending, Federal agency fund shortages, and state funding crisis, we are literally throwing away dollars that could fuel our economy and fund our schools. Worse than that, the effect of delay is causing serious damage to our environment and deterioration of our national forests.

Those of us who live in communities with burned forests, drive through or fly over miles and miles of burned areas too lat to restore. This is our legacy to our children.

Thank you for having these hearings and thank you for the opportunity to testify.

[The prepared statement of Ms. Kupillas follows:]

Statement of Sue Kupillas, Executive Director, Communities for Healthy Forests

Good morning Task Force Chairwoman McMorris, Congressman Udall and members of the Task Force. My name is Sue Kupillas and I am Executive Director for Communities For Healthy Forests, a non-profit based in Roseburg, Oregon.

Communities for Healthy Forests mission is: "To realize the prompt restoration and recovery of the conifer forest in the aftermath of fire and other catastrophic events ensuring the presence and vitality of forest lands for future generations."

We have two goals. The first is to educate communities and grass roots organizations across the United States about current conditions of forests that have experienced catastrophic events, talk about why they aren't being restored and what changes need to be made for timely restoration.

The second is to work for changes in regulation so restoration can begin soon after the catastrophic event, if managers think restoration will achieve forest's goals.

With me today is the Chairman of the Board, Bruce Klein, a community leader who owns 8 Papa Murphy's Pizza stores, and Lee Paterson, Superintendent of Roseburg public school district. Schools are affected by decreased forest revenues and when we can't even cut dead burned trees in our forests, the system is broken. Bruce and Lee were present on a tour of the fire site, two years ago where community leaders looked at a burn that occurred in 1996. The burn had not been salvaged and now is off limits to workers by OSHA, as it is deemed unsafe. The area has converted to brush fields. Because of that tour, community leaders decided that they would do something about this intolerable situation, and they formed Communities for Healthy Forests.

CHF is an organization of community members, liberal and conservative, large and small business, including a farmer and school board member, a local judge, the Cow Creek Tribes, Unions and many organizations, who have come together around the common interest of a need to restore forests that have been through catastrophic events. CHF is funded by local business, Unions, the Cow Creek Tribes, and county funds.

CHF believes that the largest impediment to restoration of forests in a timely manner is the NEPA regulation. HFRA has helped with improving forest conditions in a green forest before a fire but does not address blackened forest restoration Two weeks ago we were meeting with Counsel of Environmental policy office in Washington D.C. They told us that they thought the problem had been fixed. We discussed modifying Healthy Forest Restoration Act to include restoration of forests after catastrophic events which would help focus attention on cleanup of burned areas. However, it would not expedite the NEPA process.

The issue is the time it takes to complete an Environmental Impact Statement which could be up to three years with consultations and analysis of comments. Then the EIS can be appealed. Time becomes the weapon, as standing dead trees deteriorate and become bug infested while the courts and lawyers debate each issue. Appeals that stretch this cumbersome process out another year guarantee so much loss of value that the sales are not bid because there is no incentive to recover the dead material. Also, many companies don't want the hassle of entering protest areas, with the possibility of damaged equipment, spiked trees and tree sitters. Thousands of boilerplate comments on each EIS come in the form of e-mails. Each has to be analyzed to determine if issues are significant.

The NEPA problem is the same whether it occurs in Arizona, New Mexico, Oregon or Pennsylvania. June 2005 was the third anniversary of Arizona's devastating Rodeo-Chediski fire, that charred 460,000 acres finally contained July 7, 2002. (Nationwide, almost seven million acres burned that summer costing more than $1.6 billion in fire fighting costs and untold dollars in loss of valuable timber and jobs, all affected by the NEPA problem.)

In the year, 2002, the largest fire in the nation, the Biscuit Fire burned 500,000 acres in the Rogue Siskiyou National Forest. (Over 650,000 acres were burned in Southwestern Oregon in 2002.) On the Biscuit Fire, there are estimates that 7-10 billion board feet of timber was lost.

Today three years later,1% of the Biscuit is being salvaged, with new protesters coming in almost every week. (The protesters blockaded roads, at one point preventing the contractor from transporting an injured worker.) It took over 1 1/2 years to complete the EIS and get a ROD. The Biscuit had 23,000 comments which had to be analyzed, many of which were boilerplate e-mails. Specialists in soils, fisheries, water quality, wildlife and silviculture had to comment on effects of each of the proposed actions. There is lots of duplication in the analysis of specialists. Standardizing the analysis could simplify and eliminate some of the duplication.

NEPA provides an alternatives Methods EIS, but the Counsel of Environmental Quality has been unwilling to invoke that authority which could grant agencies to act expeditiously as in emergency to expedite the EIS process and promptly act to recover and restore the affected forests. If we relied on this authority every time, we would always need CEQ intervention before agencies could act.

On the Biscuit fire site, as the 67 mmbf (of the proposed 350 mmbf) is hauled out this summer, the value is questionable. No old growth trees have been harvested and no roads built in roadless areas yet these are still the claims of the radical groups which continue to protest. The rest of the volume is tied up in law suits and red tape.

If modifications of NEPA were made today, they would not help recover losses from the Biscuit or any of the 2002 fires but if we do something now, future burned acres can be treated. On the Biscuit Fire, there are estimates that 7-10 billion board feet of timber was lost. You can fly over it, as Bruce Klein did a couple of weeks ago, and see mile after blackened mile of dead trees as far as you can see. What a waste.

Here is what The Oregonian, (largest newspaper in Oregon), said: "It's not just all the charred trees chewed up by insects, It's all rotten: The millions of dollars and hundreds of hours spent writing plans for salvage and restoration projects, many of which will never happen; the endless lawsuits; the dueling scientists; the cynical politics; the breathless protests. Nearly all of it looks like a big waste." This indicates there is strong sentiment in favor of timely removal of dead material and restoration.

While the primary focus of Communities for Healthy Forests is education about post catastrophic event treatment in forests, CHF also supports administrative rule changes that will serve to expedite restoration. We have been looking at how NEPA could be modernized or modified to address the time issue. While our organization believes changes can take place administratively, legislation will be necessary at some point in the process to secure permanent modifications. We are looking for results, so how NEPA changes happen is not as important as making sure the correct modifications are in place. NEPA processes should not take more than six months to a year. Federal agencies should be required to meet the deadlines. That means simpler assessment on the front end, which would include (among other things) standardized requirements for specialists analyzing effects of each alternative

The "do nothing" alternative should be examined in the process. Without action, in most cases habitats, streams and soils deteriorate, fuels are still there to burn and the result moves forests away from stated goals. Do nothing has consequences and in many cases undesirable consequences. That should be done in the planning process up front.

The National Fire Plan process, the Western Governor's Association 10 year comprehensive Strategy Implementation Plan, and the Healthy Forest Restoration Act all outline strategy for prevention and fire planning, but again, do not specifically address salvage and restoration of burned areas. The burned areas present a fuel loading issue, as severe, or maybe more severe (after brush has grown up), as do the overstocked forests. This has to be addressed quickly to reduce fire danger and safety concern. In the glossary of the WGA Plan, Burned Area Rehabilitation is described as "the treatment of an ecosystem following disturbance to minimize subsequent effects. (1995 Federal Wildland Fire Policy), however there is no framework for the treatment. Clearly every plan and planning process is omitting effective plans for salvage and restoration.

The effects of a broken NEPA process on our rural communities and our schools is catastrophic. Here in the U.S. we are wasting resources, throwing away family wage jobs, not adequately funding schools and allowing remaining mill infrastructure to be dismantled. In a time of federal deficit spending, federal agency fund shortages, and state funding crisis we are literally throwing away dollars that could fuel our economy and fund our schools. Worse than that, the effect of delay, is causing serious damage to our environment and deterioration of our National Forests. Those of us who live in communities with burned forests, drive through or fly over miles, and miles of burned areas, too late to restore. That is our legacy to our children. In America, this should not happen. We urge this Task Force, to bring

leadership to the legislative process, inform The Administration of the problems with NEPA then get the changes made.

Thank you for having these hearings and thank you for the opportunity to testify. I would be happy to answer questions.

Ms. MCMORRIS. Mr. Seciwa.

STATEMENT OF CALBERT SECIWA,
ZUNI TRIBE, TEMPE, ARIZONA

Mr. SECIWA. Madam Chair, distinguished members of the Task Force, thank you for inviting me to testify at this field hearing on the National Environmental Policy Act.

My name is Calbert A. Seciwa, an enrolled member of the Pueblo of Zuni Tribe, and one of the founding members of the Zuni Salt Lake Coalition. From the onset I state for the record that I declare my opposition to any amendments of the National Environmental Policy Act. I give this testimony as an individual and do not intend to represent the Pueblo of Zuni Tribal Government.

My testimony today will address the efforts of the Zuni Salt Lake Coalition, Coalition hereafter, in regards to our successful plan of action that we employed to protect a sacred site, Zuni Salt Lake and the Sanctuary Zone. Zuni Salt Lake is the home of Ma'lokyattsk'I, our revered Salt Mother. And the associated Sanctuary Zone is a place where in ancient times, even to this day, warring tribes from throughout the Southwest put down their weapons and shared in the sanctity of Salt Mother. The development of the Fence Lake Coal Mine, that was proposed by the Salt River Project, SRP, an Arizona-based utility company, would have had irrevocable negative consequences to this significant and sensitive environmental, culturally and sacred national resource. Without NEPA, the Zuni Salt Lake and the Sanctuary Zone revered by countless of A:ho'e, People and sovereign nations would not have been heard and their voices would not have been considered in the public decisionmaking process of this country afforded by legislative authority of NEPA.

The struggle to stop the Fence Lake coal mine and preserve Zuni Salt Lake and the hundreds of cultural resource sits, aboriginal pilgrimage routes, shrines and ancestral remains within the lake and Sanctuary Zone, endured close to two decades beginning in the mid-1980s. Throughout this time, NEPA was an important tool in this effort. Without NEPA, the membership of the Coalition, affected Tribal Governments, organizations and individuals, Native and Non Native, would have been largely powerless to play any productive role in the decisionmaking process regarding this area of sacred land. We recognized that NEPA is oriented process rather than outcome and without its authority, we would not have been able to compel SRP to release the details of the coal mining production plan, nor had a clear avenue to express our sincere conviction to the U.S. Government of the devastating consequences the mine posed to the cultural, spiritual and environmental considerations to the land and the thousands of individuals that hold this sacred site to the utmost reverence. Without NEPA, we would have been both uninformed and voiceless.

In 1990, the Bureau of Land Management, BLM, released an environmental impact statement for the proposed mine. The proposed coal mine would have extracted more than 80 million tons of coal from 18,000 acres of public land administered by the BLM, as well as some state and private land in Catron and Cibola counties, located 60 miles southeast of the Zuni Pueblo Indian Reservation in rural western New Mexico. The coal was to be transported 44 miles by a proposed rail line through the heart of the Sanctuary Zone that would have destroyed an incredible density of centuries old pilgrimage trails, shrines and ancestral remains of various tribes in the Southwest. These holy pilgrimage trails were used by our ancestors in their practice of our inherent "religious freedom" right to Zuni Salt Lake.

The gravest threat that was posed by the Fence Lake Mine was the impact of the proposed under ground water pumping for dust control. Because the underground water would be pumped from the same aquifers feeding the Zuni Salt Lake, which is relatively small and only 4 to 5 deep, we were deeply concerned that the pumping could interrupt water flow to the Lake, resulting in lower water levels and even complete draining of the Lake. One of our most sacred sites would be sacrificed to control dust for cheap dirty coal.

Through the EIS and because of NEPA, we were able to learn details of the coal mine and its relation to the Zuni Salt Lake and other sacred sites in the area. We were also able to participate in the decisionmaking and to strongly voice our objections to the desecrations promised by this ill-conceived project.

NEPA also played an absolutely vital role in allowing for the incorporation and disclosure of new scientific studies that examined the potentially devastating impacts underground water pumping would have on Zuni Salt Lake.

Armed with this and several other hydrological reports one of which simulated drawdowns as high as 13 feet, much larger than the depth of the lake, we once again turned to the NEPA process. We demanded another supplemental environmental impact statement be prepared to fully and accurately all of these hydrological sciences that the previous analyses had ignored. Less than a year later, under mounting pressure and increasing——

Ms. MCMORRIS. I just need to you wrap up.

Mr. SECIWA. Under mounting pressure and increasing public scrutiny, SRP announced that it was abandoning the development of the Fence Lake Coal Mine in August 2002, almost one week from the three years of our effort.

In our case, NEPA was instrumental in preserving Zuni Salt Lake and the Sanctuary Zone and many other sacred sites essential to Zuni and other Tribes' culture, religion and way of life. The diverse plant life and wildlife which rely upon the unspoiled habitat of this special sacred area also benefited.

We do not use NEPA as an obstacle to the mine, but as a decisionmaking tool as it is intended to be. As any community would wish to do under similar circumstances, we employed NEPA's mandate to compel an unaccountable, out of state corporation and its Federal regulators to tell the truth about these impacts. This is perhaps NEPA's most important authority, ensuring the

government tells the truth about the way in which actions will affect people, local communities, land, water, and life itself.

I thank you for the opportunity to come before this Task Force and thank you for allowing this time. E'la: kwa [in Zuni] May you pass this day into the evening and happiness.

Thank you very much.

[The prepared statement of Mr. Seciwa follows:]

Statement of Calbert A. Seciwa, Pueblo of Zuni Tribal Member, Former Member of the Zuni Salt Lake Coalition

Madame Chairwoman and distinguished members of the Task Force, thank you for inviting me to testify at this field hearing on the National Environmental Policy Act. I am Calbert A. Seciwa, an enrolled member of the Pueblo of Zuni Tribe, and one of the founding members of the Zuni Salt Lake Coalition. From the onset I state for the record that I declare my opposition to any amendments of the National Environmental Policy Act (NEPA). I give this testimony as an individual and do not intend to represent the Pueblo of Zuni Tribal Government.

My testimony today will address the efforts of the Zuni Salt Lake Coalition in regards to the successful plan of action employed to protect a sacred site, Zuni Salt Lake, home of Ma'lokyattsk'I, the Salt Mother, and the associated Sanctuary Zone, where in ancient times warring tribes from the Southwest put down their weapons and shared in the sanctity of Salt Mother, from the negative environmental impacts that would have occurred by the development of the Fence Lake Coal Mine, that was proposed by the Salt River Project (SRP), an Arizona based utility company. The irrevocable negative consequences to this significant and sensitive environmental, culturally, and Sacred national resource of this nation, would have been tragedy affirmed. Without the NEPA the Zuni Salt Lake and Sanctuary Zone revered by countless of A:ho'e, People and sovereign tribal nations would not have been heard and their voices would not have been considered in the public decision making process of this country afforded by legislative authority of NEPA.

The struggle to stop the Fence Lake coal mine and preserve Zuni Salt Lake, and the hundreds of cultural resource sites, aboriginal pilgrimage trials, shrines and ancestral remains within the lake and Sanctuary Zone, endured close to two decades beginning in the mid 1980's. Throughout this time, the National Environmental Policy Act was a profoundly important tool in this effort. Without NEPA, the membership of the Zuni Salt Lake Coalition (ZSLC), affected Tribal Governments, organizations and individuals, Native and Non Native, would have been largely powerless to play any productive role in the decision making regarding this area of sacred land. We recognized that NEPA is orientated toward process rather than outcome and that without its authority we would have not have been able to compel SRP to release the details of the coal mining production plan, nor had a clear avenue to express our sincere conviction to the United States Government of the devastating consequences the mine posed to the cultural, spiritual, and environmental considerations to the land and the thousands of individuals that hold this sacred site in the utmost reverence. Without NEPA, we would have been both uninformed and voiceless.

In 1990, the Bureau of Land Management (BLM), released an Environmental Impact Statement (EIS), for the proposed Fence Lake coal mine. The proposed coal mine would have extracted more than 80 million tons of coal from an 18,000 acre area of public land administered by the BLM, as well as some state and private land, in Catron and Cibola counties, located 60 miles southeast of the Zuni Pueblo Indian Reservation in rural west central New Mexico. The coal was to be transported 44 miles by a proposed rail line through the heart of the Sanctuary Zone that would have destroyed an incredible density of centuries old pilgrimage trails, shrines and ancestral remains of various tribes in the Southwest. These holy pilgrimage trails were used by our ancestors in their in practice of our inherent "Religious Freedom" right of the Zuni Salt Lake.

The gravest threat that was posed by the Fence Lake Mine, however, was the impact of the proposed under groundwater pumping for dust control purposes, because the under groundwater would be pumped from the same aquifer feeding the Zuni Salt Lake, which is relatively small and only 3 to 5 feet deep. We were deeply concerned that the pumping could interrupt water flow to the Lake, resulting in lower water levels and even complete draining. One of our most sacred sites would be sacrificed to control dust for cheap dirty coal.

Through the aforementioned EIS and because of NEPA, we were able to learn details of the coal mine and its relation to Zuni Salt Lake and other sacred sites. We were also able to participate in the decision making process and strongly voice our objections to the desecrations promised by this ill-conceived project.

NEPA also played an absolutely vital role in allowing for the incorporation and disclosure of new scientific studies that examined the potentially devastating impacts groundwater pumping would have on Zuni Salt Lake. The original 1990 EIS for the proposed coal mine was flawed scientifically with regard to hydrology and failed to capture the cultural importance of the Zuni Salt Lake. After repeated demands from the Zuni Tribe to then Secretary of Interior, Bruce Babbitt and others, a supplemental EIS (SEIS), was conducted in 1996.

Unfortunately, at this time the Office of Surface Mining (OSM), took over the lead agency status from the BLM and was responsible for preparing the SEIS. From our perspective, OSM views itself as a promoter than a regulator of the coal industry and was either unable or unwilling to comprehend or properly address the religious and cultural concerns of Native Americans. Likewise, environmental considerations raised by conservation organizations were given little credence. As a result, this SEIS was also deeply flawed and continued to dismiss evidence that the proposed under groundwater pumping would likely have destructive impacts on the Zuni Salt Lake. In fact, OSM concluded that "Zuni Salt Lake would experience negligible short and long term impacts to this quantity and quality of its underground water."

Our efforts continued and strengthened and our coalition broadened. We also studied in depth the potential hydrological impacts and were able to convince the Bureau of Indian Affairs to took its trust responsibilities seriously and conduct it own independent analysis of the evidence. This analysis, know as the King Report, was completed in 2001, and as we would have expected, concluded that pumping in the quantities proposed would produce "significant drawdown" at the Zuni Salt Lake.

Armed with this and several other hydrological reports, one of which simulated drawdowns as high as 13 feet, much larger than the depth of the lake, we once again turned to the NEPA process. We demanded that another supplement SEIS be prepared to fully and accurately address all of the hydrological science that the previous analyses had ignored. Less than a year later, under mounting pressure and increasing public scrutiny, SRP announced that it was abandoning the development of the Fence Lake Coal Mine in August 2002.

In the case of the Fence Lake Mine, NEPA was instrumental in preserving Zuni Salt Lake and the Sanctuary Zone and many other sacred sites essential to Zuni and other tribes' culture, religion and way of life. The diverse plants and wildlife which rely upon the unspoiled habitat of this special sacred area also benefited. We did not use NEPA as an obstacle to the Fence Lake Mine but as the decision making tool it is intended to be. As any community would wish to do under similar circumstances, we employed NEPA's mandate to compel an unaccountable, out of state corporation, and its federal regulators, to tell the true story about theses impacts. This is perhaps NEPA's most important authority: Ensuring the government tells the truth about the way in which its action will affect people, local communities and the land, water, life itself. Facing the truth, SRP was forced to recognize that the costs of its project to Zuni and many other tribes of the Southwest and to the environment greatly outweighed the short term benefits of developing this area for cheap dirty coal.

E'la: kwa, Thank You.

Ms. MCMORRIS. Thank you. I want to just take a moment to thank each one of you for being here today preparing excellent testimony. I thought it was a long haul, but it was well done by each one of you.

We're going to start with some questions. We're going to go from Mr. Udall to Mr. Cannon to Mr. Grijalva and then me and then we'll just do it a couple of times.

Thank you.

Mr. UDALL. We'll start with five minutes apiece and then——

Mr. UDALL. We're going to start a round of five minutes and thank you, Madam Chair, once again for being here and we appreciate all of your testimony and your willingness to stick around and for most of you to stick around. I don't know if Secretary Prukop

is gone. I was—I look over, I was going to give her a question. But let me first of all, ask Mr. Seciwa from Zuni. You gave a rather dramatic example of how the Zuni Tribe felt that they were cut out of a project and the planning was going on and you were able through NEPA to present your expert testimony. I believe you hired experts that would talk about the damage to Salt Lake and you were able to present that and over time turn around the Federal Government in terms of the approach it was taking, so it's a pretty powerful statement in terms of a Tribe being able to put forward something very specific that is very sacred to them. That Salt Lake, your Pueblos have been going there for centuries and you were able to achieve a success. And my question is if you hadn't had the NEPA process and you've watched how sometimes with projects that the Federal Government moves forward on, how they can move forward very quickly and the other industries that are involved with those projects, do you think you would have been able to achieve this result that you talked about in your testimony?

Mr. SECIWA. No. NEPA really gave us the authority to question and to ask specific questions in regards to the exercise that the Federal Government, the Bureau of Indian Affairs and OSM, the Office of Surface Mining went through in terms of appealing their trust responsibility duties to our particular nation.

However, NEPA and the Pueblo Zuni efforts was not alone in this effort to stop this coal mine from happening and destroying a very sacred area. It also took the voices of thousands of people from throughout the country and abroad as well to be able to go before some of your Members of Congress, to make sure that your congressional delegations, our congressional delegations, make sure that the Department of the Interior, through OSM, through BLM, through BIA and all the alphabet soup under the Department of the Interior that has an impact on Native American people and lands, really lived up to their trust responsibility and adhere to all of the provisions that we asked for to be justified in this development.

Mr. UDALL. Thank you very much for that answer. Councilor Heinrich. You talked and mention that in your experience the NEPA process leads to final outcomes that have community buy in. Do you think the Federal agencies have an incentive to seek this kind of buy in absent NEPA? And for example, to your knowledge, were Federal water projects in the West sensitive to the needs of local communities prior to 1970 when NEPA was adopted?

Mr. HEINRICH. Thank you, Congressman Udall, Chairwoman McMorris. I actually was very interested in the example that Mr. Madrid from Congressman Udall's office brought up because I've been aware of the Jetty Jack situation for a very long time and they are a situation that causes a lot of problems for fire fighters.

Mr. UDALL. Just for the record, it is Mr. Madrid from Congresswoman Wilson.

Mr. HEINRICH. I apologize.

Mr. UDALL. That's OK, I didn't mean to interrupt you there.

Mr. HEINRICH. Mr. Tito Madrid from Congresswoman Wilson's office. And that was actually an outcome that I think happened, in part, because it was a quick decision made at a time when the Bureau of Reclamation and the Army Corps of Engineers and some

of those agencies didn't have to comply with NEPA. And those particular structures were put into the Rio Grande through the heart of Albuquerque and in many other places without any thought to what the long-term consequences were going to be.

The City, as well, as many other Federal agencies are now in the process of removing those and looking at how do we best keep our Bosque forest both healthy and less flammable because as Mr. Madrid mentioned, as you have this conversion, that is very much the—in part, the outcome of Federal water decisions. We have a less healthy forest, but we also have a much more dangerous forest and I think that could have been avoided with the kind of analysis that NEPA includes.

I think very much in terms of the drinking water case, that was an enormous project. It's a project where inherently no matter what decision the City of Albuquerque, the Albuquerque-Bernalillo County Water Authority and other decisionmakers made, there were going to be people who were not happy with the outcome.

I'm sure there are some people, some river advocates are very unhappy that there's a diversion structure at all, but we have one of the most flexible in terms of management responsive to the needs of wildlife and irrigators than other structure that you can imagine, a structure that is safe for people who use the river. A lot of changes were made and a lot of things were incorporated into that project because we had everyone at the table and we were forced to do that. I think sometimes it's very hard to get everybody to the table unless you have to. And usually, whether the people at the table agree with you or disagree with you, I very much believe that their input is valuable and we need to listen to everyone.

Mr. UDALL. Thank you. And we've seen the same kind of buy in with our water shed thinning up in the Santa Fe watershed.

Mr. HEINRICH. Exactly.

Mr. UDALL. Where it took a period of time and you had a large range of opinion, but people came together and came up with a project where there was no litigation and it was really truly something that led us forward, so I appreciate your comments there.

Ms. MCMORRIS. Thank you. Mr. Cannon.

Mr. CANNON. Thank you, Madam Chair. This has been a very interesting panel. I want to thank all of our panelists. I remind you that your whole statement will be included in the record and reviewed. It's been very interesting. It's been a pleasure to be here with you. I think there's a consensus, not on everything, but certainly on the fact that we can improve how we apply NEPA at least and probably some changes are appropriate.

I couldn't help thinking when Ms. Budd-Falen was speaking that as a multi-generational rancher and we have three here at least, there's a problem. You have to have a lawyer in the family. You have to pay your death taxes if you're going to pass it on and that means you take an integration operation that probably works pretty well and in effect, the financing. I guess that's why you need a banker in the family as well.

Ms. BUDD-FALEN. That's correct.

Mr. CANNON. And so if we're going to have a family ranch which I think is important to America, if we have a whole bunch of burdens, I'd like to just ask anybody on the panel if they'd like to

respond, in the minimum, what do we do to deal with this pile of documents in front of Ms. Budd-Falen? In other words, it's one thing for a city to spend its resources to come to a conclusion or a tribe to deal with a problem and these are all appropriate, but what do we do when we put a burden on family ranching or farming that results in dealing with a pile of documents like this? Does anybody want to address that?

Yes, Mr. Shipps.

Mr. SHIPPS. If I could, Mr. Cannon, it seems to me that the issue as it applies to the particular family shows how burdensome NEPA can be, but at the same time and this is the difficulty, I'm not providing an answer, but pointing out the difficulty. If you also take the testimony of Witness Blancett and then talk about cumulative impacts and each of those—which is right now, NEPA requires that you measure not just the direct, but also the indirect and the cumulative impacts of Federal action, you get to the point where proliferation of individual decisions, even though it may be the family farm is very intrusive as to them, ends up being something that is demanded to be evaluated by citizens' groups who are trying to look at a bigger picture than what's happening on that family farm. That's part of the difficulty.

Mr. CANNON. That's exactly the issue. I think you've stated it very, very well, very articulately. What do we do in the process when the larger good requires an extraordinary burden on the individual farmer, rancher or family business?

Ms. Budd-Falen?

Ms. BUDD-FALEN. For the family rancher, one of the problems that we have is you analyze the same decision so many different times. For example, if I've got a term grazing permit on Federal land, grazing on the Federal lands in general is going to be analyzed through NEPA, through a land use planning process. Those are very big documents. They analyze whether grazing should occur on a national forest or a unit of BLM land and grazing is absolutely analyzed there.

Then you have to go through a second NEPA analysis on my term grazing permit, when you've already analyzed whether grazing should occur on a national forest or a unit of BLM land and grazing is absolutely analyzed there. Then you have to go through a second NEPA analysis on my term grazing permit, when you've already analyzed whether grazing should occur on all of these allotments, in general. Already done cumulative impact analysis, and already looked at socio-economic analysis. Then so I as a rancher have to comment on the big land use plan. Then they do another NEPA analysis over land that they've already analyzed in the same NEPA plan. Then, if I decide to do an allotment management plan, I have to go through my third NEPA analysis on the same cattle operation, on the same grazing. You have to go through the big cumulative impacts analysis. You have to go through all of the various burdens, so I think that one of the things that would help family ranchers and farmers, quite frankly, is only make us go through the process once, not over and over again on the same grazing allotment.

Mr. CANNON. Thank you and of course, we're talking about family farmers and ranchers who have the particular burden of death taxes and destroying a family operation.

But the same thing goes, I think, and having worked with the Bill Barrett Corporation and various other corporations who are dealing with gas discovery, the cost is remarkable. In situations where we don't—I think there ought to be consensus, except by those extremists who don't want us to have oil and gas, who celebrate the $2.50 that we're now paying for gas at the pump and who don't want us to develop it whereas there are many ways, as I think it has become evidence that we can make this process work better without violating some of the ideas that have been presented.

I'd actually just like to end by reminding you all of what Tweeti Blancett said because it's what I said to start and that is that many in this room, living in the West are no longer Republicans, Democrats, liberals or conservatives, environmentalist or ranchers first. We're Americans. We want to protect our land. We also want to balance these issues thoughtfully so that we have oil and gas at a price that makes sense so that we have beef at a price that makes sense, so that we have ranchers that don't get driven out of business, so that we have a society that actually works well.

So I want to thank our panelists, Mr. Grijalva, Mr. Udall, Madam Chairman for holding this hearing and I yield back.

Ms. MCMORRIS. Thank you. Mr. Grijalva.

Mr. GRIJALVA. Thank you, Madam Chair. Let me, if I may, I'm going to direct this one to Mr. Brown. In your testimony and I think it was repeated by Mr. Fraley or someone else also said the same thing, that part of the issue we're dealing with here, other than the obvious is the issue of cost and that is that the NEPA process and the agencies do require additional resources and those resources are not there. Potentially, that could expedite, it could make things more efficient and I think we all tend to agree with you on that point.

But I was going to ask were you aware that on July 19th, the BLM announced it planned to charge permit applicants fees to cover the cost of permit approvals and then use the revenue to make the approval process more efficient and there are different scales to it, energy exploration, you know, unintended costs, family farm and the grazing issue, and attendant costs. Were you aware of that?

Mr. BROWN. Yes, I was, Congressman, and in response to that we were concerned about that in terms of that cost recovery proposal. First is the fees seemed exorbitant. They would escalate. There's also a provision that they could go in and adjust these any time they want.

I think the important thing to remember——

Mr. GRIJALVA. The consequence of that opposition is now in the energy bill we passed, there's a prohibition on Federal agencies to do any cost recovery in terms of the work they need to do in this NEPA process.

Mr. BROWN. Right. I haven't seen exact language, but I can tell you this, is that the oil and gas companies have spent untold millions of dollars doing things that the agencies were charged to do

such as archeological clearances before we go out and do any surface disturbance. We have to have an archeological clearance. There's sometimes—in fact, almost now, it's almost mandatory. We have to get threatened and endangered species clearances done. And we also pay for a lot of the third party NEPA analysis, whether it be an EA or an EIS. And some of those costs for an EIS, a complex EIS on a project level can easily exceed $1 million.

So that's the reason why there's concerns from industry about how that proposal was put together was because we already pick up a lot of the costs to operate on public lands.

Mr. GRIJALVA. So in effect, BLM is attempting to do—to implement a plan that some have suggested and you suggested earlier in your testimony to increase the funding for the NEPA process, get stopped. So if the users who benefit from these permits—if the users don't fund the process, that leaves the situation where it is and that's the taxpayers funding that.

Mr. BROWN. Well, one of the options could be if fees were collected, if they could be returned back to the office where the work is being conducted, that would certainly be one thing that would make it look more advantageous. The problem is that the way those funds were originally as we understood it, they would go back to the general treasury. So again, putting it back in the office where the work is to be done would be one advantage.

Mr. GRIJALVA. Last point, as far as you know, has your company ever been a plaintiff in litigation where NEPA was one of the causes of action?

Mr. BROWN. You mean in terms of being appealed by outside groups?

Mr. GRIJALVA. Yes.

Mr. BROWN. Yes sir. Our projects have been subject to litigation.

Mr. GRIJALVA. So you were a plaintiff?

Mr. BROWN. No, we were the person proposing the project, so I don't recall any cases where we have actually filed actions against the Federal Government for a NEPA decision as I can think of. But we have been subject to litigation from protesting or litigants against our projects.

Mr. GRIJALVA. I just had a point, Ms. Montoya. I thought your testimony was good and I think you made a distinction and I think that distinction as we go through this process is a very important distinction. Part of the drive that got us here has been gas and oil. I'll just be blunt about that and the present stewards and a lot of other users are the ranchers and the farmers. And how this—how these hearings, whatever comes out of this hearing balances those two and that's why I appreciate your testimony, how to balance the exploration and development demand on the part of energy versus quite frankly, the need to protect way of life and industry and an economic base there for many, many families, so I appreciate your testimony.

I yield back.

Ms. MCMORRIS. OK, thank you. Mr. Brown?

Mr. BROWN. I just wanted to clarify a question from the Congressman. When he asked about litigation, there have been cases where BP has joined them on administrative appeals of decisions from agencies, but we have not gotten the point of actually getting

into litigating the case. It's been through administrative process through the agency, just so just to clarify that answer. I'm sorry.

Mr. GRIJALVA. OK, thank you.

Ms. MCMORRIS. Thanks. Mr. Bradley, I wanted to just get a little deeper into what you had suggested as far as the state's role in NEPA and I wanted to ask does New Mexico have a similar like State Environmental Policy Act? I know like Washington State does and some of the other states do. Does New Mexico have such a similar law?

Mr. BRADLEY. We do have and through the Environment Department, we have our environmental checks and balances and laws, but it's not as extensive as the NEPA process. The NEPA process is certainly much more broad and frankly, my experience through it after taking a joint lead, I don't see anything wrong with it other than the two things that I discovered as we went through that. So the biggest problem is that the Federal agencies will go to a state agency and ask for help without the Administration even exactly knowing what's going on.

So there's kind of a cloaking that's going on that we discovered when we went through the process and I think that all should be wide open. But we do have some processes and in our case we did have a conflict in one of those that we worked through with the Secretary. But had we not taken joint lead, we would not have had that ability.

Ms. MCMORRIS. Can you share why you were first denied that joint lead status?

Mr. BRADLEY. Well, yes. They didn't want us to do it. They just flat said we don't need that and I said—I had to pull out the law and the regulations and point it out to them. Frankly, their first go at us was they did not see a need for the state to take joint lead because after all, they would use cooperating agency status with different people. But then my investigation, I found out that that's where they didn't exactly open the door. They picked who they wanted cooperating agency with, so frankly, we had to pursue it with vigor, I should say and bring our congressional delegation in on the request and then it was done. But it took a lot of effort to make it happen.

Frankly, my personal belief is Federal agency did not want the state to have that open door, being a full partner, that means and this is what we discovered and that's the reason it worked, that means the state will have access to all the data that the Federal Government is going to have and so there wasn't any cloaking. There was no hiding of any of that information. And that's how, as I pointed out, the OVR data. In the past, that would never have surfaced had we not had joint lead, because I asked what data are you using on migration of wildlife. And that's when they brought this in in the State of New Mexico. Dr. Fowler at New Mexico State did three-year study of migration of wildlife and I brought that forward and said unless you can counter this, I don't believe we're going to agree to fences or gates.

Ms. MCMORRIS. And you think further defining of what kind of science we use, the sound peer reviews might address some of those?

Mr. BRADLEY. Definitely, definitely. The silvery minnow was a great case in point. We have the conservancy here, but the first issue on the silvery minnow that was brought to the State of New Mexico from the U.S. Fish and Wildlife was that our first response, when I asked where did you get the data to declare a critical habitat area, they said you provided it. I said oh, OK, where? They told me and I went there and I'm still waiting for that data. It has never shown up because we didn't do it. Therefore, it took a Court case to discover that the initial data that the Federal agency used was a master thesis. But we don't need to go through that. We don't need to spend taxpayers' money on Court cases.

Get good, sound peer-reviewable science when you're doing these assessments and you'll eliminate all of those kind of problems, but it goes away because then how do you challenge that? I've had several examples of that through the eight years that I was Lieutenant Governor.

Ms. MCMORRIS. Good, thank you. I wonder how much time I have.

Mr. UDALL. You have 12 seconds.

Ms. MCMORRIS. OK, then I'm going to go to Oregon, while I have the yellow light and ask one question. And I appreciate you making the trip today. I was really impressed with the group that had come together in Oregon that was such a broad-based group to really look at what was going on with the forest as it related to, especially fires and I wanted to ask if you had ever requested one of the expedited—when we were in Texas, we heard where the Forest Service came in and asked for an expedited—what were they called? Alternative arrangement where Council on Environmental Quality could come in and make a quicker decision. And this was related to blow-down with trees.

But I was just wondering if you thought that reforestation should be subject to that kind of review and process, rather than the whole EIS process and if you had requested any kind of alternative review?

Ms. KUPILLAS. No, Congresswoman McMorris. We've tried to stay out of the politics of actually being actively involved in any of the forest processes themselves, but just trying to get at the regulatory language. We believe that that process could be used to expedite recovery in the forest, however, CEQ has chosen never to use it and CEQ also—even though we believe that they have the authority to. So I think they probably need some more direct authority to tell them to be able to use this.

Ms. MCMORRIS. OK, thank you.

Mr. UDALL. Thank you, Lieutenant Governor Bradley, your idea on this co-lead which sounded like it ended up with a good result, I'm trying to think it out a little bit further into other Federal agencies and I'm wondering what you would think about in terms of co-leads with the Department of Defense in managing a military facility. Wouldn't we like to retain the discretion over granting co-lead status in that kind of situation where you have the expertise in terms of the agency and not give a blanket. If your suggestion were adopted, would you give some kind of flexibility there, rather than making it mandatory across the board?

Mr. BRADLEY. Well, I think, my suggestion, Congressman is dealing with NEPA, with the NEPA Act. It's not going into Department of Defense, other than if it's an environmental issue with a Department of Defense, and we've had plenty of those particular battles, however, the Department of Defense base, as you well know, is excluded from most of those issues and at that point if and when a base is—as we're going through right with the BRAC, if a base is closed, then there is an environmental issue and it usually gets a lot of money that you have to contend with on how to clean up because in many cases they get swept under the door until that happens. We've had that experience before here in the State of New Mexico. So I don't have a problem in giving them an exclusion unless it fell under NEPA and I don't see the difference between a military base having to follow NEPA as well as the rest of the United States.

Mr. UDALL. One of the remarkable things, and you mentioned about the Department of Defense and their review processes is that they have been one of the agencies that has been the most successful in terms of recovering and moving forward with endangered species issues. On many of their bases they have endangered species issues and they work in a very disciplined way to try to do something about it. It's remarkable to me to see when many of these folks come before our committees in Washington, how dedicated they are to following the law and when they put their mind to it, the results that they can get. They're clearly involved in that.

Let me shift over to Tweeti Blancett. I know that you and your husband Lin have over several generations worked the land and cared for the land a lot and as a rancher in northwestern New Mexico have a great deal of concern as to what you're seeing.

Could you describe for the panel a little bit of what you were trying to portray by putting that on the front of your testimony there? You didn't talk about it that much in your actual testimony, but could you tell the panel a little bit and that's exactly, Madam Chair, what we're looking at.

Ms. BLANCETT. Sure. This is our grazing allotment that's been our family since the 1800s. We were there before tailored grazing. And before NEPA and before FLPMA. So we have a long heritage in this area.

If you notice the red up in the northwest corner, that's where our ranch headquarters are. It's along the Animas River and something that I would like—you have an arrow pointed to the northwest corner of the map.

Do you need one, ma'am?

Ms. MCMORRIS. No.

Ms. BLANCETT. OK.

Mr. UDALL. She's got one right there.

Ms. BLANCETT. That is the only bench in the entire San Juan County, along the Animas River that has not been breached. It is protected with NEPA. We've used NEPA for the last 25 years to keep that protected. Not that we're against oil and gas development. We are against it not being done correctly, but we're not against oil and gas development. But I think you can see, this is 32,000 acres, 95 percent of it is Federal land. There's 500 wells,

800 miles of road and 11,000 acres of the 32,000 acres are impacted by pipelines.

When I made my statement that multi-use and split estates are going to be coming to you, because you are our Congressman and Congresswoman to make decisions on all across the West, I want to show you where the impact has made ranching and multi-use in this area. I'm not talking about other ranches in San Juan County. I'm talking about the fairway of the largest oil and gas field in the entire United States.

When you have impacts like this, it's so fragmented that you can no longer conduct a viable ranching enterprise. And you are going to have to be making decisions and as you look at NEPA, I hope that you will look at cumulative impacts long range because this map tells you what the roads, the pipelines, the well locations, the noxious weeds, the contamination are going to be, not just here in Northwest New Mexico, but across the Rocky Mountain West where we have extensive development.

It can be done right. It is being done right in certain places on my ranch. But it isn't being done in the majority of cases on my ranch. And not because it can't be done, because industry is choosing not to do it in certain places.

Mr. UDALL. Thank you.

Mr. CANNON. Can I just follow up on this map, Ms. Blancett? Do you have any ranching operations in Colorado, Utah or Arizona or are you all in New Mexico?

Ms. BLANCETT. Now I'm all in New Mexico. I was in Colorado on a Federal forest grazing permit.

Mr. CANNON. How far is your northern border from Colorado?

Ms. BLANCETT. Actually, the Ute Reservation is my neighbor. That is the Colorado border.

Mr. CANNON. Do you have any school trust lands on your ranch?

Ms. BLANCETT. On this ranch, there are five sections of school trust lands, yes. With—we have the grazing permit on.

Mr. CANNON. And have those been developed?

Ms. BLANCETT. Yes, everything has been developed.

Mr. CANNON. I just want you to know that we care about our school trust lands in Utah. We're going to try to consolidate them so we can get some of that oil and gas out and pay for our school kids.

Ms. BLANCETT. Certainly.

Mr. CANNON. These wells were drilled over what period of time?

Ms. BLANCETT. They started drilling on our ranch in 1952.

Mr. CANNON. And I take it all the white little squares that you see on here, are those drill pads?

Ms. BLANCETT. Those are drill pads, compressor stations, water disposals or pipelines or compressor plants.

Mr. CANNON. I suspect if these were drilled today that many of those sites would be—you would reduce them by two or three or four or five, to be one fifth or so. It's just that we're doing some new development in Sevier County, Utah, the biggest new oil find in America is there and they've got 12 wells, 10 or 12 wells on about what is claimed to be about two or three acres in two different sites.

I suspect that if we were drilling these today, that we'd have many fewer sites. Maybe Mr. Brown, you could comment on that?

Mr. BROWN. Yes. Just like Mr. Fraley was talking about earlier and I'll probably defer to him to answer this as well, but we are trying to consolidate our operations to try and reduce our footprint as small as possible and that's one of our goals and objectives as we have anywhere we're operating today.

A lot of these are older wells that were drilled many, many years ago as Ms. Blancett mentioned, but we are trying to consolidate and reduce that footprint.

Mr. CANNON. Thank you, Mr. Zavadil, how does the cost of NEPA delays you face translate into costs for consumers?

Mr. ZAVADIL. Natural gas is a unique commodity in that it's very inelastic, both on the supply and demand side. The very small change in the supply of natural gas has a disproportionate effect on the price. Over the course of the last two or three years, four years, we've lost about 3 to 4 percent of the supply in this country and prices had increased by a factor of 300 to 400 percent. We were literally looking at $2 an MCF gas. Three years ago, we lost 30 percent of our supply and that price has tripled to over $7 in MCF at this time.

So through the NEPA process, if natural gas development is slowed and it takes a very small change in the rate of production of the natural gas to have a dramatic impact on the price paid by consumers, if we could increase the rate of production of natural gas by 1 percent a year in this country, just a very small incremental change in increase in production of gas and given the fact that a lot of it comes from Federal lands, that's possible. We could say about $20 billion to consumers. It's about $100 a family a year.

Mr. CANNON. A hundred dollars a family a year, thank you. That's very helpful. I think there's a consensus that we know where a lot of oil and gas is. We ought to be able to get it and do it thoughtfully and as a matter of fact, getting back to Mr. Bradley, your point, you were incredibly articulate. I loved your terms cloaking and hiding and you're tying that sanction. We passed the Data Quality Act, but we haven't done a very good job of enforcing that and that's what gives you the right to get that data.

May I just suggest to you and for the record that in fact, what we need to be doing with data is since peer review is difficult, you've got to make decisions on what data you have. Let's at least be transparent about what we have so if it's a master's thesis, we get to ask the guy who did the thesis who his advisors were and what his criteria were and see the data so we can reevaluate the data.

Mr. BRADLEY. Exactly.

Mr. CANNON. In other words, if it's not worth doing with a peer-reviewed article and we have something, let's at least let the people who want to comment see the data and the biggest problem we've had in my experience with many of the recent debates, including global warming is the hiding of the data, so they're not transparent, so we can't review it. And so let me suggest that the transparency of data and the Data Quality Act are vitally important in how we make NEPA actually work.

Let me just ask for the panel anyone who would like to ask, what the effect of requiring participation in the NEPA process would be as a requirement to appeal the result that would encourage participation, but it would also limit the amount of litigation subsequent. Any comments on that? And I yield back in anticipation of the answers.

Mr. BROWN. I'll try and answer that one. The way the delay works right is that to be a person that's going to appeal or is going to litigation as I understand it is you have to participate in the public comment process. In other words, once a draft is issued, you have to submit comments on that draft and then from that depending on how the final document comes out, you can go through and protest or challenge any content that you have problems with.

That seems to work well. It does encourage participation by interested parties, but that is typically the way it works now and I'm not sure that particular action is reducing any litigation, I can tell you that. But it is the way it works now.

Ms. BUDD-FALEN. Actually, it depends on the administrative agency and the regulatory requirements of the individual administrative agency. When you litigate over a Federal agency action, you have to exhaust administrative remedies. Some of those administrative requirements require that you comment on the draft before you can appeal the final and go through the administrative process before you can get into Federal Court. Some administrative agencies don't, however. Some administrative agencies, you don't have ever had to look at the document, you simply file your appeal, get through the administrative process and go on to Federal Court. So really, the comment part is not a product of NEPA, the product of the Administrative Procedures Act and whether the APA applies.

But I would absolutely agree that so far it doesn't seem to matter in terms of litigation, because all you have to do according to the Court's to participate in an APA process is your issue had to have been raised somewhere, whether it was by you or someone else. So you just look at the comments, find somebody else who complained about the same thing you wanted to complain, off to Court you go and I don't—I think that maybe that should be strengthened to sort of limit some of the litigation, but right now it doesn't seem to matter. We can litigate over anything.

Ms. MCMORRIS. Anyone else? Yes?

Mr. BRADLEY. Madam Chairwoman, the only thing I'd follow up with that is if we had access to this fuzzy science, maybe we would eliminate a lot of those lawsuits that we're coming out there.

Ms. MCMORRIS. Mr. Grijalva.

Mr. GRIJALVA. Thank you very much. Mr. Fraley, let me just ask you two or three questions. In a press release dated July 28, 2005, your company announces four consecutive quarterly earnings record. The release also announced that your total production increased 4 percent to 2879 million cubic feet of natural gas equivalent per day which is an all-time quarterly volume record, according to your release. In effect, then Burlington is producing more gas and earning more revenue than ever.

So my question is this, how should this Task Force square these facts with your testimony regarding the burden created by NEPA

compliance? I think you're doing well and you told us NEPA was holding you up.

Mr. FRALEY. Well, I think we are doing well and I think part of that is because of the dramatic increase in price that we've seen. In terms of production increases that we've realized in the last few years, a lot of that has occurred in South Texas, Oklahoma, Louisiana and more particularly Canada. Our gas production in the Four Corners area has been flat to down. Last year, we kept virtually flat. This year we're down some. And so it's been, in other areas where we don't have as much operations on Federal lands.

Mr. GRIJALVA. That same release does say that the production from the San Juan Basin was down last year, but lists unscheduled maintenance performed by pipeline companies serving the area and lingering impact on unfavorable weather earlier this year is the reasons. And I'm begging the question, if the NEPA compliance has serious impact on production, why is it not mentioned in this press release for the San Juan Basin?

Mr. FRALEY. I think when we mentioned impacts to production, we mentioned the major issues and the major issues have been weather and impact from the companies that we work with to get gas to market and the weather has had a huge impact on activity as well.

Mr. GRIJALVA. Thank you. I'm directing the questions, thank you. I have a couple of questions, given the limited time.

Ms. Kupillas, Communities for Healthy Forests. I think one of the central points, as I read and listened to your testimony and your written testimony is that EIS on logging after the Biscuit fire took too long and that length of time is the problem. Am I correct?

Ms. KUPILLAS. Yes. You're absolutely correct. In fact, I have a news article that came out Saturday, July 30th where the Federal Judge dismissed the lawsuit. This is three years after the fire which is too late to actually recover any of the material out there.

Mr. GRIJALVA. Let's talk about that recovery. The Forest Service released a scoping proposal March of 2003, I think it was less than six months after the fire for logging about 90 million board feet. The Forest Service had a draft EIS that was ready by July 2003, 10 months after the fire. They withheld releasing that report for about four months to wait for what is known as the Sessions Report. What is the Sessions Report?

Ms. KUPILLAS. Dr. John Sessions is a scientist from Oregon State University. He's a forest economist. And Doug Robertson, a Commissioner from Douglas County had asked that he look at what are the economics of the burned over area. Should we remove the dead material——

Mr. GRIJALVA. And that's one of the recommendations of 90 million to 2 billion in board——

Ms. KUPILLAS. It wasn't actually a recommendation. He actually answered a question about what are the economics, what are the economics of the Biscuit fire if we are to look at it purely as an economic issue. We realize that 50 percent of the burned over area—55 percent of the burned over was wilderness area and so that was excluded from any kind of removing dead material whatsoever.

Mr. GRIJALVA. OK, and then the Forest Service released another alternative which was, I think, 500 million, right?

Ms. KUPILLAS. Right.

Mr. GRIJALVA. And that is the one that is the preferred alternative and that's the one that drew so much public comment and litigation that you spoke to?

Ms. KUPILLAS. Exactly.

Mr. GRIJALVA. I don't know if that is necessarily a NEPA issue as much as it was a little over reaching on the part of the Commissioners, on the part of the Forest Service and the Commissioners, appropriately so, interjected themselves in the process and saying we have a different recommendation that is insisting on more recovery and more logging.

Why does NEPA bear the responsibility in this instance for the delays as much of the litigation was caused by that action that I'm trying to outline here?

Ms. KUPILLAS. It depends on your viewpoint. I believe that a lot of delays were because the NEPA analysis, actually, they got through it in a fairly timely manner, but it was the lawsuits afterwards and increasingly, the lawsuits that came after the NEPA process that were appealing the procedural issues involved in that. It wasn't necessarily the board feet, it was appealing the procedural issues in NEPA that caused the lawsuits, and then, of course, they were proven, they were dismissed by the Courts. And so the people who used NEPA delayed long enough that there's no value out there and so they know that the logging will not occur now.

Mr. GRIJALVA. Thank you. Madam Chair, I cutoff counsel here, he was trying to answer a question. Will you indulge me?

Ms. MCMORRIS. Yes.

Mr. SHIPPS. Yes. I just wanted to add that with respect to the San Juan Basin and particularly with respect to coal bed methane development, a large portion of which is located on the Southern Ute Indian Reservation, we are now seeing declines on an annual basis that vary between 7 and 12 percent declines with respect to existing production. So it's not just a question of having marketing facilities being down on a temporary basis, it's the resource itself that's being depleted. It's a finite resource.

In Colorado, there's a proposal right now that's pending to increase the density of drilling in order to increase the ultimate amount of recovery that can be obtained relative to that resource, but in light of the new kind of technology that's being developed, any of those new wells are going to be located on existing well pads and simultaneously the Southern Ute Tribe has recommended that as a condition for going forward, all existing compressors in this area adopt the best new technology, and we actually think we're going to end up having cumulative recovery of air quality by imposing that not just on new facilities, but on existing facilities in the same area and still obtaining increased development.

Mr. GRIJALVA. Thank you. I yield back, Madam Chair.

Ms. MCMORRIS. Well, as often happens at these types of events, we never have as much time as we would like. And I, unfortunately, am on a tight time schedule myself. So this—I'm going to ask if we can just ask, if you have concluding remarks or a burning question, we'll do one more quick round and then we're going to have to wrap it up.

Mr. UDALL. Thank you, Madam Chair. Let me thank you once again for this hearing and all of the witnesses that have come here today.

There is a question that's been raised that's a part of this and I'd like the folks from oil and gas and any other panelist to comment on. We've seen in previous testimony before this Committee and we've heard a little bit about it here, the idea of categorical exclusions and small amounts of land. I think it's in somebody's testimony today that where you have a well pad and five acres, and the road leading into that that maybe these should be considered as a categorical exclusion. And it seems to me the contrast and we've been educated today by a couple of the ranchers that have been here that it isn't just the issue of the one well pad, it's the issue of the entire basin or the entire grazing permit or whatever it is and the large, in some cases, large numbers of these five-acre well pads and roads and development.

So my question really is to all of you as a panel is how do we move forward on this? Isn't NEPA the process to look at the overall health of the land and the impact it's going to have, yet at the same time getting the production of oil and gas that clearly this country needs? I don't know who wants to lead on that.

Mr. BROWN. I'll address that because I have it in my detail recommendations to you. The categorical exclusion process is really designed to be a first look at a project proposal and decide whether or not it needs to be bumped up to an environmental assessment. There were a number of examples I gave. There's even more I can provide you, but the idea is to look at these on a case by case basis and for those who don't reach the level of environmental impacts being anticipated, they can either be mitigated. If they're very small, they can be mitigated. You move forward to categorical exclusion review and approve the project.

That was the intent of the proposal. It doesn't mean that you're not balancing environmental protection with development. It just means that you're looking at that project proposal and deciding whether it needs a higher level analysis.

Mr. UDALL. Thank you, Mr. Brown.

Mr. FRALEY. The only thing I would add to that is as Ms. Budd-Falen mentioned, one of the things we run into is that you have multiple levels of environmental assessment that occur, so when you do a resource management plan as has been done in the San Juan Basin recently, there is an environmental impact statement that goes along with that and as Mr. Brown mentioned, that's either good science or bad science as mentioned by Mr. Bradley, but you've got to determine beyond that how much more additional review is needed for each location that is then disturbed. And I think I agree with Dave in his comments as well.

Mr. ZAVADIL. I'll provide a third perspective from the oil and gas industry and that is that cumulative impacts are often analyzed in environmental impact statements. It's when we fall back to the individual site-specific analysis is where I believe the categorical exclusion is better applied. Ultimately, if you're developing thousands of wells, NEPA clearly is going to tell us to analyze the cumulative impacts of those actions, but it's down to that single well that's

being developed under the programmatic analysis that I believe the categorical exclusion could be best applied to.

Mr. UDALL. OK, thank you. Go ahead, Ms. Montoya.

Ms. MONTOYA. As a rancher, I believe that if we would—in our area we can consolidate—they come in and they're going to survey for a pipeline or a well or whatever, if they come out and talk to us and we can go over it with them and maybe pick a piece of ground that's not as—the grass is not as good and there's a place that's much better to put it. And we have done that a lot of times. And there's a window that they can move over. And if they follow the pipelines and the roads together, they can eliminate a lot of damage too.

So I think if they work with the ranchers first and let us help them, that is the part that we want to be able to do. I think we can eliminate a lot of damage because have—there's times that we have 10 wells coming in at one time and I mean there's a lot of damage out there. So we try to eliminate it and consolidate everything that we can to have it together.

Mr. UDALL. Thank you for those answers and as my closing comments just let me say when you have a law that's been on the books for over 30 years, it's very important for us to take a look at it like we're doing and this Task Force, I think, is undertaking its task in a very diligent way and you have really helped us out in terms of coming, many of you from long distances and providing testimony and so I just want to tell you in my closing that I really appreciate that and we look forward to working with all of you as we move forward with the Task Force recommendations and any kinds of legislative proposals that might flow out of this.

Mr. CANNON. Thank you. Let me just associate myself with the comments of Mr. Udall regarding his thanks to you all and utilization of this record and utilization of your testimony.

We live in an environment when you know you have a resource and you tap it, it declines and at the same time we have a market that's growing and so Mr. Fraley, I just wanted to follow up on some of the things you said and point out we live in an environment where technology does a couple of things. In the first place, it helps us get more out of the resource. And at the same time, it helps us find new resources, but it also helps us minimize the impact. And the key to all of this is to not have NEPA stop the process unduly. Let's be thoughtful about it. Let's take advantage of the new technology that helps us advance and bring down the cost of oil and gas.

Of course, we have two issues here that I think have become crystallized. One is that oil and gas and the other is with forests, the fact is timeliness is everything in a forest decision and to allow NEPA to continue to create an environment where we have trees rotting which means that we lose the value of those trees, but we also damage what forest remains. That's obscene. It's unconscionable. It may be OK if you've got a 10,000 year view of life, but for us who govern, we have a responsibility that's more contemporary than that.

It seems to me we've seen a couple of things here from this panel that really do require attention to what we need to do to change NEPA.

Thank you, Madam Chair. I yield back.

Ms. MCMORRIS. Mr. Grijalva.

Mr. GRIJALVA. Thank you. It's all those vowels. I want to ask Ms. Budd-Falen one question because Ms. Blancett's and Ms. Montoya's points are well taken and have you found it necessary to use NEPA, let's say to litigate on behalf of a farmer or rancher, plaintiff, represent them, let's say against an energy company? I'm just curious.

Ms. BUDD-FALEN. Yes. Those were not cases against energy companies. The cases I've been most involved with is the release of Mexican wolves and we have used NEPA in those situations because the ranchers firmly believed that the Federal agencies did not consider the needs of local communities. There were local communities and counties that requested joint lead agency and cooperating agency status that were denied in the NEPA process. And these were the counties that were right in the wolf recovery area and so we did try to use NEPA in those cases because we believe that the Federal agencies were so intent on releasing Mexican wolves that they overlooked a lot of the interest that the local communities and the people who live in those areas who would be living with Mexican wolves would have to endure.

Mr. GRIJALVA. So the adage what's good for the goose would not apply here in terms of there's some concern about the frivolousness of people using litigation. You just said you used it with a different purpose, but still the processes are available to you and the public.

Ms. BUDD-FALEN. I think you're talking about differences in degrees. You're talking about a Mexican wolf recovery program that covers two states, huge amounts of people, large amounts of area. That's one thing.

I believe that NEPA properly applies in that and that the public should be involved.

Mr. GRIJALVA. That's your major or minor issue?

Ms. BUDD-FALEN. But then you look at this huge stack of documents and we're talking about a mile of fence. And you still have to go through all this NEPA process. That's what I'm asking Congress to look at.

Mr. GRIJALVA. And your final work and your advocacy for ranchers and farmers, have you, irrespective of NEPA found it necessary to litigate against energy companies in terms of—Ms. Montoya just brought up, the lack of cooperation and consensus and working with the ranching families or the farmers that are already there on that land?

Ms. BUDD-FALEN. I'm only doing one case that actually does not—it's litigation against the Bureau of Land Management for lack of enforcement. That's the issue I have.

Mr. GRIJALVA. On an energy——

Ms. BUDD-FALEN. On issues regarding energy. The case is filed against the BLM, because we're concerned that once, just simply allowing oil and gas is one thing, but making sure then compliance is a whole other matter and that was the question.

Mr. GRIJALVA. I couldn't agree with you more. I could not agree with you more.

Let me just in a closing statement, and if I may, Madam Chair, maybe some information that would be useful for all the Task

Force members. This whole NEPA discussion, there's things that have been occurring in stand alone legislation, maybe an inventory or where that is. Executive Orders that Bush has—President Bush has been signing and issuing and their agencies and secretaries, the Healthy Forest Legislation and the points that it had in there about NEPA, the energy bill that was just passed, and the points that it had about NEPA; Department of Defense initiatives in terms of NEPA. I think that kind of inventory, maybe a thousand cuts will kind of avoid the bludgeon, but nevertheless, they're in it and I think that inventory will be good for the Task Force.

Thank you very much and thank you for your leadership and I appreciate and I appreciate the time that the witnesses all took to be here. Thank you.

Ms. MCMORRIS. Very good. I want to say a big thank you to all of you and as well as my fellow members that took time to be here today and I know you all took time to prepare testimony and the time to be here and we really do appreciate it. And the goal of this Task Force just is to gain a better understanding compared to what was passed and signed into law in 1970 and how is it being applied today on the ground. And I think it's well worth noting that we kind of—there's been bits and pieces in different laws and I think it would be valuable to do that inventory. I think that's why we're here today is because we've done it. There's been the effort within the Forest Service and there's been an effort within the energy bill and I think it pointed to the importance of us just taking the time to get a better understanding from the bigger picture.

One of the keys of NEPA is that it does mandate the public involvement, the public participation. But I think one thing I've learned is that it's not just producing a lot of paperwork and then asking for public input. How do we best go about involving the public from the very beginning so that the decisions are good decisions that are going to ultimately help the environment. And I think many of you had some recommendations that would be helpful to that. So that we move from confrontation to collaboration in our effort to protect the environment. And I think that's a goal that we all share. We've come a long way and I think it's important at times for us to acknowledge that we have improved and that science technology is leading us to even more greater uses and applications as we work through all of these areas.

So anyway, again, thanks for being here. We appreciate your testimony. If you have further comments, there may be—we may ask you questions following this hearing. We would ask you to respond in writing. We encourage you to tell others about our website or if you have others that would like to—we're seeking input from everyone.

Thanks again. We appreciate your being here.

[Whereupon, at 12:57 p.m., the Committee was adjourned.]

[NOTE: Information submitted for the record has been retained in the Committee's official files.]

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