

**CONSOLIDATION OF THE OFFICE OF SURFACE
MINING RECLAMATION AND ENFORCEMENT**

HEARING
BEFORE THE
COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

TO

RECEIVE TESTIMONY ON THE SECRETARY OF THE INTERIOR'S ORDER
NO. 3315 TO CONSOLIDATE AND ESTABLISH THE OFFICE OF SURFACE
MINING RECLAMATION AND ENFORCEMENT WITHIN THE BUREAU OF
LAND MANAGEMENT

NOVEMBER 17, 2011



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CONSOLIDATION OF THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

THURSDAY, NOVEMBER 17, 2011

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room SD-366, Dirksen Senate Office Building, Hon. Jeff Bingaman, chairman, presiding.

OPENING STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

The CHAIRMAN. OK. Why don't we get started here. This is a hearing of the Senate Energy and Natural Resources Committee to receive testimony on the Secretary of the Interior's Order No. 3315.

It is an order to consolidate and establish the Office of Surface Mining Reclamation and Enforcement within the Bureau of Land Management. The order was signed by Secretary Salazar on the 26th of October.

I hope we can all learn more about the purposes and likely effects of this reorganization from the witnesses today. I've heard concerns expressed regarding this reorganization. Some believe that consolidating the Office of Surface Mining within the BLM could serve to diminish its role and mission.

Others have expressed concern that the reorganization injects uncertainty as to how the program will be administered.

The Surface Mining Control and Reclamation Act of 1977, which is OSM's organic act, was a product of this committee's labors, as well as, of course, the House Committee on Interior and Insular Affairs.

The Surface Mining Act was neither hastily written nor lightly considered, according to then Representative Mo Udall, the bill's principal author. Here's a quote from his statement, "It took 6 years of tenacity and bitter debate to pass the act involving 183 days of hearings and legislative consideration, 18 days of House action, 3 House-Senate conferences and reports, 11 conference reports, 2 Presidential vetoes and about 52 recorded votes in the House and Senate."

The Surface Mining Act sets forth provisions particularly relevant as we consider the Secretary's order.

First, that act explicitly establishes an Office of Surface Mining Reclamation and Enforcement within the department. The statute

also requires that the director of OSM be appointed by the President and confirmed by the Senate.

Also note, the Surface Mining Act prohibits the transfer of coal-development functions to OSM. Given this provision, it's perhaps difficult to believe that Congress intended OSM to be an office within the BLM. Indeed the provision that prohibits the comingling of coal development and OSM's functions argues against this result.

Again, I look forward to the testimony from our witnesses and look forward to gaining a better understanding of the Secretary's order, both from a procedural and substantive perspective.

I thank the witnesses for being here and all others who are present today.

Let me call on Senator Murkowski for her comments.

**STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR
FROM ALASKA**

Senator MURKOWSKI. Thank you, Mr. Chairman. Welcome to those on both panels here this morning. I thank you, sir, for setting this hearing this morning to conduct some oversight on the recent order for OSM to be merged into BLM.

From the outset, I do want to make clear that I do appreciate one part of this announcement that was included in the memorandum from Secretary Salazar about making the government work better. I think that's a goal that we certainly all share. We always look for ways to make our agencies more efficient, less costly, and we should welcome the participation of the people who actually work there.

Streamlining the Federal Government is something that we should all agree to strive for, right now especially, as we're grappling with so many of these decisions related to our budget and the Federal debt.

The problem is that not every idea that emerges is going to deserve implementation, so we need to be careful to filter the good from the bad. From what we've seen so far, the secretarial order to merge OSM into BLM, in my opinion, falls into the latter of those categories.

I'm not convinced that the order is legally valid or good public policies. The committees of jurisdiction were not consulted, but left in the dark, and the department's rollout, I think, has created some confusion and uncertainty.

Now, I initially understood this would be a merger of administrative functions, and I think some of us may have supported that, but what was publicly announced was far more extensive. It seems clear that the plan would first require Congress to amend the separate organic acts that are establishing BLM and OSM.

My skepticism deepens when we take a look at what this could mean for policy implementation. OSM was specifically established as a separate entity reporting directly to the interior secretary to protect its independence as a regulatory body, and that independence needs to be protected.

What's more, the proposed merger of BLM, the entity responsible for leasing, and OSM, the regulatory body, is directly contrary to the arguments that we heard last year when the administration

sought to separate the leasing and the regulatory functions of the former Minerals Management Service.

Secretary Salazar submitted written testimony to us last summer asserting, and I'll quote him here, "I intend to restructure MMS to establish a separate and independent safety and environmental enforcement entity. We will responsibly and thoughtfully move to establish independence and separation for this critical mission, so that the American people know that they have a strong and independent organization holding energy companies accountable and in compliance with the law of the land." That was his quote.

Suffice to say I'm curious to hear why the department apparently wants to move in the opposite direction now when it comes to OSM.

Finally, from a process standpoint, it's tough not to be a critic. Few details and even fewer justifications have been provided about how this order will be carried out or even why it's warranted. Neither Congress nor stakeholders were consulted or notified that this order was in the works.

Today, it remains entirely unclear how the department plans to consult with Congress, even though the order says that that should happen, and whether or not public comments will be allowed.

The reaction to this order, Mr. Chairman, I think you have noted, has been virtually unanimous and almost entirely unfavorable. It looks for all the world like the decision was made to merge OSM into BLM before much thought was given to whether those agencies could be merged, whether they should be merged and how that would actually be accomplished. So that's not a particularly good start here.

Even before the Secretary signed this order, there were obvious problems at OSM where an independent contractor who was hired by OSM to analyze new coal regulations was subsequently fired for projecting massive job losses as a result of the rules. None of us likes to hear bad news, but the proper response is not to shoot the messenger.

So, to me, it makes more sense for this committee and the department to get existing agencies operating properly before we start talking about combining them.

So, Mr. Chairman, I'm glad that we have this hearing in front of us today. I hope that it provides some insight and perhaps some clarity into the Secretary's recent order.

I'll have some questions, of course, of the witnesses and will look forward to their responses. So thank you.

The CHAIRMAN. Thank you.

We have 2 panels today. The first is the Deputy Secretary of the Department of the Interior, David Hayes. We welcome him.

He is accompanied by the 2 directors of the effected agencies here, the Honorable Joseph Pizarchik, who is director of the Office of Surface Mining—thank you for being here—and the Honorable Robert Abbey, who is the director of the BLM. Thank you for being here.

So, David, why don't you go right ahead and give us your thoughts as to this order and anything else you think we ought to know, and then we will have some questions.

**STATEMENT OF DEPUTY SECRETARY DAVID HAYES,
DEPARTMENT OF THE INTERIOR**

Mr. HAYES. Thank you, Senator. Thank you, Senator Murkowski, and other members of the panel.

I would just like to make a few opening remarks about the Secretary's order. The Secretary, in announcing the order that is the subject of today's hearing, asked the leadership of the Department of the Interior and the 2 directors on my right and my left to evaluate whether we can consolidate some of the activities of the Office of Surface Mining and BLM in a way that will provide more efficient and cost-effective service.

This is all about seeing if we can be more efficient in dealing with the goals that are required by SMCRA, under the Office of Surface Mining, and by FLPMA, under the Bureau of Land Management.

The goal is to make government work better, to build on our strengths and to get the most out of the limited resources that we have.

Let me say at the outset that the Secretary's executive order makes it clear that the Office of Surface Mining's duties and responsibilities, as prescribed by SMCRA, will remain intact under the exclusive purview of the Office of Surface Mining director who will maintain autonomy over those issues.

Our hope and expectation is that the consolidation evaluation that we're launching will actually strengthen OSM's capabilities by making the most of available efficiencies in the OSM organization and BLM organization, aligning programs, where possible and appropriate, and eliminating duplication and optimizing effectiveness.

The enforcement and regulatory functions of OSM would remain separate from BLM's leasing activities. That's required under section 201(c) of SMCRA. That will be honored.

The focus of the consolidation is on those OSM and BLM functions that are complementary, including environmental restoration activities and administrative support functions.

Part of the background of this order is the fact that OSM is a small organization with a modest operating budget of about \$160 million and a staff that has been decreasing in number steadily over the last 10 years.

Since 2002, OSM's staff has been reduced by 17 percent. There are only approximately 520 employees in all of OSM. We need to find a way to make this small agency more efficient. That's what this reorganization is all about.

The areas that we are looking at in terms of the consolidation are areas, again, that do not touch upon the independent required obligation of OSM. We're looking, for example, in particular, at administrative functions.

Currently, the Office of Surface Mining, although it's a very small bureau, has to support a variety of separate administrative functions. It has an Office of Communications and Legislative Affairs, has an Office of Information Resources, has an Office of Equal Opportunity, an Office of Planning, Policy and Budget and a Division of Administration. All of these administrative services are siloed in OSM.

We believe that many of them can be consolidated with BLM's much larger operation and provide essentially more bang for every OSM dollar, so that they don't get essentially put into administrative functions that can be done more efficiently by a larger organization.

Similarly, on the revenue side, we have an existing independent, skilled, revenue-collection and distribution function at the Department of the Interior, the Office of Natural Resource Revenues, under the Office of the Assistant Secretary for Policy, Management and Budget.

The ministerial collection of reclamation fees by the Office of Surface Mining, and the distribution of those funds is extremely similar to the functions that our robust Office of Natural Resource Revenues is undertaking right now for the Bureau of Land Management and for the Bureau of Ocean Energy Management. They collect and distribute more than \$10 billion per year, which far overshadows the amount that is collected and distributed by the Office of Surface Mining.

We think it makes sense to take the excellent group that does that work in the Office of Surface Mining and have them part of this operation of the Office of Natural Resource Revenue to more efficiently collect and distribute these funds. It just makes sense, from our perspective.

Similarly, both organizations have some expertise when it comes to coalmine reclamation efforts. Both of them have abandoned mining programs. OSM focuses on coal reclamation activities, obviously, and collects money and oversees coal reclamation activities, including—some of those funds are used for abandoned hard-rock mining activities as well.

BLM has a similar program dealing with abandoned hard-rock mining activities. Both have experts that deal with these issues. BLM, in addition, oversees the leasing of current coalmining activities and has to review the adequacy of reclamation activities associated with current coalmining activities.

You have 2 organizations each with an expertise and capability, each modest capability dealing with very similar issues.

We believe that as we go through this process of talking with our employees, consulting with you, consulting with interest groups, that there may well be some synergies here to take advantage of these 2 very parallel programs.

The point, though, I would like to emphasize and close is that we completely honor and respect the requirements of SMCRA. The independence of the Office of Surface Mining will be retained as required under section 201(c), but just as section 201(b) of SMCRA anticipates that some of the functions called for by SMCRA can be done outside of the Office of Surface Mining, that's the area that we want to explore as we look through and administer this potential program.

I close by saying the secretarial order itself, of course, does not become effective until December 1. Moreover, what it calls for is a plan to be fleshed out by March 1. We are very much in the state of evaluation and examination of this.

We do believe that there are some synergies and some cost savings that can be identified and that we need to identify in this time

of fiscal constraint. We look forward to working with you over the coming months to make sure we do so in a way that makes sense, that works for the companies that are reliant on permits from both the Office of Surface Mining and BLM and that will deliver the services that people expect of their government.

Thank you.

[The prepared statement of Mr. Hayes follows:]

PREPARED STATEMENT OF DAVID J. HAYES, DEPUTY SECRETARY, DEPARTMENT OF THE INTERIOR

INTRODUCTION

Chairman Bingaman, Ranking Member Murkowski, and Members of the Committee, thank you for the opportunity to appear before you today to discuss the Department of the Interior's consolidation and integration of the Office of Surface Mining Reclamation and Enforcement (OSM) into the Bureau of Land Management (BLM) as contemplated by Secretarial Order No. 3315, dated October 26, 2011.

As Secretary Salazar stated in announcing the Order, the Secretary has asked the leadership in the Department of the Interior to evaluate a potential consolidation of OSM and BLM to determine whether the Department can advance the Congressionally-mandated missions of both bureaus more efficiently and cost-effectively by combining expertise and resources of the bureaus in areas that make sense, and reducing the drain on OSM resources that is associated with maintaining stand-alone support services for a bureau that has a small employee and budget base. The Secretary's goal is to make government work better, to build on our strengths, and to get the most out of the limited resources we have.

At the outset, I want to emphasize that the Department is fully committed to the OSM mission and to continued compliance with the Surface Mining Control and Reclamation Act (SMCRA). The Secretary's Executive Order makes it clear that the OSM's duties and responsibilities prescribed by SMCRA will remain intact, under the exclusive purview of the OSM Director, who will retain autonomy over those issues. The hope and expectation is that the consolidation process that the Department is now launching will strengthen the OSM's capabilities by making the most of available efficiencies in organizations, aligning programs where possible and appropriate, eliminating duplication and optimizing effectiveness. The enforcement and regulatory functions of the OSM would remain separate from BLM's leasing activities. The focus of the consolidation is on those OSM and BLM functions that are complementary, including environmental restoration activities and administrative support functions.

As the Secretary noted in his Order, we look forward to Congress' input as we move forward with this process, along with the input of our employees, the Office of Management and Budget, and interested stakeholders.

BACKGROUND

OSM was established in 1977 as a regulatory agency to oversee state surface coal mining regulatory and reclamation programs and to develop tools to ensure that states and tribes administer their programs effectively. OSM seeks to ensure that coal mining operations are conducted in a manner that protects citizens and the environment during mining, to ensure that the land is restored to beneficial use after mining, and to mitigate the effects of past mining activity by pursuing reclamation of abandoned coal mines. OSM also provides support and assistance to states in implementing state regulatory programs and reclaiming abandoned mine lands.

The OSM has a modest operating budget of about \$160 million and a staff that has been decreasing in number steadily over the past ten years. Since 2002, the OSM's staff has been reduced by 17 per cent. OSM's 525 employees are headquartered in Washington, DC, and throughout three coal-producing regions: Appalachia, Mid-Continent, and Western.

The BLM was established in 1946 and manages more than 245 million acres of public land, known as the National System of Public Lands. Although the large majority of lands managed by BLM are located in 12 western states, BLM manages approximately 15,000 surface acres in the eastern United States. In addition, BLM manages approximately 40 million acres of federal mineral estate in the eastern United States, including approximately 30 million acres under our National Forests. In total, BLM administers 700 million acres of sub-surface mineral estate throughout the Nation. As a land manager with responsibility for overseeing both surface

and sub-surface mining activities on public lands, BLM has a number of responsibilities associated with mining-related activities, including establishing reclamation requirements for current mining operations, and administering BLM's Abandoned Mine Lands (AML) program, a mining restoration program that was established in 1997 to address high priority watersheds impacted by abandoned mines.

The consolidation proposed under the Secretarial Order is intended to build on the strengths and expertise of both bureaus, to capture the benefit of synergies from integrating BLM and OSM reclamation efforts, to strengthen OSM's oversight of surface coal mining and reclamation operations, to ensure efficiencies in revenue collection and enforcement responsibilities, and provide strong and independent safety and environmental oversight of these activities.

The Department is proceeding with this consolidation exercise under the authority of Section 2 of the Reorganization Plan No. 3 of 1950. That law gives the Secretary broad reorganization authority across the Department subject, of course, to any relevant statutory limitations. In this case, any reorganization must accommodate SMCRA's explicit requirements that OSM maintain a separate regulatory and enforcement function, that it not promote the development of coal or other mineral resources, and that it be led by a Director who is appointed by the President, with the advice and consent of the Senate. In that regard, one of the critical components of our reorganization plan is that OSM's enforcement mission will remain independent from the coal leasing functions administered by the BLM. Under the reorganization plan, there will be no consolidation of those functions.

As described in the Secretary's Order, which is due to become effective on December 1, 2011, we will be evaluating four key areas for potential consolidation: (1) administrative functions; (2) revenue functions; (3) mine reclamation programs; and (3) inspection and enforcement.

Administrative Functions

We believe that a consolidation of BLM and OSM can avoid duplicative administrative support services that currently reduce OSM's effective spending power. Although it is a small bureau, OSM currently is supporting a variety of separate administrative support functions, including a Communications and Legislative Affairs Office, an Office of Information Resources, an Office of Equal Opportunity, an Office of Planning, Policy and Budget and a Division of Administration. Consolidation with BLM would enable OSM to take advantage of existing BLM and OSM administrative resources in all of these areas. By taking advantage of these efficiencies, a larger portion of the OSM budget could be dedicated to accomplishment of its core mission.

Revenue Functions

The Secretary's consolidation plan anticipates moving OSM's revenue collection function to the Department's Office of Natural Resource Revenue (ONRR)—an existing office within the Department whose sole mission and expertise is the efficient collection of revenue from various leasing and permitting activities conducted throughout the Department. By way of example, ONRR currently manages the revenue collection functions associated with BLM and the Bureau of Ocean Energy Management (BOEM). Integration of the OSM's fee collection and distribution functions that are ministerial in nature into the ONRR would take advantage of ONRR's existing expertise and resources in this area. ONRR, in turn, would benefit from incorporating OSM's high quality and efficient compliance program, with an established record of collection success.

Mine Reclamation Programs

The BLM and OSM both have resources and expertise devoted to the reclamation of current and abandoned mining activities. OSM, for example, has significant expertise in the reclamation of ongoing coal mining operations, expertise that could augment the BLM's efforts to require ongoing reclamation efforts at hard rock mines. The OSM also has significant expertise in abandoned coal mine reclamation, including its AML grants to states and tribes and the creation and administration of its Abandoned Mine Land Inventory System. During the consolidation process, the Department will be exploring the potential to merge the BLM's AML program into the OSM's abandoned mines program, so as to capitalize upon the synergies that would result in increased capability and, we expect, improved performance of both programs. We also believe that such a consolidation would improve the BLM's mine and surface reclamation programs for existing mining operations.

Inspection and Enforcement

The OSM and the BLM both maintain inspection and enforcement programs. As we move forward with developing our plan, we will consider consolidation of the

BLM's reclamation and inspection and enforcement functions related to coal mining with OSM's surface coal mining regulation, inspection and enforcement program. Consolidating these two functions could result in strengthening what are now two relatively small, separate programs, creating a more robust program that would operate under the supervision of the OSM and include their extensive institutional knowledge.

CONCLUSION

Mr. Chairman, we believe that in these times of limited budgets and resources, it is important to fully explore how government services can be delivered in the most efficient and effective manner. That is why we are considering consolidation of certain functions currently administered by OSM and the BLM. We recognize that both bureaus carry out important functions, have vital missions, and are staffed by tremendous public servants. Our goal is to build on these strengths as we consider how we might better deliver the services that the American people expect of us.

We will rely on the ideas and input of employees and many others, including the Congress, at every step of the process so that we ensure that this integration is successful and consistent with our authorities under the law.

This concludes my statement, and I am happy to answer any questions you or other Members of the Committee may have.

The CHAIRMAN. Thank you very much. Let me start with a few questions.

I guess a sort of threshold question is whether or not what you're proposing or what the Secretary is proposing in this rule is consistent with the statutes that govern. You're persuaded that it is, I gather, from your statement.

Mr. HAYES. We are, Senator. The solicitor's office has been involved in our discussions and will continue to be involved as we evaluate exactly how we might undertake this consolidation.

As I said, we would proceed consistent with both section 201(c) and section 201 (b) of the act.

The CHAIRMAN. OK. Because there is a lot of legislative history in connection with the Surface Mining Control and Reclamation Act that seems to imply otherwise to us. There's this statement in the Senate report that says, to ensure administration of the program by an independent agency with neither a resource development or resource preservation bias or mission, this title establishes the Office of Reclamation and Enforcement in the Department of the Interior. This office will be separate from any of the departments, existing bureaus or agencies. It's intended that the office exercise independent and objective judgment in implementing the act.

So that seems to us to be contrary to what the order calls for, and so I call that to your attention.

Obviously, I agree with your purpose of trying to find synergies and ways to streamline administration of the Federal Government. I think, clearly, Senator Murkowski said the same thing, I believe.

The order that the Secretary has issued in section 3(d) talks about how you want to integrate the Office of Surface Mining's coalmining regulation, inspection and enforcement programs and functions and BLM's inspection and enforcement program functions related to mining.

That seems to me to go beyond just streamlining. That seems to essentially say we're going to do this all out of the same office. I don't know if that accomplishes some greater objective, other than just saving on a few personnel. I guess the hope is that you can reduce the number of people required to perform these functions

currently performed by the 2 agencies if you do it all together. Is that the idea?

Mr. HAYES. Senator, there is a second purpose there and it goes to the point that Senator Murkowski raised in her opening statement.

Let me step back for a minute. I think what SMCRA requires in particular is that the Office of Surface Mining not be involved in the leasing function, that there be a separation between the cop on the beat, if you will, and the agency that is actually entering into leases. That's very similar to what we were trying to do, what we have done with the division of Minerals Management Service between the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement.

Currently, you have BLM doing both leasing and enforcement. We think—and the Office of Surface Mining should have nothing to do with leasing. That's clear from SMCRA. That's why it has to continue to be an independent organization with a director that is appointed and confirmed by the Senate.

We think it may make sense, frankly, to move the BLM enforcement of coal-related activities over to OSM, so that you, in fact, honor that separation between enforcement and leasing. So that's what we want to explore.

There may well be some efficiencies there as well. I mean, the reality is you have inspectors at OSM. You have inspectors at BLM, both of whom are checking on reclamation of coal activities. They're doing very, very similar functions.

In fact, they duplicate functions. After a surface coalmine that is leased by BLM closes and there's a question of how you administer the reclamation of that, both BLM and OSM independently have an obligation to inspect and ensure the reclamation activity occurs in an appropriate way. To us, it doesn't make sense to have duplicate reviews of that activity.

The CHAIRMAN. Let me just mention I do have a statement from the Navajo Nation that I'll submit for the record indicating their concern with the lack of any government-to-government consultation prior to the issuance of this executive order. So I'll put that in the record.

Senator Murkowski.

Senator MURKOWSKI. Thank you, Mr. Chairman.

In addition to the concern over lack of consultation, whether it's by tribes or others, it seems to me that we're dealing with a lot of concerns that have come about because of the details. On its face, initially, OK, some efficiency, some consolidation, some streamlining, this is all fine, well and good.

But as you get more into the details, more concerns are raised. Typically, when you have something of this significance, you would have the department conduct some briefings, some hearings. It would be part of the annual budget request. You would have the public comment and really kind of work through the process.

You've indicated, David, that you anticipate the plan to be together by March 1. We need to identify whether or not there's going to be cost savings. It sounds like there is still an awful lot of exploratory review, and, yet, we're in kind of response mode now.

Is this just a rollout that isn't working very well or has it not been thought through to the level that I think a change like this should be?

Mr. HAYES. Senator, I absolutely respect the point of view that you have here, and I want to thank you and Senator Bingaman for holding this hearing, because the reality is that we believe that there are cost savings that can be garnered here while increasing efficiencies and taking advantage of organizational capabilities we have in our department.

The reality is, though that this is complicated. Step one for us is to talk to our employees in all of the effected units and to work through with them what might be possible, what might make sense, to sharpen the pencils, to see if the expected savings are there and what they might be, and to work with you and with interested parties. That's what we are going to do.

This is a 2-page secretarial order. It is brief. It is high level, precisely because this is complicated, and it's going to require careful review and evaluation. That's our job here over the next 4 months, to go about this exercise, to talk with you more, and your staffs, to talk with industry more. That's what we intend to do.

The Secretary has no interest in coming out with a plan that doesn't make sense. He has asked me to work with these gentlemen over the next 4 months to see what we can put together, and that's what we intend to do.

Senator MURKOWSKI. I think we're going to continue to have a lot of questions about how it would actually be implemented.

I want to follow on the chairman's question, though, in terms of the authority. Has the solicitor's office provided a written opinion as to the legality of this proposal, and, if so, can you provide that to us?

Mr. HAYES. We do have some written documents from the solicitor's office that has been the solicitor's office, as I testified before, has been involved throughout. I'm happy to look into the issue of providing that.

Senator MURKOWSKI. OK. I would like that, as I'm sure it will be helpful for us as we look at this further.

I've got some other questions that I'll have an opportunity to ask you later, but I wanted to bring up something that was in yesterday's news.

This was in the U.S. News and World Report. There was an article suggesting that the administration, the President is kind of pushing gun owners off of public lands. This relates to the ability to use public lands for target practice, something that I've got a real concern with, as most of my constituents in Alaska clearly do.

I know that the Secretary was asked about this yesterday at a House resources hearing. He indicated that he was not aware of the proposal at that time.

So I'd ask either you, Mr. Hayes, or you, Mr. Abbey, if you can provide us a little better insight in terms of what is going on with this proposal, please.

Mr. HAYES. Certainly. Let me take a crack and then ask, why don't you go ahead, Bob.

Mr. ABBEY. Senator, again, I appreciate the question. You know, the Bureau of Land Management manages 245-million acres of

land, and most of that land is open to hunting and fishing and recreational target shooting.

The issue that cropped up yesterday was based upon a question that was asked of the Bureau of Land Management regarding a proposed policy to look at some of the conflicts that are currently escalating relative to recreational target shooting near communities and residential areas that are being developed adjacent to public lands.

As you may know, we do restrict shooting within developed recreation areas. We have closed off a few areas, based upon safety concerns regarding shooting that is taking place near those type of communities and residential areas.

Everything that we do relative to restricting uses on public lands would be handled through a land-use plan.

Let me assure this committee that we have nothing in place as far as going forward with any kind of rulemaking that would close off public lands to hunting or fishing or to even recreational target shooting.

But we do have, and always have had, the discretion of looking or using our land-use plans to determine appropriate uses that are taking place on public land—by BLM.

As we see some of these communities continuing to expand and build adjacent to some of these public lands, we do have some conflicts that do need to be addressed, but they are few and we will deal with those through our land-use planning process.

Senator MURKOWSKI. I would just remind everyone that the last time the Department of the Interior attempted to regulate guns in national parks, we ended up with the guns-in-park legislation. So just be aware.

I mean, I'm hearing your words here, but this is something that would cause a great deal of concern and angst.

Mr. HAYES. We appreciate that and we understand that.

Senator MURKOWSKI. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Manchin.

Senator MANCHIN. Mr. Hayes, I appreciate you being here and also to the chairman and the ranking member for calling this hearing, because I don't think you all asked for the hearing. Did you?

Mr. HAYES. No—

Senator MANCHIN. You were going your way, no matter what.

Mr. HAYES. Senator, we—

Senator MANCHIN. I'm just saying that we asked for the hearing because you weren't going to give us the courtesy of coming to tell us why you thought you didn't need our approval to do it.

Mr. HAYES. No, that's not true, Senator. The intent of the Secretary was to reach out to all of you here—

Senator MANCHIN. I think you can carry back and tell him that there's great concern on both sides. You know, very few things that we all agree on, and I think you're seeing that we agree that we think you're wrong.

So with that being said, you already have oversight—do you not, BLM?—over—aren't they part of your—

Mr. HAYES. Yes. Yes.

Senator MANCHIN. So if there's deficiencies, why wouldn't you have been helping them already, if you found different ways administratively?

Because one size doesn't fit all. We've never dealt in the eastern part of the United States with BLM. That's all they've ever dealt with in the western part is BLM. Next of all, the way our lands have been separated, it's a whole different ballgame than what you all deal with.

If you think that OSM's inspectors are better and can do a better job because you're doing the same thing, why don't you already have OSM inspectors doing yours, too?

I mean, I don't know why you need an order saying you're going to merge. Doesn't make any sense.

You haven't identified any cost savings or haven't told us about the money. If you do, I'd like to hear how much money you think you're going to save.

Mr. HAYES. We—

Senator MANCHIN. You have a dollar figure, please tell me.

Mr. HAYES. We've done some preliminary estimates and we believe we might save \$5 million a year.

But, most importantly, we are interested in consolidating the functions.

Let me just a couple of clarifications.

Senator MANCHIN. You can do that without—

Mr. HAYES. BLM has 40-million acres in the eastern United States under its management. It has a substantial presence in the east, including some coalmining requests.

But the most important thing, Senator, first of all, let me just reiterate, as I said to Senator Bingaman and Senator Murkowski, we are interested in working closely with you to flesh this out and do something that makes—

Senator MANCHIN. If you want to work with us, you ought to put your order on hold right now and tell the Secretary to hold up and let's work together. Don't move forward for December the 1st, because it's not going to be looked on favorably here. I think you're hearing that loud and clear, and I would hope you would.

How about the States that have primacy right now basically taking the lead in that? I mean, my little State of West Virginia is one that we think has done and worked well with OSM, and we're always looking for better ways to do that, but we were never consulted about this. Not the least bit were we ever contacted and say, Guess what might happen. This is why we want to do it, to give us a chance if there's something we were doing wrong or we thought OSM was doing and we could do better, no one gave us an opportunity to cure it.

I mean, in running any good office, if you detect that there's an inefficiency, you try to improve that. Then if you can't improve it and say, I've given all, every best shot I had, then you put them together, you consolidate and say, I don't need that any longer.

But I would really agree with both the majority and the ranking minority member here that I'm not sure you all have the jurisdiction to do that. I mean, it's pretty clear, if you read that the office is under 201(a), established in the Department of the Interior, the

Office of Surface Mining was established there; 201(b) requires the OSM have a director who shall be appointed by the President.

I don't know how you can just say, there is an order that the President has that—What's the purpose if you're going to take it away now and merge it when Congress basically, in 201(b), says that the President will do the appointment?

If that's the case, then it says that no legal authority program or function in any Federal agency which has its purpose promoting the development or use of coal or other mineral shall be transferred. I don't know how you read that any differently.

Mr. HAYES. You know, Senator, 201(b) also says that OSM may use, when appropriate, employees of the department and other Federal agencies to administer the provisions of this act.

Senator MANCHIN. That's fine. We're saying you already have that right. Why do you want to merge it?

Mr. HAYES. We don't—

Senator MANCHIN. So you're going to leave a director at OSM appointed by the President for the sake of face value and that's it?

Mr. HAYES. No.

Senator MANCHIN. There's not going to be anything else for them to work with if—

Mr. HAYES. No, they will—The director will administer all the required obligations under section 201(c). What we're looking at are only the administrative functions, potentially some of the reclamation, backend issues and potentially the revenue-collection capability and distribution capability that we have an outstanding centralized function for under the Office of Natural Resources Revenue.

Senator MANCHIN. Mr. Hayes, with all due respect, I would encourage you to take back to the Secretary the request to put this on hold, to pull this order until we can all work together on it and see if there is more efficiencies to be gained.

Mr. HAYES. I'll take that back. Thank you, Senator.

The CHAIRMAN. Senator Paul.

Senator PAUL. Thank you, and thank you to the panel for coming.

I think we're all concerned, Republican and Democrat, with clean water. The Clean Water Act talked about regulating navigable waters, and in the Rapanos decision, Scalia actually defines what a navigable water is. What Scalia says is that a navigable water would be relatively permanent, standing or continuously flowing bodies of water forming geographic features, such as oceans, rivers and lakes.

I think that's what the regular folks around the country would think we would be regulating, and that would be fine with most people, be fine even with myself.

I think the concern is is that some people have not agreed with that definition and they think the definition of a stream is or navigable water is any low area of land anywhere that collects water or where water runs off of, and I think that's a real problem.

Scalia goes on to say that it does not include channels through which water intermittently or ephemerally or channels that periodically provide drainage or rainfall.

My question is for Mr. Pizarchik. How do you define a stream?

Mr. PIZARCHIK. Steams, in the definitions or appeared in our regulations, do not follow the waters of the United States provisions that have been litigated, debated over the years. It's based—there's a couple of different definitions. There's a definition for perennial stream. There's a definition for intermittent stream and for ephemeral stream.

Senator PAUL. So you disagree with Justice Scalia's definition of navigable waters?

Mr. PIZARCHIK. The Surface Mining Act doesn't provide for us to conduct our activities in the context of the navigable waters. The Surface Mining Act explicitly reserves water-quality standards for EPA, and the corps also deals with navigable waters. What we have—

Senator PAUL. So your jurisdiction doesn't come from the Clean Water Act?

Mr. PIZARCHIK. No, sir, it does not. It comes from the Surface Mining Control and Reclamation Act.

Senator PAUL. OK. How many ephemeral streams are there in Kentucky?

Mr. PIZARCHIK. I don't know that anybody's ever counted that, but I'm sure there are very many.

Senator PAUL. So there's no list.

Mr. PIZARCHIK. I don't know.

Senator PAUL. It'd be pretty important if you're going to propose a stream rule and then you're going to tell me I can't do any mining activity within 100 feet of an area that sometimes has water when it rains.

Have you ever been into the mountains of eastern Kentucky?

Mr. PIZARCHIK. Yes.

Senator PAUL. When it rains and water runs off of high places and goes to low places every place that it runs off is not a stream. This is the ridiculous notion that has allowed government to overreach, and this is what annoys us in our State. You come down here from Washington, you want to tell us every area where the water runs off the mountain is a stream and it is not a stream, and I think it defies the intent of the law.

That is the danger of you going, once again, into a law that took 5 years for a lot of people—Republicans, Democrats, industry, environmentalists, everybody—to develop, and you're going to do a new stream rule, and yet you're really, really not talking about babbling brooks or rivers. You're talking about some low area in the land that sometimes has some water in it when it rains hard.

Mr. PIZARCHIK. We are in the process of examining and making a determination as to how we should modernize our regulations, take advantage of the existing science and knowledge that we've gained over the past decades to do a better job of protecting our resources—

Senator PAUL. If I had a mine, how would I know where I can build my mine? I can't, if you don't have a list of the ephemeral streams.

Mr. PIZARCHIK. You have to look at the basis, as far as the definitions, and apply that. There are determinations that are made with the regulatory authorities on what constitutes an ephemeral stream—

Senator PAUL. So you're going to let every inspector all across America decide, at that moment, whether something is a stream, whether some low area or some crevice that runs off the top of a mountain is a stream?

I mean, that, to me, when you're developing multimillion-dollar projects—You know, we have 50,000 workers in Kentucky who depend—their livelihood depends on this, another couple of hundred thousand who are indirectly related to mining, and you're going to tell a company that's going to put millions of dollars into opening a mine that, just depends on which regulator you get and they'll tell you at the time. You know, they'll know a stream when they see it, basically.

Mr. PIZARCHIK. No, that's not at all what we're going to do. We're looking to use the science to modernize our stream definition.

Senator PAUL. You'd have to have a list of streams, then. You'd have to have a GPS. We've got a GPS there. You'd have to list every stream in the world. That's the grotesque nature of this is that, you know, we're talking about an infinite amount of places where water runs off.

You hear this ridiculous notion from people saying we've destroyed 2,000 miles of stream. People think that, Oh, they're polluting the Ohio River and we've disrupted the Ohio River or some major creeks or rivers. We're not talking about that at all.

These people, through these exaggerated claims, have distorted this, but you're furthering this by allowing something ephemeral to be regulated. There is a danger to what you're doing. I will tell you that we, in Kentucky, don't like it. We will oppose you. We will make Congress vote on these things, and this will work across aisles.

But it gets back to not whether we're for clean water or we're for clean streams. It is to do and has to do with the definition of streams.

Mr. PIZARCHIK. The definition of streams that we're working on is to give further effect to the Surface Mining Control and Reclamation Act. It is replete with provisions about protecting the public, about protecting the natural resources, about protecting streams and the environmental resources out there.

This is not something that's new. We're still in the process of developing. We don't have anything out there for folks to oppose yet, because we haven't proposed anything. We expect to be able to propose the rule in the spring.

Senator PAUL. I would suggest that everybody in your office read the Scalia definition of what a navigable water is, and that we get some clarification from the Supreme Court.

We will continue to fight this. This is going to come up again, but we do need to define what a stream is, and any area where water runs off should not be considered to be a stream.

The CHAIRMAN. Senator Risch.

Senator RISCH. Thank you, Mr. Chairman.

Gentlemen, how many of you are attorneys?

Mr. PIZARCHIK. I'm an attorney.

Senator RISCH. One, 2. No? You did take civics, I assume.

Mr. ABBEY. I did.

Senator RISCH. OK. Good.

You know, I could almost overlook this whole thing if you guys were just run-of-the-mill bureaucrats, but, you know, this country has gotten to the point where the constitutional provision, which is a foundation of this country, that establishes 3 branches of government has just been totally ignored by the bureaucracy.

So far this year, Congress has passed about 1,000 pages of legislation. The bureaucracy's passed about 70,000 pages of rules and regulations, which have the force of law. The line of who is legislating here has just gone out the window.

But when you do something like this that is so blatant, that is so clearly a violation of a congressional law, you've got to say, What are we doing here? Why bother have a Congress? Why not just have the judicial branch and the executive branch?

In 1970, Title 30 U.S.C. 1201 et sequens was passed by the U.S. Congress. Now, with the stroke of a pen, what you're doing is you're saying, yes, Congress set this office up and created for this organization within the BLM, but you know what? It's only Congress. It's only a law. We'll just, with the stroke of a pen, change it, because, after all, this was done back under the Carter administration and who's going to notice? Besides that, who cares, other than Congress?

Gentlemen, we care. We really, really believe that the legislative branch is in charge of legislating and that you guys are in charge of executing what the legislative branch legislates. You're not in charge of legislating.

So we don't have any coal in Idaho, and I understand that that's primarily what OSM does. But we do have other forms of mining in Idaho, and, frankly, this has worked since 1977 relatively well.

If you wanted to change it, this is really, really simple. You come up here with a bill, and you say, This is what we want to do. These are the reasons we want to do it. Congress, we know you created our agency. Congress, we know we are subject to the laws that you pass, so would you consider changing the way that we're doing things at the BLM?

But you didn't do that, and, frankly, I'm as disgusted as anybody is on this committee with what you've done.

Thank you, Mr. Chairman.

The CHAIRMAN. As you can tell, there's a certain level of angst around the committee about the proposal.

Senator Murkowski, did you have additional questions? If not, we can go to Panel 2.

Thank you all very much for being here, and I hope you'll stay in close touch with us as to future developments with this.

Mr. HAYES. We will. Thank you.

The CHAIRMAN. Why don't we call Panel 2 forward. Let me just introduce the panel members. Mr. Butch Lambert is the Deputy Director with the Virginia Department of Mines, Minerals and Energy. He will be testifying on behalf of the Interstate Mining Compact Commission and the National Association of Abandoned Mine Land Programs.

Mr. John Corra—Senator Barrasso, I gather, was going to make an introduction of him, but he is not here at this point.

Any rate, he is the Director of the Wyoming Department of Environmental Quality, testifying on behalf of the State of Wyoming

and the Reclamation Committee of the Western Interstate Energy Board.

Mr. Patrick McGinley is Professor with West Virginia University College of Law in Morgantown, West Virginia.

Ms. Katie Sweeney is General Counsel with Legal and Regulatory Affairs in the National Mining Association here in Washington.

Ms. DarAnne Dunning is with the Western Organization of Resource Councils in Helena, Montana.

Thank you all very much for being here. I think what we'll do is to follow our normal practice of each of you take 5 minutes and tell us the main points you think we need to understand from your perspective and then we will have some questions.

Mr. LAMBERT.

STATEMENT OF BRADLEY C. "BUTCH" LAMBERT, DEPUTY DIRECTOR, VIRGINIA DEPARTMENT OF MINES, MINERALS AND ENERGY, TESTIFYING ON BEHALF OF THE INTERSTATE MINING COMPACT COMMISSION AND THE NATIONAL ASSOCIATION OF ABANDONED MINE LAND PROGRAMS

Mr. LAMBERT. Good morning. My name is Butch Lambert, and I serve as the Deputy Director of the Virginia Department of Mines, Minerals and Energy.

I'm appearing today on behalf of the Interstate Mining Compact Commission and the National Association of Abandoned Mine Land Programs.

Our member states implement regulatory programs under the Surface Mining Control and Reclamation Act and work closely and cooperatively with the Federal Government under the Federal Land Policy and Management Act.

We are intimately familiar with and work in close partnership with the Office of Surface Mining and the Bureau of Land Management.

We appreciate the opportunity to weigh in on a consolidation of these 2 Federal agencies and on the potential impacts this action will have for State governments.

As you know, Mr. Chairman, the State plays a central role in implementation and administration of SMCRA. Congress specifically provided for a primacy approach under the law, whereby the States were to be the front-line, exclusive regulatory authorities upon approval of State program by OSM.

The States also implement programs for the reclamation of lands impacted by pre-1977 mining operations that were abandoned or inadequately reclaimed.

Secretarial Order No. 3315 would consolidate the OSM within the BLM. This secretarial order will have a significant implication for State governments who implement regulatory programs under SMCRA.

Given that the States were never informed, much less consulted about this consolidation, the Secretary's order raises more questions than it answers for us. Among the most important of these are the following:

How will the consolidation impact the role of the States under SMCRA, especially in terms of grant funding?

How will the consolidation affect the current chain of command within the Interior, especially with regard to the Federal oversight of State programs?

How does Interior intend to reconcile the differing missions of BLM and OSM under the various organic laws affected by this consolidation?

How will this consolidation save money and achieve government efficiency?

Without answers to these most basic of questions, the States are at a significant disadvantage in commenting on the consolidation.

Given the recent departmental decisions on other mining-related issues, we also have serious concerns about the motivations behind this consolidation.

Beginning with the signing of the June 2009 Memorandum of Understanding between the Interior Department, the Environmental Protection Agency and the U.S. Army Corps of Engineers regarding the Appalachian coal surface-mining operations, and extending to the recent budget and deficit-reduction proposals to completely reform the AML program, the States have been unable to ascertain the reason and the basis for their departmental actions that directly impact the State and Federal relationship under SMCRA.

Our desire, as partners with OSM and BLM, is to work cooperatively with these agencies to accomplish our respective roles and responsibilities under national, environmental and land-management laws.

However, if we are cut out of the process from the very outset, it is difficult to fully engage, especially once decisions like this consolidation are a done deal.

The reorganization is particularly troublesome in terms of what it may mean for the operation of several key provisions under SMCRA, including inspection, enforcement and the AML program.

Even if OSM continues in some sort of independent role, we are uncertain what the lines of authority will be, especially in the field. The States have enjoyed and benefited from a good working relationship with OSM regional and field offices and we are hopeful that this can be maintained.

Given the complexities associated with the regulation of active mining operations, a comprehensive understanding of State programs and the nuances are each critical.

With regard to the AML program, we are even more circumspect about the potential impacts from the consolidation. Already, this program has been under attack by the administration as a recent budget deficit proposal.

I would like to submit for the record this morning a copy of the letter that the IMCC and the AML Association recently sent to the Super Committee regarding the implications of this proposal for the State AML programs.

The CHAIRMAN. We will include that in the record.

Mr. LAMBERT. Thank you, sir.

We are concerned that this consolidation would be a further attempt to implement all or part of the proposal under the banner of government efficiency.

An area of particular concern under this consolidation is the impact it would have on training and technical assistance. This is one of OSM's key responsibilities under SMCRA.

Given the increasing number of retirements at both the State and the Federal levels and the need to train new employees who may have limited knowledge of SMCRA and its regulatory framework, the OSM training program is a critical link to effective regulation. We would not want to see this or the OSM TIPS program eliminated or unduly constrained under the consolidation.

Mr. Chairman, as we learn more details about the consolidation, we look forward to working jointly with OSM and BLM to ascertain the appropriate programs and administrative efficiencies that can be gained without undermining the separate and distinct regulatory and statutory responsibilities under these 2 laws.

Thank you for this opportunity. I'll be happy to answer any questions or provide further information.

[The prepared statement of Mr. Lambert follows:]

PREPARED STATEMENT OF BRADLEY C. "BUTCH" LAMBERT, DEPUTY DIRECTOR, VIRGINIA DEPARTMENT OF MINES, MINERALS AND ENERGY, TESTIFYING ON BEHALF OF

Good morning. My name is Butch Lambert and I serve as Deputy Director of the Virginia Department of Mine, Minerals and Energy. I am appearing today on behalf of the Interstate Mining Compact Commission (IMCC) and the National Association of Abandoned Mine Land Programs (NAAMLPL).

The Interstate Mining Compact Commission (IMCC) is an organization of 24 states located throughout the country that together produce some 95% of the Nation's coal, as well as important hardrock and other noncoal minerals. Each IMCC member state has active mining operations as well as numerous abandoned mine lands within its borders and is responsible for regulating those operations and addressing mining-related environmental issues, including the reclamation of abandoned mines.

The NAAMLPL is a tax-exempt organization consisting of 30 states and Indian tribes with a history of coal mining and coal mine related hazards. These states and tribes are responsible for 99.5% of the Nation's coal production. All of the states and tribes within the NAAMLPL administer abandoned mine land (AML) reclamation programs funded and overseen by the Office of Surface Mining (OSM) pursuant to Title IV of the Surface Mining Control and Reclamation Act (SMCRA, P.L. 95-87).

IMCC and NAAMLPL member states represent a cross section of the country and many implement regulatory programs under SMCRA and work closely and cooperatively with the federal government under the Federal Land Policy and Management Act (FLPMA). As such we are intimately familiar with and generally work in partnership with the Office of Surface Mining Reclamation and Enforcement (OSM) and the Bureau of Land Management (BLM). We therefore appreciate the opportunity to weigh in on the consolidation of these two federal agencies and the potential impacts that this action will have for state governments.

As you know, Mr. Chairman, the states play a central role in the implementation and administration of SMCRA. Congress specifically provided for a "primacy" approach under the law, whereby states were to be the front line, exclusive regulatory authorities upon approval of a regulatory program by OSM. To date, 24 states have received primacy under SMCRA and continue to operate first-class regulatory programs that protect the public and the environment from the impacts of coal mining operations. The states also implement programs for the reclamation of lands impacted by pre-1977 mining operations that were abandoned or inadequately reclaimed.

OSM was established as an independent federal agency charged with implementing and administering several distinct responsibilities under SMCRA, as specifically delineated in Section 201 of the Act. Among those are reviewing and approving or disapproving state programs and assisting the states in the development of those programs. Section 705 also authorizes OSM to make annual grants to states for the purpose of administering and enforcing state programs and to cooperate with and provide assistance to states for the purpose of assisting them in the development, administration and enforcement of their programs, including technical assist-

ance and training. Significantly, for purposes of this hearing, Section 201 (b) of SMCRA provides that no legal authority, program or function in any federal agency which has as its purpose promoting the development or use of coal or other mineral resources or regulating the health and safety of miners shall be transferred to OSM.

Secretarial Order No. 3315, issued on October 26 and which is the subject of this hearing, would consolidate the OSM within the BLM in an effort to “integrate the management, oversight, and accountability of activities associated with mining regulation and abandoned mine land reclamation, ensure efficiencies in revenue collection and enforcement responsibilities, and provide independent safety and environmental oversight of these activities.” Clearly, by its own terms, this secretarial order will have significant implications for state governments who implement regulatory programs under SMCRA. Given that the states were never informed, much less consulted, about this “consolidation”, the Secretary’s order raises more questions than it answers for us. Among them are the following:

- Why were the states not consulted about this matter since they are the primary stakeholders under the various organic laws affected by this consolidation? How and when does Interior plan to consult with the states and tribes to receive their input on the consolidation and what it may mean for state/federal interaction under both SMCRA and the federal land management laws?
- How will the consolidation impact the role of the states under SMCRA, especially in terms of funding for state Title V (regulatory grants) and Title IV (AML grants)? How will it specifically impact the administration of the AML program under Title IV of SMCRA? Does it reflect a further attempt to accomplish by Secretarial order what the President has proposed for the AML program as part of his deficit reduction plan?
- How will the consolidation affect the current chain of command within the Interior Department, especially with regard to federal oversight of state programs? How could this consolidation impact the cooperative working relationship that has generally attended the implementation of SMCRA and FLPMA? Who will have primary lead responsibility for the new organization—BLM or OSM? How can a “consolidation” result in the continued viability of two separate agencies, as suggested by some of the press materials distributed by Interior?
- How does Interior intend to reconcile the differing missions of BLM and OSM under the various organic laws affected by the consolidation?
- How will this consolidation save money and achieve governmental efficiency, other than the potential for combining some administration functions? Will the combination of other functions (inspection, enforcement, oversight) actually result in the expenditure of more money, especially if the federal government assumes responsibilities that were formally entrusted to the states?
- Does Interior anticipate that changes will be needed to the organic acts affected by the consolidation?
- What is the legal basis for the consolidation? Has the Solicitor’s Office rendered an opinion on the matter?
- BLM’s primary mandate for its entire existence has been on the management of public lands in western states. How can the agency effectively shift to managing mining operations on state and private lands in the central and eastern portions of the country? How will this save money?

Without answers to these most basic of questions, the states are at a significant disadvantage in commenting on the consolidation. We hope in the near future to receive answers to these questions and thereafter to provide more detailed, specific input. We have been told that the states will be consulted some time after December 1 (the effective date of the Secretarial Order). However, given recent Departmental decisions on other mining-related issues, we have serious concerns about the motivations behind this consolidation. Beginning with the signing of the June 2009 Memorandum of Understanding between the Department, the Environmental Protection Agency and the U.S. Army Corps of Engineers regarding Appalachian surface coal mining operations and extending to the recent budget and deficit reduction proposals to completely reform the AML program, the states have been unable to ascertain the reason and basis for Departmental actions that directly impact the state/federal relationship under SMCRA. On several occasions we have requested opportunities to discuss the motivation behind these critical decisions and actions so that we can better respond to the policies and rules that have grown out of the MOU—especially the significant revisions to federal oversight of state programs under SMCRA and OSM’s anticipated proposed rule on stream protection. At every turn, we have been ignored and our input has been restricted to the formal commenting process that attends the actions.

Our desire as state partners with OSM and BLM is to work cooperatively with these agencies, as we have on many occasions in the past, to accomplish our respective roles and responsibilities under national environmental and land management laws. However, if we are cut out of the process from the very outset, it is difficult to fully engage—especially once decisions, like the consolidation, are a *fete accompli*. We are at a loss to understand why the Department, and OSM in particular, is loathe to bring the states into the early decision-making process on initiatives that directly impact the state/federal partnership. We are not just another set of stakeholders under laws like SMCRA—we are the primary regulatory authorities. Without us, the laws do not work. We have proven time and again that when we work cooperatively together as partners, we can accomplish much—and do so effectively and efficiently.

The consolidation is particularly troublesome in terms of what it may mean for the operation of several key provisions under SMCRA, including inspection, enforcement, and the AML program. BLM is not solely a regulatory agency, like OSM. Even if OSM continues in some sort of independent role (yet to be articulated), we are uncertain what the lines of authority will be—especially in the field. The states have enjoyed and benefited from a fairly good working relationship with OSM regional and field offices and we are hopeful this can be maintained. Given the complexities associated with the regulation of active mining operations, especially in various geographical regions across the country, a comprehensive understanding of state programs and the nuances of each is critical. In some respects, it has taken the better part of 30 years to achieve the working relationship we currently have with OSM field and regional offices. BLM is not likely to possess this level of experience or expertise.

With regard to the AML program, we are even more circumspect about the potential impacts from the consolidation. Already, this program has been under attack by the Administration, as evidenced by the recent deficit reduction proposal and the FY 2012 proposed budget. I would like to submit for the record a copy of a letter that IMCC and the AML Association recently sent to the Supercommittee regarding the implications of this proposal for state AML programs. We are concerned that this consolidation would be a further attempt to implement all or part of this proposal under the banner of “government efficiency”. As we note in our letter, the changes to the AML program being proposed by the Administration amount to a wholesale revision of Title IV of SMCRA and those decisions are best made by your Committee and others in Congress.

We are concerned that the consolidation could also serve as a mechanism for diluting the AML program under SMCRA, including a diversion of funding from the Trust Fund for other priorities. Even though this appears to be precluded by the language of SMCRA, there are ways in which funding can be diverted along the way, or lost due to additional bureaucratic complexities that do not exist at the present time. While BLM has administered a limited hardrock AML program, which in many ways has been dependent on the states for its effectiveness, the size and complexity of the AML program under SMCRA dwarfs the BLM program. Bringing it under the BLM banner, even for administrative efficiencies, could undermine the overall quality of the program. Again, we need to know more about what the Department has in mind with respect to how this program would be incorporated into the BLM before we can comment on the specifics. There is the potential for combining and administering the two programs in a way that would preserve the coal AML program under SMCRA while enhancing BLM’s hardrock AML program, both in the way of administrative efficiencies and funding allocations. But this will take considerable planning and discussion and hence the need for expanded consultation with the states and tribes.

An area of particular concern under the consolidation is the impact it would have on training and technical assistance. This is one of OSM’s key responsibilities under SMCRA and it has paid significant dividends over the years in terms of support for the states and tribes. Given the increasing number of retirements at both the state and federal levels and the need to train new employees who may have limited knowledge of SMCRA and its regulatory framework, the OSM training program is a critical link to effective regulation. And as we move into more complex technical issues surrounding the implementation of SMCRA, the assistance OSM provides to the states, particularly through its Technical Innovation and Professional Services (TIPS) program, is also of great importance. We would not want to see any of these program activities eliminated or unduly constrained under the consolidation.

One of the hallmarks of both SMCRA and FLPMA over the years has been the ability of the states and the federal government to work well together, especially at the field/state and regional levels. We are hopeful that this can continue and that as we learn more about the details of the consolidation, we can work jointly to ascer-

tain where program and administrative efficiencies can be gained without undermining the separate and distinct statutory responsibilities under these two laws. We doubt that this can be accomplished without maintaining an independent role for OSM that preserves the congressionally mandated relationship between OSM and the states. Given our experience with past reorganizations that have led to some Interior agencies being completely subsumed by others, as occurred with the U.S. Bureau of Mines, we have serious reservations about the current process. As a result, we encourage your close oversight of this reorganization to insure that the purposes, objectives and mandates of SMCRA and FLPMA are not lost in the shuffle.

One of the stated goals of the consolidation is to save money for the American taxpayer through administrative and programmatic efficiencies. We see this as a worthy goal, and one that the states not only share, but have consistently worked toward in the context of their own program operations. This is one of the reasons that we have opposed a recent revision to OSM's directive regarding the use of Ten-Day Notices (TDNs) in primacy states. Directive INE-35 authorizes the use of TDNs to communicate alleged defects in state-issued permits, contrary to the intent of SMCRA. Each time OSM utilizes a TDN in this fashion to second-guess a state permitting decision, it results in the considerable expenditure of state resources to respond to the TDN (as well as federal resources to review the state response). Given that states already have formal mechanisms in place for the appeal of their permitting decisions by state courts and administrative bodies, this federal process results in a duplicative, wasteful expenditure of valuable state and federal resources.

OSM's oversight directive (REG-8) also results in a duplication of effort by requiring independent inspections of surface coal mining operations in primacy states, rather than engaging in joint inspections with the states. OSM has recently re-assigned at least 18 FTEs to this effort, resulting in unnecessary expense with little to show in the way of programmatic benefit. The House Interior Appropriations Subcommittee, in its report on the FY 2012 budget proposal, recently chastised OSM for this wasteful spending, noting that: "The Committee also rejects the proposal to increase inspections and enhanced Federal oversight of State regulatory programs. Delegation of the authority to the States is the cornerstone of the surface mining regulatory program. The Committee believes the President's proposal to increase Federal inspections would not only be a redundant activity, but also duplicative and wasteful spending. The State regulatory programs do not need enhanced Federal oversight to ensure continued implementation of a protective regulatory framework." If Interior is serious about saving money, this would be a good place to start.

Finally, the importance of maintaining OSM as an independent agency cannot be overlooked. At the time that SMCRA was being debated in 1977, Congress was well aware of the importance of maintaining distinct roles and responsibilities among and between agencies that had as their mission the development of mineral resources, as compared to the protection of the public and the environment from mineral development, as well as those who mine those resources. FLPMA, SMCRA and the Mine Safety and Health Act were all passed within about a 12 month period of time by the 94th and 95th Congresses. The framers of these statutes were clearly concerned about the separation of the sometimes competing interests that attended mineral development.

In addressing the creation of OSM under Title II of the Surface Mining Act, the Senate had this to say: "The Office will be separate from any of the Department's existing bureaus or agencies. It is intended that the Office exercise independent and objective judgment in implementing the Act. . . . The Act specifically states that there cannot be transferred to the Office any legal authority which has as its purpose promoting the development or use of coal or other minerals." (S. Report No. 95-128 at pages 63-64). At about this same time, the Senate also reported out the Mine Safety and Health Act and in its report the Senate stated: "The history of the Interior Department's enforcement of [the Coal Act and the Metal Act], either by the Bureau of Mines or by the Mining Enforcement and Safety Administration (MESA), demonstrated a basic conflict in the missions of the Department. In past years, the Department has pursued the goal of maximizing production in the extractive industries, which was not wholly compatible with the need to interrupt production, which is the necessary adjunct of the enforcement scheme under the Metal and Coal Acts. . . . On the other hand, no conflict could exist if the responsibility for enforcing and administering the mine safety and health laws was assigned to the Department of Labor, since that Department has as its sole duty the protection of workers and the insuring of safe and healthful working conditions." (S. Report No. 95-181 at page 5).

The importance of separating out the respective missions, duties and roles of OSM and BLM continues today. From the states' perspective, to ignore the original intent of Congress for establishing these independent agencies would potentially under-

mine the carefully crafted statutory design and unduly upset the balance of powers and authorities between those agencies. It would also impact the state/federal relationship envisioned by SMCRA. We believe there are ways that Interior can accomplish the administrative efficiencies that it desires without running afoul of the statutory purposes of SMCRA and FLPMA and compromising the roles of OSM, BLM and the states under those statutes. We stand ready to work cooperatively with both OSM and BLM to further discuss the appropriate mechanisms to accomplish this objective.

Thanks again for the opportunity to appear before you today. I would be happy to answer any questions you may have or to provide further information.

The CHAIRMAN. Thank you very much.

Before you go ahead, Mr. Corra, let me just call on Senator Barrasso if he wanted to make any introductory comment.

Senator BARRASSO. Thank you, Mr. Chairman, I would. I want to thank you again for inviting John Corra, the Director of the Wyoming Department of Environmental Quality, to be with us and to testify here today.

John Corra is a trusted and highly esteemed public servant. He's also a good friend. We were classmates in something called Leadership Wyoming about a decade ago.

John was originally appointed as the Director of Wyoming's DEQ in 2003 by Governor Dave Freudenthal, a Democrat, and he served during the entire 8 years, the 2 terms, for Governor Freudenthal.

Subsequently, John was reappointed as the Director by Wyoming's current Governor, Matt Mead, a Republican. So John is an individual with vast experience in regulating mineral development. He's also someone who knows how to strike the right balance between environmental protection and mineral production.

Under John's leadership and stewardship, the Wyoming Department of Environmental Quality has shown how States can be effective regulators. Frankly, I wish we had more people like John here in Washington.

John, it's a pleasure to have you here today, and I look forward to your testimony.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Corra, you come very well recommended. Go ahead.

**STATEMENT OF JOHN CORRA, DIRECTOR, WYOMING
DEPARTMENT OF ENVIRONMENTAL QUALITY**

Mr. CORRA. Thank you, Mr. Chairman. Senator Barrasso, very kind words.

I want to start by thanking the committee for inviting the State of Wyoming to testify today. I'm also here to represent the views of the Reclamation Committee of the Western Interstate Energy Board, which includes Utah, Colorado, New Mexico and Montana, who, along with Wyoming, produce over half of the nation's coal supply.

Wyoming is a unique State in that we are the nation's leading exporter of energy. Mineral development accounts for about two-thirds of our State's economic well being.

We have outstanding natural-resource values, both in terms of mineral development and in terms of scenic beauty. Our challenge, then, is to manage the development and use of these racehorses in wise ways.

Now, an inextricable part of this challenge is the relationship with our Federal partners who own 48 percent of the land surface and 67 percent of the mineral estate in Wyoming.

Thus, we have a keen interest in the recent announcement by Secretary Salazar to combine 2 Federal agencies that play a key role in the development and preservation of the natural resources in our State.

This consolidation is a significant reorganization effort that has greater potential for failure than success unless serious consideration is given to the crucial role that States play in the accomplishment of the very diverse missions of the Bureau of Land Management and the Office of Surface Mining. Consultation with the States is essential to achieve positive outcomes that meet the goals of Secretary Salazar's recent order.

We've got a long history working very well with our local counterparts in both the BLM and the OSM. Our expertise in wildlife, agriculture and environmental management are critical to quality decisionmaking on their part. Our relationship with local management in the Federal Government is professional and it's collaborative.

Effective mining regulation and reclamation is achieved at a significant savings to the Federal Government as States provide nearly all the staff required to administer SMCRA at coalmining operations, and we provide staff to assist the OSM to regulate non-coalmining and the management of reclamation of abandoned mines in the State, both coal and non-coal.

This arrangement has been highly successful. In fact, OSM agrees, as can be seen in annual OSM evaluations of the State programs.

OSM's role must be viewed in contrast with our interactions with the BLM, whose mission is to manage the public lands in a manner that recognizes the nation's need for domestic resources.

BLM's statutory mandate under the Federal Land Policy and Management Act relates to multiple use and sustained yield through resource management and land planning. They do have some limited regulatory functions and they collect royalties and other fees.

Regarding coalmining, their primary role is one of assuring resource recovery and maximizing revenue. While they conduct environmental assessments in this process, their role is much different than a regulatory review of an application for a permit to mine.

Not the least of our many questions concerning the proposed merger is how this obvious conflict of interest with the role of OSM can be reconciled.

Additionally, under FLPMA, the States are not allowed the opportunity for primacy and are left to negotiate memoranda of understanding that outline the role we play in managing minerals.

We have questions about whether the merger can be completed without changes to the organic acts that govern both agencies. If this merger is intended to only simplify certain administrative procedures, we might be less interested in the outcome.

However, if it is about implementing what we believe to be poorly thought-out ideas, such as consolidating abandoned mine land reclamation at the Federal level and taking away fees from cer-

tified States and tribes, we will be in serious and substantial disagreement.

If the merger is also intended to change the way the States obtain authority to regulate—for example, from one that is spelled out clearly in rules to one that is really the best deal we can negotiate through an MOU—the States will be severely impacted.

Our concerns are further heightened by the many attempted unilateral impositions by OSM over the past year or 2. To name just a few, the expansion of the 10-day notices to apply to permits that are issued by the States, a nationwide expansion of a negotiated settlement with other Federal agencies on the stream protection rule and what appears to be a push to require States to charge fees to recover the costs associated with regulatory programs.

We are on record with our concerns over the development of the environmental impact statement for the stream protection rule, and many of these concerns are directly related to our anxiety over how this merger process will proceed.

This includes the fact that the purpose and need for the stream protection rule was never clearly articulated, nor was it vetted with the States. The action was so hurried that a careful consideration of how the rulemaking would interfere with other Federal and State authorities was totally lacking.

So we really ask what is the vision for the merger? We would also like to see the business case. No consolidation should occur until these and other issues affecting the States have been resolved.

In closing, we understand that there is a need to streamline the way Federal Government does business and achieve economies of scale wherever possible. We just simply want to avoid the law of unintended consequences and any further burdens and unfunded mandates that might be placed on the States.

There is great potential for damage to be done to the states with no rationale presented to date on how we might gain from this merger.

Again, thank you very much, Mr. Chairman, for the opportunity to speak today.

[The prepared statement of Mr. Corra follows:]

PREPARED STATEMENT OF JOHN CORRA, DIRECTOR, WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY

My name is John Corra. I am the Director of the Wyoming Department of Environmental Quality. I wish to thank the Committee for inviting the State of Wyoming to testify at this hearing today. Wyoming coal mines produced 442 million tons of coal in 2010, over 40% of the nation's total production. I am also here to present the views of the Reclamation Committee of the Western Interstate Energy Board, which includes Utah, Colorado, New Mexico and Montana, who along with Wyoming are produce over half of the nations coal supply.

Wyoming is a unique state in that we are the nation's leading exporter of energy, and stand to increase this position as renewable energy resources such as wind power are developed. We have outstanding natural resource values, both in terms of mineral development and in terms of scenic beauty. Our natural resources largely define both the "why" and the "how" we live in Wyoming. Mineral development accounts for two thirds of the state's economic well-being. It is critical that we manage the development and use of these resources in a way that serves our various interests.

An inextricable part of this challenge is the relationship with our federal partners, as evidenced by an ownership situation where the federal government owns 48% of

the land surface and 67% of the mineral estate in Wyoming. We do not control all of the elements of energy development yet we believe in our inherent right to control our destiny. Thus we have a keen interest in the recent announcement by Secretary Salazar to combine two federal agencies that play a key role in the development and preservation of the natural resources in our state. This consolidation is a significant reorganization effort that has greater potential for failure than success unless serious consideration is given to the crucial role that states play in the accomplishment of the very diverse missions of the Bureau of Land Management (BLM) and the Office of Surface Mining (OSM).

Communication, collaboration and consultation with the states are not only crucial, but are also essential to achieving positive outcomes that meet Secretary Salazar's goals articulated in his Order. We have a long history of working very well with our local counterparts in both the BLM and the OSM. I can't stress that enough. Over the past few years, and continuing today, the BLM has been updating their Resource Management Plans and conducting environmental assessments on a number of large energy development projects. The quality of these assessments is high, and a direct result of working closely with the state. Our OSM point of contact serves the state very well while also fulfilling the mission of the Surface Mining Control and Reclamation Act (SMCRA).

The relationship we have with the OSM personnel who are on the ground in Wyoming and in other western states is based on the policy and purposes of SMCRA including the federal responsibility to assist States in developing and implementing a program that will achieve the goals and purposes of SMCRA, which are to protect society and the environment from the adverse effects of surface and underground coal mining operations. The federal entity retains oversight and the terms and conditions of the relationship have been well refined over thirty years. Examples of highly valuable contributions from OSM are the Technical Information and Professional Services program, training, and the facilitation of sharing best practices across the nation. The value of the states and the critical role played by States and Tribes is acknowledged and highlighted even by OSM. The OSM mission statement includes the statement that "Our mission is to carry out the requirements of the Surface Mining Control and Reclamation Act (SMCRA) in cooperation with States and Tribes." OSM also highlights this relationship in their Vision Statement: "In cooperating with State regulatory authorities, the primary enforcers of SMCRA, and with Tribes, we will promote a shared commitment to the goals of the Act." Of interest are the positive references to the relationship between States and Tribes as noted prominently on the OSM website. One reference reads: "The Bureau, usually referred to simply as the Office of Surface Mining or OSM, was created in 1977 when Congress enacted the Surface Mining Control and Reclamation Act. OSM works with State and Indian Tribes to assure that citizens and the environment are protected during coal mining and that the land is restored to beneficial use when mining is finished. OSM and its partners are also responsible for reclaiming and restoring lands and water degraded by mining operations before 1977." Another reference highlights the successes that have been achieved: "Although a small Bureau, OSM has achieved big results by working closely with those closest to the problem: the States, Tribes, local groups, the coal industry and communities." The States and Tribes have had the overwhelming share of SMCRA Title IV and Title V implementation duties for many years and that fact must be central to any discussion of consolidation. The leadership role played by States and Tribes in partnership with the OSM has resulted in a very successful record of implementing and managing mining regulatory programs associated with both active mining operations and abandoned mine lands.

OSM's role must be viewed in contrast with our interactions with the BLM, whose mission is to manage the public lands in a manner that recognizes the Nation's need for domestic sources of minerals, food, timber and fiber. BLM's statutory mandate under the Federal Land Policy and Management Act (FLPMA) relates to multiple use and sustained yield through resource management and land planning. They have some limited regulatory functions and they collect royalties and other fees. Regarding coal mining, their primary role is one of assuring resource recovery and maximizing revenue. While they conduct environmental assessments in this process, their role is much different than the regulatory review of an application for a permit to mine. Not the least of our many questions concerning the proposed merger is how this obvious conflict of interest with the role of OSM can be reconciled. Additionally, under FLPMA the states are not allowed the opportunity for "primacy", and are left to negotiate Memoranda of Understanding (MOU) that outline the role we play in managing minerals in Wyoming. We regulate the mining and reclamation of non-coal minerals while the BLM handles the mineral claims and royalties. We also provide the management and technical assistance necessary for BLM to conduct its

non-coal abandoned mine reclamation efforts. Another question is under which model, that of an MOU or that of a primacy arrangement would best ensure that the intent of SMCRA is preserved.

The current organization model appears to serve this purpose and avoids the types of conflict of interest issues that have been raised over the Deepwater Horizon oil spill in the Gulf of Mexico.¹ While it is true that OSM collects fees, these are unrelated to both mine permitting and the sale of coal leases. If this merger was intended to simply consolidate the collection of fees and royalties, we might be less interested in the outcome. If it is about implementing what we believe to be poorly thought out ideas such as consolidating Abandoned Mine Land reclamation at the federal level and taking away fees from certified states and tribes, we would be speaking out in more affirmative ways. And, if the merger is also intended to change the way the states obtain authority to regulate, i.e. from one that is spelled out clearly in rules to one that is the best deal we can negotiate through an MOU, the states are severely impacted by the merger. Our concerns are further heightened by the many attempted unilateral impositions by OSM over the past year or two. To name just a few: the expanded use of “Ten Day Notices” to apply to permits issued by States; the nation-wide expansion of a negotiated settlement with other federal agencies on a stream protection rule; and what appears to be a push to require states to charge fees to recover the costs associated with their regulatory programs because OSM wants to reduce federal funding for the administration of Title V of SMCRA.

The States are thankful for the existence of very clear legal rights spelled out in SMCRA. While we have questions about whether the merger can be completed without changes to the organic acts that govern both the OSM and the BLM, we are clearly the “stakeholder” with the most to lose. In this regard, we note that President Clinton’s Executive Order No. 13132 on Federalism, in referring to legislation, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government requires consultation with the States early in the process. It also requires a federalism impact statement be provided to the Office of Management and Budget consisting of a description of the extent of the agency’s prior consultation with the States, a summary of the nature of State concerns and the extent to which those concerns have been met. Will this mandate be honored in a meaningful way?

We also have tremendous expertise and experience that would inform the merger process, but have serious concerns about whether the OSM and BLM will take our ideas and input into consideration. We are on record with our concerns over the development of the Environmental Impact Statement (EIS) for the stream protection rule, but I must repeat the issues because they are directly related to our anxiety over how this merger process will proceed.

- The purpose and need for the SPR was never clearly articulated nor was it vetted with the states.
- The process for gathering public input was flawed, as witnessed in Wyoming where the public meeting was held the night before the comment period ended, and the public was not allowed to speak.
- Consultation with the states consisted of sending voluminous sections of the EIS while allowing the states only days to review and comment. Not once did the consultant meet with us to seek our input and understand the differences between the East and West.
- Most importantly, the action was so hurried that careful consideration of how the rule making would interfere with other federal and state authorities was totally lacking.

We understand that there is a need to streamline the way the federal government does business, and achieve economies of scale wherever possible. A recent Memo-

¹ Interestingly, in a recent description of the reorganization of the former Minerals Management Service, pursuant to which Interior has created three independent entities to better carry out the three missions of MMS, Interior stated that: “In place of the former MMS, we are creating three strong, independent agencies with clearly defined roles and missions. MMS—with its conflicting missions of promoting resource development, enforcing safety regulations, and maximizing revenues from offshore operations and lack of resources—could not keep pace with the challenges of overseeing industry operating in U.S. waters. The reorganization of the former MMS is designed to remove those conflicts by clarifying and separating missions across three agencies and providing each of the new agencies with clear missions and additional resources necessary to fulfill those missions.” We assert that this is exactly the type of thinking and analysis that attended the creation of OSM in 1977 and that it continues to hold true today.

random of Agreement between the BLM and EPA regarding air impacts analysis purports to do this, and is an example of how the affected states were ignored until the negotiations were final.

We simply want to avoid the law of unintended consequences and any further burdens and unfunded mandates being placed on our states. It is unfortunate that the order to consolidate the OSM and BLM has been issued without a thorough vetting with the affected states prior to any final decisions. In addition to the questions posed above, we also have the following concerns:

- How will the consolidation affect the existing productive working relationship between OSM field personnel and state program personnel?
- Will the consolidation affect the allocation of funds for state coal mine regulatory programs?
- Will the consolidation affect the allocation of funds to state abandoned mine land programs?
- Will the consolidation change the oversight of state regulatory and AML programs?
- Are there better ways to improve government operations than shuffling boxes on the Interior Department's organization chart? For example, could actions be taken to enable the BLM to benefit from the OSM's high successful TIPS program and technology transfer programs with states?
- How much money could be saved by reducing waste at the OSM caused by a management decision to turn regional or local issues (e.g., mountaintop mining and revised stream protection rules) into national issues which are not germane to most parts of the country?
- How will the inevitable change in culture that follows a consolidation of agencies with maximizing functions) affect western state regulatory programs? The culture of the OSM out West is for a single regional field office, overseeing several states whereas the BLM culture is one where each state has not only a state office but also many regional and local offices. The hierarchical differences alone warrant a close look at how work is done in each agency.
- Would a consolidation affect existing cooperative agreements under which states regulate coal mining on federal lands? Would a consolidation affect other agreements between western states and DOI, such as agreements on the regulation of non-coal mining on federal lands?
- Where will the "savings" from the consolidation be realized?

No consolidation should occur until these and other issues affecting states have been resolved through robust consultations between the Department of Interior (DOI) and Western states.

In closing, OSM has stated the hope that we will offer constructive ideas. We look forward to the opportunity and hope it is not a rehash of our recent experience. Perhaps the consolidation process ultimately chosen by DOI will be guided by well known key steps to transforming organizations. These are well documented, but I cite here those presented by Mr. John P. Kotter in his 1995 Harvard Business review article, *Why Transformation Efforts Fail* and his 1996 book, *Leading Change*. Essentially these are establishing a sense of urgency, forming a powerful coalition, creating a vision, communicating the vision, empowering others to act on the vision, planning for and creating short term wins, consolidating improvements and institutionalizing the new approaches.

We ask: What is the vision for this merger? What is the business case? And lastly, who is part of the guiding coalition? There is great potential for damage to be done to the states with no rationale presented to date on how we might gain from the merger. In one sense, the two agencies are already "merged" within the DOI. We would be greatly surprised if there were not already targeted areas for improvement. We ask that you urge the Secretary to immediately engage the states in his planning process.

The CHAIRMAN. Thank you very much.
Mr. McGinley, go right ahead.

STATEMENT OF PATRICK C. MCGINLEY, PROFESSOR, WEST VIRGINIA UNIVERSITY COLLEGE OF LAW, MORGANTOWN, WV

Mr. MCGINLEY. Thank you, Chairman Bingaman, Senator Murkowski, members of the committee, thank you for inviting me to participate in this hearing.

Today, I have the privilege of appearing here to speak on behalf of coalfield citizens who were surprised—indeed, shocked—by the Secretary’s proposal to bury the OSM within the huge Bureau of Land Management bureaucracy.

I come here representing more than 30 groups, most of them grassroots organizations scattered throughout the coalfields. They include—I can’t list them all—the Citizens Coal Council, the Foundation for Pennsylvania Watersheds, the Waterkeeper Alliance, West Virginia Highlands Conservancy, the National Wildlife Federation, the Environmental Integrity Project, the Powder River Basin Resource Council and the Cook Inlet Keeper.

In the short time I have available, I’m going to truncate my remarks and summarize the objections to the Secretary’s order and touch on just a few points that are elaborated on in my written remarks.

I also want to address a few of the things that have been said here today in the hearing.

Suffice it to say, and I think the committee, in asking its questions, the responses have focused on the fundamental problem with this order, which is that it is an attempt by the Secretary, through administrative action, to change the clear mandate of the organic statute, the Surface Mining Control and Reclamation Act of 1977. It is *ultra vires*. It raises serious separation-of-powers issues.

Senator Risch, you alluded to that. I think that’s really the core of the legislative history.

Senator Bingaman, as you indicated, and Senator Murkowski, it is clear the integration or the comingling or the merger of OSM with BLM, with BLM’s resource production and coal-leasing component is certainly problematic, given the clear legislative history in which the Senate report said that this office will be separate from any of the departments, existing bureaus or agencies. What could be more clear than that?

I’ll also briefly allude to the lessons learned with regard to the Minerals Management Service, also been mentioned briefly here.

In May 2010, Secretary Salazar said the Minerals Management Service has 3 distinct and conflicting missions that must be divided for the benefit of effective enforcement, energy development and revenue collection.

While the Secretary found it imperative to divide MMS, because of its conflicting responsibilities, Order 3315 tells us that consolidating OSM with a coal-leasing and royalty-collection agency will “ensure efficiencies and revenue collection and enforcement.” The contradiction is obvious and inexplicable.

The Secretary’s order was conceived in a vacuum. That’s clear from the questions and the responses the committee has heard today. I would point to some of the answers that Secretary Hayes gave:

We are going to require careful analysis in planning. We believe there are cost savings. BLM has substantial interest in east of the Mississippi.

If you look at the BLM website, you will see no reference to that. We want to explore putting BLM duties within OSM.

There may well be synergies, but no study? No analysis of cost savings was done. It defies explanation how a move of this sort, ef-

fecting stakeholders, effecting an industry that produces coal that powers—provides 50 percent of the power in the United States, that no thought was given. All of the study and analysis, apparently, will occur between—or is beginning to occur between now and March 1.

Finally, I noticed in Secretary Hayes' promise that DOI will, going forward, consult with Congress and with the industry. I note the absence of any reference to coalfield citizens, and, indeed, that is historically a problem with the Department of Interior and the Office of Secretary. This particular move to merge OSM with BLM is really beyond any point in terms of marginalization of OSM that has occurred in the past.

We believe that the Secretary's order represents a failure to recognize and appreciate the mission Congress designed for OSM in America's coalfield communities.

While we may all have differences at this table and in Congress with regard to the performance of OSM's responsibilities, it is clear from the long history that led up through 2 Presidential vetoes to the enactment of the 1977 act that the coalfield citizens who are coalminers, families of coalfield communities, they were a primary focus, as well as ensuring the Nation's coal production.

A message the Congress, the 95th Congress sent in the enactment of the 1977 act appears not to have sunk in at the secretarial level. No communications. No consultation, and, as you notice, the rationalization for the consolidation of OSM into the Bureau of Land Management is justified totally on financial grounds, with no consideration of the impact of this merger on coalfield citizens, both in the east and in the west.

Perhaps at the highest levels of the Department of the Interior, the controversy triggered by this ill-considered administrative action will give rise to a new understanding and appreciation of OSM's mission and a renewed respect for coalfield citizens.

The Secretary should withdraw Order 3315.

I would be glad to answer any questions or provide additional information that may be helpful to the committee.

Thank you very much.

[The prepared statement of Mr. McGinley follows:]

PREPARED STATEMENT OF PATRICK C. MCGINLEY, PROFESSOR, WEST VIRGINIA
UNIVERSITY COLLEGE OF LAW, MORGANTOWN, WV

Chairman Bingaman, Senator Murkowski, and members of the Committee, thank you for inviting me to participate in this hearing on the Secretary of the Interior's Order No. 3315 to Consolidate and Establish the Office of Surface Mining Reclamation and Enforcement within the Bureau of Land Management.

Since 1975, I have been a member of the West Virginia University College of Law faculty where I am presently the Judge Charles H. Haden II Professor of Law. Prior to this, I served as a Special Assistant Attorney General with Pennsylvania's Environmental Strike Force where I enforced laws regulating coal mining and mine safety prior to enactment of SMCRA.

I grew up in the Western Pennsylvania coalfields as the grandson of a coal miner who worked in West Virginia and Alabama coal mines a century ago. My mother was born in Piper, a coal company town in the Cahaba coalfield of Bibb County, Alabama. From the time I joined the WVU faculty until the present, I have represented coalfield families and organizations in matters relating to SMCRA. I was honored to have served on then-Governor Manchin's Independent Investigation teams that reported on the Sago and Upper Big Branch mine disasters.

Today, I have the privilege of appearing before the Committee to speak on behalf of coalfield citizens who were surprised and shocked by the Secretary's proposal to bury the Office of Surface Mining ("OSM") within the behemoth bureaucracy of the Bureau of Land Management ("BLM").¹ Their opposition to Order No. 3315 is based upon the following:

- Order No. 3315 violates SMCRA and contravenes Congress's carefully crafted structure for regulating the adverse impacts of surface and underground coal mining; it also conflicts with the Department's long-standing interpretation of OSM's relationship with the Office of the Secretary;
- The Secretary's action is precluded by the specific language of the statute barring the Secretary from co-mingling employees of any federal agency that "promotes the development or use of coal" with OSM—a prohibition that clearly applies to the BLM;
- The Secretary's Order was conceived in a vacuum with no prior notice or consultation with Congress, the coal industry or coalfield citizens; rather than saving money and making both agencies more efficient, the Order would create additional costs and inefficiencies as well administrative chaos;
- Underlying Order No. 3315 is the Office of the Secretary's profound miscomprehension of the role Congress designed for the Secretary and OSM within SMCRA's structure.

SECRETARIAL ORDER NO. 3315 VIOLATES THE LETTER AND SPIRIT OF SMCRA

Congress carefully designed SMCRA to insure OSM would act as an independent entity within the Department of the Interior under the direct supervision of the Secretary. To accomplish this purpose, SMCRA §201 (b), 30 U.S.C. §1211(b) provides:

The Office shall have a Director who shall be appointed by the President, by and with the advice and consent of the Senate, . . . The Director shall have the responsibilities provided under subsection (c) of this section and those duties and responsibilities relating to the functions of the Office which the Secretary may assign, consistent with this Act.

SMCRA subsection §201 (c), 30 U.S.C. §1211(c) mandates that:

The Secretary, acting through the Office, shall

(1) administer the programs for controlling surface coal mining operations which are required by this Act; review and approve or disapprove State programs for controlling surface coal mining operations and reclaiming abandoned mined lands; [and] make those investigations and inspections necessary to insure compliance with this Act[.] (emphasis added).

The legislative history of SMCRA explicitly describes Congress's purpose in creating and placing OSM in the Department of the Interior:

To insure administration of the program by an independent agency with neither a resource development (the promotion of mining, marketing, or use of minerals) or resource preservation (pollution control, wilderness, or wildlife management) bias or mission, this title establishes the Office of Reclamation and Enforcement in the Department of the Interior. This Office will be separate from any of the Department's existing bureaus or agencies. It is intended that the Office exercise independent judgment in implementing the Act.² (emphasis added).

Thus, Congress mandated that the Secretary act through OSM in administering and enforcing SMCRA. Then Secretary Andrus recognized this direct relationship between the Secretary and an OSM exercising independent judgment when the permanent regulatory program regulations were promulgated in 1979.³ Importantly, every subsequent Secretary of the Interior for more than three decades through both Republican and Democratic administrations has accepted this interpretation of

¹ See Appendix "A" for list of those represented.

² See COMMITTEE ON ENERGY AND NATURAL RESOURCES; SENATE REPORT NO. 95-128; 95TH CONGRESS 1st Session; S. 7, at 63-64. (emphasis added)(Hereafter "Senate Report 95-128"). See also, H.R. CONF. REP. 95-493, H.R. Conf. Rep. No. 493, 95TH Cong., 1ST Sess. 1977, 1977 U.S.C.C.A.N. 728, at—, 1977 WL 16021 (Leg.Hist.) (Senate and House Bills substantially similar).

³ See 44 F.R. 15313 Mar. 13, 1979 and 44 F.R. 49684 (Aug. 24, 1979), 30 C.F.R. § 700.1—§700.4.

SMCRA without question. Order No. 3315 is clearly contrary to, and conflicts with, the Department of Interior's long-standing interpretation of the Act.

An administrative agency may be authorized to change its original interpretation of ambiguous provisions of an organic statute, but it cannot amend the statute by administrative fiat. Nor may an agency camouflage a major policy decision under the guise of making minor adjustments of personnel and assignments within an agency.⁴ In this regard, it must be noted that the Secretary's proposal to restructure SMCRA's abandoned mine lands (AML) program and fee collection system has major policy implications. The 2006 AML program reauthorization by Congress was carefully crafted and should not and cannot be altered through a Secretarial Order that is both inappropriate and unlawful.

Secretarial Order No.3315 would alter the clearly delineated unambiguous long-standing relationship of the Secretary to OSM and impact statutorily-mandated functions without the express grant of such authority by Congress. The Secretary may not restructure SMCRA by such an order and his attempt to do so is ultra vires—that is, beyond the constitutional and executive powers of the Secretary.

COMINGLING EMPLOYEES OF OSM WITH THOSE OF AGENCIES THAT PROMOTE
DEVELOPMENT OR USE OF COAL IS EXPLICITLY PROHIBITED BY SMCRA

The Secretary's action in seeking to "integrate" OSM into BLM is precluded by the specific language of the SMCRA, which bars co-mingling employees of OSM with those of any federal agency that "promotes the development or use of coal" with OSM. Section 201 of SMCRA created OSM and assigned its responsibility. Congress intended to provide some flexibility in staffing OSM and utilizing, where appropriate, the skills and expertise of employees of other federal agencies:

The Office shall have a Director who shall be appointed by the President, by and with the advice and consent of the Senate, . . . The Director shall have the responsibilities provided under subsection (c) of this section and those duties and responsibilities relating to the functions of the Office which the Secretary may assign, consistent with this Act . . . The Office may use, on a reimbursable basis when appropriate, employees of the Department and other Federal agencies to administer the provisions of this Act, providing that no legal authority, program, or function in any Federal agency which has as its purpose promoting the development or use of coal or other mineral resources . . . shall be transferred to the Office. (emphasis added).

The legislative history of SMCRA explains that "[t]he Act specifically states that there cannot be transferred to the office any legal authority which has as its purpose promoting the development or use of coal . . ."⁵ As noted above, Senate Report 95-128 made it very clear that SMCRA was not to be administered by a resource development agency whose duties included either "the promotion of mining, marketing, or use of minerals" or "a resource preservation (pollution control, wilderness, or wildlife management) . . . mission." BLM is both a resource development agency and resource preservation agency.⁶ It is odd, indeed, that the prohibition contained in §201 (b) and the legislative history was ignored when Secretarial Order No. 3315 was issued.

Curiously, the Office of the Secretary has quickly forgotten the lessons of the combination of enforcement and mineral development in the Minerals Management Service ("MMS"). In May 2010, Secretary Salazar properly recognized that combining mineral marketing with environmental protection and enforcement responsibilities created a destructive conflict within the MMS:

The Minerals Management Service has three distinct and conflicting missions that—for the benefit of effective enforcement, energy development, and revenue collection—must be divided," said Secretary Salazar. "The reorganization I am ordering today is the next step in our reform agenda and will enable us to carry out these three separate and equally-important missions with greater effectiveness and transparency. These reforms will

⁴ See 5 U.S.C. §553 (a)(2) (Excepted from the Administrative procedure Act's informal rule-making requirements are "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts").

⁵ Senate Report 95-128 at 64.

⁶ The scope of BLM's authority is described by the agency as managing "public land resources for . . . energy development, livestock grazing, recreation, and timber harvesting, while protecting a wide array of natural, cultural, and historical resources . . . include[ing] 221 Wilderness Areas totaling 8.7 million acres, as well as 16 National Monuments comprising 4.8 million acres." http://www.blm.gov/wo/st/en/info/About_BLM.html

strengthen oversight of offshore energy operations, improve the structure for revenue and royalty collections on behalf of the American people, and help our country build the clean energy future we need.⁷

The combination of conflicting missions of the MMS was intolerable. The Secretary found that separation of those conflicting responsibilities into separate and independent administrative entities will enable the Department to carry out its mission with “greater effectiveness and transparency,” and the reforms will “strengthen oversight” and improve “revenue and royalty collections.” Contradicting the analysis leading to the separation of conflicting functions in the MMS, Order No. 3315 tells us that doing the opposite—“consolidating”—OSM within BLM—will “integrate the management, oversight, and accountability of activities associated with mining regulation . . . ensure efficiencies in revenue collection and enforcement responsibilities and provide independent safety and environmental oversight of these activities.”⁸ These contradictory messages and the underlying logic of DOI decision-makers are difficult to decipher.

What is clear, however, is that the decision to combine the mission of OSM within BLM violates both the letter and the spirit of SMCRA. Moreover, Order No. 3315 pursues a policy that the Secretary himself rejected as unworkable in the context of the Mineral Management Service. While OSM has had its strong critics among the constituency I represent, and among state programs and the coal industry, OSM has never experienced a scandal of the magnitude of what occurred at the MMS. Moreover, the nation’s coal production has increased and environmental protection as well as mine land reclamation have improved significantly in the thirty plus years of OSM’s existence. Coalfield citizens I represent are at a loss to understand the motivations underlying Secretarial Order No. 3315.

In supporting the Secretary’s order, a BLM news release emphasized that its mission includes managing “over 245 million acres . . . primarily located in 12 Western states, including Alaska . . . with a budget of about \$1 billion” and that it “administers 700 million acres of sub-surface mineral estate throughout the nation.” Moreover, the release stated, “BLM’s multiple-use mission is to sustain the health and productivity of the public lands for the use and enjoyment of present and future generations . . . by managing such activities as outdoor recreation, livestock grazing, mineral development, and energy production, and by conserving natural, historical, cultural, and other resources on public lands.”⁹

In contrast, since its creation, OSM’s focus has been exclusively on coal mining regulation, reclamation of coal mines and enforcement of SMCRA. The experience and expertise of the giant agency and the small, specialized agency are complementary only at the extreme margins. Surely, the merger of an agency with 525 employees into BLM’s huge 10,000-employee workforce with its billion-dollar-plus budget would bring scant efficiencies and economies of scale.

Troubling as well is a message given in support of the proposed merger: An OSM official reportedly told a House of Representatives Committee last week that “[f]or the past decade, the agency has consistently been underfunded . . . consolidation could bolster our ability to get the resources we need to maintain oversight.”¹⁰

Experience suggests that the proposed consolidation is likely to produce administrative chaos and bureaucratic turf wars as an agency with expertise and experience in regulating coal mining is buried deep within an agency whose multiple missions include the promotion of mining, marketing, of minerals and resource preservation. Common sense facilitates sound decision-making. Common sense suggests “if it ain’t broke—don’t fix it.” Secretary Salazar should withdraw the unlawful, ill-conceived and illogical Order 3315.

⁷ Interior Dept. Press Release, Salazar Divides MMS’s Three Conflicting Missions, (May 15, 2010), <http://www.doi.gov/news/pressreleases/Salazar-Divides-MMSs-Three-Conflicting-Missions.cfm>

⁸ Section 1, Purpose, Secretarial Order No. 3315 (October 26, 2011).

⁹ BLM News Release, Interior to Examine Integration of Interior’s Mining Regulation and Mine Reclamation Programs (October 26, 2011).

¹⁰ Platts Energy Week, Lawmakers question OSM merger impact on coal (Nov. 2011), <http://www.plattsenergyweektv.com/story.aspx?storyid=173876&catid=293> Given the importance of coal mining to our nation, the strict but fair regulation of mining and reclamation, and the protection of the nation’s waters should compel the Secretary of Interior to personally make a powerful case for fully funding OSM so that it may “maintain needed oversight.” Burying the agency in BLM and hoping that the move “could bolster our ability to get the resources we need to maintain oversight” would seem an odd way for the Secretary to administer SMCRA’s mandate to protect coalfield communities and their environments.

A SUGGESTION FOR A BROADER APPLICATION OF SMCRA'S BAN ON COMINGLING
RESOURCE PRODUCTION AND ENFORCEMENT WITHIN ONE AGENCY

A statement must also be made relating to Senator Murkowski's excellent observations about the integrity of the Interior Department's regulatory programs. Occasionally, irresponsible coal operators cause catastrophic death in our coal mines; similarly irresponsible companies have caused environmental devastation in the diverse coalfield communities across the nation where coal is mined. Like negligent lapses in mine safety that kill miners one by one, the adverse impacts of irresponsible coal mine operations play out almost unnoticed by the larger world and the media: one damaged coalfield community; one lost forest; one polluted stream; and one polluted or destroyed water supply.

A poignant article in the Charleston Gazette newspaper explained the depth of the loss of coal miners in "accidents" that claim one or two coal miners at a time.¹¹ Each coal miner's death, the article found, was caused by a violation of mine safety law and rules. Similarly, a steady, widespread, degradation of Appalachian communities occurs as a result of mining operations that violate the law.

Coalfield citizens are left to feel that they are unimportant to this Administration and that they are not entitled to the same consideration that underlies the Secretary's correct decision to isolate offshore oil and gas regulation from the DOI's oil development activities. Coalfield citizens are astonished that the Secretary and the President believe that inserting coal mining regulatory enforcement inside the very Interior agency that promotes and profits from coal development is a prudent idea. They wonder how BLM can decide to lease a tract of coal on public land and then expect the "integrated" OSM permitting staff to feel independent enough to deny a permit if the mining is found to violate SMCRA and cause adverse externalities.

If the Administration is serious about preserving and enhancing the integrity of the Interior Department's environmental enforcement programs, a very different approach would emerge. OSM would be joined, in reporting directly to the Secretary, not just by the offshore oil and gas regulatory agency, but also by a new agency, the Office of Public Lands Protection and Enforcement. BLM could continue its mission to promote heavily subsidized mining, timber, and oil and gas production from public lands and turn designated public lands into sites for private developers of energy facilities. But the BLM staff regulating those industries, charged with enforcing the laws and regulations and supposedly protecting public lands, would, like the regulators of offshore energy development and the regulators of coal mining environmental impacts, be in a separate regulatory agency independent of BLM's resource development function.

Not only is there no public interest, economic or efficiency justification for the Administration's proposal to place an independent regulatory agency inside the Interior Department's resource development agency, the Administration's plan to do this indicates that the only way to truly safeguard the integrity of environmental regulation within the Interior Department is to take BLM's regulators and enforcers and place them in an independent public lands protection agency, as was appropriately done in the case of the Mineral Management Service.

LACK OF TRANSPARENCY ERODES CONFIDENCE IN OSM'S REGULATORY MISSION

The Secretary's Order appears to have been conceived in a vacuum with no prior notice or consultation with Congress, the coal industry, coalfield citizens or the sovereign Native American nations. This failure to consult, discuss and explore the implications of a major decision altering the statutory structure of enforcement within the Department of the Interior is inexplicable given the President Obama's endorsement of transparency in government.

Apparently, someone at the Department of the Interior decided that burying OSM within the enormous BLM bureaucracy would, as mentioned earlier, "integrate the management, oversight, and accountability of activities associated with mining regulation and abandoned mine reclamation; ensure efficiencies in revenue collection and enforcement responsibilities; and provide independent safety and environmental oversight of these activities."

Ordinarily the impact of such an important decision as evinced by Secretarial Order 3315 would be fully evaluated and all those with an interest in the success of the agency's mission would be consulted in advance. There is no evidence, however, that the DOI studied or otherwise analyzed the impact of merging the smaller agency into the huge entity. The purported savings and efficiencies that would ac-

¹¹ Ken Ward Jr., Beyond Sago: One by One Disasters make headlines, but most miners killed on the job die alone, THE CHARLESTON GAZETTE (Nov. 5, 2006). <http://wvgazette.com/News/BeyondSago/200611050006>

crue from the implementation of Secretarial Order 3315 are based on pure conjecture. Statements by BLM and OSM spokesmen confirm this.

BLM Director Robert Abbey's is quoted in a BLM news release: "OSM and the BLM have many complementary responsibilities with respect to mining and the reclamation of mine lands, and it makes sense to explore how we can bring the best out of the two bureaus as they carry out their statutory responsibilities." (emphasis added). Interior spokesman Chris Holmes, told a media interviewer that "it's too early in this process to identify precisely where those savings will come from and how much we can save . . ." (emphasis added).

In short, these statements confirm that "exploring" how to integrate OSM into BLM is something that will be done between now and March 1, 2012. How and when DOI will determine if there are, in fact, "savings" that will accrue is not apparent; plainly, such a calculation was not performed by DOI in advance of the issuance of Order 3315. It is not surprising that those responsible for the issuance of the Order failed to consult with OSM's stakeholders in advance.

Looking and listening can avoid a train wreck. That simple logic apparently was not considered in DOI's rush to bury OSM inside BLM. The coalfield citizens I represent before you hope that this Committee will inquire and identify how and why such a decision was made without serious study or analysis of its impact on those affected.

THE SECRETARY FAILS TO COMPREHEND OSM'S ROLE IN PROTECTING COALFIELD COMMUNITIES

Finally, but importantly, those whom I represent today believe that Secretarial Order No. 3315 represents a profound failure to comprehend the role Congress designed for the Secretary and OSM, and the importance of OSM to coalfield communities and to the Nation. At the very heart of Congress' enactment of the SMCRA and of OSM's mission, is an overarching concern for the people of America's coalfield communities and for the environment that sustains them.

In 1976, coal supplied eighteen percent of America's electricity. Today, coal powers fifty percent of our electricity and in significant degree because of SMCRA and OSM's supervision of state coal regulatory programs. Recognizing this fact is not to suggest that SMCRA is currently being administered and enforced as intended. As with regard to coal mine safety, much progress has been made—but much more can and should be done to protect the environment of the coalfields and the people who live there. But that is an issue for another day. Suffice it to point out that many in this Congress have argued that coal is crucial to America's energy future. I submit that robust and fair enforcement of SMCRA is equally crucial; burying OSM in BLM would impede accomplishment of both goals.

The 95th Congress understood this simple point when it enacted the SMCRA. The Act contains more public participation rights than any other federal environmental regulatory statute—for a reason. That Congress understood that a key to public acceptance of coal mining is to prevent externalization of harm to families, communities and the environment caused by unlawful coal mining activities. The legislative history of SMCRA is replete with this message as is the statute itself.

Historically Secretaries of the Interior have treated OSM as a poor stepchild of the Department—an agency with a narrow focus on only one mineral and on enforcement rather than federal public land management. The agency has long been significantly underfunded, as Director Pizarchik recently conceded. However, the burial of an underfunded half-alive OSM in the behemoth bureaucracy of BLM is beyond any prior marginalization of the agency.

Many coalfield citizens who understand the role of OSM under SMCRA feel that Secretary Salazar's issuance of Order 3315 shows a fundamental disrespect for them and their communities. I suspect, however, that the decision to issue this Order was grounded in a failure to recognize and appreciate the mission of the long beleaguered OSM.

Let me briefly explain. Over the years since enactment of SMCRA those whom I represent have at times been very critical of regulatory and policy decisions made by OSM political appointees. Nevertheless, the field personnel and technical experts within OSM have frequently taken citizen complaints and concerns seriously. These front-line OSM inspectors, geologists and mining engineers have been crucial in OSM's efforts to implement SMCRA's mandate to protect those who live over and near coal mines from environmental and socio-economic injuries that accompany violations of SMCRA.

There are numerous examples of OSM's field inspectors and technical experts using their expertise to prevent mining operations that would have harmed coalfield communities and families. These professional OSM staffers also have, in some situa-

tions, been permitted to use their expertise to develop facts that allow coalfield families who have suffered injuries to have their rights vindicated through SMCRA-created administrative or judicial remedies. These efforts of front-line men and women of OSM are accomplished using their skills, expertise and savvy garnered from years of working cooperatively with coal operators and state program regulators.

Sadly, one can examine Secretarial Order 3315, DOI news releases and the statements of agency officials without finding a reference to the OSM mission regarding coalfield communities. Whether grounded in disrespect of coalfield citizens or ignorance of OSM's mission and its' impact in the coalfields, Order No. 3315 dishonors the letter and spirit of the SMCRA and should be withdrawn. Perhaps, at the highest levels of the Department of the Interior the controversy triggered by this ill-considered and cavalier administrative decision will give rise to a new understanding and appreciation of OSM's mission—and renewed respect for coalfield citizens.

I would be glad to answer any questions and to provide any additional information that may be helpful to the Committee. Thank you.

APPENDIX A

The following organizations are represented by Professor Patrick C. McGinley's testimony at the Senate Committee on Energy and Natural Resources Hearing on November 17, 2011 regarding the Secretary of the Interior's Order: 3315.

Citizens Coal Council—Bridgeville, PA
 8th Day Center for Justice—Chicago, IL
 Appalachian Citizens' Law Center—Whitesburg, KY
 Black Mesa Water Coalition—Flagstaff, AZ
 Black Warrior Riverkeeper—Birmingham, AL
 Buffalo Creek Watershed Association—Claysville, PA
 Cahaba Riverkeeper—Birmingham, AL
 Center for Coalfield Justice—Washington, PA
 Citizens Against Longwall Mining—Hillsboro, IL
 Citizens Against Ruining the Environment—Lockport, IL
 Citizens for Pennsylvania's Future (PennFuture)—Harrisburg, PA
 Citizens Organizing Project—Knox County, IL
 Coal River Mountain Watch—Whitesville, WV
 Cook Inletkeeper—Homer, AK
 Delaware Riverkeeper Network—Bristol, PA
 Environmental Integrity Project—Washington, DC
 Faith in Place and the Illinois Interfaith Power and Light Campaign—Chicago, IL
 Friends of Bell Smith Springs—Stonefort, IL
 Friends of Hurricane Creek—Tuscaloosa, AL
 Friends of the Earth—Washington, DC
 GASP—Birmingham, AL
 Greene County Watershed Alliance—Greene County, PA
 Kentucky Resources Council—Frankfort, KY
 Mountain Watershed Association—Melcroft, PA
 National Wildlife Federation—Washington, DC
 Nizhoni Ani—Kykotsmovi, AZ
 Ohio Environmental Council—Columbus, OH
 Ohio Valley Environmental Coalition—Huntington, WV
 Powder River Basin Resource Council—Sheridan, WY
 Prairie Rivers Network—Champaign, IL
 Residents Against the Power Plant—Bulger, PA
 Statewide Organizing for Community eMpowerment—Knoxville, TN
 The Foundation for Pennsylvania Watersheds—Alexandria, PA
 Upper Wheeling Creek Watershed Association—East Finley, PA
 Vermont Law School Environmental and Natural Resource Law Clinic—South Royalton, VT
 Waterkeeper Alliance—New York, NY
 West Virginia Highlands Conservancy—Rock Cave, WV
 Wheeling Creek Watershed Conservancy—Nineveh, PA
 Wild South—Asheville, NC

The CHAIRMAN. Thank you very much.
 Ms. Sweeney, go right ahead.

**STATEMENT OF KATIE SWEENEY, GENERAL COUNSEL,
NATIONAL MINING ASSOCIATION**

Ms. SWEENEY. Good morning, Chairman Bingaman, Ranking Member Murkowski and members of the committee. Thank you for inviting me to discuss our concerns regarding the consolidation of OSM within BLM.

Without repeating the legal arguments already raised by members of the committee and other panel members, I agree that, as a threshold matter, the order raises a serious legal question: Can this consolidation be accomplished without specific authorization from Congress, especially given that on its face, SMCRA appears to prohibit this merger?

In these difficult fiscal times, National Mining Association appreciates the need for agencies to look at conserving resources. Perhaps there may be some merit to the proposal to consolidate some of the non-policy administrative functions of BLM and LSM, though couldn't that be accomplished by some sort of agreement rather than a merger?

But this proposal should also be examined from the broader economic standpoint of what the department can do to grow our economy and put people back to work. As President Obama recently declared, ultimately, our recovery will be driven, not by Washington, but by our businesses and our workers.

I'd like to highlight that the mining industry was among the few sectors of our economy that substantively increased jobs over the last decade. But we could have done much more if the U.S. had policies that encourage rather than impede domestic mining, and these are the issues that we think the secretary should address. We are skeptical that the consolidation of BLM and OSM will achieve these goals.

In particular, we recommend that Department of Interior review its permitting processes for mining activities. The length, complexity and uncertainty of the process places high hurdles in the path of mine operators. It can take between 7 and 10 years to get all the permits necessary to mine on BLM lands.

There are many causes of delays for BLM permits, but one key, primarily administrative, chokepoint is the Department of Interior's clearance process for NEPA Federal Register notices sent from State BLM offices. These administrative notices require 14 levels of review at Department of Interior.

This policy adds approximately 1 year to the already lengthy permitting process and has never, in our experience, resulted in a final product that differed substantively from that submitted by the State BLM.

We appreciate the legislation introduced by Senator Heller and others on this committee to place a 45-day time limit on these DOI reviews.

We also applaud the efforts of Senator Murkowski and other committee members to pass critical minerals legislation that includes a review of the permitting system to determine how to make it more efficient while maintaining our current environmental standards.

Another way the department can marshal scarce resources, absent a consolidation, is to ensure agencies focus on mission-essen-

tial activities. OSM has strayed from that path with its recent policy of reviewing and second-guessing State permitting decisions in primacy States. The increases in the oversight of State programs has proven to be unnecessary, duplicative and a waste of taxpayer dollars.

Nor is this approach justified by some alleged failure of the primacy States to properly implement the SMCRA program, as OSM's own annual evaluation reports demonstrate that the States have done an excellent job in regulating coalmines.

There is much OSM and BLM could do to better utilize diminishing resources without resorting to a merger, and additional specific recommendations are contained in the Appendix A to this testimony, but to highlight one example, OSM has squandered millions of taxpayer dollars with respect to developing the wholly unnecessary stream protection rule.

Despite the fact that the Federal Government had already spent 5 years and more than \$5 million on developing a stream buffer zone rule, OSM decided early in this administration to abandon that rulemaking and commission a new EIS.

OSM has already spent more than \$4.4 million on this project and is now pouring in an additional \$900,000 because it did not agree with its own contractor's report, which showed that the agency's rewrite of existing regulations would likely cost tens of thousands of jobs.

We also note that the merger is not likely to accomplish the substantive aims laid out in the order. For example, is integration of the OSM abandoned mine land programs and BLM's reclamation programs feasible, given the agency's different regulations, reclamation standards and funding mechanisms?

Similarly, it's difficult to comprehend how the 2 agencies' regulation, inspection and enforcement programs can be consolidated. For instance, it would be nonsensical to mix and match OSM and BLM inspectors, because they are trained to look for different things at different types of mines, coal and hard rock.

NMA looks forward to a continuing dialog with the agencies, the department and Congress about ways to conserve agency resources while promoting efficient utilization of our abundant domestic resources to meet the Nation's needs for affordable electricity and minerals vital to innovation and a strong economy.

Thank you.

[The prepared statement of Ms. Sweeney follows:]

PREPARED STATEMENT OF KATIE SWEENEY, GENERAL COUNSEL, NATIONAL MINING ASSOCIATION

Good morning. Thank you for inviting me to testify before you today. My name is Katie Sweeney and I am speaking today on behalf of the National Mining Association (NMA). NMA is a national trade association that includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry.

The Secretary of the Interior, Ken Salazar, issued secretarial order number 3315 on October 26 directing the consolidation of the Office of Surface Mining, Reclamation and Enforcement (OSM) within the Bureau of Land Management (BLM). The proposal raises more questions than it answers. Obviously, the different statutory authority and clearly divergent mandates of the two agencies raises issues about

how they can be merged but as a threshold matter, the order raises a serious legal question—can this consolidation be accomplished without specific authorization from Congress?

On its face, the Surface Mining Control and Reclamation Act (SMCRA) § 201 establishes OSM as an independent agency within the Department of the Interior, and directs the Secretary to “act through the Office. . .” (referring to OSM). It does not tell the Secretary to “act through the BLM.” The same section creates a firewall prohibiting the transfer of any legal authority, program, or function from any federal agency that promotes development or use of coal or regulating the health and safety of coal to OSM. The Federal Land Management and Policy Act (FLPMA), which guides BLM’s management of federal lands, clearly promotes the development of coal and other minerals on federal lands. Included in FLPMA’s congressional declaration of policy is the statement that “the public lands be managed in a manner that recognizes the Nation’s need for domestic sources of minerals . . . from the public lands.”

In these difficult fiscal times, NMA appreciates the need for federal agencies to investigate ways to conserve resources. Perhaps there may be some merit to the Secretary’s proposal to consolidate some of the non-policy administrative functions of OSM and BLM. But this proposal should also be examined from the broader economic standpoint of what the Department can do to grow our economy and put people back to work. As President Obama recently declared, “ultimately, our recovery will be driven not by Washington, but by our businesses and our workers.”

I’d like to highlight the fact that metal and coal mining were among the few sectors of our economy that substantially increased jobs over the last decade—when the overall economy experienced the first job-loss decade in 75 years. Such success is bittersweet, not only because we still have millions of unemployed Americans, but also because mining could have done so much more if the United States had policies that encourage—rather than impede—domestic mining. And these are the issues we think the Secretary should address. We are skeptical that the consolidation of OSM and BLM will achieve these goals.

In particular, we recommend that DOI review its permitting processes as they relate to mining activities. As the burden of regulations increases so does the complexity and time it requires to obtain permits and authorizations necessary to commence job-creating enterprises. The length, complexity and uncertainty of the permitting process place high hurdles in the path of mine operators. It can already take between 7 and 10 years to get all the permits necessary to mine on BLM lands.

There are many causes of delays for BLM permits but one key, primarily administrative, choke-point in that process is DOI’s policy for processing certain administrative notices for mining operations and other commercial enterprises on public lands. The current “clearance process” for National Environmental Policy Act (NEPA) Federal Register notices sent from Bureau of Land Management state offices requires 14 levels of review at the Department of the Interior’s Washington, D.C., office. This policy adds approximately one year to the already lengthy permitting process and has never, in our experience, resulted in a final notice that differed substantively from the product submitted by the state. And the costs of the delays are substantial, impacting the net present values of projects and putting new jobs on hold. We appreciate the legislation introduced by Sen. Dean Heller (R-Nev.) and co-sponsored by many on this committee to place a 45-day time limit on the reviews of these notices by DOI. And we also applaud the efforts of Senator Murkowski and other committee members to pass critical minerals legislation that includes a review of the permitting system to determine how to make it more efficient while maintaining our current environmental standards.

Merging OSM and BLM has the potential to create uncertainty and even further delays in mine permitting as staff become accustomed to their new roles and responsibilities. In addition, NMA has generally found that when multiple agencies are involved, the permitting process, far from being more streamlined, more often than not leads to greater delays.

Another way the department can marshal scarce resources absent consolidation is to ensure agencies truly focus on mission-essential activities. OSM has strayed from that path with its recent policy of reviewing state-issued mining permits in primacy states and second guessing state permitting decisions. This emphasis on massive increases in the oversight of state programs has proven to be unnecessary, duplicative, and a waste of millions of taxpayer dollars. OSM’s own annual evaluation reports demonstrate that the states have consistently done an excellent job in regulating coal mines. Yet the agency has increased inspections by 46 percent with no reprieve in sight even though the increased inspections have resulted in very few enforcement actions. For example, OSM took no enforcement actions in the country’s top coal-producing state, Wyoming. Paradoxically, the agency has funded these unneces-

sary and wasteful policies at the expense of the very states that are doing such an excellent job in regulating mining.

As part of the agency's state program oversight mantra, OSM has also asserted the authority to issue "ten day notices" in situations where the agency disagrees with permitting decisions by primacy states. This is yet another example of OSM misusing its existing authority and limited resources, and, is being done without proper authority from Congress.

There is much OSM and BLM could do to reflect the new reality that agencies will have fewer resources without the need for a total consolidation of the two agencies. Additional specific recommendations for improvements are contained in Appendix A to this testimony, the comments NMA submitted to DOI in response to the required retrospective review of regulations and policies under Executive Order 13563. But to highlight one example, just look at how OSM has squandered millions of taxpayer dollars with respect to developing unnecessary new rules and regulations. Despite the fact that the federal government has already (and recently) spent 5 years and more than \$5 million on developing a stream buffer zone rule, OSM decided on the first day of the new Administration to change this rulemaking and commission a new EIS before the rule was even given an opportunity to go into effect.

By its own admission and testimony, OSM has already wasted more than \$4.4 million on this project, and even its staunchest environmentalist supporters describe it as "an expensive fiasco." Now OSM is pouring another \$900,000 into the project because it does not agree with its own contractor's report, which showed that the agency's rewrite of existing regulations would likely cost tens of thousands of jobs.

Instead of looking to integrate these two agencies to address budget problems and cover up mistakes, OSM should put to better use the resources that have already been provided by Congress. Instead of conducting unnecessary and redundant inspections that produce no results, illegally second-guessing state permitting decisions, and rewriting hundreds of pages of settled rules that will put tens of thousands of Americans out of work, OSM should be using its resources to do more research, to improve technology and to provide training for its State partners so they can do a more effective job of being the primary regulators of surface coal mining operations, as SMCRA intended.

While the Secretarial Order may result in cost savings due to consolidation of administrative functions, the merger is not likely to accomplish the other substantive aims laid out in the order. For example, the order will integrate "OSM's abandoned mine land programs and functions . . . and BLM's mine and surface reclamation programs." Is integration of these programs feasible given the agencies have different regulations, reclamation standards and funding mechanisms. BLM, unlike OSM, currently has no authority to collect monies from active mining operations to fund AML cleanup, and while NMA supports funding of AML cleanup through a reasonable future royalty as part of broader changes to the Mining Law, OSM's AML program should not be that model. According to OSM's own 2012 budget justification, while the AML program has taxed the coal industry more than \$10 billion since its inception, and Congress has appropriated more than \$7.5 billion to the agency for this purpose, OSM has managed to complete only about \$2 billion in the actual clean-up of abandoned mine lands. This type of inefficient program should not be exported to another Interior agency.

Similarly, it is difficult to comprehend how the two agencies' regulation, inspection and enforcement programs can be consolidated. Again, the agencies have different statutory and regulatory mandates. As such, agency personnel gain expertise that does not transfer automatically to another program. For instance, it would be nonsensical to mix and match OSM and BLM inspectors as they are trained to look for different issues at coal and hardrock mines.

Lastly, it is unclear how the states' roles will be impacted by such a merger. While SMCRA contemplates states being the exclusive regulatory authorities within their borders once they have an approved program, BLM operates differently. The state-run programs under SMCRA are significantly more efficient than either OSM or BLM-run programs. Will the merger complicate state permitting, and would a BLM-run agency likewise attempt to interfere with and second guess state permitting decisions the same way that OSM has recently done?

NMA looks forward to a continuing dialog with the agencies, with the Department, and with the Congress about the best way to conserve agency resources while promoting more efficient utilization of our abundant domestic resources to meet the nation's needs for affordable electricity and minerals vital to innovation and a strong economy. We believe that regulating our activities can be done in an efficient manner while ensuring that our members receive permits in a fair and timely manner, and taxpayer dollars are used effectively.

Thank you for the opportunity to share our views.

APPENDIX A

NATIONAL MINING ASSOCIATION,
Washington, DC, March 28, 2011.

Regulatory Review,
Office of the Executive Secretariat and Regulatory Affairs, U.S. Department of Interior, 1849 C Street, NW, Washington, DC.

DEAR SIR/MADAM:

RE: Comments on improving DOI's regulations—Docket Number DOI—2011—0001; Department of the Interior Retrospective Review under E.O. 13563

The National Mining Association (NMA) appreciates the opportunity to respond to your request for information to help shape the Department of the Interior's (DOI) plan to review existing regulations and identify opportunities for improvement through modifications, streamlining, expansion or repeal. 76 Fed. Reg. 10526 (Feb. 25, 2011).

NMA is the national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering, transportation, financial and other businesses that serve the mining industry. Since many NMA members conduct mining operations on federal lands, we have a fundamental interest in the adoption of principles and policies that foster the prudent management and stewardship of the nation's natural resources. Because DOI manages much of the lands with our nation's critical mineral resources and administers programs that directly impact many mining operations, NMA offers the following comments regarding the regulations and policies that should be included in the retrospective review under Executive Order (E.O.) 13563.

GENERAL COMMENTS

DOI requests comments regarding how, generally, it can best review its existing rules in a way that will identify rules that should be changed, streamlined, consolidated or removed. NMA believes that DOI's engagement of affected parties and other stakeholders is the most appropriate way to identify such rules. As DOI moves forward with its review, NMA urges the department to ensure that its regulations are consistent with DOI's mission, including its resource use mission. As identified in DOI's strategic plan, a key component of the resource use mission is to provide America with access to energy and minerals to promote responsible use and sustain a dynamic economy. The importance of the federal lands for coal, hardrock and other minerals cannot be understated. See Fact Sheet: The BLM—A Sound Investment for America for discussion of the \$112 billion contribution of BLM public lands to the economy.

RULES, POLICIES AND GUIDANCE FOR REVIEW

NMA has identified below several rules, policies and guidance that should be reconsidered during the retrospective review. These rules, policies and guidance impose substantial and unjustifiable burdens on the mining industry that are simply not necessary for DOI to achieve its regulatory or statutory objectives.

- Secretarial Order 3310 on Wild Lands and related guidance

In issuing Secretarial Order 3310, DOI is creating a confusing and duplicative system to protect federal lands with wilderness characteristics. The announcement of the policy has already halted several planned mining projects as Bureau of Land Management staff are commandeered to conduct the new wilderness inventories required by the order. The order fails to acknowledge the existing federal laws in place to protect "wild lands" such as the Federal Lands Policy and Management Act (FLMPA), National Environmental Protection Act and the Endangered Species Act. Instead, the Wild Lands Policy ignores FLPMA's "multiple use" mandate and favors very limited passive recreational uses.

Essentially, the policy subverts BLM's FLPMA obligations by establishing a new regulatory program that re-initiates and expands a Wilderness identification procedure that sunset on October 21, 1993 with the submittal of Presidential Wilderness recommendations to the Congress. The Wild Lands Order requires BLM to identify lands that qualify for management as though they are Wilderness, even though they did not so qualify under the Wilderness Inventory mandated by Congress.

The order will put into place an onerous system that could delay decisions regarding uses of federal lands for a decade or longer. Consider that pursuant to the order, BLM has indicated it will inventory 220 million acres of land in the context of the fact that it is not uncommon for a single Resource Management Plan to take 10 or more years to complete. Pursuant to the retrospective review required by E.O. 13563, DOI should rescind the Secretarial Order on Wild Lands and the related changes to its manuals and guidance documents.

- Federal Register Reviews

DOI should also review the policy enunciated in Instruction Memorandum 2010-043, "Guidance on Preparing Federal Register Notices." This "clearance process" for NEPA Federal Register notices needlessly adds months to the permit process for minerals mining and coal projects on federal lands as it requires 14 separate layers of departmental review of notices developed by State BLM offices. (See attached chart.)

The impact of these delays is significant as most mining operations require at least three of these notices per project. As the clearance process routinely takes 3-4 months per notice, this policy adds approximately a year of review time for project approvals. These delays also result in lost federal, state and local revenues, fewer jobs and lost opportunities. For example, one mining company indicated that the delays are preventing the hiring of more than 1,000 new employees, and another stated that for each month of delay the company loses more than \$1 million in net present value. Furthermore, the uncertainties regarding length of time for approval of mining activities has contributed to an all-time low amount of mineral exploration dollars being invested in the United States and to increased reliance on foreign supplies of minerals.

This clearance process is in addition to the existing thorough environmental review process undertaken by BLM for mining projects on federal lands. A typical environmental impact statement undertaken pursuant to NEPA takes over three years to prepare. DOI has never adequately explained the need for this review process and it does not appear to result in substantive changes to the submitted documents. In fact, in the mining industry's experience, the review process has never resulted in a final product that differed substantively from what was submitted by the state BLM offices. DOI should rescind IM 2010-043 and return to the previous process where Federal Register notices could be submitted directly by BLM state offices without stopping at DOI for additional reviews.

- General Review of NEPA Guidance

DOI should also review its guidance on NEPA to determine if there are ways to better integrate NEPA reviews with permitting of mining operations. DOI should recognize that since NEPA's enactment, Congress has passed numerous laws that prescribe substantive goals and procedures to prevent or minimize adverse impacts to environmental resources. These laws include those that provide the authority to promulgate standards for mining operations, such as the Federal Land Policy and Management Act (FLPMA), the Surface Mining Control and Reclamation Act (SMCRA) and the Forest Service Organic Act, as well as specific environmental laws such as the Clean Air Act (CAA), Clean Water Act (CWA), Endangered Species Act (ESA) and the Safe Drinking Water Act (SDWA). These laws and their corresponding regulations require a thorough analysis of the possible environmental effects of mining operations. NMA believes that the functional equivalent of a NEPA review occurs during the permitting of mining operations on federal lands, and therefore a completely separate NEPA review is unnecessary, duplicative and results in significant delays. Please see the attached NMA concept paper on exemptions for mining operations based on this "functional equivalence doctrine" that has been developed by federal courts" to exempt federal agencies from complying with NEPA's environmental review process when other "substantive and procedural standards ensure full and adequate consideration of environmental issues."

- Financial Guarantees Under 43 CFR 3809

The retrospective review that DOI is conducting provides a perfect opportunity to rectify a problem created when the 43 CFR 3809 surface management regulations were revised in 2001. Given developments since that time, DOI should review the decision to prohibit new corporate guarantees and increases of any existing corporate guarantees under BLM's revised section 3809.500 et. seq.

Commercial surety capacity is frequently constrained and leads to questions as to whether the capacity required by the mining industry will be available even at substantially higher direct and indirect costs. Given the constraints on the availability of surety, BLM needs to ensure a wider variety of financial assurance mechanisms,

such as corporate guarantees, are allowed to fulfill obligations under the 3809 regulations. The wholesale jettisoning of corporate guarantees is not necessary to eliminate the problems that BLM and the states had with that form of financial assurance. Past problems with corporate guarantees can be solved by establishing reasonable qualification criteria followed by periodic evaluation to verify that companies remain qualified to self-bond.

Other federal agencies such as the U.S. Environmental Protection Agency (EPA), U.S. Nuclear Regulatory Commission (NRC) and BLM's sister agency, the Office of Surface Mining (OSM), recognize corporate guarantees as an acceptable financial assurance instrument. EPA allows for corporate guarantees for waste disposal sites upon satisfaction of certain criteria, including tangible net worth, a ratio of total liabilities to net worth, a ratio of current assets to current liabilities or total fixed assets in the United States. See 40 CFR 264.143. NRC has a regulatory guidance document, Reg. Guide 3.66 (DG-3002), that provides qualification mechanisms for corporate guarantees. BLM has accepted NRC-approved corporate guarantees for uranium projects on BLM-managed lands in Wyoming, Utah and New Mexico. OSM provisions allow self-bonding based on bond-rating, tangible net worth, a ratio of total liabilities to net worth, a ratio of current assets to current liabilities or total fixed assets in the United States. See 30 CFR 800.23. BLM should consider a corporate guarantee program for the hardrock mining sector based upon sound qualification criteria, just as EPA, NRC and OSM programs have done in order to afford other mechanisms to satisfy bond requirements.

- OSM Policy Directives Relating to State Oversight

In late 2009, OSM proposed major changes to oversight of state programs, including additional federal inspections and significant potential for second guessing of state permitting decisions. OSM's own evaluations of the state programs do not reveal any problems that necessitate these changes. In fact, NMA questions OSM's legal authority to make such changes under the Surface Mining Control and Reclamation Act (SMCRA). OSM's new policy of interfering with state permitting decisions is also inconsistent with a number of court decisions interpreting the federal-state relationship under the Act. Yet OSM ignored these concerns and finalized several directives, including Directive REG-8 "Oversight of State and Tribal Regulatory Programs," Directive REG-23 "Corrective Actions for Regulatory Program Problems with Action Plans" and Inspection and Enforcement Directive INE-35 on "Ten Day Notices." These directives should be rescinded as a part of DOI's retrospective review.

- OSM Stream Protection Rule

While not yet promulgated, DOI should use this review opportunity to reconsider whether it should move forward with the rulemaking OSM is developing on "stream protection." This rulemaking is inconsistent with the President's new executive order. The anticipated stream protection rule is intended to displace a 2008 regulation that was the product of a five-year comprehensive rulemaking process that provided the members of the public and state regulators clarity and certainty, while at the same time requiring improved environmental performance. OSM had not even implemented the 2008 rule before deciding to change it. The agency has not identified any basis or need for these significant regulatory changes, most of which will only add burdens on companies and states through complex and duplicative standards that recreate the uncertainty that was corrected by the 2008 rule.

The rulemaking options under consideration would cost thousands of mining jobs, sterilize millions of tons of coal reserves and impair the coal supply essential to the nation's energy requirements, without any demonstrated environmental benefit over the current rules they are trying to rewrite. Additional sampling and monitoring requirements will add enormous information collection burdens while essentially duplicating the sampling and monitoring requirements already in place in the project's associated NPDES permits. Prohibitions on mining near streams could sterilize millions of tons of coal reserves and render many mines uneconomical. Requiring full restoration of stream form and function before any additional mining can take place could paralyze many mining operations, and establishing corrective action thresholds could interfere with legitimate mining operations that have not violated any water quality standards. Also, requiring condition precedent sequencing of the mining activities and limitations on mining areas not only conflicts with what activities have been permitted but also may prevent compliance with the terms and conditions, more specifically the reclamation requirements, of the permit. Dictating certain post-mining land uses would be contrary to goals of wildlife managers and/or landowners who desire more flexible uses for reclaimed mine lands. The new so-called coordination procedures will add months and even years of delay to critically

needed mining permits. Many of OSM's proposals would also duplicate or contradict authorities under the Clean Water Act that are reserved for the states, in violation of SMCRA. Not only do the proposed rules duplicate authorities, but the rules also duplicate sampling, monitoring, avoidance and minimization processes, and the selection of least damaging alternative analyses. DOI should direct OSM to discontinue this rulemaking effort.

- DOI Should Preserve the 1996 Biological Opinion

Since 1996, OSM and the U.S. Fish and Wildlife Service (FWS) have successfully relied on a biological opinion used to address the effects of surface coal mining and reclamation operations on threatened and endangered species. The opinion correctly concludes that such operations conducted in accordance with properly implemented federal and State regulatory programs under SMCRA are not likely to jeopardize the continued existence of listed or proposed species, and are not likely to result in the destruction or adverse modification of designated or proposed critical habitats. However, certain FWS offices have recently attempted to circumvent the opinion by requiring section 7 consultations or by providing comments through the Army Corps of Engineers' § 404 process rather than through the SMCRA process. DOI should ensure that the longstanding terms of the 1996 biological opinion between OSM and FWS are followed by both agencies.

- DOI Should Not Allow Abuse of Citizen Suit Provisions

OSM, along with some other agencies, have allowed certain groups to exploit the citizen suit provisions of the implementing laws. They are settling lawsuits with plaintiffs' lawyers rather than vigorously defending regulations from legal challenge, and are further using the litigation as an excuse to change longstanding policies of the agency. In addition, DOI has paid attorneys' fees to plaintiffs who have not even been successful on the merits of the issue being litigated. DOI should demand that its agencies vigorously defend duly promulgated regulations and findings, and should not pay attorneys' fees to litigants except when warranted under the law.

- Energy Policy Act Amendments to the Minerals Leasing Act

DOI should extend its regulatory review to include rules or policies that, if implemented, would achieve the goals enunciated in the Executive Order to promote economic growth, innovation, competitiveness and job creation. For example, the BLM needs to move forward with its long-planned regulations to implement the Energy Policy Act of 2005's amendments to the Minerals Leasing Act. The 6 year delay in promulgating the rules has created confusion and delays. BLM needs to move forward with the regulations to implement the Minerals Leasing Act amendments. Congress determined that such amendments were necessary to promote efficient production, encourage maximum recovery of coal resources and optimize federal and state royalties. Therefore, BLM should move forward to implement the following EPLA amendments and corresponding BLM regulations:

- EPLA Section 432: allows lease modifications greater than 160 acres under certain circumstances (requires changes to 43 CFR 3432.1)
- EPLA Section 433: extends the current requirement that all reserves be mined within 40 years (requires changes to 43 CFR 3487)
- EPLA Section 434: changes the method for computing advance royalties (requires changes to 43 CFR 3483.4)
- EPLA Section 435: deletes the requirement that a lessee submit a coal lease operation and reclamation plan within three years of lease issuance (requires changes to 43 CFR 3482.1)
- EPLA Section 436: eliminates the financial assurance requirement to guarantee payment of deferred bonus bid installments by a licensee with a history of timely payments (requires changes to 43 CFR 3422.4)

CONCLUSION

It is NMA's sincere hope that DOI's retrospective review will result in more efficient regulations consistent with the goals of E.O. 13563. This nation needs a rational and systematic approach to managing the wealth of natural resources in and on our federal lands. If you have any questions about this submission, please contact me at (202) 463-2627 or ksweeney@nma.org.

Sincerely yours,

KATIE SWEENEY,
General Counsel.

The CHAIRMAN. Thank you.

Ms. Dunning, why don't you go right ahead?

**STATEMENT OF DARANNE DUNNING, WESTERN
ORGANIZATION OF RESOURCE COUNCILS, HELENA, MT**

Ms. DUNNING. Thank you, Chairman Bingaman, Vice Chairwoman Murkowski and other members of the Senate Energy and Natural Resources Committee.

My name is DarAnne Dunning, and I'm here today representing the Western Organization of Resource Councils, which is a 7-State grassroots organization that's made up of landowners and citizens who live and work in and near the coalfields in the Western U.S., including the States of Montana, Wyoming, North Dakota and Colorado.

I'd like to thank you for the opportunity to testify and for including our citizen voices in this discussion today.

I grew up in southeastern Montana where my family has been ranching since the 1880s, originally raising horses and now cattle. Our family ranch is just a few miles south of the proposed coal tract development at Otter Creek, which is the largest new coalmine proposed in the lower 48. We're also quite close to existing coalmines in southern Montana and northern Wyoming in the Powder River Basin.

Our engagement with this topic goes back to the very inception of SMCRA, and, today, I bring with me in spirit the ranchers and farmers who traveled from the Northern Plains and the Powder River region throughout the 1970s to come to Washington, DC, to enlist the help of Congress in achieving important reforms in the regulation and oversight of coalmining in the United States.

Those farmers and ranchers from the West joined with the citizens from the Appalachian region and coalfields in eastern States who had seen the coal industry overwhelm State and local government regulators and operate with impunity.

They worked with Congress to ensure that OSM became an independent Federal enforcement agency that was intentionally designed to be transparent and accessible to those citizens who were so affected by the dramatic disturbance of coalmining in their communities.

Secretary Salazar's order raises 3 main concerns that go to the very heart of the functioning and workability of SMCRA.

The first is the fundamental conflict in the mission and purpose of the 2 agencies, which could be severely compromised if they're rolled into one agency.

Second, the concern of burying OSM into a large, bureaucratic layer of government like BLM that could compromise OSM's functionality, insulate it and make it less responsive to citizen involvement.

Third, as has been well addressed, whether the Department of Interior can legally integrate OSM into BLM without amending SMCRA.

BLM is responsible for the leasing of the vast majority of the West's coal reserves, while OSM is fundamentally a regulatory and enforcement agency. Separating these functions into 2 distinct agencies is important for avoiding conflicts of interest, such as what we've seen recently in the leasing of offshore oil reserves.

The Deepwater Horizon oil spill is an example of how the Federal Government's role in promoting the leasing and development of Federal natural resources sublimated its regulatory responsibilities.

In response, the Minerals Management Service was divided into 3 separate agencies and actually created 2 new independent bureaus. Yet, Secretary Salazar's order now proposes to combine the separate leasing and regulatory functions of coalmining into one bureau, the Bureau of Land Management.

At this time, BLM's in a process of an aggressive push to dispose of approximately 6-billion tons of the public's coal in Montana and Wyoming alone to private companies.

I'd like to discuss some issues with BLM's handling of coal in the West that might shed light on why it might not be appropriate to place mine leasing oversight, regulation and enforcement all within BLM.

First, BLM decertified the Powder River Basin in the late 1980s as a coal-producing region, and it remains decertified despite the massive increase in leasing and the fact that the Powder River Basin is the largest source of coal in the United States.

As a result, the leases in the Powder River Basin are being leased almost entirely on a lease-by-application, piecemeal process, which is not mindful of the cumulative impacts in the area.

This lease-by-application process also undermines the agency's ability to determine the fair market value for the coal, because when the applicant and the bidder is one and the same, it's next to impossible to have a competitive bid process that actually results in a fair market value.

BLM is additionally pushing forward with even more coal leases despite a clear record that mines seeking even more Federal coal have not complied with the contemporaneous reclamation as required under SMCRA.

For instance, in Wyoming, only 3.5 percent of disturbed acres have reached Phase III bond release, yet, BLM has proposed leases in Wyoming totaling an additional 50,000 acres.

The dominant culture within the Bureau of Land Management has been as a promoter of coal in the region, and, for that reason, it's singularly unsuitable to absorb OSM.

Specifically, section 201 of SMCRA prohibits integrating OSM within a Federal agency such as BLM whose purpose is promoting the development or use of coal.

In conclusion, I urge the members of the committee to look at the many questions raised by the proposal. We oppose moving forward with this order until those questions can be addressed and a much greater investigation of the proposal and consultation with all of the affected stakeholders, including the citizens of the coalfields, can take place.

So thank you very much for your time and for the opportunity to comment on this important matter.

[The prepared statement of Ms. Dunning follows:]

PREPARED STATEMENT OF DARANNE DUNNING, WESTERN ORGANIZATION OF
RESOURCE COUNCILS, HELENA, MT

Chairman Bingaman, Vice Chairwoman Murkowski, and members of the Senate Energy and Natural Resources Committee, my name is DarAnne Dunning. I am representing today the members of the Western Organization of Resource Councils, a seven-state grassroots organization made up of landowners and citizens who live and work in and near the coal fields in the western U.S. Thank you for the opportunity to testify and for including our voices in this important discussion today.

The members of the Western Organization of Resource Councils live in and around the coal mining regions of Wyoming, North Dakota and western Colorado, as well as in Montana, and we would be profoundly affected by Secretary Salazar's proposal which is before you for consideration today, to integrate the Office of Surface Mining into the Bureau of Land Management.

I grew up in southeastern Montana where my family has been ranching since the 1880s, originally raising horses and now cattle. Our family ranch is a few miles south of the proposed coal tract development on Otter Creek, which is the largest new proposed mine in the lower 48. The area is also close to the existing coal mines at Colstrip and Decker and in northern Wyoming. I currently reside in Helena, Montana, where I am in private practice as an attorney and part of my practice focuses on energy and natural resources issues in the Northern Plains and Powder River Basin in Montana. I am a member of Northern Plains Resource Council, one of the 7 statewide groups that make up WORC.

Our engagement with this topic goes to the inception of the Surface Mine Control and Reclamation Act (SMCRA). I bring with me in spirit the ranchers and farmers—some of them neighbors and dear family friends—who traveled from the Northern Plains and Powder River region to Washington, DC, throughout the 1970s and walked the halls of this beautiful capitol enlisting the support of first our Western delegations and then the wider assembly of Congressmen and women from all regions to achieve important reforms in the regulation and oversight of surface mining in the United States. Several of them stood in the Rose Garden of the White House in August 1977 when President Jimmy Carter signed SMCRA into law, along side citizens from the coal fields of Kentucky, Tennessee, and West Virginia. The adoption of the SMCRA was a landmark achievement where ordinary people could take their case and make a difference in whether mining would continue to devastate their homes and farms or the coal industry would be held to a rigorous and fair standard across the nation. SMCRA gave unprecedented powers to citizens in implementing and enforcing the law.

Our members had a significant impact on how the law was written to ensure that surface mining reclamation west of the Mississippi would reflect the unique distinctions of our semi-arid climate where water is precious and the native grasslands and rare prairie forests have evolved uniquely over time to withstand our harsh, dry and brittle climate.

They also joined with citizens from the Appalachian region who had seen the coal industry overwhelm state and local government regulators and operate with impunity as they polluted waters and left gaping holes and spoil piles across the landscape. These citizens voices rose together to insist on a regulatory framework that was open to the ongoing presence and engagement of people who live near and are affected by coal surface mining operations. They worked with Congress to craft legislation that ensured an independent federal enforcement agency and one that was intentionally ordained by Congress to be transparent and accessible to the citizens who are so affected by the dramatic disturbance of surface mines in their communities.

Secretary Salazar's proposed integration of the Office of Surface Mining into the Bureau of Land Management raises a number of red flags that caution us against this move. These concerns go to the heart of the effective functioning and workability of SMCRA.

Three immediate and compelling concerns raised by this proposal are

- (1) the fundamental conflicts in mission and purpose of the two agencies which could be severely compromised if they are rolled into one agency,
- (2) the addition of a large and inflexible bureaucratic layer of government that would compromise OSM's functionality, insulate it and make it less responsive to citizen involvement, and
- (3) whether the Department of Interior can integrate OSM into the Bureau of Land Management without amending SMCRA.

BLM and OSM have distinct and, to some degree, conflicting missions. BLM's mission is to manage the use of public land resources primarily in the West, includ-

ing coal, and get fair market value for them. BLM is responsible for the leasing of the vast majority of the West's coal reserves. OSM regulates coal mining on both public and private lands, although most active with private lands in the East. It is charged with ensuring that reclamation of all coal-mined lands occurs and that it is done under rigorous and strict standards with full transparency and oversight by states and the public at large. OSM is fundamentally a regulatory agency, while BLM's role in part is to manage federal coal reserves, which includes leasing activities that bring revenue to the federal government. Both are necessary functions, but separating them in two distinct agencies is important for avoiding conflicts of interest, such as those that have arisen in leasing high-risk off-shore oil reserves. We need to ensure that OSM's regulatory functions, which include ensuring realistic mining and reclamation plans that do not compromise the welfare of citizens or the protection of the environment, are not compromised by similar conflicts of interest.

One lesson of the Deepwater Horizon oil spill in the Gulf of Mexico is that the federal government failed in its mission to enforce public safety in its oversight of oil well drilling because its role in promoting the leasing and development of federal oil in the Gulf sublimated its regulatory responsibilities. In response, the Minerals Management Service has been divided into three sections, including two, independent bureaus. Yet, Secretary Salazar now proposes to combine the separate leasing and regulatory functions of coal mining into one bureau in BLM. BLM is 20 times the size of the Office of Surface Mining. The sheer mass of this agency and its employees and distinctive mission threatens to enmesh OSM in an impenetrable and difficult to navigate bureaucracy that poses enormous challenges to citizen participation. Our experience in the West is that the path for a citizen to reach a responsible official within the Office of Surface Mining is relatively straightforward. In contrast, because of its size and broad portfolio of responsibilities and many subdivisions, both geographic and topical, BLM presents a complicated challenge to citizens wanting to the engage the agency on vital decisions that affect them, their property, health and livelihoods.

At this time, BLM is in the process of an aggressive push to dispose of approximately 6 billion tons of the public's coal in Montana and Wyoming. This massive disbursement of the public's reserves to private companies raises several important questions that shed light on why it might not be appropriate to place mine oversight, regulation and enforcement within the BLM.

- The leases are being offered on a lease by application piecemeal process, despite the clear directives of the Federal Coal Leasing Amendments Act and federal court rulings to manage federal coal leases regionally, mindful of cumulative impacts.
- The lease by application process undermines the agency's ability to gauge the market for federal coal, as competition at these lease sales is almost unheard of. Two recent sales this past summer in the Southern Powder River Basin underscore this point. Two nearby mining companies (Alpha and Peabody) bid against each other, resulting in significantly higher bonus bids. (Belle Ayr North, July, 2011 .95/ton and West Caballo, August, 2011, \$1.016/ton)
- BLM decertified the Powder River Basin in the late 1980s and, despite the massive increased activity in leasing applications and the fact that the Powder River Basin is the largest source of coal in the US, has not re-certified the area as a coal producing region.
- BLM's coal leasing program has not undergone any serious independent scrutiny since the 1980s and is ripe for review, particularly in the area of how it determines what constitutes fair market value for the public's coal.
- BLM is pushing forward with coal leases despite a clear record that mines seeking more federal coal have not complied with the contemporaneous reclamation as required under SMCRA. OSM has identified in recent years the increasing gap between acres disturbed and acres released from Phase III bonds, which is the determinative measure that the land has met the standards of the act. Phase III bond release indicates that a viable sustainable vegetative community has stood the test of time in the harsh climate conditions of our region. For instance, in Wyoming only 3.5% of disturbed acres have reached Phase III bond release.

The dominant culture within the Bureau of Land Management has been as a promoter of coal in the region and its consistent stance in this respect makes it singularly unsuitable to absorb OSM which is charged with regulation and enforcement and must be independent and transparent.

For example, a recently proposed coal exchange in Montana (Nance-Brown AVF Coal Exchange) approved by the BLM ignores the rights of surface owners to withhold consent to surface mining of their privately owned, deeded land where it over-

lies federal coal. BLM is explicitly mandated under Sec. 714 of SMCRA to consult with private surface owners in split estate federal coal and may convey that coal for surface mining purposes. While the federal government was obliged by a court order to exchange federal coal with the coal owned by Nance-Brown deemed unsuitable for surface mining, the idea that this exchange could take place under privately held surface without consent is outrageous. Such arrogance on the part of BLM in regard to its obligations under the law ignores Congress clear intent and disrespects private property rights.

Finally, there are potential issues with integrating OSM into BLM without amending SMCRA. OSM was specifically established as a separate entity to protect its regulatory function. In addition, Section 201 of SMCRA prohibits integrating OSM within and federal agency “whose purpose is promoting the development or use of coal or other mineral resources.” Yet, one of BLM’s purposes is the development of coal through leasing.

I urge you to look into the many questions raised by the proposal. We oppose moving forward with the order until these questions can be addressed and much greater investigation of the proposal and consultation with all of the affected stakeholders, including the citizens of the coalfields, can take place.

Thank you for your time and the opportunity to comment on this important matter.

The CHAIRMAN. Thank you all for your testimony.

Senator Shaheen has not had a chance to ask questions, so why don’t I go to her first and have her ask her questions?

Senator SHAHEEN. Thank you very much, Mr. Chairman, and I would reassure all of the people testifying that I share many of the concerns that you’ve all raised about the effort to combine these 2 agencies.

I spent a fair amount of time living in West Virginia and going to—living in Pennsylvania near the coalfields. So I appreciate the challenges that people living near those fields often experience. So I do appreciate the concerns that folks are raising today.

Ms. Sweeney, I would actually like to address some of the hard-rock mining issues. You expressed concern about the difficult financial times that we’re in, and I agree with that. I understand that that may be the motivation behind this legislation, even though I think it may be ill-conceived.

But you talk about the importance of encouraging rather than impeding domestic mining. One concern that I have is that the mining law of 1872 provided the opportunity for federally owned gold, silver, copper, uranium and other hard-rock minerals to be mined without paying anything to the government, and I think that has put in place a pretty good deal for the mining industry, but something that I think we ought to reexamine, and I wonder how you would respond to that.

Ms. SWEENEY. Thank you for the question.

Obviously, you know, we are concerned about, you know, having policies that promote domestic mining, and the mining law has been one of those policies that has promoted domestic mining.

But there are a lot of barriers and hurdles to mining, one of which is, you know, the minerals may be difficult to find. They are difficult to find, and that’s why the mining law does have—allows the public to go out and explore for mining operations.

But I do understand your point. You think that mining isn’t paying a fair return to the public. You know, obviously, there are many other contributions that mining makes besides royalty, but I can tell you that National Mining Association has been supportive of changes to the mining law, which do include a royalty to give a fair return to the public.

Senator SHAHEEN. I guess I'm less concerned over that fair return to the public, because I would agree that the public does benefit from those minerals that are mined, but my concern is that we have actually an overly generous form of depreciation, known as percentage depletion, that mining companies are able to take advantage of that really results in a double subsidy for those hard-rock mining companies.

That is the piece that I really think we ought to take a look at, because, in these times of austerity, I do think looking at those subsidies that may no longer make sense in today's world that may have made sense in 1872, when that law was passed, really ought to be looked at, so that we're not providing double subsidies to mining companies to encourage them to do their exploration.

Mr. McGinley, I wonder if you could describe for me the importance of the stream protection rule with respect to regulating valley fills and mountaintop mining removal?

Mr. MCGINLEY. I can briefly describe what I understand to be the impact.

Also, earlier in the hearing, Senator Paul asked some questions with regard to the prospective application of a new rule. He mentioned Justice Scalia's opinion, but Justice Scalia's opinion was not the controlling law of the Rapanos case. It was Justice Kennedy's opinion.

The question of ephemeral streams, ephemeral streams have never been regulated under SMCRA, but they are locatable on any topographic map. They're used by mining engineers in the permitting process, so just to make that clear.

I believe that the proposals, in the past, the buffer zone rule that was in effect from—I believe it was 1981 or 1982 until late in the Bush administration, the second Bush administration, prohibited mine activities within 100 feet of an intermittent or perennial stream. Intermittent is defined. It is somewhat nebulous.

But, in any event, mountaintop removal mining went on for several decades with that rule in place, and, in fact, expanded to an extraordinary extent, to the extent that people of the coalfields are concerned about the impacts of this large—much larger, growing, larger-scale mountaintop removal operations.

The impacts on communities are attendant the large-scale mining—blasting, damage to structures, flooding and health problems.

Recent studies, peer-reviewed studies, have indicated that there may be health-related impacts to coalfield communities that are impacted by large-scale mining, as well as environmental impacts, not—certainly with regard to the headwater streams, but the scientific studies, including the environmental impact statement done by EPA, indicate downstream serious water-quality impacts as a result of the valley fills.

Finally, these valley fills are some of the biggest structures that exist east of the Mississippi. Coalfield residents, especially in Appalachia, who live, really in the shadow of these enormous fills—some of them are 2 or 3 miles long filling the heads of hollows, 200-, 300-, 400-foot deep with mine spoil—they live there with a memory of the Buffalo Creek Disaster that occurred in Logan County, West Virginia, in 1972 that killed 129 West Virginians and made thousands homeless.

So there are concerns about the growing stability of—or the stability of these very large valley fills and also the large coal-waste, liquid-waste impoundments that loom over communities. So there are very serious concerns among coalfield communities, especially in Appalachia. That's where mountaintop removal operations occur.

Senator SHAHEEN. Thank you.

The CHAIRMAN. Senator Murkowski.

Senator MURKOWSKI. Thank you, Mr. Chairman.

I want to thank all of you who have appeared before us today for your testimony.

It's not too often, Mr. Chairman, that all of us that are up here on the dais are in agreement, and then to have a full panel that has expressed the same concerns, perhaps for differing reasons, I think it is a clear signal to us that there is much, much work that needs to be done, if, in fact, this can even move forward.

I've heard from each of you the request, if you will, that there needs to be the stakeholder input. There needs to be that consultation that clearly did not take place.

Perhaps the Secretary will take the advice of Senator Manchin here and pull this down, but if he should not, I would certainly hope that, at a bare minimum, there is a level of consultation not only with the committees, the Congress, but, clearly, with those that are involved in mining operations, whether it's coal or hard rock, from the concerns that we've heard here this morning.

I do want to ask a question, because both Mr. Corra and Mr. Lambert spoke to it, and I think just about everybody had some issues as they related to state primacy over the coal programs.

Mr. Corra, you mentioned that there are differences between the coal programs in the Powder River Basin and what Mr. Lambert sees in the mountains of Virginia there.

Can you speak to perhaps some of the differences and provide us with what would happen if this merger were to move forward and the programs that you have had in place, would they be significantly impacted by the order that we're looking at? How would the States be able to continue with the level of operations that you have had respecting the differences that we see in a place like Wyoming, as opposed to Virginia or West Virginia?

Mr. CORRA. Mr. Chairman, to the first question, the arid west is much different than Appalachia, and the mining techniques are different. In Wyoming, our mines, on a somewhat regular basis, do mine through intermittent streams and perennial streams, and they restore those streams.

I presented some testimony before another committee a while back that showed some pretty good examples of that where we've even won reclamation awards from the Office of Surface Mining for that work.

So the terrain is flatter. The climate is much more arid, and, in fact, the Clean Water Act even recognizes differences between the east and the west.

One of our issues with that particular stream protection rule is that we felt that OSM might actually be intruding on authorities that were given to us through the Clean Water Act in the USEPA. So I hope that answers the questions about the differences.

With regards to what will happen in the future, we simply don't know, and that is what is causing us some great concern. It has taken 30 years to build the professional relationships that exist out there. With regards to the BLM, I think the working relationship inside the State is very good. So, as senior management in those organizations implement the merger in whatever form or fashion it might take, we're quite anxious about how that will upset that balance.

We're pretty proud of the fact that we provide input, a lot of input and a lot of technical assistance to both Federal agencies in Wyoming all the time.

Senator MURKOWSKI. I appreciate that.

Mr. Lambert.

Mr. LAMBERT. Yes, ma'am, thank you. I agree with Mr. Corra. At this point, with the limited information that we've been provided, I don't think we can even second guess what that might look like if those 2 departments are merged.

Agreeing with Mr. McGinley, you know, the Appalachian region is a very different region from the arid West, and we do have distinct, separate mining operations using valley fills.

I would kind of disagree to a point that they are impacting to the point that we are destroying the environment. We have several studies that also says that this is being done in a respective manner.

We have built a 30-year relationship working with OSM, and if this merger takes place, with the limited information that we have and the limited involvement that we have had to this point, will that destroy our 30-year relationship in implementing SMCRA? As a State primacy, how would we be affected with our primacy programs? We just don't know that at this point.

That's why we encourage OSM, BLM, if this moves forward, to engage the States as well as the industry and other parties to be involved in this integration.

Senator MURKOWSKI. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Mr. McGinley, Mr. Hayes stated in his testimony that the revenue collection operations of OSM will be transferred to the Office of Natural Resource Revenue. Mr. Hayes also stated that enforcement in regulatory functions would remain separate from leasing activities. Does that alleviate your concerns about the combination of the 2 offices? Because, from your testimony, it sounds like Mr. Hayes might be missing the point.

Mr. McGinley: I think the Office of the Secretary is missing the point.

I took the liberty of looking at the structure of—the hierarchy structure within the Department of Interior, the bureaus and the offices that's available on line, and it has a place from the Assistant Secretary level to OSM, Bureau of Land Management and other offices and bureaus.

I haven't heard anything from the secretary's office where exactly the Presidential appointee, the director of OSM, would fit in that

structure. Would the director of OSM be reporting to someone in BLM?

I agree with my colleagues here what is unknown about this proposal and the fact that it wasn't vetted at all is extraordinarily troubling. I would submit that that is a reason that we find those of us who may disagree on many issues with regard to coalmining and coalmining enforcement and reclamation, we all come here astounded that this proposal has been made with so little forethought. How this would work, the process that would be involved is totally unclear.

There are some administrative functions, I'm sure, that could be accomplished, and savings accomplished with arrangements that fall far short of tampering with the structure—the command of the organic statute, the Surface Mining Control and Reclamation Act.

Senator FRANKEN. Thank you.

Mr. Lambert, I'm member of the Senate Indian Affairs Committee, and I take the concerns raised by Indian tribes especially seriously.

The U.S. Government has an agreement with tribes to consult with them before making policy changes that affect tribal lands. To your knowledge, did any such consultations like this take place before this decision was made?

Mr. LAMBERT. Senator, I think Mr. Corra would be better to answer that question.

Senator FRANKEN. OK. Mr. Corra.

Mr. CORRA. Mr. Chairman and Senator Franken, I am not aware that any of those consultations took place, would not know. All I can say is that as far as the State of Wyoming is concerned, no one has talked to us.

Senator FRANKEN. OK. The Navajo Nation released a statement saying that they had not been consulted, and, at this point, I would not—If that's the case, they were not keeping up with their obligations to the tribes.

Ms. Sweeney, the Interior Secretary issued this order on October 26 with an effective date of December 1. That seems like a pretty short timeline, since it sounds like very little consultation was done beforehand. We've already heard that the States weren't consulted.

Did the National Mining Association know anything about this before the decision was made? Also, do you feel like a month isn't an adequate timeline for this implementation?

Ms. SWEENEY. The mining industry was just as surprised and shocked as everybody else. Yes, the very, very short timeframe, given the legal questions, the fact that they don't seem to have looked at what exactly the cost savings will be, seems like cart before the horse.

Senator FRANKEN. OK. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Barrasso.

Senator BARRASSO. Thank you very much, Mr. Chairman, and just to follow up along that same line of questioning, and I agree with my colleague, Senator Franken, for his concerns, because I think we all share those concerns.

I'm just kind of thinking of the written testimony from Mr. Corra, Mr. Lambert. You both expressed concerns. Secretary didn't consult the States prior to issuing Order No. 3315, and do you real-

ly think that it's possible to have meaningful consultation after the fact, after the issuance of the order? If so, you know, what would meaningful consultation look like after you know what they're already planning to do?

Mr. LAMBERT. Senator, this proposal of the integration of those 2 agencies in the short timeframe makes me think back to the procedure of the stream buffer zone rule when States were not contacted until the last minute. To me, this seems like an effort that we have defined a problem and we don't even—or we have defined a solution and we don't even know what the problem is as of yet.

So, at this point, given this short timeframe, my answer would be no. I don't think no meaningful consultations could be conducted, given that we're looking at the first of December.

Senator BARRASSO. Mr. Corra.

Mr. CORRA. Mr. Chairman, Senator Barrasso, I think I would echo my colleague. I think that we've seen 2 examples. One is the stream protection rule and the other is a recent memorandum of agreement that was reached between the BLM and the EPA and others with regards to how they do environmental analyses ahead of their resource management plans and their impact statements on projects—and those have a definite impact on the States. That was completely negotiated right at the end. Just before signature we were notified of that.

So, so far, consultation has not taken place, and part of what we want to do today is to seek some way in which we can.

Our view is that, you know, once we understand what the work is, then we can put an organizational structure around it. This seems to be the other way.

Senator BARRASSO. In your testimony, you had some concerns also about the merger's impact on abandoned mine land, the AML program. I wonder if you could just elaborate a little bit on those concerns and what steps should the department be taking to ensure that the AML program is not affected.

Mr. CORRA. Mr. Chairman, Senator Barrasso, the way in which abandoned mine lands are reclaimed in the State of Wyoming, because we're a certified State, we are able to take care of the non-coal reclamation as well as coal, and we work very closely—the BLM recognizes the infrastructure that we have in place for reclamation. So we actually augment a lot of their work, and we have a memorandum of agreement with them that governs how we regulate non-coalmines and reclaim non-coalmines as well.

So as it stands right now, we've been very effective at doing that. Wyoming being the largest coal producer in the country, it has most at risk, if you will, as the agency begins to look at that subject.

Senator BARRASSO. Additionally, not just that, let's talk about a couple of other things. The written testimony, you both expressed—you and Mr. Lambert both expressed concern about the OSM's recent practice of second guessing the State permitting decisions. I wonder if you could tell the committee how long this has been taking place and what might be the reason for it?

Mr. LAMBERT. Thank you for the question, senator.

This just recently took place, beginning the first of the year, when the new directives came out from OSM that they would start second guessing our permitting decisions.

Senator BARRASSO. How about the proposed stream protection regulations? You just specifically mentioned that a little bit, Mr. Corra. You think that that—that the OSM has faithfully followed the current national environmental protection or the National Environmental Policy Act during the rulemaking process? What do you think is happening there?

Mr. CORRA. Mr. Chairman, Senator Barrasso, it appears on the surface that they are following the basic tenants of the National Environmental Policy Act. However, the way in which they the States, by the way, were signed up as cooperating agencies. However, we were given massive volumes of data to review in like a limited number of days.

The way in which they sought public input was also flawed, in my opinion, very cursory, if you will.

Senator BARRASSO. With regard to the OSM's proposed stream protection regulations, if this goes on, the regulations are finalized, do you think there's going to be an impact on jobs in our home State?

Mr. CORRA. Mr. Chairman, Senator Barrasso, I think it's too early to tell. The way in which the information has been presented to us as they have gone through—is rather complicated. They talk about a smorgasbord. I think it will have an impact on the industry, but I'm not sure exactly what it is.

I think some of the original assumptions they made about just simple fuel switching are probably too simplified. I think when utilities begin to make choices on fuel, those choices take on way many different dimensions than just where the coal comes from.

Senator BARRASSO. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Unless there's additional questions from any panel member, I want to thank this group of witnesses. I think it's been useful testimony and we appreciate it. We will take your testimony to heart and hope to learn something from it.

Thank you very much.

[Whereupon, at 11:12 a.m., the hearing was adjourned.]

APPENDIXES

APPENDIX I

Responses to Additional Questions

RESPONSES OF DAVID HAYES TO QUESTIONS FROM SENATOR BINGAMAN

Question 1. Please provide for the record any analyses, opinions, memoranda, or other documents, including those from the Office of the Solicitor, regarding the legality of Secretarial Order 3315 providing for the consolidation of the Office of Surface Mining Reclamation and Enforcement into the Bureau of Land Management.

Answer. Any written product prepared by the Solicitor's Office entails the provision of legal advice to the Department of the Interior and thus is confidential attorney-client and predecisional material. It should be noted that the report issued to the Secretary on February 15, 2012, titled Report for the Secretary on the Proposed BLM/OSM Consolidation (Report), which can be found at: <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageid=283745>, recommended that the Office of Surface Mining continue to operate as an independent bureau within the Department and that the Director of the Office of Surface Mining continue to report to the Secretary through the Assistant Secretary for Land and Minerals Management. Secretarial Order No. 3320, issued on April 13, directs implementation of the recommendations made in the Report.

Question 2. Please provide for the record any analyses, opinions, memoranda, or other documents regarding the pros and cons of consolidating the Office of Surface Mining Reclamation and Enforcement into the Bureau of Land Management. Please include any documents regarding budgetary savings from such a consolidation.

Answer. Documents associated with this process reflect internal, pre-decisional deliberations. Regarding budgetary savings, actual savings will depend on the successful consolidation of various shared support services between the two bureaus, in accordance with the recommendations set forth in the February 15 Report.

Question 3. To whom will the OSM Director report within the Department?

Answer. As noted above, the February 15, 2012, Report recommends that the Office of Surface Mining continue to operate as an independent bureau within the Department and that the Director of the Office of Surface Mining continue to report to the Secretary through the Assistant Secretary for Land and Minerals Management. Secretarial Order No. 3320, issued on April 13, directs implementation of the recommendations made in the Report.

Question 4. Please describe the federal-state-tribal relationship—the so-called “primacy model” contemplated by the Surface Mining Act? What are OSM's ongoing responsibilities under the Surface Mining Control and Reclamation Act once a State or Tribe attains primacy?

Answer. Congress recognized the unique needs of states and tribes and the unique environmental conditions within state and tribal boundaries. Thus, the Surface Mining Control and Reclamation Act encourages states and tribes to enact and administer their own regulatory programs—that is, to attain “primacy”—within federal minimum standards contained in SMCRA and OSM's implementing regulations. Once OSM approves a state or tribal regulatory program, the state or tribe becomes the primary regulator, with respect to the approved program, within its boundaries, while OSM provides guidance and technical assistance to the state or tribe, conducts oversight of approved programs, and provides backup federal enforcement as necessary.

Question 5. One of the witnesses on the second panel stated that it can take 7 to 10 years to get all the permits necessary to mine on BLM lands. The same witness indicated that there are 14 levels of review in the Department's Washington,

D.C. office for NEPA Federal Register notices. Is this correct? If not, please provide the correct information for the record.

Answer. Each year, the Bureau of Land Management's State Offices send from 300 to 500 Federal Register notices to the BLM Washington Office for review, which is designed to improve the overall quality and consistency of the BLM's Federal Register notices. Errors are identified and corrected in about 90 percent of notices submitted for review. Generally speaking, larger mine projects involve longer permitting timeframes. Such projects typically require more analysis under the National Environmental Policy Act or may entail more controversy than a smaller mine project. Larger projects can also be more complicated for mine operators, who may have to amend their plans after submission. Litigation can also contribute to the length of permitting timeframes. The agency is continuing its efforts to review and process permits and to prepare Federal Register notices in accordance with applicable laws.

Question 6. There has been controversy surrounding OSM's efforts to review and revise the stream buffer zone rule. This issue is raised in the statements of some of the witnesses on the second panel. Please provide for the record an explanation of the process being undertaken by the agency and why the regulation is being reviewed.

Answer. Congress specified several purposes for SMCRA, intending that the Department strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal. OSM must ensure not only the coal supply essential to the Nation's energy requirements is provided but also that American coal mines operate in a manner that protects people and the environment and that the land is restored to beneficial use following mining.

As OSM proceeds with development of its proposed Stream Protection Rule, it will consider the extensive comments it has already received from the public and state and federal agencies. It will also consider the benefits, as well as the costs, of the agency's regulatory alternatives. OSM began seeking comments very early in the rulemaking process.

The Environmental Impact Statement (EIS) that OSM is developing in support of the rule will examine a range of alternatives. In addition to analyzing the significant environmental impacts of the proposed Stream Protection Rule and its alternatives, the EIS will evaluate the economic impacts of each alternative and will provide OSM with critical information needed to inform decisionmakers and the public. OSM will take the time necessary to make informed decisions on the rulemaking, taking into account the EIS analysis, and will provide ample opportunity for public input on both the proposed rule and the associated Draft EIS.

RESPONSES OF DAVID HAYES TO QUESTIONS FROM SENATOR MURKOWSKI

Question 1. In response to a question regarding written materials from the Solicitor's Office at the Department of the Interior related to the Secretary's Order #3315, you agreed to provide the Committee with copies of such materials. I respectfully ask that you do so.

Answer. As reflected in the transcript of the hearing, the Deputy Secretary agreed during the hearing to look into the question of whether written materials from the Solicitor's Office could be released. Any written product prepared by the Solicitor's Office entails the provision of legal advice to the Department and thus is confidential attorney-client and predecisional material. It should be noted that the report issued to the Secretary on February 15, 2012, titled Report for the Secretary on the Proposed BLM/OSM Consolidation (Report), which can be found at: <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageid=283745>, recommended that the Office of Surface Mining continue to operate as an independent bureau within the Department and that the Director of the Office of Surface Mining continue to report to the Secretary through the Assistant Secretary for Land and Minerals Management. Secretarial Order No. 3320, issued on April 13, directs implementation of the recommendations made in the Report.

Question 2. President Clinton's Executive Order No. 13132 on Federalism requires a federalism impact statement be provided to the Office of Management and Budget—containing a description of the agency's consultation with the States, a summary of the nature of State concerns and the extent to which those concerns have been met—when policy actions that have a substantial impact on the States are taken. In relation to Order #3315, will this mandate be honored?

Answer. The Department has been clear that OSM's core duties and responsibilities prescribed by SMCRA would remain intact and under the purview of the OSM Director, and the recommendations contained in the February 15 report are con-

sistent with this position. As such, the Department does not anticipate that any proposed consolidations will have a substantial impact on State SMCRA programs. While the provisions of the Executive Order No. 13132, referenced in this question, pertain specifically to the issuance of regulations, significant consultations and meetings with Departmental employees, tribes, state agencies and local communities, industry representatives, and congressional staff have taken place as the Department has developed an implementation plan for the original order.

Question 3. How will Order #3315 affect the existing productive working relationship between OSM field personnel and state program personnel?

Answer. We do not intend to alter the productive working relationships in place between OSM field personnel and state program personnel. From the beginning of this process, the goal has been to evaluate how the Department might be able to more efficiently and cost-effectively combine expertise and resources of the two bureaus in areas that make sense, reducing the drain on OSM resources associated with maintaining stand-alone support services for a bureau that has a small employee and budget base.

Question 4. Will Order #3315 affect the allocation of funds for state coal mine regulatory programs?

Answer. While the Department cannot comment on budget allocations that are yet to be made, the goal has been to make government work better by increasing efficiencies, building upon existing strengths, and getting the most out of limited resources. As recommended in the February 15 report, the allocation of grant monies will continue to be made in accordance with existing OSM practices, and we do not anticipate that any proposed consolidations will affect how these funds for state coal mine regulatory programs are allocated.

Question 5. Will Order #3315 affect the allocation of funds to state abandoned mine land programs?

Answer. As noted in response to the previous question, while the Department cannot comment on budget allocations that are yet to be made, the intent of any proposed consolidations is to make government work better by increasing efficiencies, building upon existing strengths, and getting the most out of limited resources. As recommended in the February 15 report, the allocation of funds to states for SMCRA Title IV abandoned mine land programs will continue to be made in accordance with existing practices, and we do not anticipate that any proposed consolidations will affect the amount or allocation of such funds.

Question 6. Will Order #3315 change the oversight of state regulatory and AML programs?

Answer. The February 15 report recommended that OSM's core duties and responsibilities, including oversight of state regulatory and AML programs, will remain intact and under the purview of the OSM Director, and once a state or tribe attains primacy to administer its own approved SMCRA regulatory and AML programs, OSM retains oversight authority to assure compliance with SMCRA and the approved programs.

Question 7. Are there better ways to improve government operations than shuffling boxes on the Interior Department's organization chart? For example, could actions be taken to enable the BLM to benefit from the OSM's high successful TIPS program and technology transfer programs with states?

Answer. The Department and its bureaus are always searching for opportunities to improve program performance, and this effort is a positive, substantive attempt to make government work better, to build on our strengths, and to get the most out of available resources.

Question 8. How much money could be saved by reducing waste at the OSM caused by a management decision to turn regional or local issues (e.g., mountaintop mining and revised stream protection rules) into national issues which are not germane to most parts of the country?

Answer. Congress specified several purposes in SMCRA, intending that we strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal. OSM must ensure not only the coal supply essential to the Nation's energy requirements is provided but also that American coal mines operate in a manner that protects people and the environment and that the land is restored to beneficial use following mining. Mountaintop mining and the protection of streams from the potential adverse effects of coal mining are critical issues of national importance. Such national issues are traditionally coordinated at OSM headquarters, with appropriate input from regional and field offices. This time-honored and effective approach does not constitute waste.

Question 9. How will the inevitable change in culture that follows a consolidation of agencies affect state regulatory programs?

Answer. The Department has been clear that OSM will continue to fulfill the core missions assigned to it by statute, including approval of state and tribal regulatory programs and subsequent program amendments and oversight of those programs. Thus, we anticipate that the OSM-state/tribal relationships will remain largely the same. As discussed in the February 15 report, the goal is to improve OSM's ability to perform core functions by leveraging the existing expertise and resources of BLM and OSM in areas that make sense, and reducing the drain on OSM resources that is associated with maintaining stand-alone support services for a bureau that has a small employee and budget base.

Question 10. Would Order #3315 affect existing cooperative agreements under which states regulate coal mining on federal lands? Would a consolidation affect other agreements between western states and DOI, such as agreements on the regulation of non-coal mining on federal lands?

Answer. We do not anticipate that any of the recommendations contained in the February 15 report will result in changes to these cooperative agreements.

Question 11. Where will the cost savings from the consolidation be realized and in what exact amounts, over time?

Answer. One of the goals is to create efficiency in administrative functions in order to maximize the resources available to perform core agency functions. Actual savings will depend on the successful consolidation of various shared support services between the two bureaus, in accordance with the recommendations set forth in the February 15 Report.

Question 12. Why were the states not consulted about this matter since they are the primary stakeholders under the various organic laws affected by this consolidation? How and when does Interior plan to consult with the states and tribes to receive their input on the consolidation and what it may mean for interaction between the federal government and state governments under both SMCRA and the federal land management laws?

Answer. Significant consultations and meetings with Departmental employees, tribes, state agencies and local communities, industry representatives, and congressional staff have taken place as the Department has moved forward with its review.

Question 13. How will Order #3315 impact the role of the states under SMCRA, especially in terms of funding for state Title V (regulatory grants) and Title IV (AML grants)? How will it specifically impact the administration of the AML program under Title IV of SMCRA? Does it reflect a further attempt to accomplish by Secretarial order what the President has proposed for the AML program as part of his deficit reduction plan?

Answer. OSM's core duties and responsibilities, including oversight of state regulatory and AML programs, will remain intact and under the purview of the OSM Director, and once a state or tribe attains primacy to administer its own approved SMCRA regulatory and AML programs, OSM retains oversight authority to assure compliance with SMCRA and the approved programs. Moreover, while the Department cannot comment on budget allocations that are yet to be made, the allocation of grant monies and funds for SMCRA Title IV abandoned mine land programs will continue to be made in accordance with existing practices.

Question 14. How will the consolidation affect the current chain of command within the Interior Department, especially with regard to federal oversight of state programs? How could this consolidation impact the cooperative working relationship that has generally attended the implementation of SMCRA and FLPMA? Who will have primary lead responsibility for the new organization—BLM or OSM? How can a "consolidation" result in the continued viability of two separate agencies, as suggested by some of the press materials distributed by the Department of the Interior?

Answer. The February 15 report recommends that the Office of Surface Mining continue to operate as an independent bureau within the Department and that the Director of the Office of Surface Mining continue to report to the Secretary through the Assistant Secretary for Land and Minerals Management.

Question 15. Does the Department of the Interior anticipate that changes will be needed to the organic acts affected by the consolidation? How does the Department of the Interior intend to reconcile the differing missions of BLM and OSM under the various organic laws affected by the consolidation?

Answer. As discussed in the February 15 report, the focus of the proposal is on those functions in the two bureaus that are complementary, including environmental restoration activities and administrative support functions. As a result, no changes to the organic acts are needed to implement the recommendations contained in the February 15 report.

Question 16. How will this consolidation save money and achieve governmental efficiency, other than the potential for combining some administration functions? Will the combination of other functions (inspection, enforcement, oversight) actually

result in the expenditure of more money, especially if the federal government assumes responsibilities that were formally entrusted to the states?

Answer. As discussed in the February 15 report, efficiencies will be gained through a consolidation of some functions, though there may be transition costs in the early stages of implementation. The Department can advance the congressionally-mandated missions of both bureaus more efficiently and cost-effectively by combining the expertise and resources of BLM and OSM in areas that make sense. We do not anticipate that the federal government will assume responsibilities that are currently entrusted to the states.

Question 17. Historically, BLM's primary mandate has been on the management of public lands in western states. Under Order #3315, how would the agency effectively shift to managing mining operations on state and private lands in the central and eastern portions of the country? How will this save money?

Answer. The February 15 report recommended that OSM continue to perform the core duties and responsibilities assigned to it under SMCRA. The focus of the proposal is on those functions in the two bureaus that are complementary, including environmental restoration activities and administrative support functions.

Question 18. SMCRA specifically states that OSM cannot merge with any legal authority, program, or function of an agency that promotes the leasing of coal or regulates the health and safety of miners in 30 USC 1211(b). Are you aware of this provision?

30 USC 1211(b)

The Office may use, on a reimbursable basis when appropriate, employees of the Department and other Federal agencies to administer the provisions of this chapter, providing that no legal authority, program, or function in any Federal agency which has as its purpose promoting the development or use of coal or other mineral resources or regulating the health and safety of miners under provisions of the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742) [30 U.S.C. 801 et seq.], shall be transferred to the Office.

Answer. The Department is aware of this provision and any proposed reorganization would be implemented in compliance with this provision and any other applicable laws.

Question 19. In Order #3315, you propose integration of core OSM and BLM functions, including regulation, inspection and enforcement, state program oversight, and fee collection. But as noted above, SMCRA specifically prohibits the transfer of such legal authority to OSM. Isn't this proposed integration prohibited by law?

Answer. We continue to be mindful of all provisions of SMCRA, and intend to continue compliance with the law, as we move forward.

Question 20. Does Reorganization Plan #3 give full discretion to the Secretary to organize the department as he sees fit?

Answer. Reorganization Plan No. 3 of 1950 gives the Secretary broad reorganization authority, subject to other express statutory language, such as 30 U.S.C. 1211(b), as cited above.

Question 21. Is that authority not limited by subsequent Congressional action that specifically addresses the organization of the Department?

Answer. As noted in response to the previous question, the broad reorganization authority under Reorganization Plan No. 3 of 1950 may be exercised subject to other express statutory provisions.

RESPONSES OF DAVID HAYES TO QUESTIONS FROM SENATOR BARRASSO

Question 1. A number of witnesses at the Committee's hearing questioned whether the Secretary has the legal authority to merge the Bureau of Land Management (BLM) and the Office of Surface Mining Reclamation and Enforcement (OSM).

- Has the Solicitor issued a written legal opinion on the proposed merger?
- If so, would you make the written legal opinion available to the Committee?

Answer. Any written product prepared by the Solicitor's Office entails the provision of legal advice to the Department and thus is confidential attorney-client and predecisional material. It should be noted that the report issued to the Secretary on February 15, 2012, titled Report for the Secretary on the Proposed BLM/OSM Consolidation (Report), which can be found at: <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageid=283745>, recommended that the Office of Surface Mining continue to operate as an independent bureau within the Department and that the Director of the Office of Surface Mining continue to report to the Secretary through the Assistant Secretary for Land and Min-

erals Management. Secretarial Order No. 3320, issued on April 13, directs implementation of the recommendations made in the Report.

Question 2. Why did the Secretary fail to consult with the States and Indian tribes before issuing Order No. 3315?

Answer. As indicated in the February 15 report, significant consultations and meetings with Departmental employees, tribes, state agencies and local communities, industry representatives, and congressional staff have taken place as the Department has moved forward with its review.

Question 3. It is my understanding that the Secretary plans to consult with the States and tribes sometime in the future.

- When will the Secretary consult with the States and tribes?
- How will the Secretary ensure that such consultation is meaningful given that it will take place after the effective date of Order No. 3315?

Answer. As indicated in the response to the previous question, significant consultations and meetings with Departmental employees, tribes, state agencies and local communities, industry representatives, and congressional staff have taken place as the Department has moved forward with its review.

Question 4. The state regulators at the Committee's hearing expressed concerns that the proposed merger will affect the Abandoned Mine Land (AML) program under the Surface Mining Control and Reclamation Act (SMCRA).

- Will the proposed merger affect the AML program?
- If so, how?

Answer. OSM's core duties and responsibilities, including oversight of state regulatory and AML programs, will remain intact and under the purview of the OSM Director, and once a state or tribe attains primacy to administer its own approved SMCRA regulatory and AML programs, OSM retains oversight authority to assure compliance with SMCRA and the approved programs.

Question 5. The state regulators at the Committee's hearing expressed concerns that the proposed merger will affect the States' regulatory authority under SMCRA.

- Will the proposed merger affect the States' regulatory authority under SMCRA?
- If so, how?

Answer. We do not anticipate changes to state regulatory authority under SMCRA. The Department has been clear that OSM's core duties and responsibilities prescribed by SMCRA will remain intact and under the purview of the OSM Director, and once a state or tribe attains primacy to administer its own approved SMCRA regulatory and AML programs, OSM retains oversight authority to assure compliance with SMCRA and the approved programs.

Question 6. The state regulators at the Committee's hearing expressed concerns that the proposed merger will affect OSM's regulatory grants to States under SMCRA.

- Will the proposed merger affect OSM's regulatory grants to States under SMCRA?
- If so, how?

Answer. We do not anticipate that the administration of the AML program under Title IV of SMCRA will be affected. The Department has been clear that OSM's core duties and responsibilities prescribed by SMCRA will remain intact and under the purview of the OSM Director. Once a state or tribe attains primacy to administer its own approved SMCRA regulatory and AML programs, OSM retains oversight authority to assure compliance with SMCRA and the approved programs. Moreover, while the Department cannot comment on budget allocations that are yet to be made, the allocation of grant monies and funds for SMCRA Title IV abandoned mine land programs will continue to be made in accordance with existing practices.

Question 7. A witness at the Committee's hearing expressed concerns that the proposed merger will result in permitting delays.

- What steps will the Secretary take to ensure that the proposed merger will not result in permitting delays at OSM and BLM?

Answer. This proposal is a positive, substantive attempt to make government work better, to build on our strengths, and to get the most out of available resources. As indicated in the February 15 report, significant consultations and meetings with Departmental employees, tribes, state agencies and local communities, industry representatives, and congressional staff have taken place as the Department has developed an implementation plan for the original order.

RESPONSES OF DAVID HAYES TO QUESTIONS FROM SENATOR HELLER

Question 1. As you know, the Department of the Interior (DOI) natural resource development on public lands brings in vast revenue for the federal government. Additionally, the resource development industry has been one of the few areas of our economy where we have seen growth in recent years. Increased production means more jobs, more economic activity, and ultimately, more money to the federal treasury.

I am generally concerned about this Administration's approach to energy and natural resource development—especially during these challenging times when jobs, revenue, and affordable energy resources are more important than ever.

In my home state of Nevada, the mining industry is one of the few bright spots in our economy. Nevada's unemployment is 13.4%, but in our largest mining region, it is more than 6% lower. Our mining industry could be even more robust if DOI had policies that promoted responsible development. In fact, I recently introduced S. 1844, which is legislation to address administrative delays for public lands permitting. My legislation would give DOI 45 days to complete required Washington office reviews of Notices of Availability required by the National Environmental Policy Act prior to publication in the federal register.

I don't know if you are aware that this one administrative requirement can add up to a year to the permitting process for a mining plan of operations. This is ridiculous. I would suggest that adopting my legislation would be a good first step towards real reform of duplicative and unnecessary regulations within DOI.

Policies that promote responsible resource development are good for our economy. In that light, my question to you is: with this proposal to merge BLM and OSM functions, how can you be certain that it won't complicate an already cumbersome permitting process and further delay job creation?

Answer. The Department and its bureaus are always searching for opportunities to improve program performance, and the consolidation of certain overlapping functions implemented by two bureaus in the same Departments is a positive, substantive attempt to make government work better, to build on our strengths, and to get the most out of available resources. The agencies are continuing their efforts to process various mining applications, permits, and notices of availability in a timely fashion with a view to meeting the requirements of applicable laws.

Question 2. I also have a question that relates to broader issues of access to public lands. I am aware of a new draft proposal by DOI to limit access to certain federal lands for shooting sports. I do not take restriction of 2nd Amendment rights lightly. Nearly 85% of Nevada is controlled by the federal government—and most of that land is under the management of the Bureau of Land Management (BLM). Access to public land is vital for the economic health and character of my state. The mere assertion that some people "freak out" about gun rights isn't enough of a reason to alter the Constitution.

1. Can you give me specific examples in Nevada of places where the BLM has determined "social conflicts" relating Second Amendment rights exist?
2. Who should decide what constitutes a "social conflict" that merits federal action—DOI? Congress? Voters?
3. Do you believe Congress has been unclear in defining the scope of Americans' Second Amendment rights?
4. Does DOI believe that different backcountry activities, such as hunting and hiking, are mutually exclusive?
5. Given that a DOI employee has stated that this policy is not a result of public safety concerns, does the draft policy reflect a position that sportsmen's activities do not enjoy equal protection under BLM multiple-use mandate? Please explain.

Answer. The Department supports opportunities for hunting, fishing and recreational shooting on federal land. By facilitating access, multiple use and safe activities on public lands, the Bureau of Land Management helps ensure that the vast majority of the 245 million acres it oversees are open and remain open to recreational shooting. Based on feedback received from the Wildlife and Hunting and Heritage Conservation Council, Secretary Salazar directed the BLM, on November 23, 2011, to take no further action to develop or implement the draft policy on recreational shooting referenced in your question and to manage recreational shooting on public lands under the status quo under existing authorities.

RESPONSES OF JOE PIZARCHIK TO QUESTIONS FROM SENATOR BARRASSO

Question 1. A number of witnesses at the Committee's hearing expressed concerns about OSM's increased use of ten day notices.

- Why is OSM increasing its use of ten day notices?

Answer. OSM has undertaken oversight improvement initiatives that include increasing the number of OSM's oversight inspections, including independent inspections, for the purpose of evaluating how states administer their SMCRA regulatory programs. The number of Ten Day Notices (TDNs), the instrument that OSM uses to notify states of alleged or actual violations, has increased along with the number and type of inspections. These notifications allow states to take action to rectify those violations or show good cause for not taking action, such as demonstrating that the violation does not exist under the approved program. Most TDNs are resolved cooperatively with state regulatory authorities.

Question 2. A number of witnesses at the Committee's hearing expressed concerns about OSM's proposed stream protection regulations and the manner in which the agency has conducted the rulemaking process.

- What steps will OSM take to ensure that state regulators, especially regulators representing cooperating agencies for the purposes of the National Environmental Policy Act, have a meaningful opportunity to comment during the rulemaking process?
- What steps will OSM take to ensure that the public has a meaningful opportunity to comment during the rulemaking process?

Answer. All state agencies will have the opportunity to comment on the proposed stream protection rule and DEIS when the proposed rule and notice of availability of the DEIS are published in the Federal Register. Nineteen state agencies, including 11 state regulatory authorities, are serving as cooperating agencies in development of the DEIS under NEPA, and OSM is carefully considering their input in the ongoing process of preparing the DEIS. OSM values the expertise of the state cooperating agencies, and appreciates the time and resources they are contributing to the development of the proposed rule.

The public will be given the opportunity to comment on the proposed rule and DEIS, in accordance with applicable Federal law, including the Administrative Procedure Act and NEPA. OSM will respond to the public comments it receives, and consider them when taking final action on the rule and EIS. Any final rule and final EIS will be published in the Federal Register. Publication of the draft rule will build upon earlier extensive public outreach conducted by OSM. Although not required by law, OSM issued an Advance Notice of Proposed Rulemaking to solicit early public comments on issues that ought to be addressed in the regulation. This advance notice generated over 32,000 public comments. OSM also conducted 15 stakeholder outreach sessions with a broad cross-section of stakeholders, including state and tribal regulatory authorities, industry, environmentalists and others, to obtain further input. Additionally, OSM held nine public scoping meetings across the country to obtain initial public input for the development of the DEIS, consistent with the requirements of NEPA.

Question 3. It is my understanding that OSM's former contractor estimated that the proposed stream protection regulations would cost thousands of jobs. I am concerned that OSM's new contractor may be subject to improper influence with respect to job loss estimates.

- What steps is OSM taking to ensure that the individuals responsible for estimating job losses from the proposed stream protection regulations will not be subject to improper influence?

Answer. OSM is currently completing an analysis of the environmental impacts of the rule under development, in accordance with NEPA and other applicable federal law. This analysis will include relevant socioeconomic impacts, including impacts to jobs, costs, etc., as appropriate. OSM staff is completing those portions of the analysis for which the agency has in-house expertise. For certain other portions of the NEPA analysis, OSM has hired a contractor with significant technical expertise and experience in the Federal NEPA process. The completed analysis will be based on sound science and clearly articulated methodologies. As required by NEPA, it will make explicit reference to scientific and other sources relied upon for its conclusions. To help ensure confidence in the integrity of the process, OSM has also arranged for the DEIS analysis and conclusions to be evaluated in a peer review process. When OSM completes the DEIS and proposed rule, they will be made avail-

able for public review and all interested parties will at that time have the chance to comment on OSM's analysis, methodologies, assumptions and conclusions.

APPENDIX II

Additional Material Submitted for the Record

BUFFALO CREEK WATERSHED ASSOCIATION,
Claysville, PA.

Ken Salazar,
Department of the Interior, 1849 C Street, NW, Washington, DC.

SECRETARY SALAZAR:

While there is national awareness that significant changes need to be made to reduce the national deficit, there is no consensus on what those changes should be. Many agencies, institutions, and organizations are experiencing trepidation as legislators struggle to stabilize the economy. Of utmost concern to the Buffalo Creek Watershed (BCWA) and similar community-based environmental protection organizations, is the potential adverse impact that selected corrective action proposals such as Secretarial Order No. 3315, driven by a mandated deadline and initiated without the benefit of congressional consultation or public input, may have on the environment and the future health, safety, and welfare of the nation's citizenry.

Downsizing and consolidation of services are popular contemporary strategies for capturing operational efficiencies and lowering costs—actions that tend to be politically, if not publically, appeasing and, once approved, quickly implemented. The most expeditious strategy, however, is not necessarily the most optimal; and, what may prove economically feasible is not necessarily morally appropriate.

The Office of Surface Mining (OSM) and the Bureau of Land Management (BLM) have conflicting purposes and responsibilities. In addition, there is substantial anecdotal and documented evidence to suggest that neither entity is functioning in a consistently efficient and effective manner. So, here we are once again in reaction mode, attempting to “band-aid” known operational deficiencies within two governmental agencies that could and should have been proactively addressed. That being said, the internal weaknesses of those two agencies will most likely not be resolved by bureaucratizing them. Rightsizing and restructuring would be the more prudent approach subjecting both to a rigorous long-overdue analysis and reform that would ultimately streamline operations, reduce costs, and maximize the performance of both agencies.

The BCWA is not opposed to exploring opportunities for improving the function of the OSM and the BLM. It is strongly opposed, however, to entombing the OSM in a behemoth administrative quagmire of conflicting interests that threaten to diminish the OSM's regulatory and enforcement responsibilities, and timely response to environmental threats. The BCWA challenges the notion that an OSM/BLM merger will boost industry oversight or coal reclamation. This proposal, incidentally or deliberately, offers another obvious “pass” to the coal industry at the expense of public health and safety and preservation of the nation's natural resources.

The sense of urgency to address the country's economic woes is legitimate. It is interesting, however, that the Department of the Interior has targeted the OSM as a problematic agency given a press release just one year ago (November 18, 2010) in which you, the Assistant Secretary for Land and Minerals Management Wilma Lewis, and OSM Director Joseph Pizarchik commended OSM initiatives to improve oversight of state surface coal mining programs and its “great strides in establishing and enacting consistent, transparent and effective policies.”

Know that the BCWA does not support Secretarial Order No. 3315—Consolidation of the OSM within the BLM. It is the association's contention that any immediate savings that might be realized under this proposal would be minimal compared to the long-term impact of, and potentially catastrophic costs associated with, diminished environmental protection. Frankly, this proposal, when viewed collectively with the recent budget and human resource reductions to the states' Department of Environmental Protection, and proposed plan of some presidential candidates and

legislators to eliminate the federal Environmental Protection Agency, makes this proposal conspiratorially suspect. As one of many front-line environmental protection organizations the BCWA is intimately aware of the legacy of land and water damage sustained from decades of irresponsible mining practices and lax governmental oversight and enforcement. We decry any legislative decision that values the special interests of an industry over that of citizens, wildlife, aquatic life, and habitat.

STATEMENT OF MARY ELLEN DECLUE, LITCHFIELD, IL

DEAR SECRETARY SALAZAR AND MS. ADAMS:

Thank you for the opportunity to comment on Secretarial Order No. 3315 that places OSMRE in the Bureau of Land Management.

My home is surrounded by coalfields and a coal fired utility. My community as well as others in Illinois have endured adverse effects of polluted air, water and subdivided farmland. Illinois Department of Natural Resources/Office of Mines and Minerals approves permits and promotes agendas of mine operators without consideration of the health of residents and contamination of the environment.

OSMRE is a vital community resource that citizens can turn to with concerns, questions, and guidance. If this agency is placed in the BLM, the focus and viability to citizens will be lost.

There are consistent violations of SMCRA, the Clean Air Act, and the Clean Water Act that are allowed. Addressing these issues through Administrative Review with a hearing officer hired by and directed by IDNR/OMM is a meaningless, expensive process for citizens.

OSMRE, represented by the Alton Field Office and the Indianapolis Area Office, has consistently been available to listen, examine, and address concerns of coalfield residents. Over the last 3 years, I have personally had many one-on-one meetings, e-mail communications, and letter correspondence with this office.

IDNR/OMM was approving underground coal slurry injection into mine voids through insignificant permit revisions. The public was not involved or informed that this was taking place or that their well water might be contaminated. OSMRE addressed this matter and IDNR/OMM now recognizes coal slurry injection applications to be considered as a significant permit revision.

Citizens living in coal communities need a voice and ability to communicate local effects to a national directory. If OSMRE is lost in the mega complex of BLM, their issues will not only be "insignificant," but their cumulative effects will not be recognized.

The attention of OSMRE to issues of coal mining in the Mid-West is illustrated by the Director of OSMRE, Joseph Pizarchik, along with Erwin Barchenger and Andy Gilmore's productive meeting on June 20, 2011 with me and several citizens to listen to our issues in order to minimize the adverse impacts of coal mining in communities.

OSMRE should not be changed, but rather additional funding would greatly help them do their mission of protecting communities. I strongly oppose the Secretarial Order No. 3315 that would place OSMRE in the Bureau of Land Management.

SOUTHWEST VIRGINIA,
November 30, 2011.

Department of the Interior,
1849 C Street, N.W., Washington DC.
Email: gail—adams@ios.doi.gov

DEAR MS. ADAMS:

We wish to submit comments on the above referenced order No. 3315. We understand that a Senate Congressional hearing was held on November 17th and we wish the following comments to be made a part of the public record for the November 17th hearing.

We do not represent an organization, with the exception of one organization who chose to be signatory to the comments, but we do represent a loose knit set of community members in southwest Virginia that have a vested interest in the proposed folding of OSM into BLM. Order No. 3315 is an absurd proposition and we do not support the move.

Although residents of the coalfield communities are not always in complete agreement with OSM's actions, we realize their importance in the scheme of industry ac-

tivities and their oversight and evaluation worth. In the absence of such activities, we feel that the communities of the coalfields would be even more at risk.

OSM was established by Congress to be a separate entity and we fear Secretary Salazar has neither the authority nor the right to move OSM into BLM where OSM's numbers and resources could be treated with very real inferiority.

SMCRA (1977) prohibits the integrating of OSM with any Federal agency "whose purpose is promoting the development or use of coal or other mineral resources" (Sec. 201), which is a primary responsibility of the BLM. Moving OSM into BLM would be a direct violation of SMCRA.

BLM is primarily a land management and mineral leasing agency while the duty of OSM is to be a law enforcement agency related to coal mining and reclamation. Combining these will create a dysfunctional bureaucratic agency with employees at odds internally. It would be an impossible situation.

The Appalachian people frequently feel they are left out of conversations regarding decisions that affect their communities, their health, and their environment. This is currently being repeated again. OSM has the role of protecting our communities from the irresponsible actions of coal mining operations. On many occasions, these mining operations are very close neighbors to us. The Interior Dept. must understand and acknowledge OSM's role in our communities as valid and important.

Thank you for the opportunity to submit our comments to be included in the record for the November 17th congressional hearing on this very important matter.

Respectfully submitted,

Kathy Selvage, Gary Selvage, Tommy Kilgore, Joyce Kilgore, Mary Ellen Kelly, Carl Ramey, Louise D. Ramey, Margaret Flynn, Elizabeth Jaspers, Lucy Spencer, Marlene Bush, Larry Bush, Raymond Davidson, Dorothy Taulbee, Maude Jervis, Mary Pace, Samuel Needham, Judy Needham, Bill Wilder, Rita Carr, Gary Bowman, Carol Bowman, Jackie Hanrahan, CND, Appalachian Faith & Ecology Center.

TROUT UNLIMITED,
Arlington, VA, November 23, 2011.

Hon. JEFF BINGAMAN,
Chairman, U.S. Senate Committee on Energy and Natural Resources, 304 Dirksen Senate Building, Washington, DC.

Hon. LISA MURKOWSKI,
Ranking Member, U.S. Senate Committee on Energy and Natural Resources, 304 Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN BINGAMAN AND RANKING MEMBER MURKOWSKI: I am writing on behalf of Trout Unlimited (TU) and its 140,000 members nationwide with concerns regarding the consolidation of the Office of Surface Mining (OSM) and Bureau of Land Management (BLM) as announced by U.S. Department of the Interior Secretary Salazar on October 26, 2011 in Secretarial Order 3155. The Order was the subject of a hearing last week before your Committee. Please include this letter in the hearing record.

TU's mission is to conserve, protect and restore North America's trout and salmon fisheries and their watersheds. In pursuit of this mission, TU works to clean up abandoned coal mines throughout the Appalachian coal fields and protect high-quality coldwater fisheries from new mining operations that threaten to pollute these sensitive headwater ecosystems. In particular, TU has received technical support from the OSM and financial assistance through its Watershed Cooperative Agreement Program—both of which have been critical components to the planning and implementation of numerous abandoned coal mine remediation projects.

As a result of our positive experiences working with the OSM and our overall efforts to protect high-quality coldwater streams, we list the following concerns regarding the consolidation of OSM and BLM:

1. From the standpoint of integrating two agencies with different—and somewhat conflicting—roles, we are concerned about OSM's ability to continue the active enforcement of coal mining operations once it becomes part of the BLM. OSM is statutorily required by the 1977 Surface Mining Control and Reclamation Act (SMCRA) to enforce regulations that protect citizens and the environment from coal mining operations and ensure that the land is properly reclaimed post-mining. On the other hand, BLM is responsible for managing and leasing millions of surface and sub-surface acres for the purpose of mineral extraction.

2. We are concerned about the potential for the consolidation of OSM and BLM to impact OSM's Watershed Cooperative Agreement Program (WCAP) and the relationship that citizen groups have developed with OSM over the past few decades regarding abandoned coal mine cleanup. The tens of millions of dollars from OSM's WCAP have played an important role in helping citizen groups fund and implement on-the-ground abandoned mine drainage remediation projects. Additionally, OSM staff have provided invaluable technical support to citizen groups, and have helped to ensure that projects are implemented in a cost-effective, technically sound manner.

3. We have questions about whether the Title IV Abandoned Mine Land Fund of SMCRA as reauthorized in 2006, and subsequently the Abandoned Mine Land programs led by states, will be affected by the consolidation of OSM and BLM. Our concern is that changes to the Title IV fund could impact the amount of restoration work being done on the ground.

TU strongly urges the Committee to ensure that the Department of the Interior addresses these concerns before it moves forward with the consolidation of OSM and BLM. It is imperative that solutions or policies are developed to adequately address any negative impacts to OSM's roles and programs as a result of consolidation with the BLM.

Sincerely,

STEVE MOYER,
Vice President of Government Affairs.

NAVAJO NATION DEPARTMENT OF JUSTICE,
OFFICE OF THE ATTORNEY GENERAL,
Navajo Nation, AZ, November 17, 2011.

DEAR CHAIRMAN BINGAMAN, RANKING MEMBER MURKOWSKI, AND MEMBERS OF THE COMMITTEE ON ENERGY AND NATURAL RESOURCES:

The Navajo Nation welcomes this opportunity to comment on the recent, and startling, news that the Department of the Interior (Interior) intends to consolidate the Office of Surface Mining Reclamation and Enforcement (OSM) within the Bureau of Land Management (BLM), two departments within Interior which are of critical importance to the Navajo Nation (Nation). This proposed consolidation was done without any consultation with the Nation as required under Executive Order 13175 and pursuant to the federal trust responsibility, without adequate planning and coordination with the Nation's programs which operate under direct federal grants from one or more of these agencies, without consideration of the impact on the Nation's Abandoned Mine Land Reclamation (AML) Program and Surface Coal Mining and Reclamation (Surface Mining) Program, under Titles IV and V, respectively, of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201 et seq.

FEDERAL TRUST RESPONSIBILITY AND REQUIREMENT FOR CONSULTATION

On October 26, 2011, Secretary Ken Salazar, Department of the Interior, issued Secretarial Order No. 3315 (Order) which would consolidate OSM with BLM, and would "integrate the management, oversight, and accountability of activities associated with mining regulation and abandoned mine land reclamation; ensure efficiencies in revenue collection and enforcement responsibilities; and provide independent safety and environmental oversight of these activities." Secretarial Order No. 3315. As recognized in Executive Order 13175, the federal trust responsibility requires prior and meaningful consultation with the Navajo Nation on agency actions with tribal implications. See Executive Order 13175, 65 Fed. Reg. 67249, 6724967252 (Nov. 6, 2000)*; see DOI Departmental Manual, 512 DM 2 ("It is the policy of the Department . . . to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety"); see also DOI Departmental Manual 303 DM 2 ("The proper discharge of the Secretary's trust responsibilities requires that persons who manage Indian trust assets . . . [p]romote tribal control and self-determination over tribal trust lands and resources"). "Policies that have tribal implications" are specifically defined under EO 13175 as "proposed legislation . . . or actions that have substantial direct effects on one or more Indian tribes . . ." Id. at 6249 (emphasis added).

*Document has been retained in committee files.

In this case, the Order is clearly an action with tribal implications. Yet, contrary to clear federal policy, prior to the Secretary issuing the Order, there was no consultation with any Nation official, at any level, by any official in the Department of the Interior, including any official in OSM or BLM. Moreover, Secretary Salazar apparently has no intention of consulting with Indian tribes before the Order becomes effective on December 1, 2011. See October 26, 2011 Memorandum from Secretary Salazar to Directors of OSM and BLM (“The Order will become effective December 1, 2011, following consultation with the White House, Office of Management and Budget, employees, and applicable congressional committees with responsibilities over these functions”) (emphasis added). Unfortunately, due to the lack of consultation with the Nation, the full extent of the impacts of the Order on the Nation and its affected programs remains unclear.

Undoubtedly, in order to accommodate the merger of the two agencies, the Order will require substantial rewriting of multiple federal laws and regulations, including laws and regulations that directly impact the Nation’s AML and Surface Mining Programs. The Nation will also have to rewrite the Nation’s own laws and policies, as well as agreements with OSM, to correspond with changes to OSM and BLM resulting from the Order, including the Navajo Abandoned Mine Lands Reclamation Act, 18 N.N.C. §§ 1601 et seq., the Navajo Reclamation Plan, and the Nation’s cooperative funding agreements with OSM. In addition, OSM and BLM are partners with the Bureau of Indian Affairs (BIA) in a multi agency agreement addressing management of coal mining on Indian lands, and that agreement would also have to be amended.

Moreover, the changes under the Order will directly impact tribal trust assets, and the federal land management responsibility to restore tribal lands impacted by past federally approved mining activities. The Nation’s primary economic assets are its coal, oil, and gas resources, resources which are directly regulated by BLM and OSM. The federal government and the Department of the Interior in particular have an obligation to manage these resources in the best interests of the Nation. Additionally, past mining activities on the Nation, approved by the federal government, and expressly benefiting United States defense interests, have left a legacy of adverse health, safety and economic impacts on the Nation. The federal government, as the Nation’s trustee, has an obligation to ensure these impacts are addressed and not further adversely impacted by the proposed consolidation of OSM into BLM.

POTENTIAL SMCRA TITLE IV IMPACTS

The Nation’s AML Program has ongoing reclamation responsibility for 260 identified coal sites and approximately 1100 identified non-coal mine sites, primarily uranium mine sites left over from the long federal legacy of uranium mining to support U.S. defense efforts. The Nation’s AML Program also provides leverage funding for crucial infrastructure projects in tribal communities most impacted by the legacy of mining on the Nation. The Order would impact communication and coordination between the federal officials directing responsible for engaging with the Nation’s AML Program on these important activities, including strategic planning, facilitating grants, providing technical assistance, and ensuring continuity of vital AML Program activities on the Nation, and the long-term stewardship of the land.

Given the great success of the Nation’s AML Program, the Nation finds it alarming that the Secretary has decided to issue his Order. In partnership with OSM, the Nation’s AML Program works. Since 1988, the Nation’s AML Program has developed a proven track record of effectively reclaiming both coal and non-coal abandoned mine sites, as evidenced by five AML reclamation awards given to it by OSM, including two national awards for extraordinary efforts in reclamation. The Order, issued without any consultation or consideration of this past history and success, has the potential to dislocate an excellent federal-tribal working relationship.

POTENTIAL SMCRA TITLE V IMPACTS

As with the Title IV comments above, the Nation is concerned with the impact the Order would have on the development of the Nation’s Surface Mining Program. Specifically, the Nation is concerned with the impact this Order will have on the establishment and continued growth of the Nation’s Surface Mining Program, including future funding for, and development of, the Navajo Nation Mining and Reclamation Act. Since 1982, the Nation has been working diligently with OSM for the Nation to obtain regulatory primacy over coal mining operations occurring on the Nation’s lands. This endeavor has and will continue to require continuous and close contact between the Nation’s officials and representatives of OSM. The Order may very well adversely impact the Nation’s, and OSM’s, long efforts to achieve this im-

portant goal consistent with the federal policy for tribal self-determination and control of its resources.

FUNDING AT RISK

The Nation has past experience with OSM and Interior regarding potential reductions in funding without adequate consultation with the Nation. For example, OSM and Interior have previously attempted to reverse the 2006 amendments to SMCRA, amendments which were developed and passed in close coordination with affected Indian tribes. These efforts would have effectively eliminated AML's funding and the Nation's AML Program in its entirety. In trying to reverse the 2006 amendments to SMCRA, as in the case of the Order here, OSM and Interior repeatedly failed to meaningfully consult with the Nation.

Similarly, here, in addition to the appalling lack of consultation before issuing the Order, there has been no consideration of potential, and significant, adverse financial impacts from this reorganization on current and future funding for the Nation's AML and Surface Mining Programs. The Nation's AML and Surface Mining Programs receive 100% of their funding through cooperative grant agreements with OSM. Additionally, the Nation's Minerals Department currently receives separate funding from BLM to carry out various natural resources related regulatory responsibilities, funding which is potentially at risk in a merger of these two federal agencies.

The Nation appreciates this opportunity to present testimony regarding the potentially adverse, and unknown, impacts of the Order, issued without any consultation or coordination with the Nation. The federal trust responsibility demands that the Department of the Interior consider impacts to federally recognized Indian tribes, including the Nation, when undertaking any such actions which have such clear and direct tribal implications. The Nation looks forward to working together with the federal government, including the United States Congress, under the auspices of our government-to-government relationship, to identify and ameliorate the potential adverse impacts to the Nation from the Secretary's Order.

Respectfully yours,

HARRISON TSOSIE,
Attorney General.

PAUL SPRUHAN,
Acting Attorney General.

INTERSTATE MINING COMPACT COMMISSION,
Herndon, VA, October 24, 2011.

Hon. PATTY MURRAY,
Co-Chairman, Joint Select Committee on Deficit Reduction, 448 Russell Senate Office Building, Washington, DC.

Hon. JEB HENSARLING,
Co-Chairman, Joint Select Committee on Deficit Reduction, 129 Cannon House Office Building, Washington, DC.

DEAR SENATOR MURRAY AND REPRESENTATIVE HENSARLING:

We are writing on behalf of the 34 member states and tribes of the Interstate Mining Compact Commission (IMCC) and the National Association of Abandoned Mine Land Programs (NAAML) regarding a legislative proposal contained in the President's Plan for Deficit Reduction related to the reclamation and cleanup of abandoned coal mine lands (AML) located throughout the United States. We understand that this proposal, among others, is being considered by your Committee as part of a larger deficit reduction plan.¹ The coal AML proposal would have significant, deleterious impacts on current efforts by state and tribal programs for the ongoing cleanup of abandoned mined lands and as such we strongly oppose it. The proposal would also leave the public with fewer protections from these dangerous haz-

¹ The President's Plan also includes a somewhat related proposal that would establish a new program for the cleanup of hardrock abandoned mine lands. While the states and tribes have strongly advocated for a meaningful hardrock AML program, including Good Samaritan protections for potential Clean Water Act liability, we believe any legislative consideration and debate should occur before the committees of jurisdiction in Congress and not as part of deficit reduction given the complexities associated with this matter and its potential interrelationship with the ill-conceived coal AML proposal. In this regard, we understand a hearing on potential legislation addressing hardrock AML is tentatively scheduled for November 17 before the House Energy and Mineral Resources Subcommittee.

ards and would negatively impact the environment, particularly the restoration of mine-scarred lands and waters. In the end, there is the potential for the loss of jobs in areas that are already economically depressed.

More specifically, the coal AML proposal would, among other things:

- Eliminate AML funding to certified states and tribes
- Eliminate funding to states based on historic coal production
- Eliminate minimum funding to under-funded states
- Prohibit the expenditure of AML money for noncoal reclamation
- Restrict the re-payment of unappropriated (prior balance) funds to states and tribes based on the amount of money paid into the AML Fund by these states and tribes
- Restrict the use of AML funds for future acid mine drainage cleanups
- Restrict the use of AML funds for restoration of coalfield citizen water supplies
- Restrict the use of AML funds for addressing environmental impacts from prior coal mining
- Undermine a 30 year working relationship between the states, tribes and federal government

While the Administration attempts to make the case that these adjustments are consistent with the will of Congress, recent amendments in 2006 to the Surface Mining Control and Reclamation Act of 1977 (SMCRA) belie this position. Instead, what the Administration proposal reflects is a consistent and continuing pattern of irritation and angst about the 2006 amendments that has been reflected in attempts to undo those amendments in every budget proposal since FY 2008. In each and every case, Congress has rejected these proposals and, to the contrary, has entertained legislation to further clarify the intent and focus of the 2006 amendments in response to regulations adopted by the Office of Surface Mining that run contrary to the law. Once again, with this deficit reduction proposal, we see the Administration attempting to emasculate the will of Congress as expressed in the 2006 Amendments. A more complete analysis of the impact of the proposal is attached.

We urge the Select Committee to reject this proposal and to confirm the intent of Congress as expressed in the 2006 Amendments to SMCRA. While we understand that two of your primary goals are to eliminate wasteful spending and realize savings to the federal Treasury, this proposal would do so at the expense of existing state and tribal programs that effectively and efficiently protect the public and cleanup the environment. The changes worked by the Administration's proposal would only complicate and confuse programs that are working well by any standard of performance measurement and would also likely undermine the future viability of these programs. Any savings realized under the proposal are minimal as compared to what would be lost without the continuation of these vital programs as currently structured. Furthermore, the proposal would upset the statutory design and interrelationship between the Title IV (AML) program under SMCRA and the Title V program for the regulation of active mining operations, whereby the states were entitled to receive AML grants only where a Title V program was in place. Unduly restricting AML grants could result in a serious reevaluation by some states concerning the retention of those Title V programs.

The original intent of the framers of SMCRA in 1977 was to protect public health and safety and the environment related to abandoned mine lands as a critical part of the surface mining program. In 2006, following 10 years of debate and eventual compromise among all affected parties, Congress once again labored over and decided upon a revised course of action for our nation with respect to the cleanup of abandoned coal mine lands that built additional certainty and stability into the program. We urge the Select Committee to allow this law to work as intended and to defer to the authorizing committees regarding any needed further adjustments.

We appreciate your consideration of this request and would be pleased to answer any questions you may have or provide additional information to the committee.

Sincerely,

GREGORY E. CONRAD,
Executive Director,

Interstate Mining Compact Commission.

MADELINE ROANHORSE,
President,

National Association of Abandoned Mine Land Programs.

ATTACHMENT.—ANALYSIS OF PROPOSAL TO REFORM AML PROGRAM

INTRODUCTION

The Obama Administration has proposed to make extensive changes to the existing Title IV Abandoned Mine Lands (AML) Program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Proposed legislation related to these changes was submitted directly to the Joint Select Committee on Deficit Reduction, as part of the President's "Plan for Economic Growth and Deficit Reduction. The intent of the proposed legislation is to totally re-shape the AML program to focus solely on coal reclamation. In addition, funding would no longer be distributed directly to states and Indian tribes to carry out the purposes of the Act, as directed by the 2006 Amendment to SMCRA. Instead, every project proposed by the AML states and tribes for potential funding would be subject to a nationwide annual competitive grant process. More significantly, instead of states and tribes determining the priority for funding abandoned mine projects within their jurisdictions, the decision for awarding funding for specific projects would rest solely with the Secretary of Interior. This would undermine the concept of primacy under SMCRA and damage the working relationship between OSM and the states and tribes, replacing it with a single autonomous authority that would essentially federalize the process.

The Administration has proposed similar changes through the budget process over the past several fiscal years with no success. Proposals have been offered up to eliminate funding for certain states and to change the focus of the program. Through an open and deliberative process, the appropriations committees, and ultimately Congress, have rejected such changes to Title IV. Additional attempts have been made by the Administration to eliminate the AML emergency program and shift 18 positions to provide additional federal oversight of state programs under Title V of SMCRA. Those proposals have also been rejected, and yet the Administration perseveres with its course of action. It is clear from the recent legislative history that Congress believes that the current language and approach under SMCRA is the best path for achieving the reclamation and environmental restoration objectives of the Act. This latest proposal by the Administration to make major changes to the Act is the latest in a series of attempts to upset the balance and stability in the AML program forged by Congress.

The proposed legislation submitted to the Select Committee is fraught with problems and errors. This reflects the fact that the language was drafted quickly and without the advantage of an open and deliberative process. For example, the revised language includes what appear to be incorrect section citations leading to confusion about how funding is intended to be applied. For instance, the proposed legislation notes that 80% of the monies in the fund would be disbursed each year but there is no specific language that clarifies that the disbursement would be for the express purpose of meeting the intent of Title IV and SMCRA. Also of concern is the lack of any reference regarding the use of the remaining 20%. The hurried and ill-conceived approach is clearly demonstrated by this failure to define with clarity how funds would be used under the proposed legislation.

BACKGROUND

The infrastructure of our nation was built on the back of mining. Mining fueled the growth of our industrialized economy, leaving us with a legacy of historic abandoned mines. The intent of Congress since the original passage of SMCRA has always been very clear. Congress determined that the priority of the Act was to protect the public from historic mine hazards and to restore the environment where impacted by past mining. That intent remains the same today.

The original intent of the Act also recognized the strong connection between historic mining and current mining practices. The lessons of the past supported the value of having a strong regulatory program to ensure that mining can continue but in a safe, environmentally sound manner. SMCRA Title V provides for a strong regulatory program that includes an equally strong reclamation component for on-going mining operations. Congress also recognized the strong leadership role that states can and should play in the regulatory area. Thus SMCRA provided the language both allowing and encouraging states to accept primacy for regulatory programs and to serve as the lead for regulatory activities. To help encourage states to adopt primacy, SMCRA requires states to implement Title V regulatory programs in order to receive abandoned mine land funding under Title IV. These provisions recognized the leadership role played by the states and tribes for both the regulatory program and the abandoned mine land reclamation program.

Over the years, the AML program faced many challenges regarding funding. Congressional action was required on several occasions to extend the AML fee under

SMCRA and to allow funding to continue unimpeded for needed reclamation activities. In some years, Congress did not appropriate the full amount of funds collected through AML fee collections, which resulted in states being under-funded and further challenging the ability to effectively continue reclamation activities. The need to continually extend SMCRA also resulted in uncertainty for industry, since they had no ability to determine if, or when, the fees assessed on coal production would terminate.

These uncertainties were the main driver for the changes enacted under the 2006 Amendments to SMCRA. Discussions and deliberations about what changes were appropriate under the Act continued for many years and ultimately resulted in the 2006 Amendments, which provided a clear path forward and a level of stability for the program. States and Tribes were guaranteed that they would have sufficient funding to properly manage their programs. Funding for reclamation activities was also guaranteed. The combination of these changes provided the certainty for states and Tribes to allow for efficient and effective planning and delivery of reclamation work. Where public facilities, such as water systems, were impacted by past mining activities, states and tribes could be assured of a source of funds to repair or replace that critical public infrastructure. The 2006 Amendments extended the Title IV program through September 30, 2021 thus giving the states and tribes a long term planning window for accomplishing needed reclamation. The extension of the program through September 30, 2021 also provided industry with some certainty relative to the fee collection.

Two things have always been understood: The intent of Congress, as expressed both through the original SMCRA and again through the 2006 Amendments, was to protect the health and safety of the public from the impacts of past mining and to restore the environment. It was also clear that states and tribes were the appropriate entities to assume the leadership role to implement Title IV. The strong positive annual audits and annual oversight reports for state and tribal programs are positive proof that Congress's faith in the state and tribal leadership was well-placed.

The need continues for strong programs addressing the remaining inventory of abandoned mine sites. States and tribes still have legacy abandoned mine sites that pose significant threat to public health and safety and continue to pose environmental challenges. The intent of Congress to address those issues is far from having been satisfied.

OVERVIEW OF CONCERNS

The changes currently proposed by the Administration would have major impacts on state and tribal programs. The 2006 Amendments represented a significant compromise reached after many years of thoughtful debate and deliberation that brought critically needed certainty and stability to both the national program and state and tribal programs. The benefits resulting from those 2006 Amendments are clear and obvious. AML programs now provide an effective assessment and planning function critical to the implementation of the intent of SMCRA. State and tribal management of programs has resulted in much-needed jobs, increased protection of citizens and communities from the impacts of past mining and resulted in the elimination of serious environmental hazards posed by abandoned mine sites.

The 2006 Amendments provide certainty that funds would continue to be available for these important planning, management and reclamation activities. The language adopted in 2006 mandates that the AML funds derived through fee collections be used for the purposes of the Act. This ensures the timely flow of funding critical for the continuity of program activities. Unfortunately, the current Administration proposals would replace this certainty with language that is confusing and unclear on the intent of the availability and use of the funds. Many states, if they fail to receive administrative funding through the proposed competitive process, may be forced to discontinue their programs resulting in a loss of state and tribal programs.

All performance assessments concerning current AML programs indicate that these programs are well managed, effective and are delivering strong results to meet the intent of SMCRA. Audit reports, annual oversight reports and program records demonstrate the success of the program as it currently exists. Over the last 30 years a strong and successful partnership has developed between the states and tribes and the OSM. This partnership has been further strengthened since the passage of the 2006 Amendments.

The question then is this: With the strong positive benefits that have been demonstrated since the 2006 Amendments, what is the driving need to undermine the 2006 Amendments with rushed, flawed and unclear legislative language? This question is even more significant when we remember that it took nearly 10 years of de-

liberations to ultimately adopt the 2006 Amendments. Since the 2006 Amendments were the result of a multiple year effort (with extensive input from states, tribes, OSM and other stakeholders), what is the rush to replace them without any public input? The current proposal was prepared in a vacuum without any opportunity for states, tribes or the committees of jurisdiction to comment on proposed legislative language.

SPECIFIC CONCERNS

The current Administration proposal raises numerous concerns. Significant among them are the following:

- Guaranteed AML payments to states and tribes would be eliminated. These guaranteed payments provided funding certainty for planning, management and reclamation activities. Areas affected by this change include payments based on historic coal production, payments to under-funded states, repayment to states and tribes of unappropriated (prior balance) payments, and payments to certified states and tribes.
- Expenditure of AML money for non-coal reclamation would be prohibited.
- The acid mine drainage set-aside program would be eliminated.
- The 2006 Amendment language clarifying that AML moneys could be used for water supply projects without limitation would be eliminated.
- Funding for environmental restoration projects may be eliminated if funding is not approved by the Secretary of the Interior.
- Greatly expanded AML project justifications would be required as part of the annual competitive bidding process.
- States and tribes would be required to submit increased accounting and reporting related to past expenditures on an annual basis.

CONCLUSION

The abandoned mine land program as amended through the 2006 Amendments to the Act has a proven track record of success in efficiently addressing public health and safety concerns from legacy mining, the elimination of significant environmental hazards associated with abandoned mines, providing jobs, and improving local communities by addressing hazards that impact those communities. The program continues to work well. We cannot support the changes proposed by the Administration that would emasculate the 2006 Amendments, which were passed after years of public input and deliberation. The current proposal was obviously quickly crafted and contains flaws and confusing language that reflect the total lack of meaningful input by those who are intimately familiar with the program. The current proposal is unsound, lacks the basis and need to support its adoption and should be rejected. SMCRA should be allowed to work as intended and, if it is determined that further adjustments are needed, that action be deferred to the authorizing committees.