Committee on Natural Resources
Subcommittee on Public Lands and Environmental Regulation
Oversight hearing on "Threats, Intimidation and Bullying by Federal Land Managing Agencies, Part II."

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To: Honorable Chairman Hastings, Subcommittee Chairman Bishop, and members of the Committee

My name is A. Blair Dunn. I am an attorney and a fifth generation agriculturist in southern New Mexico. My family, to this day, raises cattle and horses on a ranch that includes private land, Bureau of Land Management ("BLM") land and New Mexico State Land. My law practice focuses on assisting those involved in agriculture, natural resource use, and conservation. My family has long been involved in the legislative process and active in government. My grandfather, a long time legislative finance chairman for New Mexico, would have told you that the business of government is much like the business of tending to the apple orchard, where myself and many of my family were raised. Growing apples consists of watching out the for the good and the bad, and getting rid of the bad apples so the good ones don't spoil; government should consist of watching for the good ideas by getting rid of the bad ones, allowing the good employees to thrive while getting rid of the rotten ones that destroy the whole bushel.

This applies to what we are here today to discuss, overseeing the business of Federal Agencies and their employees. One of my clients is Otero County in New Mexico. You just heard from one of their commissioners regarding the trouble that their county is subjected to as a result of those within the federal bureaucracy that would use their power in a heavy handed or malicious way that violates civil and Constitutionally guaranteed rights. Otero County has sent pleas to this very committee for Congressional inquiry and oversight into what is happening in their County, and what is happening in their County is far from an isolated incident.

Otero County, like many others, is crying out for Congressional oversight into the harms caused by those bad apples that misuse the power of the executive in way that harms or interferes with private property rights. Such oversight of executive agencies is a crucial component of ensuring a well-run government. Such oversight has long been held to be an implied authority of Congress derived from the rest of the legislative functions of Congress, as delegated by the United States Constitution.

To say that our federal government is large and extensive is an understatement,

and would not do justice to the state of our affairs. To that end Congressional oversight into the activities of the few bad apples runs counterintuitive to reality. Without a doubt, it must be agreed that the majority of federal employees are dedicated and hardworking individuals that are trying to do their jobs to the best of their abilities in keeping with the direction and mandates of U.S. Constitution and federal laws. However, a well-crafted tool to assist Congress in overseeing and addressing those that would abuse their power to violate the civil and Constitutional rights of the citizens of the United States is sorely missing. Some would say that such a tool does already exist, and has existed for many decades, in the form of The Civil Rights Act of 1871, which prohibits governmental employees, "acting under the color of state law," from proximately causing the depravation of certain Constitutionally guaranteed rights. However, The Civil Rights Act of 1871 only applies to state officials.

I. BACKGROUND ON CASE HISTORY AND EFFECTS OF PREVIOUS DECISIONS ON CURRENT INTERACTIONS BETWEEN THE PUBLIC AND FEDERAL EMPLOYEES

This Committee has previously heard testimony from Ms. Karen Budd-Falen. I have reviewed her testimony and the cases to which she cites. I concur with her analysis of both Bivens v Six Unknown Federal Narcotics Agents, 403 U.S. 388(1971) and its role in Wilkie v. Robbins, 551 U.S. 537, 577 (2007). For purposes of this testimony I will not belabor the important work of this Committee by again reciting that analysis, but would respectfully offer that I incorporate her legal analysis in my testimony and adopt her legal opinion as concurring with my legal opinion.

Ms. Budd-Falen offered in her testimony that the Robbins case "now acts as a complete bar to the judicial branch of government, regardless of the extreme nature of the federal officials actions," and I would for the most part agree, certainly inasmuch as it does act as a complete bar to actions seeking to address conduct by federal employees using the authority of their offices to violate private property rights outside of the mandates of the Fifth Amendment. But I would respectfully offer to the Committee that her analysis falls short of the full effect of the decision without the subsequent action that the Court offered Congress should undertake:

> We think accordingly that any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation. "Congress is in a far better position than a court to evaluate the impact of a new species of litigation" against those who act on the public's behalf. And Congress can tailor the remedy to the problem perceived, thus lessening the risk of a rising tide of suits threatening legitimate initiative on the part of Government's employees.

551 U.S. at 562. Citations omitted. Thus, instead of acting as a complete bar, such precedent now serves to embolden federal employees to reach even further in abusing their power to violate private property rights absent oversight and legislation from Congress. An overreaching or maliciously acting employee runs little risk of retribution from their acts. Behaviors of threatening or cajoling, as you have heard about from

others here testifying today, are allowed to proceed under a stronger cloak of immunity.

For example, one of my clients, El Capitan Precious Metals, Inc., a mining company in southern New Mexico that is seeking to utilize new technology to create industry and jobs in the local communities, has been subjected to threats and cajoling by the United States Forest Service employees. El Capitan is seeking to rework and reopen the mining claims on private property that they now own, some of which are hundreds of years old. Incidental to the claims to patented lands are vested rights of ingress and egress to their fee simple property that is surround by National Forest lands. Pursuant to the laws of this country, their predecessors owned a vested private property easement across forest service lands to access their private property. Now after 100 years of use on the ¾ mile road, upon which their vested easement runs, they are being told that they have no right, that they must go thru the NEPA process and they must purchase a special use permit to use the road. The road has literally been in use since 1914 and the Forest Service is telling them they must go through a lengthy and expensive NEPA process to continue use of the ¾ mile road from the highway to their mine. At one point they were threatened with charges of criminal trespass for mine employees utilizing their private property easement. They have repeatedly been cajoled to abandon their private property rights and just take a special use permit for the road. Such actions, if done by a state employee, would certainly have prompted a civil rights claim for the attempt to deprive them of their private property right. Instead, they are left seeking other less immediate remedies of pursing federal litigation for a taking and hopefully a short term remedy to provide them continued access to their private property, but in the mean time they run the risk of the loss of their business or even criminal prosecution for using their vested easement. I can point to other examples from clients seeking federal grants of inspection harassed only because the federal employee disagreed with the species of animal they intended to harvest. All of these types of actions harm not only the specific individual or companies, but also harm local rural economies and cost communities much needed jobs.

The public trust in government should be a sacred thing to federal employees. I think that to most of them it is. But for those that would abuse the power they have been given, the public deserves an avenue to provide oversight, the public deserves a ticket to the door of the court house to seek a remedy for their damages. As has been previously cited, the Robbins's dissenting opinion discussed the merits of a narrowly tailored cause of action to provide and found merit to such an action:

> Adopting a similar standard to Fifth Amendment retaliation claims would "lesse[n] the risk of raising a tide of suits threatening initiative on the part of Government's employees." Discrete episodes of hard bargaining that might be viewed as oppressive would not entitle a litigant to relief. But where a plaintiff could prove a pattern of severe and pervasive harassment in duration and degree well beyond the ordinary rough-and-tumble one expects in strenuous negotiations, a Bivens suit would provide a remedy. Robbins would have no trouble meeting that standard.

551 U.S. at 582. Internal citations omitted.

I can say without reservation that three of my current clients would directly fall into this category of people maliciously harmed by an abuse of power by federal employees, and I can say with absolutely the same lack of reservation that all 3 of them would never reach a point of needing to file a cause of action. I say that without reservation because I firmly believe that such options as are being discussed here by this Committee would serve to deter many instances of abuse of power and would incentivize the agencies to ensure that the proper checks and balances were in place to prevent such an abuse of power.

An argument can be made that the creation of new causes of actions would cause a flood of federal litigation, burdening the Courts and costing tax payer money. But such an argument leaves aside the fact that these causes already exist against the state employees. Further, one must give weight to the simple argument that if the harm is not occurring, then citizens will have nothing to bring a claim on.

A claim (similar to a Section 1983 claim) must include the components of a right that is possessed by a person that has suffered a deprivation of said right by an action carried out by a government employee acting under the color of the law. The deterrence policy of Section 1983 operates through the mechanism of compensation of the actual damages suffered by the victim. See *Carey v. Piphus,* 435 U.S. at 256-57 (1978); Memphis Community School Dist. v. Stachura, 477 U.S. 299, 307, 106 S.Ct. 2537, 2543, 91 L.Ed.2d 249 (1986) ("**deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are *compensatory*** ") (emphasis in original). As the Supreme Court noted in *Carey,* "[t]o the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." 435 U.S. at 256-57. Tinch v. City of Dayton, 77 F.3d 483 (6th Cir. 1996) See also Medina v. Pacheco, 161 F.3d 18 (10th Cir. 1998) (recognizing the deterrent value of section 1983 of the Civil Rights Act).

II. PROPOSED LANGUAGE

I have also reviewed the following proposed language for a statute that could be enacted to protect private property owners from intimidating or cajoling behaviors by federal employees acting under the color of law:

> *The attempted taking of private property or private property rights by means of governmental employee harassment or intimidation, under color of law, is hereby declared to be a violation of Civil Rights Act. Harassment or intimidation against the owners of private property or private property rights constitutes such violation when (1) a property owner's relinquishment of his property or property rights is made explicitly or implicitly a term or condition of receipt of a permit or license from a governmental agency, (2) submission to or rejection of such conduct by a property owner is used as the basis for the grant of or conditions included in a permit or license, or (3) the conduct of the*

governmental employee has the purpose or effect of unreasonably interfering with an individual's private property or private property rights. An attempted taking of private property or property rights under this section can be composed of a series of separate acts that collectively constitutes a significant deprivation of the ownership or use of private property or property rights. In determining whether the activities of a governmental employee are actionable under this section, consideration can be given to the frequency of the discriminatory conduct, harassment or intimidation, its severity, and whether such governmental action interferes with the ownership, use or legitimate investment backed expectations of the property owner.

Such narrowly tailored language would serve as a much needed guidance post to federal agencies. Imagine if, in considering fencing around private property water rights, threatening local governments with trespass for using vested easements, or cajoling a 5th generation agriculturist to go along with a plan or lose his grazing permits, the federal employees also had to consider whether their desired actions and behavior resulted in liability to the government for damage to private property rights. Arguably they should already be doing so in their oaths to uphold the Constitution, but in reality some of them are not, with no fear of retribution for acting badly. I would respectfully request that the Committee consider what added deliberation decision makers and supervisors would make when considering a proposed action or statement made to a private land owner if they must first consider the liability of violating a citizen's civil and Constitutional rights. Section 1983 claims under the Civil Rights act have been proven to encourage constitutional policing by local law enforcement officers around the country; wouldn't it make sense to encourage constitutional regulating and land managing by our federal agencies employees?

III. THE AMOUNT OF BAD APPLES VERSUS GOOD AND GIVING THE PUBLIC THE TOOLS TO HELP CONGRESS PROVIDE OVERSIGHT TO FEDERAL AGENCIES AND EMPLOYEES

By and large, these examples of federal employees acting intentionally to violate the private property rights of American citizens are the exception, not the rule. But as you have heard from testimony today, and will continue hearing well into the future, should Congress fail to act to remedy this issue, the problem will continue to grow. The federal government is broad in size, with thousands of federal employees; sorting through all of the employees to root out the bad apples is a task that is beyond the capabilities of Congress to do one oversight committee hearing at time. Congress should open the door of the Courthouse to the everyday citizens to help shoulder the burden sorting out the bad apples and remedying the damages done by those that would abuse their power.