

# Committee on Natural Resources

Rob Bishop, Chairman

Hearing Memorandum

September 28, 2015

To: Natural Resource Committee Members

From: Majority Committee Staff

Subject: Full Committee Oversight Hearing: *“Respecting State Authority, Responsibilities and Expertise Regarding Resource Management and Energy Development”*

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The Committee on Natural Resources hearing will take place on **September 30, 2015 at 10:00 a.m. in room 1324 Longworth House Office Building**. The hearing will focus on the sweeping and growing impact of the federal government’s regulations and policies on states, specifically on improving coordination between the federal government and western states, and a need for the government to defer to state authority in areas of state experience and expertise.

## **Policy Overview:**

- States derive a number of independent rights and responsibilities under the Tenth Amendment to the U.S. Constitution, which states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>1</sup>
- Western states account for 94 percent of all federal land, and are therefore disproportionately impacted by federal decisions that do not account for state interests. Federal over-regulation represents an ongoing threat to western states, as it has diminished federal-state partnerships, and led to increasingly harmful regulatory decisions and a proliferation of litigation that adversely impact the states’ statutorily-defined jurisdictional roles and economies.
- The federal government is decreasing opportunities on federal land, and therefore necessitating reliance on programs such as Payments in Lieu of Taxes<sup>2</sup> and Secure Rural Schools.<sup>3</sup> The federal government must encourage multiple uses on federal land as required by the Federal Land Policy and Management Act<sup>4</sup>, and provide expediency in the permitting process.
- Long-term federal mismanagement of Western national forests has led to overgrowth, an alarming increase in invasive species, and proliferating annual catastrophic fires. The Federal Forest Resilience Act, H.R. 2647 represents an opportunity to boost active management of the forests, and thereby protect western interests.

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<sup>1</sup> U.S. Const. amend. X.

<sup>2</sup> See Pub. L. No. 94-565 (1976), available at <http://www.gpo.gov/fdsys/pkg/STATUTE-90/pdf/STATUTE-90-Pg2662.pdf>.

<sup>3</sup> See Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. No. 106-393.

<sup>4</sup> The Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579.

- The federal government has increasingly pursued policies that have undermined historical state management of water resources. For example, many western states and water users have substantial issues with the controversial “Waters of the U.S.” regulation and continue to have concerns over federal efforts to implement other policies that could override state supremacy on water rights and groundwater regulation.
- The West has sought to handle Native American issues collaboratively, and will continue to do so. While the Indian Reorganization Act provides no clear guidance as to how the Secretary of the Interior should hold new lands in trust, any legislative solution should clearly incorporate western concerns, and require state input.

**Witnesses (in alphabetical order):**

*The Honorable Steve Bullock*  
Governor, State of Montana

*The Honorable Dennis Daugaard*  
Governor, State of South Dakota

*The Honorable Gary Herbert*  
Governor, State of Utah

*The Honorable Matt Mead*  
Governor, State of Wyoming

**Background**

Since the founding of the United States, there has been an inherent tension between the role of the federal government and the states. This tension is most pronounced in the western states where issues involving federal land consistently challenge the limits of state sovereignty. Indeed, the 19 state members of the Western Governors’ Association (“WGA”) account for 94 percent of all federal land in the United States.<sup>5</sup>

This hearing will highlight the impact of the federal government’s expanding regulatory reach over states, and will seek to expound upon solutions in the following areas: regulatory impacts on energy development, federal land use management, forest management, Native American issues and water policies.

*Regulatory Impacts on Energy Development in Western States*

The western states have played a key role in promoting the revitalization of the energy sector in the United States. As such, the western governors have committed to “developing energy policies that will promote both economic growth and environmental protection” and lead

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<sup>5</sup> Congressional Research Service, Federal Land Ownership: Overview and Data, R42346, December 2014.

America to a future of “energy security.”<sup>6</sup> This commitment is evident as the WGA’s member states account for 78 percent of crude oil production in America. Furthermore, those states truly represent “all-of-the-above” energy strategies, as they also provide 66 percent of all renewable energy generation in the United States.<sup>7</sup> It is crucial that the federal government work collaboratively with the western states to ensure the shared goal of “energy security” is met.

The WGA defines “energy security” as “being able to meet all domestic energy needs from clean, affordable and reliable North American sources.”<sup>8</sup> This “fully achievable” goal can be accomplished with the resources of the West, but must not be hindered by the federal government. Yet, the WGA has indicated that “over time, the strength of the federal-state partnership in resource management has diminished” with “federal actions neglect[ing] state expertise and diminish[ing] the statutorily-defined role of states.”<sup>9</sup>

Over just the past several months, the Department of the Interior’s bureaus and sub-agencies have proposed or already finalized **more than 200 new rules and regulations**.<sup>10</sup> Recently, the promulgation of the federal hydraulic fracturing (“fracing”) rule highlighted an area of state control in which the federal government sought to intervene. The BLM premised the rule on a lack of fracing regulations on public land. However, this justification ignored that states had been regulating fracing under a “system of cooperative federalism as envisioned through the Safe Drinking Water Act.”<sup>11</sup> This is demonstrated by BLM’s acknowledgement that at least 99.3 percent of the total well completions on federal and Indian lands nationwide occurred in states with existing hydraulic fracturing regulations.<sup>12</sup>

Despite this fact, the BLM released a final rule on March 20, 2015, with the rule failing to adequately consider state regulations, and providing little deference to state expertise. As such, Colorado, North Dakota, Wyoming, and Utah are currently engaged in ongoing litigation that challenges the rule’s statutory authority.

Similarly, the development of the Stream Protection Rule provides an example in which the federal government completely shut-out the states. In 2010, the Office of Surface Mining Reclamation and Enforcement (“OSM”), as the lead agency for the National Environmental Policy Act (“NEPA”) review of the Stream Buffer Zone Rule rewrite, entered into memoranda of understanding (“MOU”) with a number of states. These MOUs set forth the expectations and

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<sup>6</sup> Western Governors’ Association, 10-Year Energy Vision: Goals & Objectives, at 5, June 2013, available at [http://www.westgov.org/component/docman/doc\\_download/1719-10-year-energy-vision?Itemid=53](http://www.westgov.org/component/docman/doc_download/1719-10-year-energy-vision?Itemid=53).

<sup>7</sup> U.S. Energy Information Administration, Electric Power Monthly with Data for July 2015, at 126, available at <http://www.eia.gov/electricity/monthly/pdf/epm.pdf>.

<sup>8</sup> Western Governors’ Association, 10-Year Energy Vision: Goals & Objectives, at 8, June 2013, available at [http://www.westgov.org/component/docman/doc\\_download/1719-10-year-energy-vision?Itemid=53](http://www.westgov.org/component/docman/doc_download/1719-10-year-energy-vision?Itemid=53).

<sup>9</sup> Western Governors’ Association, Policy Resolution 2014-09: *Respecting State Authority and Expertise*, available at <http://www.westgov.org/policies/307-other/724-wga-western-governors-resolution-respecting-state-authority-expertise>.

<sup>10</sup> See Agency Rule List – Spring 2015, available at [http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1000&Image58.x=46&Image58.y=10&Image58=Submit](http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1000&Image58.x=46&Image58.y=10&Image58=Submit)

<sup>11</sup> Memorandum in Support of North Dakota’s Motion for Preliminary Injunction, *Wyoming v. Jewell*, at 23, No. 15-cv-43 (D. Wy. filed Mar. 26, 2015).

<sup>12</sup> 80 Fed. Reg. 16187.

responsibilities for the lead and cooperating agencies for environmental impact statement activities under NEPA for the Stream Protection rulemaking and afforded cooperating agency status to the signatory states. However, OSM excluded the states from the NEPA process in contradiction of both NEPA regulations and their MOUs. This exclusion resulted in 11 states withdrawing as cooperating agencies.<sup>13</sup>

Both the fracing and stream protection rules exemplify how the federal government has treaded over state authority. In addition, the Administration has proposed other significant rules, including a potential rule that could raise royalty rates on federal onshore oil and gas leases by as much as 50%;<sup>14</sup> regulations that would manage 1.5 million additional acres in the Arctic National Wildlife Refuge in Alaska as wilderness, shutting off energy exploration and development, and indefinitely withdraw large swaths of the Arctic to offshore drilling.<sup>15</sup>

However, the regulatory effects are not just limited to claims of statutory jurisdiction. Indeed, many of these regulations will adversely harm western economies. For instance, independent research has demonstrated the fracing rule could cost up to \$345 million per year;<sup>16</sup> while the delayed decision on the Keystone Pipeline has prohibited between 3,000 and 4,000 indirect new jobs in South Dakota at an economic cost of \$100 million.<sup>17</sup>

These economic and jurisdictional consequences are hindering America's path to energy security. With climate change increasingly being used as justification for future regulations, such as the BLM's forthcoming rule governing methane emissions, it is clearly necessary for states to have input in the development of federal regulatory actions. Therefore, to promote a return to a strong federal-state partnership, the federal government must: 1) take into account "state data and expertise" when developing the underlying science for federal regulatory actions, 2) engage in pre-rulemaking consultations with governors and state regulators, 3) consult with the states during the refinement of the rules, and 4) provide significant deference to states where Congress has expressly delegated authority away from the federal government.<sup>18</sup>

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<sup>13</sup> See April 2, 2015 letter from Chairman Rob Bishop, U.S. House Committee on Natural Resources, to Director Joseph Pizarchik, U.S. Office of Surface Mining Reclamation and Enforcement, *available at* [http://naturalresources.house.gov/uploadedfiles/letter\\_to\\_director\\_pizarchik\\_on\\_steam\\_protection.pdf](http://naturalresources.house.gov/uploadedfiles/letter_to_director_pizarchik_on_steam_protection.pdf).

<sup>14</sup> <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=1004-AE41>

<sup>15</sup> [http://www.regulations.gov/#!documentDetail;D=BOEM\\_FRDOC\\_0001-0308](http://www.regulations.gov/#!documentDetail;D=BOEM_FRDOC_0001-0308);

<http://www.doi.gov/news/pressreleases/obama-administration-moves-to-protect-arctic-national-wildlife-refuge.cfm>

<sup>16</sup> July 22, 2013 Memorandum from John Dunham to Kathleen Sgamma, Business Impact of Revised Completion Regulations, at 1, *available at* <http://www.westernenergyalliance.org/wp-content/uploads/2013/07/Final-Economic-Analysis-of-the-BLM-Fracing-Rule-Revision.pdf>.

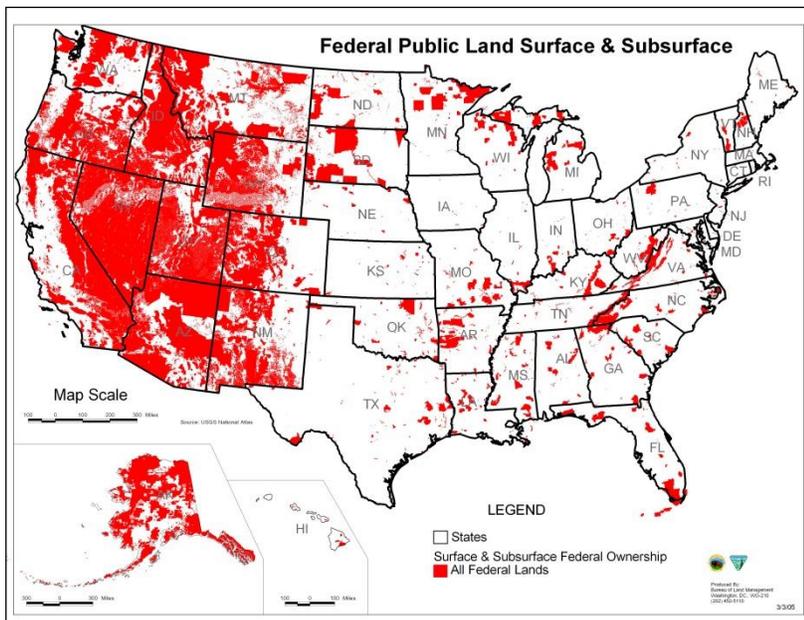
<sup>17</sup> See TransCanada, A Primer on the Keystone XL South Dakota Public Utilities Commission Hearings, <http://keystone-xl.com/a-primer-on-the-keystone-xl-south-dakota-public-utilities-commission-hearings/> (last visited September 25, 2015).

<sup>18</sup> Western Governors' Association, Policy Resolution 2014-09: *Respecting State Authority and Expertise*, *available at* <http://www.westgov.org/policies/307-other/724-wga-western-governors-resolution-respecting-state-authority-expertise>.

## Federal Land Use Management

With western states accounting for 94 percent of all federal lands in the U.S. and management discretion of this land given to federal agencies, western states are most impacted by the adverse consequences of federal decisions, such as federal NEPA and leasing activities, permitting processes, and the implementation of the Endangered Species Act (ESA).

When the Obama Administration assumed control of the federal government in 2009, it inherited the most leased acreage of federal land since 1992.<sup>19</sup> This fact has allowed the



**Figure 1: Federal Ownership (surface and sub-surface) in states**  
Source: BLM

Dakota, Utah, and Wyoming, leased federal acreage has fallen by 27 percent.<sup>21</sup> These decreased acreages will eventually lead to a decrease in production, which – when coupled with costly new federal regulations – will result in lost revenue to those states with federal land.

Second, it is becoming increasingly difficult to obtain a permit on federal land. In 2014, the average approval timeframe for an Application for Permit to Drill (“APD”) on federal land was 227 days.<sup>22</sup> On state land, the same process took an average of 33 days.<sup>23</sup> Although the

administration to claim an increase in onshore federal crude oil production, reflected by numbers from the Office of Natural Resources Revenue demonstrating an increase from 104 million barrels in FY 2009 to 148 million barrels in FY 2014.<sup>20</sup> That said the current trend in production is likely untenable due to a number of factors brought on by this administration’s policies.

First, the Obama Administration’s leasing activities have resulted in a decrease of leased federal acreage by 12.6 million acres since the end of fiscal year 2008. Indeed, in Montana, South

<sup>19</sup> U.S. Bureau, of Land Management, Total Number of Acres Under Lease As of the Last Day of the Fiscal Year, Oct. 29 2014.

<sup>20</sup> This number excludes tribal lands. Office of Natural Resources Revenue, Sales Volume by Sales Year from FY 2009 to FY 2014 for Federal Onshore Statistics, <http://statistics.onrr.gov/reporttool.aspx>.

<sup>21</sup> U.S. Bureau, of Land Management, Total Number of Acres Under Lease As of the Last Day of the Fiscal Year, Oct. 29, 2014.

<sup>22</sup> U.S. Bureau of Land Management, Average Application for Permit to Drill (APD) Approval Timeframes: FY2005 – FY 2014, available at [http://www.blm.gov/wo/st/en/prog/energy/oil\\_and\\_gas/statistics/apd\\_chart.html](http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/statistics/apd_chart.html).

<sup>23</sup> See Western Energy Alliance, Peeling Back the Red Tape Tactic 2: Delay, available at <http://www.westernenergyalliance.org/RedTapeNation/Delay>.

APD process is but one step in the overall permitting process, it is illustrative of the larger problem in obtaining permits through a federal agency.

Third, the federal government is drastically curtailing access to federal land in the West under the guise of the ESA. Although the ESA specifically requires the Secretary of the Interior to “cooperate to the maximum extent practicable with the States,” much of the pending regulatory decisions under the ESA are occurring because of the Interior Department’s closed door “mega settlements,” which states were not parties to, between the federal government and environmental groups.<sup>24</sup> In turn, many of the ESA decisions are being made without actual adequate or meaningful data or input from the states.

### *Greater Sage-Grouse Management*

On September 22, the U.S. Fish & Wildlife Service (“FWS”) determined that the Greater Sage-Grouse (“GrSG”) would not be listed under the ESA. The day before, BLM and USFS signed records of decision implementing sweeping revisions to dozens of federal land use plans with new guidance and restrictions for the species across millions of acres of western federal lands. Despite the FWS’ determining not to list the species under the ESA the new BLM and USFS guidelines for the species on federal lands are arguably just as restrictive, or more than, a listing decision.

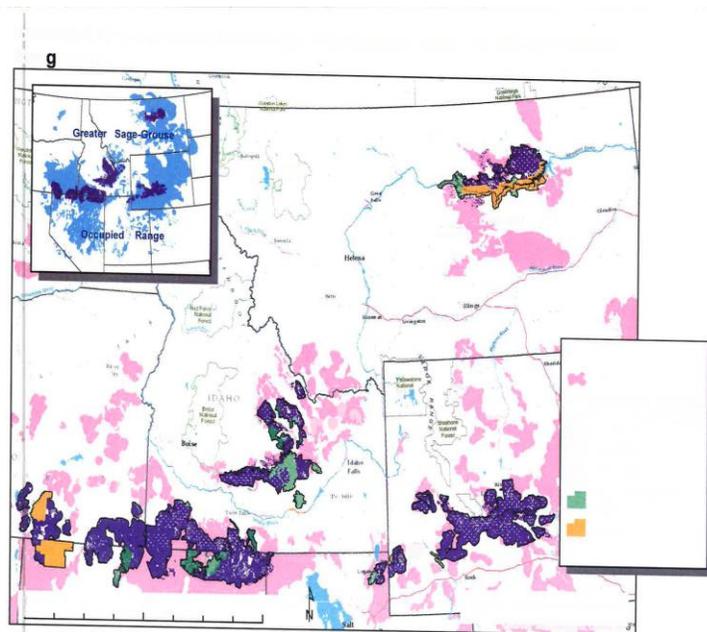


Fig. 2: U.S. Fish and Wildlife Service’s “identified” Greater Sage Grouse strongholds (Source: FWS Memo, Oct. 27,

The revised land use plans include extensive surface disturbance restrictions, including expanded buffers around breeding areas and caps on disturbance of three or five percent in certain habitat areas. The plans also recommend the withdrawal of nearly **10 million acres** from hard rock mining in Idaho, Montana, Nevada, Oregon, Utah and Wyoming.<sup>25</sup> These restrictions will have devastating effects on future multiple uses activities including grazing, mining, oil and gas development, renewable energy development, and agriculture on federal lands and the rural communities whose economies rely upon them.

The plans are also inconsistent with state management plans to protect the species, which were developed with broad stakeholder involvement and take into account local habitat conditions and recent state-developed science. Despite the Department of Interior’s claim that

<sup>24</sup> 16 U.S.C. § 1535.

<sup>25</sup> Scott Streater, “Interior proposes banning new mining on 10M sage grouse acres,” E&E News, Sept. 23, 2015.

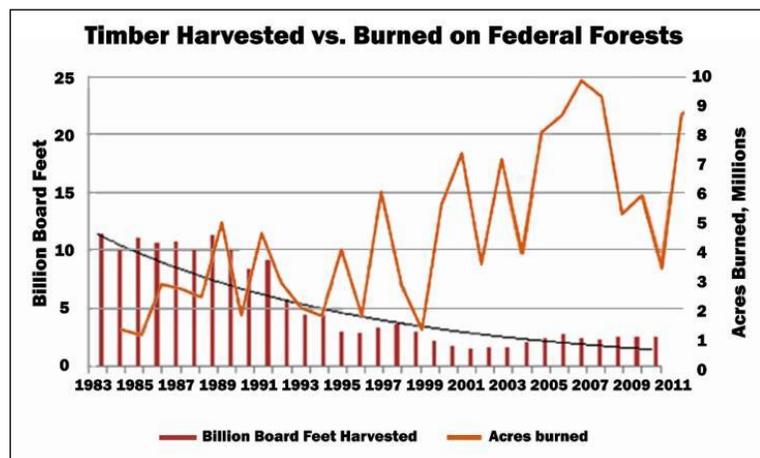
there was “unprecedented coordination” between federal agencies and states, concerns raised by many states throughout the planning were largely ignored in lieu of utilizing top-down guidance developed at the national level.<sup>26</sup> Most states objected to the final land use plan amendments through protests and their Governor’s consistency reviews, which were dismissed. The State of Idaho has already filed a lawsuit challenging the new federal land use plans.<sup>27</sup> Several counties and mining companies also filed lawsuits challenging the plans in Nevada, and it is assumed that many more will follow suit in the coming months.

Though new data shows the sage grouse population has already begun to increase, it is unknown how the federal government will interact with states if the sage grouse numbers continue this trend and thereby negate the need for such stringent regulatory measures in those five states. As a result, Western governors have called for meaningful and expanded opportunities for states to comment, participate, or take the lead in fending off potential species listings through state driven conservation efforts.<sup>28</sup>

Efforts to include states in the federal permitting process and leasing cycle should be encouraged. By doing so, development on federal land will no longer be shunned, thereby ensuring continued profits for the states, and voiding the need for legislative action to account for lost profits due to federal mismanagement.<sup>29</sup>

### Federal Forest Management

As recognized by the WGA, “the health of the nation’s federal forests and range lands has deteriorated.” This deterioration, attributed in part to “a reduction in active management,” has a massive impact on western states – the most obvious impact being catastrophic wildfires, which threaten lives, homes, municipal watersheds, wildlife habitat and tourism.<sup>30</sup> This year, **nine million acres** have burned in catastrophic wildfires – the vast majority of which were in western states.



Yet, the threat from wildfire continues to intensify. According to the Forest Service, **58 million acres** are at high risk to catastrophic wildfire; however, the agency is only thinning

<sup>26</sup> See [http://westgov.org/images/LTR\\_GSG\\_Rollup\\_Mtgs\\_FINAL.pdf](http://westgov.org/images/LTR_GSG_Rollup_Mtgs_FINAL.pdf)

<sup>27</sup> Eric Johnson, “Idaho sues U.S. over sage-grouse habitat restrictions”, <http://www.reuters.com/article/2015/09/26/usa-sagegrouse-idUSL1N11V2NY20150926>

<sup>28</sup> See Western Governors’ Association, Policy Resolution 13-08: *Endangered Species Act*, available at [http://www.westgov.org/component/docman/doc\\_download/1729-13-08?Itemid=53](http://www.westgov.org/component/docman/doc_download/1729-13-08?Itemid=53).

<sup>29</sup> See Twenty years of Forest Service Land Management Litigation, Miner, Malmsheimer and Keele, *Journal of Forestry*, January 2014.

<sup>30</sup> See Western Governors’ Association, Policy Resolution 13-08: *Endangered Species Act*, available at [http://www.westgov.org/component/docman/doc\\_download/1729-13-08?Itemid=53](http://www.westgov.org/component/docman/doc_download/1729-13-08?Itemid=53).

250,000 acres per year.<sup>31</sup> At this rate, the Forest Service will never overcome the true problem – overgrown, unhealthy forests which are susceptible to severe wildfires, insects and disease infestation. To solve this problem, the Forest Service must increase active management to restore our federal forests back to health and prevent catastrophic wildfires and their many negative impacts.

Further compounding the issue of forest management is the ongoing threat of litigation the Forest Service faces. States like Montana have been hit especially hard by litigation. There, the Kootenai National Forest Supervisor approved an Environmental Impact Statement to proceed with the Grizzly Vegetation Management project on 2,360 acres identified as being at significant risk of wildfire. The proposed activities included timber harvest, fuels reduction, prescribed burning, pre-commercial thinning, wildlife habitat improvement, and watershed rehabilitation – all activities that would have promoted a healthy forest. These activities were nullified, after a federal district court judge granted an injunction in 2010.

Wildfires continue to increase in size, severity and cost. As a result, more of the Forest Service’s budget is spent on wildfire suppression than any other line item, and the agency must borrow from other non-fire accounts when it exhausts appropriated wildfire spending. The House recently passed H.R. 2647 (Westerman/Zinke), the *Resilient Federal Forest Act*. This bill resolves the fire borrowing problem and would give the Forest Service the tools it needs to thin overgrown forests and reforest after wildfires. Furthermore, H.R. 2647 addresses the pervasive problems associated with litigation. Between 1989 and 2008, 1,125 lawsuits were filed against the Forest Service. H.R. 2647 requires would-be litigants to post a bond if the lawsuits they are filing on collaborative projects.

An additional piece of legislation that addresses forest management is H.R. 2358 (Zinke), the *Electricity Reliability and Forest Protection Act*. This legislation ensures reliable electricity service and further reduces the risk of fire, by addressing current federal requirements that impede the efforts of utilities to promote active and responsive vegetation management. The WGA supports this legislation and would encourage its passage.

Federal agencies continue to neglect the necessary management that would reduce the threat of wildfires in the West. It is imperative that the risk of wildfire be decreased, and that the Forest Service begins to actively manage western forests in healthy ways again.

#### *Land and Water Conservation Fund*

Despite broad, bipartisan support of the original intent of the Land and Water Conservation Fund (LWCF), the program has drifted far from that intent. Over the years, the funds have been diverted from state and local projects and have been primarily used to expand the federal estate. Under the original LWCF authorization in 1965, **60 percent** of the funds in the program were specifically set aside for the stateside assistance grant program. In reality, of the \$17 billion appropriated throughout the history of the program, **only 25 percent** has been allocated to stateside grant program. In 2015, stateside *received just 16 percent of appropriated*

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<sup>31</sup> Testimony of Mary Wagner, Associate Chief, Forest Service at House Agriculture Committee hearing September 15, 2015.

*funds.*<sup>32</sup> Despite the diminishing funding, the program has awarded over 40,000 grants to states and localities for outdoor recreation projects, including hiking trails, open spaces, public swimming pools, and sports fields.<sup>33</sup>

Much has been said about the consequences of the expiration of the LWCF on September 30<sup>th</sup>. Despite conjecture, the only thing that expires is the ability to accrue additional revenues into the fund, which currently has an unappropriated balance of **\$20 billion**. At the current rate of appropriation, it would take roughly 60 years before the fund is liquidated. Importantly, Congress' authority to appropriate to fund and implement projects under LWCF does not change. The House Committee on Natural Resources is currently working on a stand-alone reauthorization bill that will modernize and refine the 50-year old law and prioritize grants for state and local communities, as intended in the original 1965 Act.

### *Protecting State Water Law*

According to the Western Governors Association, states are the primary authority for allocating, administering, protecting, and developing water resources, and they are primarily responsible for water supply planning within their boundaries. States have the ultimate say in the management of their water resources and are best suited to speak to the unique nature of Western water law and hydrology. The federal government has long recognized the right to use water as determined under the laws of the various states.<sup>34</sup>

Western states have collaborated with the federal government and have been in conflict with it at other times. For example, many of the western states depend on a number of federal water development authorizations and appropriations, including the Water Resources Reform and Development Act, to develop water supply projects under the auspices of state water law.<sup>35</sup> However, the recently promulgated and litigated EPA regulation, "Waters of the U.S.," has been a source of controversy. The regulation has been delayed through injunction when thirteen states – including ten western states – sued the federal government in belief that the regulation expanded federal jurisdiction over streams, wetlands and in some cases, ditches.<sup>36</sup>

The U.S. Forest Service has also been subject to criticism of overreach by some western states. In 2014, the agency proposed a controversial "Groundwater Directive" to "establish a consistent approach for addressing both surface and groundwater issues that appropriately protects water resources, recognizes existing water uses, and responds to the growing societal need for high-quality water supplies."<sup>37</sup> This proposal followed a failed agency proposal aimed at overturning state water law at ski resorts on some Forest Service lands.<sup>38</sup> The WGA submitted comments and letters to the agency stating concerns that the proposal "leads us to believe that

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<sup>32</sup> *Land and Water Conservation Fund: Overview, Funding History, and Issues*. Vincent, Carol Hardy. Congressional Research Service. June 17, 2015.

<sup>33</sup> LWCF Grants (1965-2014). National Park Service, *available at* [http://www.nps.gov/ncrc/programs/lwcf/fed\\_state.html](http://www.nps.gov/ncrc/programs/lwcf/fed_state.html).

<sup>34</sup> Western Governors' Association, Policy Resolution 2015 – 08, *Water Resource Management in the West*  
<sup>35</sup> *Id.*

<sup>36</sup> <http://farmfutures.com/story-north-dakota-judge-approves-waters-injunction-13-states-0-131513>

<sup>37</sup> Western Governors Association October 1, 2014 comments to the U.S. Forest Service, p. 1

<sup>38</sup> [http://www.denverpost.com/business/ci\\_25987649/forest-service-backs-off-controversial-water-clause-ski](http://www.denverpost.com/business/ci_25987649/forest-service-backs-off-controversial-water-clause-ski)

this measure could have significant implications for our states and our groundwater resources.”<sup>39</sup> After numerous hearings and criticism, the Forest Service withdrew the proposal in June 2015.<sup>40</sup> While these proposals have been withdrawn, legislation has been offered to ensure that federal government does not seize water rights issued under state law.<sup>41</sup>

Since the western states depend on adequate water supplies for short and long-term needs, hearing witnesses will discuss the role of state water law and interaction with the federal government.

### *Native American Issues in the West*

There are approximately 56.2 million acres of land held in trust by the United States for the benefit of Indian tribes and individual Indians. The vast majority of these trust lands are located in the western states. Two issues of major importance the West has been addressing in regards to tribal relations are 1) Indian water rights, and 2) the acquisition lands to be held in trust by the Secretary of the Interior.

On the issue of Indian water rights, western states are required to reserve water interests for reservations based on the Winters doctrine.<sup>42</sup> This doctrine states that once a reservation has been established, a certain amount of water must be reserved for necessary purposes within that reservation. To avoid the costs of litigation surrounding these water rights, the western states, acting through the WGA, promoted the Ad Hoc Group on Indian Water Rights, which advocates for negotiated settlements instead of litigation.<sup>43</sup>

Second, the Secretary of the Interior’s ability to take lands into trust has a substantial impact on both state and local communities because such lands are exempt from taxation and state/local regulatory jurisdiction (e.g., county zoning rules), and such lands are usually a prerequisite for a tribe to operate a casino under the Indian Gaming Regulatory Act of 1988.

The 2009 *Carcieri* case, resolved by the Supreme Court, recognized Congress’ original intent in its enactment of the Indian Reorganization Act of 1934 was to allow the Secretary to acquire land in trust only for those tribes that were recognized and under federal jurisdiction when the Act was passed in 1934.<sup>44</sup> Since that decision, the Secretary’s authority to take new land into trust has been ostensibly limited.<sup>45</sup> It is unclear whether the Department has, in fact, chosen to decline any application to take land in trust on the grounds the tribal applicant was not recognized and under federal jurisdiction in 1934. In the briefing phase of the *Carcieri* litigation, many states went on the record expressing concerns about the land into trust process,

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<sup>39</sup> Western Governors Association July 2, 2014 letter to U.S. Department of Agriculture Secretary Tom Vilsack

<sup>40</sup> <https://brianallmerradionetwork.wordpress.com/2015/06/19/06-19-15-wga-news-u-s-forest-service-withdraws-proposed-directive-on-groundwater/>

<sup>41</sup> <https://www.beefusa.org/ourviewscolumns.aspx?NewsID=4874>

<sup>42</sup> See *Winters v. United States*, 207 U.S. 564 (1908).

<sup>43</sup> Western Governors’ Association, “Clean, Reliable Water Supplies for the West”, <http://www.westgov.org/water-supply-transfers-drought>.

<sup>44</sup> See *Carcieri v. Salazar*, 555 U.S. 379 (2009).

<sup>45</sup> Heidi McNeil Staudenmaier, Impact of the *Carcieri* Decision, American Bar Association (2009).

and seeking increased engagement from the federal government regarding such trust land decisions.

Indian water rights and the land into trust process are two issues concerning Native American land that the West addresses. As the holder of the majority of tribal lands, any proposed legislative fixes should incorporate the views and opinions of local and state governments in the western United States.

### *Federal Handling of the EPA Gold King Mine Spill*

A recent, egregious example of federal overreach and lack of proper communication with states that resulted in disaster is the Environmental Protection Agency's spill of 3 million gallons of contaminated mine water into Cement Creek near Silverton, Colorado. The plume flowed from Cement Creek into the Animas River and then into the San Juan River, affecting multiple states and tribes in the west.<sup>46</sup> Despite local resistance to a CERCLA Superfund designation, EPA had been using emergency provisions in the law to conduct work in the area for years.

In fact, EPA knew for at least a year that water was impounded behind the Gold King Mine adit (entrance) and that a blowout at the site was possible<sup>47</sup> – yet EPA took no steps to test the water pressure before digging into the adit with heavy machinery, nor did the agency consider the affects its activities might have on ESA-protected species and habitat in the area.



To make matters worse, following the spill EPA's notification to states and tribes was inept to non-existent and the agency delayed if not outright thwarted the sharing of information and testing data with affected states and tribes. Not only did EPA trigger the disaster, it then failed to notify downstream authorities and users in a timely fashion. For example, Colorado Parks and Wildlife – not EPA – notified the Southern Ute Tribe. Then the Southern Ute Tribe – again, not EPA – notified New Mexico.

The Gold King Mine disaster illustrates why the federal government's lack of communication and coordination with states and others with more experience and expertise can result in catastrophic consequences.

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<sup>46</sup> Marc Stewart, *EPA: Spill 3 times larger than estimated; Gov. can't set definite timetable for clean-up*, ASSOCIATED PRESS, Aug. 9, 2015, available at <http://www.thedenverchannel.com/news/local-news/epa-no-health-risk-to-wildlife-after-gold-king-mine-spill>.

<sup>47</sup> Task Order Statement of Work for Gold King Mine, available at <http://www2.epa.gov/sites/production/files/2015-08/documents/08-1570601.pdf>.