United States House of Representatives
Committee on Natural Resources
Subcommittee on Oversight & Investigations

Examining Policy Impacts of Excessive Litigation Against the Department of the Interior

TESTIMONY OF MARK S. BARRON
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Biographical Note:

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

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

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

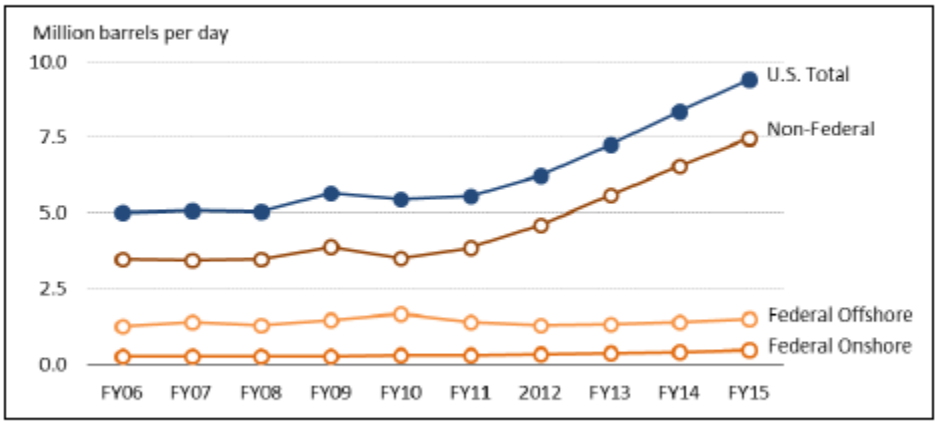
Mr. Barron is a graduate of Cornell University and a *magna cum laude* graduate of the University of New Mexico School of Law where he earned membership to the Order of the Coif and served on the *New Mexico Law Review*. A prolific author and speaker on topics affecting energy producers, Mr. Barron has been featured or quoted in dozens of industry and mainstream media outlets on topics related to energy policy, hydraulic fracturing, and commercial development on public lands. In 2016, Law 360 selected Mr. Barron as a national "Energy MVP." In 2015, Law360 named Mr. Barron one of five national "Rising Stars" in Energy – a designation given to the best attorneys in America under forty years of age.

I. INTRODUCTION.

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

The best example of how Interior's agencies struggle to accomplish their mission is the administration of the federal oil and gas leasing program. Since the turn of the new century, technical advancements that allow producers to identify promising sources of oil and gas and to extract hydrocarbons from previously inaccessible geologic formations, combined with the entrepreneurial ingenuity of American industry, have resulted in American energy companies reaching production levels once thought impossible. The accessibility of abundant oil and gas resources has transformed conventional understandings of the energy landscape, leading some to predict millions of new jobs and the reindustrialization of America as well as imminent American energy independence. But while domestic production has grown in recent years, the percentage of that production that is extracted from federal lands has declined in the same period.[1]

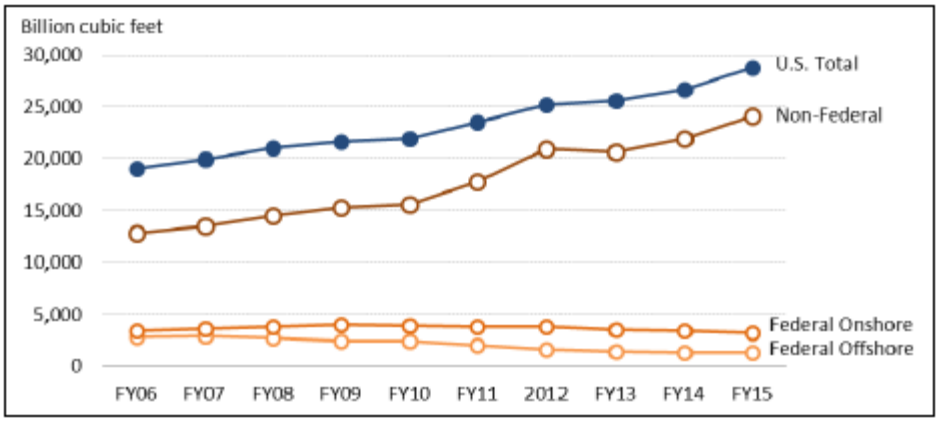
Figure 1. U.S. Crude Oil Production: Federal and Nonfederal Areas FY2006-FY2015
(million barrels per day)



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

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

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



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

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

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

But whereas the need to curtail excessive regulation has received attention from industry groups, media, and political figures, there is a second, less discussed complication for operators who wish to produce federal minerals – the prolific amount of litigation that special interest groups initiate to slow or prevent development of federal minerals. While the prospect of litigation is a burden often attendant to oil and gas development, that prospect has become a

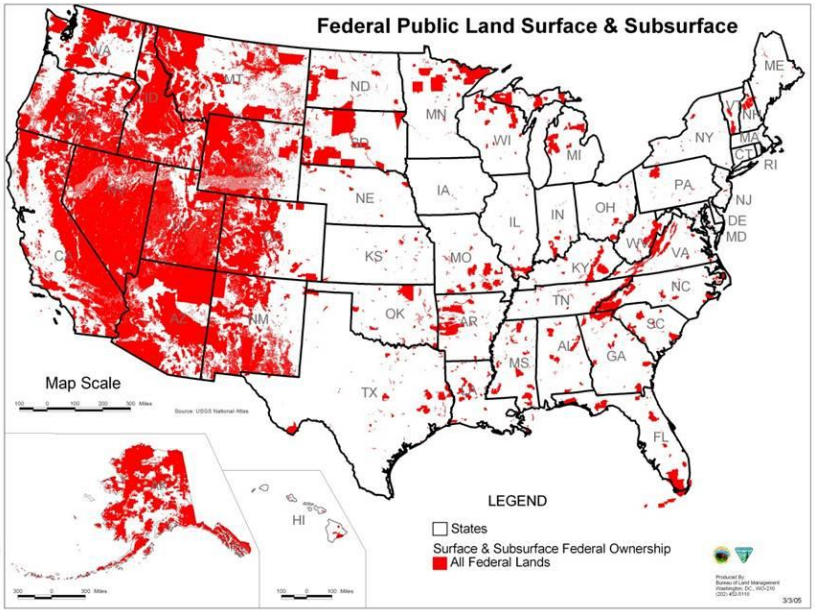
[2] Exec. Order 13,783, *Promoting Energy Independence & Econ. Growth* (Mar. 28, 2017).

virtual certainty when working on federal lands. And because the United States wears several hats in oil and gas exploration and development – administrator, regulator, and market participant – there are numerous possible situations in which operators may find their projects enmeshed in challenges to how the United States has exercised its responsibilities and balanced its various roles.[3]

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

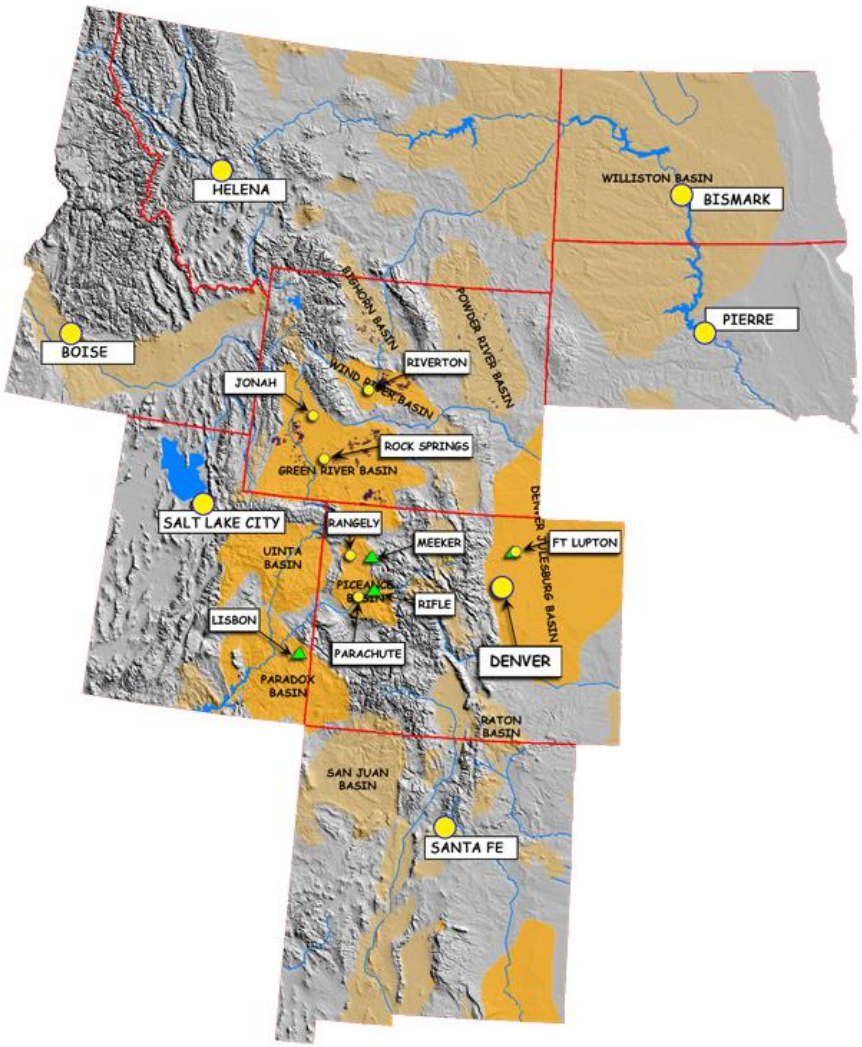
II. THE LITIGATION BURDEN.

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



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

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



Exacerbating the challenges that operating on federal lands present, special interest groups have not confined litigation challenges to those projects that fall within the boundaries of federal lands. Several environmental statutes have provisions that apply – and can therefore be

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

theoretically enforced – beyond the federal property line. Special interest groups frequently attempt to manipulate the provisions of the Endangered Species Act, the Clean Water Act, the Clean Air Act, and the National Historic Preservation Act, among others, to disrupt development on and off federal lands.

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

A. INTERIOR ROUTINELY FAILS TO MEET STATUTORILY IMPOSED DEADLINES.

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

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

The Mineral Leasing Act imposes a discrete, ministerial obligation with which the Secretary "shall" abide: "Lease sales shall be held for each State where eligible lands are

[5] U.S. Const. art. IV, § 3, cl. 2.
[6] *See* Bureau of Land Mgmt., *Guidelines for Submitting an Expression of Interest (EOI)* ("EOI Guidelines"): https://www.blm.gov/nm/st/en/prog/energy/oil_and_gas/guidelines_for_submitting.html.
[7] *See id.*

available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary."[8] Consistent with that obligation, BLM's regulations require that "each proper BLM Sate [sic] office shall hold sales at least quarterly if lands are available for competitive leasing."[9] BLM's regulations also articulate specific categories of "Lands available for competitive leasing."[10] These categories include, but are not limited to, "Lands included in any expression of interest."[11] The Mineral Leasing Act's implementing regulations specify that "all lands available for leasing shall be offered for competitive leasing."[12]

BLM regularly fails to comply with the obligation to conduct quarterly lease sales in each of the states where eligible lands are available. Over the last two years, none of the major oil and gas producing states have conducted quarterly lease sales in each state under the Office's jurisdiction: the New Mexico State Office conducted two sales in 2015 and two sales in 2016; the Montana/Dakotas State Office allowed more than six months to pass in between sales of leases in North Dakota and Montana; the Wyoming State Office conducted only three lease sales in 2016; the Utah State Office conducted two sales in 2015 and two sales in 2016; and the Colorado State Office conducted three sales in 2015 and two sales in 2016.[13] Not surprising, many of the cancellations and deferrals are in response to suits and legal challenges that special interest groups brought in opposition to fossil fuel leasing on federal lands.[14]

Once a sale is conducted, a second set of deadlines is triggered. The Mineral Leasing Act provides that "[l]eases shall be issued within sixty days following payment by the successful bidder."[15] Federal courts have interpreted this provision to mean that "energy companies are entitled to a final decision on whether the lands are or are not to be leased within sixty days of the dates the leases were paid for by the top qualified competitive bidders under the Mineral Leasing Act."[16] Like the leasing obligation, BLM routinely fails to meet this obligation to timely issue leases that companies have won at auction and paid for. In almost every circumstance, this failure is the result of BLM's inability to resolve administrative protests that special interest groups file in opposition to virtually every parcel that is offered for lease.[17]

And even when leases are issued, BLM consistently fails to meet its obligations to timely process operational permits. The Mineral Leasing Act requires that, no later than ten days after the date on which BLM receives an APD, BLM shall: (i) notify the applicant that the application is complete; or (ii) notify the applicant that information is missing and specify any information

[8] 30 U.S.C. § 226(b)(1)(A).
[9] 43 C.F.R. § 3120.1-2.
[10] 43 C.F.R. § 3120.1-1.
[11] 43 C.F.R. § 3120.1-1(e).
[12] 43 C.F.R. § 3120.1-1.
[13] *See* Bureau of Land Mgmt., *Reg'l Oil & Gas Lease Sales*: https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing.
[14] *W. Energy Alliance v. Jewell*, No. 1:16-CV-912-LF-KBM (D.N.M.), Conservation Groups' Mot. to Intervene at 16 (Oct. 19, 2016) (explaining that the New Mexico State Office cancelled a January 2015 lease sale in response to an administrative appeal that special interest groups filed).
[15] 30 U.S.C. § 226(b)(1)(A).
[16] *W. Energy Alliance v. Salazar*, No. 10-CV-0226, 2011 WL 3737520, at *7 (D. Wyo. 2011).
[17] *Id.* at *2 ("Although BLM strives to review and resolve protests in a timely manner, the number, timing and complexity of protests typically cause BLM to fail to issue the protested leases within the 60–day window specified in the MLA.").

that is required to be submitted for the application to be complete.[18] BLM almost never meets this deadline and, indeed, rarely if ever prepares and transmits any formal notice that an application is complete.

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

B. SPECIAL INTEREST GROUPS' LITIGATION ADVANTAGE.

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

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

And the impact of these delays extends well beyond individual companies. Particularly for the western public lands states, the stakes of federal oil and gas activity are high. A state receives fifty percent of all monies received in the form of sales, bonuses, and royalties (including interest charges) derived from oil and gas production on federal lands within a state's

[18] *See* 30 U.S.C. § 226(p)(1)(A)-(B).
[19] *See* 30 U.S.C. § 226(p)(2)(A).
[20] *See EnerVest, Ltd. v. Jewell*, No. 2:16-cv-01256-DN, 2016 WL 7496116 (D. Utah Dec. 30, 2016).
[21] Breaking the Logjam at BLM: Hearing on S. 279 and S. 2440 Before the S. Comm. on Energy & Natural Resources, 113th Cong. 491 at 20 (July 29, 2014) (testimony of Neil Kornze) (explaining that since 2011, average processing times have ranged between 196 and 300 days).
[22] Ben Wolfgang, *Trump helps drive donations to environmental groups*, WASH. TIMES (Feb. 9, 2017) ("[V]irtually all prominent environmental groups say donations are pouring in at unprecedented rates.").

borders.[23] Litigation that frustrates or delays development and incentivizes operators to move development activity off of federal lands and on to private lands actively harms states and taxpayers.[24]

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

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

[23] 30 U.S.C. § 191(a).

[24] The sums involved are significant. In Fiscal Year 2014, for example, federal oil and gas royalties totaled almost $3.1 billion. *See* 80 Fed. Reg. 22,148, 22,150 (Apr. 21, 2015). Of that amount, $112.6 million was distributed to Colorado; $16.2 million to Montana; $546.4 million to New Mexico; $191.5 million to Utah; and $542.7 to Wyoming. *See* Center for Western Priorities, *A Fair Share: The Case for Updating Oil and Gas Royalty Rates on Our Public Lands* at 5 (June 18, 2015).

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

[26] *See id.*

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

III. SUMMATION.

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