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Edited Panel Transcript, Uncooperative Federalism: The Complexity of Shared Governance

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EDITED PANEL TRANSCRIPT

UNCOOPERATIVE FEDERALISM: THE COMPLEXITY OF SHARED GOVERNANCE

ENERGY LAW AND POLICY IN THE ROCKIES
OCTOBER 30, 2015*

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November 23, 2015

The University of Wyoming College of Law's Center for Law and Energy Resource in the Rockies (CLERR) and the University of Wyoming School of Energy Resources (SER) co-hosted the 2015 Landscape Discussion on Energy Law and Policy in the Rockies on October 30, 2015 at the Marian H. Rochelle Gateway Center in Laramie, Wyoming.

* Energy Law and Policy in the Rockies was hosted by the University of Wyoming on Friday, October 30, 2015 at the Marian H. Rochelle Gateway Center in Laramie, Wyoming. Transcript services were provided by Indelible Impressions Wyo., Inc.

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The objective of this annual conference, held every fall on the campus of the University of Wyoming, is to bring together stakeholders having collaborative interests to engage in a thought provoking discussion on key energy topics currently at play in Wyoming, the Rocky Mountain region, and the Nation. One of the topics the steering committee selected for this year's conference was the concept of shared governance or cooperative federalism between the federal government and state government when it comes to environmental regulation, including air and water quality regulation, wildlife management, and regulation of hydraulic fracturing.

A panel discussion entitled "Uncooperative Federalism: The Complexity of Shared Governance" was held during the morning session of the conference. The panel was moderated by Ryan Lance of Crowell & Morning LLP, and included the following participants and subjects:

- Rob Mathes—The Unintended Impacts of Avoiding a Sage Grouse Listing.
- Paul Seby—The Regulation of Hydraulic Fracturing; Who's on First, the State or the Feds?
- Nada Culver—Potential Unilateral Actions that May Emerge as President Obama Leaves Office.
- Alex Dunn—Waters of the United States.

As this is such a timely and dynamic topic, the co-directors of CLERR asked the *Wyoming Law Review* to include a transcript of the panel's discussion in this edition.

The panel's moderator, Ryan Lance, has provided a wonderful introduction to the topic of cooperative federalism, and a transcript of the panel's discussion follows. I hope that you find the transcript as insightful and enjoyable to read as I found the live panel discussion to be.

Sincerely,

Temple Stoellinger

Assistant Professor, Haub School of Environment and Natural Resources

Co-Director of the Center for Law and Energy Resources in the Rockies, University of Wyoming College of Law

[INSERT ADJECTIVE] FEDERALISM

By Ryan Lance

Legal and political theorists have attempted to characterize and qualify the term "federalism" in numerous articles and papers through the years, especially in the context of the management and enforcement of environmental laws. At its very basic level, federalism is the framework employed to divide and balance powers and authorities between and among federal and state governments. In the 1970s, during the development and passage of many of our nation's core environmental laws, congressional committee work centered on being deliberate with language to ensure that the political theories of the day, that were behind the various flavors of federalism, could be put into practice.

As the alphabet soup of federal laws became richer with the passage of acronym heavy regulations, branding efforts were pursued to nuance the particular construct of federalism that was being furthered through the law. An expansive array of adjectives was deployed to explain exactly how the law fit within the federalism landscape. Certain laws were meant to enable "layer cake" federalism while others were crafted to enable "marble cake" federalism. "Cooperative federalism" was juxtaposed against "dual federalism." In the minds of the governing and educated elite, the grand political science laboratories contemplated by the Founding Fathers—commonly referred to as the states—had been sufficiently stocked with federal resources, backstopped by federal authority and motivated to meet and exceed "minimum" federal standards with the promise that if they did, they could control how the laws would be implemented, and thus how they would affect local economies, customs, and cultures.

Through time, as the inevitable disputes and disagreements between the states and their federal overseers as to the adequacy of state efforts have become more prevalent, especially in the face of declining federal dollars and other resources, few seem to care whether they are eating a layer cake or a marble cake. Instead, state regulators are compiling graphs showing crossing lines where one axis shows increasing requirements and the other depicts decreasing dollars to implement those requirements. Federal agencies lament the inadequacy of state efforts, especially in the face of increasingly complex, detailed, and available scientific data and literature. Citizens, armed with political power and citizen suit provisions, challenge both federal and state agencies to meet their view of how a particular law must be implemented. The high-minded work to carefully craft, define, and label the relationship between federal and state governments has seemingly devolved into a single modifier: uncooperative.

I. INTRODUCTION

RYAN LANCE: Like other western territories, Wyoming's move toward statehood reflected widespread popular dissatisfaction with federal administration of the

territory. The local populous attributed many of their problems to insensitive and ill-informed territorial officials who were appointed from Washington for political reasons.

The case of territorial Justice William Ware Peck, a native New Yorker, appointed to the bench by President Rutherford Hayes in 1877, and then assigned to Sweetwater Uinta County in western Wyoming, illustrates the depth of the tensions. Peck's arrogance and insensitivity to local customs so incensed local residents that they successfully petitioned the territorial legislature to transfer or exile Peck to the remote and sparsely populated northern regions of the territory.

This sage-brushing incident, atypical of how citizens throughout the western territories reacted to arrogant territorial officials, was not reversed by Congress, though Peck eventually spent his term in Cheyenne working solely on territorial Supreme Court matters. Wyoming found its territorial status even more frustrating and pursued public land policies that were an anathema to the local populous.

Cleveland's selection of Thomas Moonlight, the recently defeated democratic gubernatorial candidate in Kansas as Wyoming's territorial governor proved a disaster. Unfamiliar with local conditions, Moonlight promoted policies designed to encourage [] Wyoming small farms, at the expense of the cattle industry, which relied on large expanses of open range.

Moonlight also vetoed several popular legislative measures, including bills established in counties and protecting livestock operations, which aroused the ire of the territorial legislature. At the same time, President Cleveland's policy of prohibiting fencing on [] public domain land, which encompassed much of Wyoming's territorial land base [] and provided important pasture exposure on the cattle industry[,] was not favorably received.

These developments firmly convinced Wyoming political leaders that the only effective way to ensure [self-government] and to participate meaningfully in the formulation of federal policy affecting Wyoming was to secure statehood, and it did so in [twenty-five] days after calling the territorial constitutional convention . . . .

[T]here is a long history in our state where our partners in the federal branch may not fully understand, or we perceive that they won't fully understand and appreciate local custom, culture, and the economic drivers in our community. The panel that has been assembled for you today is well equipped to address some very specific circumstances that we are currently facing and recently have faced coming from Washington and regional offices and federal agencies and involving state agencies. The reality of our circumstance in the state is not only do you have a reliance on the federal government because of land ownership patterns, but also because of federal permitting and other requirements that are imposed

through both legislative and administrative action. As we go through the panel you're going to hear from Mr. Rob Mathes . . . and he is going to talk to you about the listing determination and the planning processes that were involved leading into that decision not to list the Greater Sage-Grouse.

Inherent in that, which Rob will cover with you, is this motion of federal planning, which involved many of the public lands across the west and implicated all of the things that the territorial legislature and Wyoming encountered as threats to our economy. And of course, the federal bent is that in order to preclude listing certain things had to be done, and landscape, especially, with the pension for litigation of those decisions, which will still come I'm sure.

Next on the panel will be Mr. Paul Seby. Paul has a very recent and now long history dealing with hydraulic fracturing. He's worked with the Waters of the U.S. rule making and litigation and the Clean Power Plan, representing the State of North Dakota as lead counsel in those efforts. Paul is going to talk to you primarily about hydraulic fracturing but will also touch on his experience and time working in the Waters of the U.S. base, which of course, implicates a lot of the same things again that the territorial legislature is concerned about in the late 1800s.

Next on the agenda, which will be a little bit flip from what you see, is Alex Dunn. Alex comes to us from ECOS in Washington and brings a new bipartisan deal on the budget with her, so she cleared that out when she was in Washington and came out, so it's nice to have her here. She is going to talk predominantly about the waters in the U.S. and all of the accompanying litigation and rule making that has surrounded that.

And finally, Nada Culver is here from the Wilderness Society. She is going to talk to us a lot about what is coming. We know that wilderness is out there and we know the Clean Power Plan is out there. We know that hydraulic fracturing rule making is done and we know about sage-grouse. What we don't know is what Nada is going to tell us about, which is her crystal ball prognostication of what else the Obama administration may have in mind as they close out the remaining years of President Obama's second term.

We know from our experience with—the Clinton administration, and even from the Bush administration, that there are all sorts of fun packages that get left in the House as they're leaving. The question for Nada is, are those things that we want to open and share with our family and friends or are they things that we would rather leave pre-packaged and in a vault somewhere. So that is the structure of the panel . . . .

So with that I will start with Mr. Rob Mathes . . . . Rob is a fine lawyer and a good friend and I'm pleased that he's on this panel, and I think you will be as well. So please join me in welcoming Rob.

II. COMMENTARY

ROB MATHES: [T]oday we are going to talk about a little bird—a little bird that I can sadly say has somewhat defined my life over the last year. If we follow more of a Chinese calendar here in the western world with the year of the dragon and the year of the monkey, this would undoubtedly be the year of the sage-grouse. For those of us that engage in a public land practice in the oil and gas industry, in the coal industry, in the hard rock industry or, quite frankly, for everyone who lives within the sagebrush scene in the [eleven] western states, sage-grouse has been what we've been talking about.

But let's talk about this bird. This is a bird that Lewis and Clark tell us were so numerous at one point in time they literally blackened the sky. There [are] passages and there are fantastic journals exploring the western United States that describe this bird as being the most numerous of the species they saw in the western United States. As we've moved across and kind of explored and domesticated the west, those numbers have dropped through agriculture, through the domestication of the landscape, and the removal, quite frankly, of the sagebrush.

And so we got to a point where, in the late 1990s and early 2000s, a series of organizations petitioned to have the sage-grouse listed under the Endangered Species Act. Three main petitions were filed again, in the late 1990s and early 2000s, suggesting that the species was so in peril that it required further protection under the Endangered Species Act. Those petitions sat with the United States Fish and Wildlife Service for a considerable period of time, almost five years, and finally in 2005 the service determined that the species was not warranted for listing.

Essentially they said that there were adequate protections to protect the species and that the populations were sufficient in order to avoid a listing in the Endangered Species Act and all the restrictions, protections that go with such determination. That case was litigated by a series of environmental organizations and non-governmental organizations in front of a judge in the District of Idaho . . . Judge Winmill, he will be a popular part of our story this morning, because he plays a role again and again with respect to this little species.

[I]n December of 2009, Judge Winmill overturned the Fish and Wildlife Service determination. He found that there was not adequate protection for the sage-grouse and that the species did . . . deserve additional protections. So the matter was kicked back to the service. And of course, 2009, what happens in that time period, well we're getting new administration. The Department of the Interior in 2010, in March of that year, made a determination that the sage-grouse did, in fact, warrant protection under the Endangered Species Act, but that it was precluded by higher priorities.

Essentially it's a way for the service to parse, if you will, a species, indicating that it does deserve protection but that we've got higher priorities right now,

there's other things we need to do. Katie Schroder, a partner of mine in Bjork Lindley Little calls [this] the candidate list . . . . [Like] Hotel California, . . . you can check out any time you want, but you can never leave. It was essentially a way that the service could just leave species in place and not have to move forward with any formal determination.

Well, that changed [] as a result of a different lawsuit that was brought, again by a series of environmental organizations, non-governmental organizations that suggested that this parking lot had to be dealt with, that you could not continue just to leave these species in Hotel California, and that you had to make a determination . . . .

[A]s a result of litigation and an eventual settlement the government, the Fish and Wildlife Service agreed to make a determination on the sage-grouse by the end of the fiscal year 2015. So we had made that decision relatively recently in the past. And so all of [a] sudden the sage-grouse was once again very, very much in the highlight. In addition to this listing litigation there was also litigation involving land use plans . . . .

After 1976 Congress instructed the Bureau of Land Management in the Federal Land Policy and Management Act of 1976 to develop land use plans. These are essentially guide books, blueprints, if you will, for how our public land should be managed in a particular geographic area. So states like Wyoming are divided to a series of geographic areas that are managed by a single land use plan.

Land use planning is a lengthy process; it can take between three and ten years in some situations. And it makes a series of decisions about how our public lands are going to be managed. It decides which lands are available for oil and gas leasing and under what conditions, [w]hat lands are available for grazing, and again, under what conditions. And it also talks about areas that, quite frankly, need to be protected, need to be . . . reserved from mineral development, for example, and protected for recreation and other uses.

So, during the Bush administration, there was a large push to issue a series of land use plans, and a series of them came out in Wyoming, in Utah in particular, in 2007 and 2008, towards the end of the Bush administration.

Western Watersheds Project filed a lawsuit challenging the vast majority of those land use plans that were issued in Wyoming and Idaho and Nevada. Primarily focused on two issues, grazing on the public lands and adequate protections for the sage-grouse.

In 2011, Judge Winmill determined that two of those land use plans were inadequate. Essentially the parties to the litigation agreed to test some of the theories in just two plans rather than trying to have a huge briefing on [thirty]

to [thirty-five] land use plans. [T]he Court found that the protections for the sage-grouse were not adequate and that they needed to be redone, and he had set some timelines for those in order to see how they were going to protect those species better.

So now we have sort of challenges to the sage-grouse coming from two directions. We have this listing determination that has to be made by 2015 and we have a court telling us that at least some of the land use plans, possibly all of the land use plans in the western United States, are inadequate to protect the sage-grouse.

So what is the BLM's response? Well, Wyoming was actually the leader in this . . . area, and, in 2010, the BLM in Wyoming indicated it was going to revise all of its land use plans within the state in order to develop greater protections for sage-grouse. This was brought about partially by the litigation that was ongoing. And it was also driven by Governor Freudenthal's efforts to protect the sage-grouse, which he started in August of 2008 by issuing an executive order changing the way land use would be done in Wyoming in order to provide greater protections for the sage-grouse.

We'll talk about those restrictions a little bit more and the way they were incorporated into the federal plans eventually. But it is fair to say that Governor Freudenthal's foresight on this issue really drove the BLM to make some greater protections for the sage-grouse. A little bit later, after the decision from Judge Winmill, the Bureau of Land Management indicated it was going to amend [ninety-eight] land use plans across [eleven] western states in the United States. This was the single largest land use planning effort ever undertaken by the Bureau of Land Management since it was originally ordered by Congress to develop land use plans in 1976, and even that process took over [fifteen] years to get most land use plans in place. This was a phenomenal undertaking by the Bureau of Land Management for a very small bird . . .

So in 2013 [and] 2014, we started seeing these draft land use plans and draft environmental impact statements rolled out. Montana ended up sort of taking the lead even though Wyoming got out in front. We saw Colorado and some of the other states followed. Then the Bureau of Land Management did something that was really fantastic. [T]hey issued all [ninety-eight] land use plans in a final form on May 28, 2015. It was literally nine-and-a-half feet of paper stacked vertically that people like Nada, [Ryan, and I] spent time reading during June. [It] was a pretty dark month.

And then on September 23 and September 24, the Bureau of Land Management and the Forest Service issued their final records of decision. There was a great deal of national coordination to ensure that these plans were

relatively consistent on a national scale, a lot of large mitigation plans and programs baked in.

What does it look like for Wyoming? Well, in Wyoming, thanks to Governor Freudenthal, [and] the State of Wyoming's leadership, it looks a lot like development did prior to the development of these land use plans. As part of the executive order issued in 2008, 2010, and then again in 2015, the idea is inside designated core areas, sage-grouse quarries, also called priority habitat management areas by the BLM, we want to have only one location per 640 acres. We don't want to have more than [five] percent disturbance within that area, and that's from all sources, [both] anthropogenic and natural occurrences such as fires.

And we're going to protect areas around leks. Leks, for anyone who doesn't know, are areas that are relatively free of sagebrush, where the sage-grouse can engage in kind of their mating dance . . . . In those core areas we want to have a six-tenth of a mile on service occupancy [to] protect the integrity of that area. Outside of core, we just want to have a quarter of mile [or] a little bit less. And we're going to have timing restrictions that can be as long as December 1 to June 30, if there's winter concentration habitat. The more common is March 15 to June 30, and that's really to protect the lekking and the breeding period.

So that's what it looks in Wyoming, these areas, the core areas, . . . are heavily protected areas. [Some areas] have moderate restrictions, so it's not too bad to develop. And then . . . [there are] areas . . . still open to oil and gas development, coal mining, and grazing. There is still land there open for multiple use.

Let's see what happened to Utah. Utah did not have a mandatory land use plan or executive order, they had the voluntary program that had been established, but it was deemed inadequate by the Fish and Wildlife Service and the BLM. So we see BLM develop a program that looks a little bit more like Wyoming's, one location per 640 [acres], but we see it at [three] percent disturbance capped instead of a five.

We also have a series of buffers 3.1 miles in which areas are very restricted around leks, much larger than what we saw in Wyoming. There's a four-mile restriction around these leks and breeding areas where you can't have tall structures. We have a lot of noise restrictions and you have longer seasonal restrictions than we see in Wyoming. You also see requirements for mandatory compensatory mitigation and active management. It's just a different system.

You can take a look at the map and you can see that there [are] very [few] of . . . [those areas] that we saw in Wyoming where you have kind of multiple use[.] [Y]ou have . . . a lot more . . . areas that are effectively off limits to most forms of oil and gas development.

Our neighbors to the south [in Colorado] had a very similar situation. [They have] one location per 640 [acres], [three] percent disturbance cap, the seasonal buffers, the timing restrictions, [t]he adapted management, and the compensatory mitigation. [A]s a result of these land use plans, on the same day that the land use plans were announced by the Secretary of Interior down in Denver, Colorado, they issued a not warranted decision. They basically said that BLM has now come to the table and developed a land use plan that is protective enough that the sage-grouse do not need to be listed under the Endangered Species Act.

The next day the land use plans, in sort of the western portion [of Colorado], sort of the Nevada/Oregon basin, that area, have been challenged. There's been two lawsuits that have been challenged, so we don't know what happens or is going to happen to these land use plans. So far the ones in Wyoming and Colorado have not been challenged, but I think there's still a chance that we'll see some challenges to those. Actually, that's not true. The grazers in Wyoming actually recently filed a lawsuit . . . . So we have this interplay with challenging the land use plans and the non-warranted decision.

The question really is, and we'll talk about it a little bit more this morning, is: Was the cure worse than the cold? Are the restrictions baked into the land use plans possibly worse than the actual listing determination may have been[?] [I] think that's going to be something that we're all going to work on and learn about more as we go through the years.

I think in Wyoming that may not be the case. I think in Wyoming, we adopted a plan that for the most part industry can live with and the BLM incorporated in their plans. So we may not have a case of uncooperative federalism to the extent in Wyoming as we do in the western states, but that's something I look forward to discussing more with our analysts.

RYAN LANCE: We will certainly explore that question and others. The next analyst this morning will be Mr. Paul Seby . . . . Paul is going to talk to us, not only about his experience in hydraulic fracturing litigation, preliminary injunction filing under Casper, but also his experience representing the State of North Dakota as the lead counsel on the Waters of the U.S. litigation, which also Alex Dunn will talk to you about . . . .

PAUL SEBY: Good morning . . . I appreciate the invitation to speak to the conference very much . . . . I cheated a little bit. I was supposed to just talk about the hydraulic fracturing rule and the litigation related to it, but I brought in my topic a little bit to talk about cooperative federalism because I, . . . at least for my professional career, am involved in two cases at the moment that I think are really great examples of cooperative federalism and why it's important and why it matters . . . .

[I] also think that the two cases I'm going to tell you about, at least where they sit today, are a good, I hope, bellwether for more development of the concepts of enforcing cooperative federalism—that is the relationship between the national government, the federal government, and the states. [It] is a core aspect of our federal system of government [that] you have states as sovereigns, and that has to mean something. [It] certainly did at the founding of our country. And that it has ever since that time been a source of healthy tension between the federal government and the states.

Sometimes it swings dramatically, other times it swings back and centers itself. I think we are in a time where the federal courts are enforcing it more than ever because it is being tested more than ever by a federal government that wants to expand its authority at the expense of the states. [Y]ou see that in the two cases I'm going to talk about, which [are] the BLM hydraulic fracturing case and the Waters of the United States regulation adopted by two federal agencies, the U.S. Environmental Protection Agency and the Army Corps of Engineers.

[A]s I said, I think it's a bellwether. [T]wo cases that will also speak to developments, I think, will occur in the next year with regard to EPA's Clean Power Plan rules. . . . I'll say at the outset, this is not a presentation that's anti-federal government. [T]his is a presentation that is, I hope, anchored in some core principles of our constitution. [T]he issue is not about being for or against clean air or clean water, it's about whether you're for or against the basic premises of our federal system of government.

[T]hat's not a value judgment. [T]hat is a decision that was made long ago, and it's a question of whether or not the actions by our government fit within that context. [T]here's a lot at stake in these issues. They involve not just economic development or environmental protection, but the preservation of our basic form of government.

[T]he sources of cooperative federalism are . . . the basic premise of our constitution, and also statutes that have been adopted since then, which are numerous over the years. [A] lot of people don't realize it, but the Supreme Court actually has a legal presumption in favor of cooperative federalism. [F]ederal courts are to interpret the federal statutes with a . . . presumption that the [court is supposed to apply the lens of cooperative federalism] in interpreting the meaning and the structural relationship between the federal government and the states in these statutes. And in the environmental and energy context, those statutes are numerous.

[Federalism is moving from] cooperative to inoperative . . . . I [say] . . . that because I think that defines the bookends of the spectrum in terms of this tension that has probably gone on since the founding of our country, but it has accelerated and [is] much more dramatic in today's era, where we have large

federal governments competing with and wanting to take over the roles and responsibilities that have traditionally been the province of the states.

So in the statutory context we have the Clean Water Act, Clean Air Act, the Surface Lining Statute, the Resource Conservation Recovery Act, and many others that over the years the courts, including the Supreme Court of the United States, have referred to as models of cooperative federalism. And the federal government has roles and responsibilities that are defined as well as the states.

[O]ftentimes, the predominant theme amongst these statutes is that the federal government sets minimum standards and, after that, it's up to the states to adopt or apply those standards in an individual context within their borders and individual circumstances. But also make judgments, oftentimes balancing certain considerations, and . . . the authority and discretion for making those decisions is entrusted to the states. I'm going to give you a few examples here in a moment.

[W]ith regard to the first case study, if you will, the BLM adopted a regulation to regulate for the first time under the Mineral Leasing Act hydraulic fracturing, the practice of extracting shale gas and oil. [T]hey did that earlier this year, the final rule, and after a lengthy rule-making several years, to which there was great interest expressed on all sides.

[T]he rule did something for the first time that BLM or federal government had never done before, and that was regulate and . . . impose performance standards of operation on public lands involving federal mineral interests, setting standards for performance, and requiring operators to get approval from the BLM for the first time versus the states.

[T]hat was quite an impactful development because many western states and other states have developed extensive regulatory programs to regulate the practice of hydraulic fracturing for energy development. In particular, North Dakota, Wyoming, Colorado, and Utah did. . . . And so when that regulation came out [it not only] preempt[ed] those state regulations and laws in place to regulate that practice for the protection of drinking water, but also . . . advance[d] what many of these states have in their statutes and, indeed, their constitutions. [I]t is in the state's interest to have an orderly development of the state's natural resources, and do so in a manner protective of the state's environment, including its water resources, [because most of] the western states . . . own unincorporated water. And so the state has a proprietary interest in that as well as the development of those natural resources.

[T]he states have grave concerns with this preemption of their statutory and regulatory systems, particularly when the BLM finalized a rule saying that there were no federalism impacts associated with the rule. [T]he rule is immediately challenged under the Administrative Procedure Act here and the U.S. District

Court in Wyoming and the case was assigned to Judge Scavdahl in Casper. [T]he states that brought the challenge were led by the State of Wyoming . . . . North Dakota didn't file its own petition for review, rather, . . . North Dakota intervened in Wyoming's challenge and did that purposely so that [it] would satisfy the test for intervention, which was to establish the existence of a legally cognizable interest . . . .

[T]hat was, in the state's context, all of the sovereign interest in North Dakota for developing regulations for hydraulic fracturing practices . . . , [a]nd also for the protection of the state's groundwater resources and property interests. [T]he Court granted North Dakota's intervention for those reasons. Colorado joined Wyoming as a co-petitioner and so did Utah.

The southern Ute Tribe also intervened in the case [and] brought their own challenge . . . . [T]hen, of course, the industry association's IPAA and the Western Energy lines challenged the regulations as well [under] [s]lightly different grounds. They looked at the detailed aspects of the rule and alleged that they were arbitrary and capricious and how the BLM assembled the regulation without basis.

So the state's main concern with the rule was the fact that Congress made a decision in the Energy Policy Act in 2005 to not allow EPA to regulate hydraulic fracturing because it knew that many states had developed underground injection regulations and statutory programs to protect their groundwater resources and other aspects of environmental concern . . . .

[T]he states also challenged the regulation because under the Federal Mineral Leasing Act for . . . many decades. [I]t's an old statute, that Congress recognized that the federal land management agencies had to respect the environmental policies or protection measures in place by the state set to follow those in . . . natural resource development and activities on public lands.

[North Dakota] also challenged the rule because, under the state Drinking Water Act [provided that states submitted plans that demonstrated they met minimum protection requirements]. [T]he Supreme Court has again noted [that this statute is] a model of cooperative federalism. [T]he federal government, through the EPA, set standards to protect drinking water, potential or actual sources of drinking water around the country . . . .

Congress made a judgment that the state's programs were to be respected and going forward the EPA could not interfere with them. [T]his regulation did that because it took over the state's regulation of those ground water resources.

[C]hallenges were filed the day of and within a few days after the rule was published in the federal register. [T]hen the motions for preliminary injunction were filed and asserted before transferred for preliminary injunction, existence of

irreparable harm, and substantial likelihood of success on the merits, and that the equities favored an injunction and that it was in the public interest.

The hearing was held by Judge [Skavdahl] very quickly, in fact, [it was held] the day before the rule was slated to go into effect. And the judge, after a nine-hour hearing, hearing from the federal government, nine federal attorneys and the states and the industry associations, after nine hours from the bench issued an order saying that "I don't have the administrative record in this case. I've heard compelling evidence from the states and industry association as to the defects in the rule, and there are real questions." And so as a result, the Judge stayed the implementation of the rule the day before it was scheduled to go into effect, [a] [v]ery substantial and unusual decision.

He invoked a provision in the Administrative Procedure Act and the precedent from the Tenth Circuit . . . and he said that he was not going to write anyone a blank check. [T]his was a temporary stay of the rule. [F]irst, the BLM had to provide the court and the parties with the administrative record by a date certain. And then after that within a few days, . . . allowed the parties to cite to the administrative record back to the Court. [They could] argue nothing new, but just identify any of the citations in the administrative record that related to the parties' existing arguments.

We all did that, and then at the end of September of this year, just two months ago, Judge [Skavdahl] issued a preliminary injunction finding that the states and the industry petitioners satisfied the high burden for a preliminary injunction, he enjoined the rule from going into effect any further and found that, principally, that he agreed with the state's arguments that the BLM lacked jurisdiction to adopt this rule, meaning that it violated the Energy Policy Act because Congress specifically prohibited EPA from regulating hydraulic fracturing and left that to the states. And the Judge said that "If Congress did that for EPA they didn't leave the back door open for the BLM to do it instead."

[H]e made a number of important statements in there, and so I urge you to read the opinion. It's quite a civics lesson in our system of government. [H]e . . . gave the agencies no deference and said that they merely went outside the bounds of what Congress allowed them to do. [A]gencies are creatures of statute and they . . . only get their authority from the clear language of the statute. [I]n this case there was none and, therefore, they were acting outside of that authority and that was the end of inquiry.

He went on to say, though, even if they had authority they didn't do a very good job in connecting the dots between some alleged need for the rule and the rule that they imposed . . . . And that was important because there . . . is nothing in the record that shows a critical need for the BLM to stand in place of the states as the states effectively protect ground water resources and their environment

and air quality and so forth. [T]he BLM was not filling any public policy need or environmental protection need . . . .

So the case sits with the preliminary injunction . . . . [A] preliminary injunction is a tool that's seldom used, but it preserves the status quo until the full hearing on the merits occurs, and that will still happen. And so in the presentation of the administrative record to the Court and to the parties, we noticed that the BLM's record is gigantic, it's tens of thousands of documents.

They claimed more than [forty] percent of the record to be privileged, and something that we and the Court couldn't see. And primarily called it deliberative process privilege, that this was their internal thinking and so forth, and they weren't going to expose that to judicial review.

Our concern with that is that looking at just their privilege law, many of the documents that they claim to be privileged in this huge amount of material doesn't even qualify on its face. It's communications to or from third parties. It's factual information. It's things that postdate the record and the rule and so forth. [I]t's really a sloppy job.

[O]ur concern with that, I'll articulate to the Court, is it's interfering with the Court's ability to conduct a meaningful judicial review on the merits and our ability to talk about that.

[T]hose things go on and we are wanting the Court to schedule a merits briefing, and the BLM is starting to play some games with that. They want to have the parties agree to just have this jurisdictional issue go up to the Tenth Circuit. I think that the BLM probably could live with a ruling that this rule is arbitrary and capricious, and they have to go back to the drawing board and would do that, if so inclined, and if time allows them.

But what they can't live with is this jurisdictional ruling that says they don't have the authority to do it at all. And so I'm certain that this case will go before the Tenth Circuit sometime soon, in what fashion remains to be seen. [T]his is an important case in my premise of cooperative federalism because it's the state's ability to maintain control over their environmental protection standards but also allow that to go forward with economic development and balance those two considerations as part of the state's traditional authority over a police power, over its economy and its water resources and so forth. [It's a] very important cooperative federalism case worth following.

The next circumstance I'm going to talk about . . . [is] a little bit of background on the Waters of the United States regulation adopted by, again, the U.S. Environmental Protection Agency and Army Corps of Engineers.

The Clean Water Act is a federal environmental statute that's been in place since 1977 and, again, the Supreme Court uses this phrase . . . that this statute is also a model of cooperative federalism. [I]t defines the roles and authorities between the federal government and the states, recognizing that the commerce clause provision constitution allows the federal government to regulate interstate waters, navigable waters, and it makes sense to want to protect [it]. [T]he federal government needs to protect commercial activities and waterways that flow between multiple states, cross state boundaries . . . and, with that, the quality of those waters. [T]hus, a regulatory program under the Clean Water Act was born and it's been in place for decades . . . .

And with that program there has been tension between what is the limits of the federal authority and what are the zones of authority of the states. In the Clean Water Act, Congress recognized that the states are to be respected in preserving their land use authority, . . . which includes intrastate waters, waters that are solely in a state and do not affect interstate commerce . . . .

And so the key definition in all of this is "Waters of the United States" but in the Clean Water Act it's not defined. Congress did not define that term and that precipitates a lot of the tension that has gone forward over the next couple of decades through the current time . . . . EPA and the Court have issued regulations to define what "Waters of the United States" means. And it's really these, what I'll call [the] traditional definition. It's the interstate aspect of waters.

[T]hen along comes the Waters of the United States rule. [I'll give] just a little bit of overview of the federal agencies and the state's role in the Clean Water Act permitting. [It is a] statute that has significant application in a number of contexts. Obviously, it's the Army Corps of Engineers, [] [they have a] historical role . . . in building bridges and whatnot and dams and water structures on interstate waters. [T]he EPA, from a water quality standpoint, . . . have significant roles in developing regulations and authority and the development of permits and the issuances of permits and affluence standards.

[T]he states . . . have delegated the early ability to take delegated authority under that statute for those water quality programs. [T]hey have their retained power over waters that are in-state only. [W]hen this dividing line between state and federal authority shifts, who is affected by that? Obviously the states are, because the increase in federal jurisdiction comes at the expense of the states. [T]hen it flows from there to everyone who has business activity associated with land use or water discharges of any kind. [Agriculture], oil and gas, mining, and so forth in the west are very substantial interests that are related to this moving line.

And so the Supreme Court has looked at this issue of what does "Waters of the United States" mean a number of times over the last [thirty] years, and

I'm going to just talk about three cases in particular, because they really set the stage for issues that are before the courts today with regard to this Waters of the U.S. rule.

[The] first case from the mid '80s [is] *United States v Riverside Bayview Homes*. This was just a basic question of . . . does navigable waters include adjacent water bodies to these traditional interstate rivers and waters? And the Supreme Court said, yes, it does. Those waters need not be navigable to be regulated, but they are within the province of the federal jurisdictional rule and authority.

Then in a 2001 case that I'll just refer to it as *Swancc*, the Corps of Engineers [] just after Bayview, had adopted a regulation and tried to seize on this agency concept referenced in Bayview Homes. [T]hey said that any water that a migratory bird could land on is federal, because migratory birds move in interstate commerce and Justice Scalia said the argument was that these migratory birds carried federal jurisdiction with their winged feet, and the court said, no, they don't. [T]hat was too expansive. And the Court said there has to be some nexus, some real meaningful nexus between an isolated water and a navigable water for there to be federal jurisdiction.

And then along comes this case, [the] *Rapanos Carabel* companion cases of 2006 that created the confusion that . . . the EPA [is] seizing upon today for the Waters of the U.S. regulation. The Supreme Court was asked to again revisit the issue where is the line between federal and state authority over state and federal waters, and specifically this concept of adjacent waters, how adjacent and so forth.

[T]hat case created a mess. There was no majority opinion. There was a plurality opinion. [T]hen there was a standalone, concurring opinion, and then four dissenting justices. The plurality opinion, four justices said that navigable waters has to mean relatively permanent bodies of water and there has to be water present, it can't be a dry feature.

So Justice Scalia wrote that plurality opinion and said relatively permanent has to mean there is water there and there has to be a surface connection between that water and the navigable water. [T]hat does not include intermittent federal streams, but does not necessarily include things that are seasonally that way.

And so the concurring opinion by Justice Kennedy deferred to the significant nexus concept from the Court's earlier *Swancc* decision, and said the nexus exists if there is a chemical, physical and biological connection that can be shown between the two waters.

[T]here is no majority opinion for *Rapanos*, there are only concepts. [T]hat's going to be important because it gets to the point about some of the legal conclusions that the district court has recently made with regard to this Waters of

the U.S. rule. Even under the standards of *Rapanos*, this mixed case, there has to be a significant nexus . . . to the traditional waters.

[A]fter *Rapanos* issued some documents and the states initiated those, and the program was moving along fine, and then the administration decided these needed to be a center piece regulatory action to fix some perceive[d] . . . ambiguity in the law. And so it proposed a regulation that sought to redefine Waters of the U.S. and it started with this traditional definition of navigable waters and built on that, and then it added several categories to that that became the subject of much controversy.

It said that all tributaries of these traditional waters had to [be] included. All waters, including wet lands adjacent waters and so forth will also be included, but there had to be a significance nexus. That was the proposed rule.

And then the rule was finalized, significantly changing that concept and broadening that in a very substantial way. [T]here is some rule debate about what that looks like on a map. I think Alex may cover some of those illustrative examples of what this looks like. A lot of people think that the federal jurisdiction exponentially expanded by [thirty] to [forty] percent, again at the expense of state and private waters.

[T]his federal expansion of the jurisdiction cuts into the state, that's obvious, but also imposes a lot of additional burdens and requirements on the states in the implementation of their delegated programs, as well as industry, businesses [and] agriculture in complying with these things. This is a federal statute and the definition matters because federal jurisdiction is involved and violations of the Clean Water Act are punishable by several civil finds, up to $37,500.00 per day. There's a circumstance in Wyoming, you may have heard about it, Andy Johnson just built a stock pond on his own property and the EPA is prosecuting him civilly. And there are also criminal penalties for that, those activities. [They are also] enforceable by citizen suits.

So this rule was finalized from a draft rule that the Corp of Engineers, senior officials in the Corps commented upon this draft rule, very similar to when it was finalized. [T]he Chief Legal Officer of the Corps told the Chief Army Master General that it's difficult, if not impossible, to persuade the federal courts that this definition, which expands to include millions of acres of truly isolated water . . . is inconsistent with the statute, basically, is what he's saying.

So challenges were filed against the rule. I represent North Dakota and we lead a [thirteen] state coalition challenging the rule. We filed an action in the United States District Court in North Dakota, in Fargo, and then concurrently filed a petition for judicial review in the Eighth Circuit. And did that because there is case law around the country that says different things about where

these actions are to start. So we filed a protective petition in the Eighth Circuit for that reason.

And now the EPA and the Corps take the position that the district courts do not have jurisdiction, only the court of appeals have jurisdiction. That's because of this interpretation of the language in the statute of where our jurisdiction lies.

[Thirteen] separate lawsuits were filed in district court [with] [fourteen] separate petitions in courts of appeal around the country. The judicial panel, a multi-district litigation, consulted all of the court of appeals actions to the Sixth Circuit. [O]ur case in front of Judge Ericson in Fargo, like the fracturing rule, was held the day before the rule or a couple days before the rule went into effect. The judge, after, again, a lengthy hearing took it under advisement and then a few days later issued an injunction against the rule.

The scope of the injunction was not stated . . ., so we asked for clarification about that because the rest of the states around the country [and] outside of our coalition wondered. [T]he judge clarified his ruling [and] said that he only enjoined the rule in [thirteen] states, and that includes Wyoming and Colorado.

[L]argely [the injunction argues that the rule] violates the Clean Water Act in terms of the scope that even under Justice Kennedy's plurality concurring opinion and *Rapanos*. [T]he rule exceeded that, and it also violated the Tenth Amendment because it cut into the states' police power land use authority over waters that are solely unrelated to commerce within the states' border.

[T]he judge also found that he agreed with us that at least we had made a showing of a substantial likelihood of success, that the EPA and the Corps promulgated a final rule that was not a logical argument of the proposed rule therefore violated the Administrative Procedure Act time requirements.

[E]very [state district court case] was stayed at EPA's request, pending the outcome of another determination by the judicial panel and all type district litigation about whether on EPA's motion to concentralize all of those cases, our judge said "I'm not doing it, I'm not staying the case because to do so would deprive the [thirteen] states of a preliminary injunction hearing." [H]e denied the stay request and went ahead and heard the preliminary injunction motion and granted the motion.

Recently, before the judicial panel held by district litigation which in itself is a very unique court, it's seven judges appointed by the chief justice of the United States Supreme Court and served for a year to decide whether or not cases of a similar theme around the country should be centralized in one place for judicial economy. Those seven judges held a hearing in New York a couple weeks ago and

then acted quickly to deny the EPA's motion and the cases are not centralized. [O]ur case will proceed.

The Sixth Circuit a couple of weeks ago, you may have read about, we filed motions to dismiss our own petition there, because we said to the court, "The district court has taken jurisdiction over this case, it properly belongs there. It does not properly belong in the court of appeals so please dismiss our petition." All the other states did the same. Even environmental groups have taken that position which is great.

[T]he Sixth Circuit issued an order staying the rule nationwide, pending the determination of jurisdiction. A court hearing has been held or scheduled for December 8, and we'll be involved in that. [W]e are trying to push the gas pedal in our case in North Dakota to get into the merits and the feds are resisting. They've filed three motions to stay. We're responding to the latest one today saying there is no basis for the stay. And next week is the deadline for the feds to appeal the prevailing injunction to the Eighth Circuit, so we will be anxious to see that. They will be arguing because they have not indicated as such that the Eighth Circuit no longer has jurisdiction because everything has been consolidated to the Sixth. [It's a] very important issue about whether or not the feds can centralize their way to things and keep it away from the [S]upreme [C]ourt, which is what they are trying to do and we're fighting that. I'm done. Thanks very much.

RYAN LANCE: Next up is Alex Dunn from ECOS, and I will only offer a very brief introduction to say that she was brilliant before she left Washington. The minute she crossed the Potomac she gained a lot of intelligence. So we're looking forward to hearing her talk.

ALEXANDRA DUNN: [I] work with the states, so I work with states all the time. I work with the states every single day and I work on states in their implementations of environmental laws. So I think what I'll do is talk a little bit about who ECOS is, and then some of the principles that I've seen coming out of relationship that we have with EPA today. I will also talk a little bit about [the] Waters of the U.S. I think you all got a good sense of the battleground there.

First of all, what is ECOS? [It stands for] the Environmental Council of States. We're the association of your state environmental commissioners, so on my board of directors is Todd Parfitt from the Wyoming DEQ . . . . [M]y current president is Martha Rudolph, who is the director for Colorado's environmental programs. Also on my board of directors is Dave Glatt from North Dakota who represents the Region, [which includes eight] states with us. Todd happens to chair our waste committee. So I'm just giving you a sense of there is great leadership from the western state environmental directors in our organization. We have a board member from each EPA region. [T]hen we have officers from around the country.

We spend a lot of time working as state environmental directors, and I am sort of their liaison with EPA.

We're constantly focused on that state/federal relationship. And Paul had said in one of his first lines, doing from cooperative federalism to inoperative federalism, and we had a little prep call about this. I said what I kind of see happening is going from cooperative federalism to collaborative federalism, and someone on the call said what the heck is collaborative federalism. So I'm going to talk a bit about that and give you some examples.

Bottom line is [that] ECOS was created at the National Governors Association. Your governor has stepped out, but basically the state environmental directors found that when the governors got together they talked about prisons and health care and education, and they might talk for an hour about environment national resources issues. And these folks want to talk more than an hour with each other.

So they formed ECOS [twenty-two] years ago to provide a forum for the [fifty-three], and, no, we don't have [fifty-three] states, but we do have the District of Columbia, Puerto Rico and the Virgin Islands active in our organization as well. So those [fifty-three] environmental directors get together, through us, twice a year.

So what do we see happening right now? What's really important is the way the laws were structured with this delegation to states, ECOS is absolutely about the preservation of delegation. Okay. So the states have taken these programs, states operate these programs, and there is continual sense of oversight from EPA.

Just last week we received a memorandum that is going to include principles and best practices for the federal government overseeing the delegation of state programs. [W]hen states originally got the authority, through the Clean Air Act, the Clean Water Act, . . . and so forth, they had to show that the state had resources, money, [and] the ability to enforce solid state laws. They had to stand in the shoes of the federal government. If they could make that showing, they got all these authorities for federal law.

Well, now what's happening is the federal government is looking and saying [that] it's been [thirty or forty] years for some of these delegations. [I]n fact, one state for their Clean Water Act delegation, . . . went back and looked for the documentation of what the delegation looked like. And it was like, "[D]ear state of X, congratulations, you have a Clean Water Act program, love EPA" . . . .

[Alaska] . . . just got delegated about four years ago [and] went through an incredibly rigorous process that you would probably expect today, but was not the case in the 1970s when these programs were being delegated. So we had to look really, really closely at the federal oversight of these state programs. When we

got the memo, it talks about best practices and principles for oversight delegated programs. We got the new one, the revised [one] with our comments included in it was assuring program integrity and health.

[T]hen EPA said, "Now, states, we don't want you to feel like we're overseeing you, we are really not, we just want to make sure you have good programs with integrity. In other words, we're going to be overseeing you, okay."

So the fact there's that healthy tension, as we've heard constantly, between the states and the federal government, and what the states don't want to be second guessed on is how much money they are putting into their programs [or] how many people they have out doing inspections.

Those are choices to be made by the states [to] not be really second guessed by the federal government. But we have an Achilles heel on this as states. If we want to keep those states rights, if we want to say we can protect the sage-grouse, we can protect tributaries, we can protect upland waters, we can protect clean air, then we have to be very careful when states walk around and say "We're broke, we have no money, we can't raise permit fees, we're laying off staff, we have a hiring freeze." Okay. All of that compromises your ability to show that you're capable to do the job and sort of empowers the community that says, "Unless there is federal jurisdiction over these things our resources are at risk." Right?

So you have to make the case [that states are competent], and I spend a lot of time in Washington making the case that states are competent, and I know the governor there, there is no way that he would agree that states are incompetent. States are highly competent. But there are a lot of factors that give out in the news that question whether states can really do the job.

Right now the U.S. Chamber of Commerce is sending FOIA requests to state agencies around the country. We haven't figured out exactly how many states they are covering, but I'm aware of about [fifteen] or [sixteen], asking the state to produce, through FOIA, the state budget for the clean air program, the water program, the number of ETEs, etc.

And what do you think the business community is going to try to show? They are going to try to show that the states do not have the capabilities to do the Clean Power Plan, to do Waters of the U.S., to do all these other things.

Now, the U.S. Chamber is ultimately going to hope that that supports the argument for those things to go away, but it could backfire. It could backfire, because if the state can't do the clean power clan properly, what happens? You get a federal implementation plan. If the state can't regulate waters of the state effectively, what do you get? You get the federal land grab, as people have called the Waters of the U.S. rule. Okay.

So we've really got to focus on how to make the case for those of you in this room, and I sense that there's a pretty good, strong feeling in this room for states' rights and states' competency to make that case.

[I] know that is probably a bad thing to say in this state, but I do hail from the Empire State, and I just love New Yorker cartoons because, you know, with the Waters of the U.S. it's like everybody is intelligent, everybody is smart, but do we have completely opposite interpretations of what these roles are all about.

And we just can't agree, and we haven't been able to agree in the last [thirty] years. [The] Supreme Court can't even sort it out. As you heard, what they tried to do with the Waters of the U.S. rule was give us clarity, right. That's all we lawyers want is clarity—just tell us what is in and what is out. [T]hey made a lovely list of what is out, and thank goodness bird baths and swimming pools are out. But we knew that. Okay.

[T]he hard part is the tributaries, . . . the ditches, [and] the ephemerals, . . . especially out here in the west. That's why people are thrashing about through the courts, as you've heard. That's why when I was recently in Canada, a Canadian said to me, "You guys are crazy in America, [thirty-six] of your states are suing the federal government over a new rule. We don't do those things in Canada."

And I said "Wait until the Clean Power Plan comes out, you're going to see more." So, again, the concept, what's at bay if you walk away from the Waters of the U.S.? Not knowing anything else, just know it has to do with tributaries and ephemeral streams . . . .

And ditches, oh my goodness, are we actually trying to figure out if there is federal jurisdiction over ditches? Yes we are. Why? Why? Because the argument is if we don't cover this with federal jurisdiction something bad will happen to the land, it will be destroyed, states will be in favor of economic development extraction, and it will all be filled in and we'll pay to the country.

[W]hy did I say that I see collaborative federalism happening? I recently had an Australian Fulbright legal scholar in my office and he said "I'm here studying federalism in the United States, tell me all about it, we really are having problems in Australia. Would you do it again if you set it up? Would you have an EPA?"

And I said, "Wow, that's a big question. [Y]eah we have an EPA, and here is what EPA will do. EPA is fabulous at research. EPA is fabulous at studies. EPA has capabilities that the states cannot do, in fact, most state DEPs [and] DEQs do not do substantive research. The EPA's Office of Research and Development does. We would use EPA for the scientific work that we use to support a lot of decision-making. So, yes, we needed EPA. And, yes, there are cross-boundary issues, absolutely."

He said, "Then why is everyone so angry? Why are you all suing? What's going on here?"

I said, "What you see is a lot of agitation over new policies. But just remember, we have [forty] years of history, [forty] years of what I call the core environmental programs that nobody is really fighting about anymore. Basic water permitting, basic land permitting, basic air permitting, and in that arena, we are starting to see what I call collaborative federalism."

We're starting to see EPA sit down with states and say it's time to streamline the fact that a company has to report to six different clean air databases. Half of the data flows to the state, half of it flows to local, half of it flows to the feds. It's like before . . . . So we had to type our name—first, middle, [and] last—and our Social Security number on [fifteen] college applications [with the] same information. Companies have to do that today. You have to deal with the same lap long facility ID [fifteen] times with [fifteen] databases, [and if] one number goes off [then] bam, nothing matches up.

So this is where you are going to [hear] more from me as we talk about states and the federal government working to improve the core business. Are we going to fight about the new stuff? Without question. Without question. But we are finding ways to work much better on the old stuff.

And I'll just lastly leave to say that I am . . . a very proud hockey mom . . . . So I will leave you with one of my favorite quotes from Wayne Gretsky, one of the greats. And what did he say? You all know this, right; "the good players skate to where the puck is and the great players skate to where the puck will be." Okay.

That is what states need to do. That's what you heard about sage-grouse. [T]hose states got ahead and had their plans, I think is what you're saying. Guess what, boom, you cut out the federal government because you did your job. So the more states can get ahead, the more states can grab these issues and show the NDOs, and [they] maybe persuade Nada . . . that they can do this work. We might have a little bit more success keeping the federal government off our sheet of ice.

RYAN LANCE: So get out your pens and paper and this is going to be a litigation forecast for a lot of you. So as you are developing clientele and you are briefing points going forward, you've heard a lot about the past now we're headed into the future, and I can think of no one better to present it and more well connected in this administration and in the states, frankly, than Nada Culver. So Nada, please join me and give us your thoughts.

NADA CULVER: I'm not sure where to go with that. If this helps, I was going to come up in my robe to Christmas future costume. I don't have any slides, so if

you can just imagine me in a giant black robe and a big hat, and this is what's all going to happen to you, so you feel afraid. I think that is kind of my topic.

All the scary things that could happen to us as this administration starts to head out so . . . we can look back to what happened at the end of the Clinton administration [and] the Bush administration [to] see where things are headed. [T]hink about it in the context of what we've been talking about. So far this administration really has had a big focus on collaborating with the states.

The sage-grouse is a great example. They started that process by putting in the federal register [that] we're going to try to make the preferred alternative in all our EIS's to state plans. That was a really bold move. They couldn't follow through with it so that wasn't well received in the end but . . . that was the focus. And I think the questions [are] now[:] Where does it go and does it get scary if this administration decides that there isn't a lot to be gained from cooperative efforts[?]

So I think the biggie that everyone is aware of . . . will [not] be a surprise for the crystal ball purpose [is] our national monument. These were some of the worst received things designated at the end of the Clinton administration. We've already seen the Obama administration designate [nineteen] national monuments, 260 million acres of public land and waters, and you can consider that as protected or locked up, depending on your perspective. And I think we're going to see quite a bit more.

There's discussion of the Bears Ears in Utah as well as the greater Candyland in Utah, both of which affect energy development. [There is] the California Desert National Monument which would [affect] mining, as well at the rural energy . . . . There's a Grand Canyon Watershed National Monument under consideration, just in case the withdrawal Candyland isn't enough, [and] the Brooklyn Rivers in West Virginia. [It] affects a lot of the mining as well. [There's the] Gold Butte in Nevada, which it's hard to imagine that will be well received, quietly received, if that goes forward. That would arguably affect money but possibly some of our favorite trespass cows that are wondering the state of Nevada right now.

And then there [are] also some other monuments under consideration, so I think this is one that we can expect to see. This is probably one of the best examples of . . . uncooperative [federalism]. But if you look at the way the Obama administration has handled these monuments, there has been a series of public meetings before each monument. There has been outreach to the state. [M]any of them are being designated in places where legislative efforts have failed. [F]or instance, federal farms out in California [are] asking the Obama administration to consider a monument there if it can't move forward.

One other thing to note about monuments, for all of you with clients, [is that] no challenges to those have been successful. So carry on, but thus far the Antiquities Act remains effective.

Another tool that I think we'll see used are mineral withdrawals. We did have challenges already to the significant withdrawal from mining around the Grand Canyon. Those challenges thus far have been unsuccessful. That is one of the topics of state of Nevada and mining properties and county challenging the grouse plans.

We are [going] to see those withdrawals move forward. There are [ten] million acres that are already segregated under the federal grouse plans would be considered for permanent withdrawal in the next two years. We'll probably see a few million acres of withdrawal under consideration in the California desert, as one of the larger renewal energy planning efforts goes forward there.

And I think we have also seen them before, so it's interesting if you're an environmentalist that the energy is pitted against energy. [T]here are a lot of withdrawals that have been done as far as solar and wind development.

[W]hen the feds did a solar program, that's why they immediately segregated any withdrawal of all of those plans from other activities. [W]hen the immanence of the wind and solar leasing rule, I think we may see additional withdrawals there as well. So that should be, arguably, pretty scary in our Halloween theme.

So continuing on that topic. I think . . . another thing we'll . . . continue to see are both listings and delists, maybe even a relisting under the Endangered Species Act. [One listing] from the Halloween theme[:] we'll see some bats. [With] delisting, there's a lot of discussion around things like the Gunnison sage-grouse where there are efforts still going on to get a change and decision there to list that species as threatened. And then we will see a lot of efforts, as we have from this administration, to do both.

They have made a big effort to show that they're looking at not listing certain species as well as listing others, so I think we will continue to see these moving in long steps, some of each. And then again, if we want to go with the scary Halloween theme, I'm sorry, I don't have a great graphic for you. [T]he sage-grouse, if these lawsuits do enjoin the plans, those are cornerstone of the Fish and Wildlife Service listing determination, that listing is no longer warranted.

The Fish and Wildlife Service have determined that that bird warranted listing under the Endangered Species Act. The change came in large part because of the federal plans, as well as certain state plans, like Wyoming, but I think it's fair to say that that could come back, depending on what happens, which is scary to me as well, just because of all the work that's gone into it.

[I have a] couple more ideas of fun things down the road . . . I don't think any of them are particularly secretive crystal ball stuff. [One idea] would be new rule-making. You've seen how popular Waters of the U.S. fracking rules have been. There's much more coming.

One that I think will get a lot of attention here [are] rules governing methane. EPA isn't moving forward with their role but the Bureau of Land Management is going to move forward with their own role. They are going to call it hunting and flaring. It will be about capturing methane emissions.

And this is something where we have state regulation in some places. Colorado has a very robust methane rule and EPA has a methane rule. So the BLM is going to wade right into that. I'm sure that will be interesting.

We'll see the Wind and Solar Leasing Rules coming out, so if you do wind energy, there will be competitive leasing, there will be designated areas for leasing, and trying to get the renewal energy system to look more like what we see for oil and gas and geothermal.

There are a lot of other rules on oil and gas measurements. These are really down in the lead of where you have to put your measurement equipment and how you deal with wind or water to co-mingle resources. It fits back in with the methane regulations and also royalties and rents and other things that are still on the table. There's a whole suite of those rules out there looking at everything from, "is [two dollars] an acre enough for a federal lead," to "what is the percentage of royalties you should be paying[?]"

So those are all potentially in there, as well as some leasing rules on coal royalties. A couple . . . are sitting out there that may be getting less attention. [T]he BLM resizing its clean air over that. They call it plan 2.0 and after [forty] years of funding they finally are at 2.0.

I want you to note, since Ryan mentioned this, there are still many places that don't have the new master plan around . . . . One of the things that's rumored is the way that the feds cooperate with the states and the land use planning process may be affected by this rule change. So we expect to see that coming shortly as well.

[O]ne thing that we all may need to take a break from thinking about, but I think may come out before the administration is oil shale.

Under a settlement agreement, the feds were supposed to issue some new oil shale rules in 2012. They are a wee bit behind but I think there's a chance those will come out before the end of the administration.

So the big wide option is what kind of policies might come as the administration winds down. Again, we saw a lot of this in the Bush administration, different policies did get in place before they left office.

[E]xpect to see a number of policies and secretarial presidential memoranda. [I] think these will address . . . the energy context climate change. We're waiting for DOI policy and BLM policy to come out and that will address adaptation as well as dealing with impact.

The other big [idea about the future], I think, from energy perspective is on mitigation. This has been a big theme for this administration. Possibly not the sexiest topic for executive orders and policies but they really, really like it. [T]his goes to impact federal land. You're going to negate it. Now we have a standard in the grouse plans that you don't have to just clean up your mess, you have to make it better than when you were there.

This is beyond leave no trace, this is beyond anything Ranger Rick told you. This is a whole new ball game. And I think we'll continue to see some more guidance on mitigation as well. We're seeing that in the grouse plans. We're seeing it in the NPRA in Alaska. There's a huge effort going on there to come up with a mitigation plan for development of Rooster Tooth projects out there. So I think we'll continue to see that as well as planning 2.0 policy. [W]hile planning might not sound that interesting to some of you. These are the places where we decide on federal lands if they're going to be available for energy development.

The other thing that you will see is not only new policies but plans get[ting] finished. Rob mentioned some of the most fun I had at the end of the administration, which was the torrents of land use plans that came at the end of the Bush administration. They got six plans out, I think, in less than five weeks. So we [expect] that may happen again and this is where we'll see the tie in with the coming end again. [Y]ou may see some more land use planning decisions [and] some additional executive secretarial orders. Again, that's mainly focused in this administration on climate change mitigation, transportation and transmission. [W]e may see some more of that moving forward.

[I have] two more to end with scary ideas. [Y]ou have heard a lot about lawsuits. There may be some more from both sides on the grouse and on the number of these other rules. If you notice on the Waters of the U.S., the people suing are . . . the people who thought the rules went too far [and the] people who felt the rules didn't go far enough.

Another thing we can see at this point of administration is settlements. [R]ight now there's a discussion. [I]t looks like there are . . . claims already from Southern Ute on the fracking rules are going to be settled. I think they're going to look hopefully some way to resolve some litigation before the end.

And the last [idea] . . . would be the biggest scary picture, if I could put one out there for you. There's been a lot of momentum gained and messaging around this very simple straight forward black and white concept . . . leave it in the ground "we've done enough, leave all the oil and gas or coal, just [leave] it there." [T]hat has been getting a lot of traction and messaging. There's even legislation under way from some folks in Congress about this, [s]o there may be an interesting way that that plays out. [O]ne way [we] could see that happening is trying to slow down some of the leasing. You can see deferrals of leasing. There were an estimate basically about five million acres of leases that had been deferred. A lot of grouse plans were being put together. Where those go now? Do they stay on the sideline? Do they come back into the leasing process and does that expand beyond that? So [there is] lots to challenge potentially.

[I] think . . . if you keep challenging everything, then do you drive the administration back to some of these other tools that don't survive legal challenges? So you can continue to challenge the fracking rule and the grouse plans and the Waters of the U.S. and oil shale and methane and everything else. [T]hen you end up back at something that you're not going to be able to challenge successfully [like] mining withdrawal [and] things like that. So that's just a small plug for ongoing cooperative federalism.

III. PANEL DISCUSSION

RYAN LANCE: [I] will start with what is sort of the central question. It seems that whether it's Section 6 under the Endangered Species Act or granting of primacy under the various Clean Air and Clean Water Acts, . . . there was this vision of marble cake or layer cake federalism, whichever one you subscribe to. . . . It seems like the states are more in the role now as a limited partner where you get all of the responsibility on the boots on the ground, you get the responsibility for funding and then the general partner sits out there and judges what you do and says if you don't do what you say you are going to do[.] Alex, we're going to come and we're going to have dire consequences and we may even enact things like the Waters of the U.S. Rule . . . React to that. Is that a fair depiction of what we see today?

ALEXANDRA DUNN: I think what we're seeing more of is this particular agency right now has a number of people at the helm who were former state officials. The administrator, herself, and several of her deputies were in state government, in the state DEP of Q. So we have a unique moment to work with people who want to work with states. I will say that regardless of your political strides, . . . this EPA has figured out that they actually get better rules that are easier to implement and more effective with early meaningful engagement of states.

Now, early meaningful engagement historically has meant EPA gets in the black box, decides what they're going to do [and] pops out of the box. "You got

ten days to tell us [if this] is this thumbs up [or] thumb down and we're going to publish it in the federal register."

We're starting to see early collaboration about FACA that we have to be careful of because when EPA consults, we have considerations about FACA . . . . If it was [fifteen] businesses advising EPA, people would kind of go, get itchy. But if it's [fifteen] states, it's different. We say it is different. It is absolutely different[;] you can't have [fifteen] states. You can have [twenty] states in the room hearing co-regulators. We are not being published.

PAUL SEBY: Well, I think the concept of federalism is part of our structural system of government. So enforcing it when . . . the feds cross the line is a healthy thing. And I think that collaboration is important. But there are a number of policy prerogatives this administration is pursuing . . . that cross the line and you're starting to see federal courts say that's the case. It's not just the states and political officials suggesting that's the case. It is the case.

[I]t's a healthy thing for them to enforce that line because crossing that line comes at the expense of our system of government and that's a good thing that's going on. And litigation is part of that because that's how you get the federal courts to perform their role, which is to enforce the role of that branch of the government.

RYAN LANCE: So in that space, you saw the hydraulic fracturing rule making, across the west of Wyoming. You saw it with sage-grouse were the states are early actors. They come to the table and they say, look, we don't want these federal regulations. We're going to adopt state level regulation, hopefully guide that federal action.

The states received the benefit of that bargain brought in the context of sage-grouse. You mentioned that at the close of your topic is the cure worse than the disease that we were trying to preclude.

ROB MATHES: Ryan, in Wyoming [we] certainly . . . saw a level of collabortion that we did not see with the other states. Wyoming was out in front as I talked about a little bit earlier and they received a lot more deference to the point that I have heard governors and chiefs of staff and other policy makers and other states actually complain like, "How did Wyoming get such a sweet deal?" And I think Governor Freudenthal would respond, "I've been dealing for eight years and that's why we got a different take."

Montana fell somewhere in between. They had a state plan very similar to Wyoming's. Originally it was not given much deference in the change, a little bit counter . . . to the actual decision. You saw Colorado issue an executive order a week or two before the final decisions came out and it did not receive deference.

They came to the table too late and I think you saw the same thing in Utah where there was a state plan and had been around for a while. [I]t was entirely voluntary. So you saw a very different situation.

I think a lot of oil and gas operators, in particular, think the cure is worse than the cold. I think they feel like there's no chance to get exceptions to work in spaces potentially impacted by sage-grouse. [T]hen some think a listing would be better because there is a system under the Endangered Species Act to get a Take Permit.

We've seen an interesting change of many responsibilities from the states. I think Colorado and Utah, in particular, where those buffers we talked about you can get an exception but only if you get the concurrence of the state law agency, the BLM, and the official officers.

It's interesting on several levels to me because, one, you have the Fish and Wildlife Service exercising jurisdiction over a non-listed species which is arguably intentional with their governing statutes. And then, two, you see a split between the traditional balance between BLM and state wildlife agencies which is BLM will habit manage the habitat [and] the states will manage the wildlife and that's shifted, I think, in my opinion in those states that did not lead out front.

RYAN LANCE: Nada, you not only have experience in the sage-grouse context, I think this is credit to your approach. You also did a similar thing in Gunnison grouse context in Colorado. What's your reaction to . . . the cure [being] worse [than] the cold—are we understating the cold because we don't understand how the rule works?

NADA CULVER: I tend to favor it was better if it was listed approach. I know plenty of oil and gas companies who have been waiting for years for a permit for a project. I don't think that's worked really honestly anybody could say that's a better solution under [sixty-seven] million acres of federal land.

I think at least now we know where things go and how they go and I would agree with what Ryan said that the states that got out in front and came to the table and had specific ideas did get better treatment. The states that . . . essentially folded their arms . . . a got a little bit [worse treatment], although . . . every one of these states got some special breaks.

If you go there, you were so unfortunate as to read all nine feet [of the] estimated plans . . . . Utah is the only state that has leasing in general habitat with standard stipulations. [They have no] protections for grouse. Did they deserve that? Arguably not under the standard we're talking about.

So there were efforts made [and] every state got a combination. Nevada's exempt from the surface disturbance limitations. I think there was a huge effort

to do that and to me, . . . we don't engage once a species is listed . . . because . . . there are . . . so many contact points.

[L]ooking at the way things worked with the Gunnison sage-grouse, we thought we had a good plan there and that it was working. [N]ow what we're seeing is honestly the anecdotes [of] people, . . . try[ing] to figure out what to do with the Gunnison sage-grouse so we have a habitat. What do you do? You think there's 4,000 birds. You can just look around and not here, but, you know, you call the Fish and Wildlife Service [and] there's nobody there to call you back. So it's not very efficient. And I think everyone certainly spent a lot of time at the table and I think it's worth giving it.

RYAN LANCE: Seems—I come from the state perspective, Paul, . . . if you do some of these good things [like] enact fracking regulation, [a]nd there's this Monday morning quarterback that comes in [and] says, "Oh, that's not enough, we're going to do something else." What's the remedy? I mean, the states can come to the table but . . . [i]t seems that the states are tired of this "Mother, may I" approach.

How do we get to a point where we truly collaborate given that you have a lot of differences between EPA region [and] you have a lot of differences between fish and wildlife service region[?] [T]rying to get a blanket that covers all those territories the same is difficult. How do you meld that with national policy but a regional focus on a lot of these things that really needs to be brought to table[] and really nuance actual differences between these jurisdictions?

PAUL SEBY: I think the basic answer to that question is correct to what Congress chose to do with the statutes that are on the books. It's the Clean Air Act, Clean Water Act, they have a number of delegated authorities to the states to make discretionary calls about balancing things.

And when federal rules are written that take that away like the Clean Power Plan, for example, the Section 111(d) provision [is] at the heart of all of this. [T]he Clean Air Act that says states' EPA can set a process and a result that has to be achieved in terms of the decision.

But how you get from here to there is up to the state and the state using these factors and EPA's written . . . yet another rule that takes that away and says [that] EPA decides. And so how do you get to that collaboration? I think it has to start with . . . federal respect for the role the state was given in the statute and that's not a process that can be changed by people's opinion because it's the law. [R]espect for the law has to be a common theme of any new regulatory initiatives as a basic premise.

ALEXANDRA DUNN: Just on the Clean Power Plan, I think part of what really troubles states [is someone] saying, "Hey states that get ahead, . . . have a great

defense, right?" But we saw in the Clean Power Plan, states that got ahead got a raw deal. So, you know, I analogize it to fitness, right? The states that already [lost] [fifty] pounds were told, "go lose another [twenty]." While losing the first [fifty] was easy, maybe. [I]t's kind of hard, but losing that next [twenty], where's it going to come from? Down to the bone.

I think that it's really troublesome. The other thing that took me for was resources. And what concerns me there were ten years ago, we heard about unfunded mandates all the time. Unfunded mandates is like the bumper sticker. It's like everyone was [resigned to] the fact that everything right now is an unfunded mandate. There is no money flowing behind these programs like there were in the early days. The funding is flat. Flat funding is really negative funding.

[As] for the Clean Power Plan, the EPA, now this is the President's request, was an additional $500,000.00 per state for the Clean Power Plan. Half a million dollars per state was the request. It was [twenty-five] million nationally.

So if you have something that's that important to you as an administration, you have to put your money where your mouth is and resource it. And that's where I see the break down. They have the vision, they want everyone to do it, but they're not coughing up the resources and they're not willing to fight Congress for them.

PAUL SEBY: Ryan, one other comment, I think it's true, especially of Wyoming's context, [] that this administration . . . . has done something that's unprecedented. [I]n Wyoming's case, with the Regional Haze Plan, . . . the State submitted a plan as it's required to under regional program.

And the EPA largely vetoed that plan [and] imposed a federal plan in its place. That act was the [fiftieth] act under the Clean Air Act by this administration in the last seven years to discard a state exercising its authority, throw it away, and replace it with a federal plan that cost tens of millions of dollars more and achieved no humanly perceptible difference in visual air quality in a national park.

[If] you compare that to, just for example, the prior administration, for better [or] for worse, EPA imposed three federal plans in eight years. That's a big difference. And so I think the point of the comment is that policy perspectives matter to the relationship between the state and the federal government. [T]here is a willingness to participate in the partnership or not. And I think a lot of rules in the litigation following that we're talking about reflect a problem.

RYAN LANCE: This will be my last question and then I want to hear from the audience in terms of questions you might have. But it seems to me, and it goes to kind of the core of this whole panel, [that] there's a sense in the west that, "You know what, we think the states have a role. We think the states have a role in

combination, of course, as you read the statutes." There's a tension that says, "but we don't trust the states enough whether it's the EPA or conservation community or even some of the other states judging each other."

From your perspective, is it valid to say the states can do this? Given what you've seen in the sage-grouse context, in the Gunnison context, [and] in the monument designations, . . . where . . . the conservation community came forward and said, "look do something proactive. If you don't, this is where we're going to have to go." And the states do it. . . .

NADA CULVER: I think many states can do many of these things. I think another challenge is, [for example], we talk about the fracking rule. There's discussion in the judge's decision about the states that were occupying the zone. But there were many states that were not occupying it.

And so beyond that, I think that is the biggest concern [is] when we get to these . . . health and safety kind of issues. We do have some states that are doing a bang-up job but there's a whole bunch of other states that are not doing a good job or doing enough. It seems to me that [it] is an appropriate place for the feds to step in.

But I do think there are many situations where the states can do it. And I think the federal government right now is as challenged on funding as the states are. What we can say with the Gunnison sage-grouse is there isn't funding for the Fish and Wildlife Service participation for a 4,000 bird population and is not going to make the state of Colorado and other department of national resources. They want to put them in there, [and] they want to help out. I think it's not a blanket unfortunately. There's not an easy answer.

RYAN LANCE: [I want to look at] the context with the fracking issue. If that's the case, why not put a meaningful variance procedure into it[?] That's unworkable for all intents and purposes. There are states that are truly capable and step forward. Why not give them sort of functional role and primacy that you see with clean air, clean water[?]

NADA CULVER: I hope it's not offending anybody in our community. We certainly support the concept of variance. And I think that would be a very sensible way to handle a lot of these issues. I think that was the concept of what Colorado was hoping, in a way, would happen with Gunnison that you wouldn't list it because they [had] shown enough there, and if you can put a variance in, [that's great] . . . . I think we'll see Colorado push for that when oil and methane rules come out.

For the same reason, I think that's a better solution than . . . what we effectively saw in the Gunnison grouse was kind of a variance. Maybe you got your

own special plan. But—[in] the way that was handled, I don't think expectations were set right. When you put a scoping notice out and you say "We're going to adopt a preferred alternative every single state plan." And then at the end you say, "Yeah, not so much. So all those things we told you we would consider aren't meeting our standards." [Y]ou kind of set yourself up for that and that was not, you know, handled well. So I think reasonable expectations from both sides can be set.

IV. QUESTIONS FROM THE AUDIENCE

QUESTION: [O]n behalf of the client, I actually operate a small oil and gas company, take them from tech start-up to full scale development. For the last two or three months, I've watched [twenty-one] presumptive presidential nominees and two parties and four debates talk to me specifically in the light small business owner about creating jobs, creating wealth for America . . . . [W]ith the regulatory environment that you're describing, I realize you're talking about the environment between the states and the federal government.

Where is the consideration for my small business? I don't mean literally me, I mean the thousands or tens of thousands of companies that literally cannot operate today because once these rules are promulgated, the fracking rule, for example, it's virtually impossible, in my opinion, for a small company to be able to navigate just the regulatory morass before we even get to the substantive, the technological or economic issues. Where do you see that consideration if there even is one in the state government[?]

ALEXANDRA DUNN: I might try. I think that's a great point. EPA and federal agencies have to do some sort of small business impact analysis most of their rule making. The example I'll give is the MPDESE reporting rule. So after ten years of thrashing about, we've decided that it is unacceptable that in several states the majority of DMR, Discharged Monitor Reporting, is still going on on paper.

We can track shoes across the country when we order them from L.L. Bean but we cannot track hazardous [waste] from one truck to another. [W]e're moving to electronic and the MPDESE reporting rule, EPA made several exceptions for waivers for small communities [and] small businesses, but they made it so narrow that since it is pretty much . . . for communities [that], for religious reasons, . . . don't use the internet. [T]hat's always good to take the Amish into consideration in federal rules. [It's also] for people in isolated areas where there is no broadband, so they still are going to have to mail something in with a stamp. But I don't know if I see a real consideration of maybe a parallel effective program for smaller businesses.

ROB MATHES: I think in the oil and gas context, Ryan, I have not seen that consideration. When you look at the oil measurement rule [and] the gas

measurement rule, they would create jobs, I suppose, from the standpoint you would need an Army to comply with some of the reporting requirements that are being promulgated. But from an economic standpoint, it would just be impossible for small operators to get out on the federal lands, I think, in the foreseeable future, which is really tough in states like Wyoming and Utah where half of our land, and well over half of our minerals belong to the federal government.

Part of the idea behind the Reform Act in '87 was to allow anyone to come to an auction and bid and maybe find an opportunity on the federal lands. And that, in the west, was a very common system. Well, McMurry comes to mind, comes together, has a little idea, and wow, we have Jonah Field, and not just the Jonah Field across the way.

So yeah, it's going to be really, really tough. It's not to say some of those rules don't come from a good place. We want to ensure that the federal royalties are correctly and properly paid. I want that as a tax payer but consideration has to be given for making compliance possible instead of just setting the bar too high.

RYAN LANCE: So on a compliance front, we're hearing new technological age where it isn't just the DEQ or the EPA inspector. It's the average Joe Schmo out there with an iPhone that can measure ambient air quality standards with their iPhone. Where are we headed with that? I mean, you talk about regulation at the state or federal level, the citizen supervisions and citizen enforcement provisions are changing the nature of enforcement and how these laws are applied almost by the minute. Paul? Or Alex?

PAUL SEBY: It is a big deal. It is a big deal because it puts all of those cases in federal court. The Clean Air Act [and] Clean Water Act . . . all got citizen supervisions that provide federal court jurisdiction. And the penalties are substantial.

So it becomes a question of [are] these new technologies . . . credible evidence of violations[?] [A] big area of the law that will be developing is what's credible relative to the EPA reference methods of things like that.

NADA CULVER: [T]he State of Arkansas just created an app for citizens to go out with their iPhone. They can see something that looks kind of odd, like weird colored soil or water, take a photo, GPS locates it, goes right into Arkansas DEQ.

Now Arkansas, we don't normally put in our list of most resource states when it comes to their environmental program. But they're ahead, they know this is coming and they're already experimenting with how they're going to manage this data flow. And we asked . . . "Are you getting a lot of nuisance complaints[?] [A]re you getting a lot of random things[?] [Is there] just the person that goes out

every day and takes tens pictures and files them with the agency? I mean, how do you manage that?"

And they said they're really not having that problem . . . but they do have to be responsive. So I think we're going to see more citizen monitoring, which I think we are. We can't stop it. We're going to see more citizen monitoring. We have to think about how we're going to manage it as companies, as state regulators, and give validation to the people that want to be a part of the process. A lot of that data submission is because they want to impact the process. So maybe there are ways to bring people into the process so that they don't feel like they're outside something having to e-mail photos.

RYAN LANCE: Nada, is that an outgrowth of just the technology being available or is there a real sense out there that . . . neither the states nor the feds know how to do this so we're going to take literally the law into our own iPhone.

NADA CULVER: Yeah. [I] think it's shown how it can work in inventory for Lance Holder's characteristics where there are these kinds of lands out. [T]he BLM was supposed to go inventory their whole estate. They'll get to that when they finish planning 1.0.

But right now we have citizens who go out and do that. And what that is is people who are connected to the places and who have the passion and the time and now the technology to get out there and go do just unbelievable work. [I] think that's where it's coming from is the knowledge [that] if you live near a facility or you are interested in the wilderness area and you know it and you care about it, you do have sometimes more knowledge, more time, more attention to pay to those places. And what this has done especially in the wilderness context if we look at that as an example is giving people a constructive outlet.

[T]he BLM has come up with some guidance that says if you want to come in here and complain that we missed [ten] million acres of fabulous wilderness in Sweetwater County, you better have some good photos, you better have some maps and you better have some coordinates. So that's how that has evolved . . . . I think it's the same thing. People that are around these places and want to be heard . . . may have the knowledge that others don't and . . . the people with ten pictures [are] out there. They do have more time on their hands, apparently, to do this. I think they will do it.

RYAN LANCE: Other questions[?]

QUESTION: [I've] been involved with numerous federal plans. Jack Morrow Hills in Sweetwater County, Lander RMP, and the Nine Plan. The Governor was gracious enough to put me on the sage-grouse implementation team many years ago.

My experience there is that in these federal processes, there's a wonderful spirit of cooperation to a point. Generally, after the draft comes out close to the final and then all of the sudden we have to get Washington's blessing and wonderful things like master leasing plans, things are mandated to be there to get the Washington blessing. [There are] things that the corroborators did not want [and] never had any intention of looking at and when they were looked at, they were determined not to benefit the resource.

But I think we're there that occurred with the sage-grouse plan. We have an executive order. It was agreed upon by the cooperators of the state. When we went into the Nine Plan, the feds started adding things, things that were not consistent [so in] the State of Wyoming . . . we have words on the paper . . . . [I]n fact, yesterday, the state BLM director says we are going to manage by the executive order.

But I believe in realty what we're going to have is words on the paper will be far different than the administration on the ground[] [a]nd a big gap there that will lead to abuse and over regulation. So my question and the reason I came today was to find out what can we do, as a State of Wyoming, to protect our grazers, our energy producers, [and all] people that are in the recreation business from being regulated out of business.

RYAN LANCE: So Rob, you've been involved with this in terms of analyzing the plans. Obviously, for potential points of challenge to give counsel to clients. There's the "as written challenge" and then there's the "as applies challenge" which will come down the road. What's your reaction to the history question and then I'm going to ask to Nada to maybe not act in rebuttal but certainly add to.

ROB MATHES: Sure. In the land use planning context an "as applied challenge" and the "direct challenge" is very difficult. There [are] two Supreme Court cases, one involving forest service planning and one involving BLM planning that make a direct challenge a pretty high hurdle. You almost have to have a procedural violation that they did something wrong.

As Commissioner said, [federal] regulations enacted under the Bush administration really invited local government into the land use planning process [by] requiring the BLM to take input from the local government at various stages through the planning process. The regulations and the law are clear, however, that they are allowed to give input. [T]hey don't get a vote. At the end of the day [the] Supremacy Clause says it's a federal decision. So if they acted within the scope of their discretion, it's a tough challenge.

The "as applied challenge" I think is almost a certainty with these plans because, as the Commissioner indicated, there are inconsistencies across the plans. [T]here is unclear language and . . . it is just a really ripe environment for very

different interpretations to apply. We've already seen two field offices in the . . . couple [of] months since the plans have come out apply things that seem to be inconsistent on their face.

[W]e're already seeing some tension. So I think there's, sadly, a lot more litigation and a lot more disputes to come, but . . . unfortunately, . . . I can't tell you in a crystal ball if those will be successful or not or if industry will survive what could be considered a period of really intense regulation.

NADA CULVER: I don't want to give the Commissioner legal advice. I won't do that. But I think there is a chance right now while we're waiting to actually have an "as applied challenge" because I don't think that [spatial] challenges make sense. I think my organization has tried that and lost as well. We didn't like plans. From this perspective, "we don't like the plan thing" is not the best use of time.

In speaking of this time period, we're waiting for the as applied challenges to come up that might come in from huge write-in groups, there is an opportunity now to shape how it gets applied on the ground. A lot of the language in the plans [is missing definition], despite the fact that I don't remember how many pages the glossary is now. It seems like they missed a lot of the terms we actually need defined to figure out how to apply them on the ground and make them work.

[T]hose are still going to be the kinds of decisions that most people in this room will operate in the space on federal lands, know how to work with. And they're going to be dealing with the same folks at the BLM field offices and district offices and state offices. So I think the way that the plans actually come to be applied can be defined in a way that does work well. [T]here's certainly consideration from a conservation perspective as well as industry. I think in this time period that's really good use of time. It could be effective, should I say.