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Panel Discussion:

Public Lands – Hot Topics Involving ESA, NEPA and Wilderness Protection:
Have We Seen the End of New Natural Resource Projects in the West?

The Bureau of Land Management in the 21st Century–
New Challenges in a Changing Environment

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ABSTRACT:

In 2010, public lands managers face a new and challenging environment as they seek to balance wilderness preservation, wildlife needs, recreation demands, and renewable and conventional energy development. The environment in which these choices must be made will literally be “new,” as climate change ushers in a period of shrinking water supplies, concerns about greenhouse gas emissions from the burning of fossil fuels, soil erosion, wild fire, and the viability of native plant and animal communities. But, paradoxically, change has been one of the few constants on America’s vast Western land, and BLM, albeit in bunny-hop fashion and sometimes only in response to court order, has moved over the years from a narrow focus on resource exploitation to one which includes wilderness and other types of preservation. Needless to say, pressure on the BLM to manage for long-term ecological sustainability while providing for some level of resource development will be intense. This paper discusses a few of those challenges in the context of climate change, wilderness preservation, and competing demands for energy development.

INTRODUCTION

The title of this panel discussion includes the attention-grabbing question, “Have we seen the end of new natural resource projects in the West?” The answer, of course, is no. And the answer will remain “no” for the foreseeable future.

On the other hand, the answer to the question, “will it be more challenging for energy companies to develop public lands resources?” is “yes.” But the sky is not falling for energy development. First, energy companies have a surplus of oil and gas leases and permits to drill. For example, oil and gas companies now hold leases on over 32.5 million acres of public lands throughout the West that are not in production. Similarly, in FY 2009 BLM issued 4,487 permits to drill for oil and gas, 1,220 of which are not being used.¹

Moreover, land use plans the BLM released in 2008 pursuant to the Federal Land Policy and Management Act (“FLPMA”)² provide that eighty percent of BLM lands in the eastern half of Utah are available for oil and gas development. At the same time, just a small fraction of those lands will be managed to protect characteristics associated with wilderness. For example, in the 1.8 million-acre Moab field office, of the 464,777 acres the BLM itself found to qualify for wilderness designation, a little more than 47,761 acres were given some level of protection from development, roads and off-road vehicle use.³

In short, to borrow from Mark Twain, at this point reports about the death of the energy industry – or other multiple uses for that matter -- on BLM lands are greatly exaggerated.

But the story of BLM land management today is not just about energy development and wilderness preservation. Highway rights-of-way claims which some counties in Utah, Nevada and California assert under an 1866 law commonly known as R.S. 2477 extend for thousands of miles across BLM lands, including lands proposed for wilderness protection. A related problem, the increasing use of off-road vehicles (“ORVs”) and the difficulty in enforcing their use in the backcountry, has become a primary threat to the long-term health and sustainability of the land, not to mention to the future viability of these areas as wilderness.

Despite significant pressure for energy development and motorized use on public lands, a reallocation of public lands uses is underway, slowly but inexorably, as a result of legal challenges, wilderness legislation, new climate policies, and an ever-increasing countervailing demand for land preservation and recreational opportunities. With this in mind, the “hot topics” for public lands today center on climate change, wilderness protection, energy development (including the rise of renewable resources) and motorized use.

¹ See <http://wilderness.org/files/BLM-Oil-Gas-Data-Through-FY2009.pdf>.

² 43 U.S.C. § 1702 (1976) (BLM to develop resource management plans based on the continuing inventories of the resources under its management).

³ A coalition of conservation groups has sued to overturn three of the Utah resource management plans. *Southern Utah Wilderness Alliance v. Allred*, Civ. No. 1:08-CV-02187-RMU (D.D.C. filed Dec. 2008).

CLIMATE CHANGE

Perhaps no other public lands issue will be as important in the coming decades as climate change and the regulatory and management responses it inspires. Once thought of primarily as an air quality issue (and it is certainly that), the climate change problem implicates land management strategies and decisions across the board, from energy development, to wildlife protection, water resource management and wilderness preservation. Both the Obama administration and courts will have a significant impact on how climate change will play out across the West's public lands.

A 2007 report by The Intergovernmental Panel on Climate Change recites a narrative of gripping predictions about climate change and its ecological impacts. These include increased and earlier spring runoff from snowmelt,⁴ earlier bird migration and egg-laying,⁵ poleward and upward shifts in plant and animal species,⁶ a decrease in water availability and runoff in dry regions of 10-30%,⁷ increased storm intensity with greater flood risk,⁸ insect outbreaks, diseases and wildfire with debilitating effects on native vegetation.⁹ These reports follow on, and reiterate, earlier IPCC studies that found that the impacts of climate change could be particularly severe in the kinds of open rangelands typical of the intermountain and southwest regions of the United States.

The U.S. Geologic Survey ("USGS") confirms that the same dramatic impacts, predicted with a reasonable certainty, will occur on much of the West's public lands, including on the Colorado Plateau.¹⁰ In "Impacts of Climate Change on Water and Ecosystems in the Upper Colorado River Basin,"¹¹ the USGS predicts that precipitation will decrease by 15-20%, and that temperatures will increase by up to 4 to 6 degrees Celsius.¹² "By 2050, increasing temperatures alone are predicted to increase evaporation, resulting in average soil moisture conditions in the Southwest being worse than the conditions experienced during any of the mega-droughts of this century,"

⁴ IPCC, 2007: Summary for Policymakers. In: *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, M.L. Parry et al. Eds., Cambridge University Press, Cambridge UK, 7-22, at 8-9 (available at <http://www.ipcc.ch/>). See also Marc Kaufman, *Study: Global Warming Responsible for Western Droughts*, Washington Post, January 31, 2008, at www.washingtonpost.com/wp-dyn/content/article/2008/01/31/AR200813101868_pf.html (scientists predict less snow and more rain in mountains of western U.S., and that dams overwhelmed by sudden runoff will have to release water downstream instead of storing it for agricultural and municipal water supplies); Felicity Barringer, *Lake Mead Could Be Within a Few Years of Going Dry, Study Finds*, New York Times, February 13, 2008, at www.nytimes.com/2008/02/13/us/13mead.html?_r=1&oref=slogin&pagewanted=print (discussing also the oversubscription of Colorado River water and its inability to meet growing demand in the southwestern U.S.).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 11.

⁸ *Id.*

⁹ *Id.* at 14.

¹⁰ The Colorado Plateau includes northern Arizona, southern and eastern Utah, northwestern New Mexico and western Colorado.

¹¹ U.S. Department of the Interior, U.S. Geological Survey (Aug. 2007) (http://www.suwa.org/site/DocServer/USGS_CO_Plateau_Climate.pdf?docID=4101).

¹² *Id.* at 1.

including the Dust Bowl years of 1953-56 or the 1999-2004 drought.¹³ “Increased warming is expected to decrease runoff by up to 30% through the 21st Century.”¹⁴

These changes are already producing, and will continue to produce, concrete, observable changes to the health of public lands on the Plateau, which in turn will result in decreased water availability to both human consumption and support of native plants and wildlife. Noting that existing public lands uses such as grazing, recreation and energy exploration and development already create broad swaths of disturbed surface area where soil stability is reduced, the USGS report explains that a warming environment adds to those existing impacts to decrease further ecosystem resilience to climate change.¹⁵

The Interior Department will be forced by these new realities to change their management strategies. It must provide new tools and strategies to stave off the most dramatic impacts of climate change. Related questions remain: Do land managers have a duty to analyze the effects of climate change on the long-term sustainability of natural and cultural resources, and then to ameliorate those effects to the extent possible? What, exactly, does existing law require? What new laws and administrative policies are necessary to address climate change on public lands?

Most relevant for public land managers is the IPCC’s suggestion that land managers develop and adopt of a mix of strategies, including research and mitigation measures that will reduce the vulnerability of native ecosystems to climate change. The IPCC specifically highlighted the importance of measures such as altered recreational choices and new planning regulations, as well as reducing both loss of natural habitat and deforestation.

Additionally, a U.S. Climate Change Science Program Final Report includes “information on how existing practices could be adjusted, or new strategies developed, to address the effects of climate change on natural resources.”¹⁶ These strategies, which are meant to provide sound mechanisms to increase the resilience of ecological systems to climate change, include:

- Identifying and protecting key ecosystem features;
- Reducing anthropogenic stresses like developments which affect native vegetation and cause erosion;
- Protecting a “portfolio” of several slightly different species or ecosystems, which increases these chances that one or more will be suited to the new climate conditions;
- Protecting more than one example of a particular kind of ecosystem, which increases the chance of survival of that type if one or more others are lost in a catastrophic event;
- Restoring key intact ecosystems with important functions, like wetlands or riparian areas which confer resilience to flooding and provide necessary habitat for most native plants and wildlife;

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 2.

¹⁶ EPA, Global Change Research Program, Science in Action: Building a Scientific Foundation for Sound Environmental Decisions, *Assessment Provides Strategies for Managing Natural Resources in a Changing Climate: Findings of the U.S. Climate Change Science Program Synthesis and Assessment Product 4.4* at 2, available at http://www.epa.gov/ord/npd/pdfs/gcrp-factsheet_SAP-4-4.pdf.

- Identifying refugia where key species and ecosystem types have the highest likelihood of survival of climate change.¹⁷

Importantly, the first option, reducing human-caused stressors, was judged to be the most effective strategy for increasing resilience to climate change among the three types of terrestrial ecosystems studied in the report.¹⁸

The extent to which climate change will become a part of public lands management will play out in the courts, in Congress, and within the Department of Interior as it engages in long-term land use planning and in the development of strategies which may well reflect the recommendations listed above. Specific examples of how climate change is increasingly part of the public lands discussion follow.

- The Endangered Species Act and Climate Change:

In the absence of clear direction from the Department of Interior or Congress on how public lands will be managed in an era of climate stress, courts are increasingly faced with ESA cases based on climate change and its impact on wildlife. Three cases demonstrate the impact of this litigation strategy:

1. In 2007, the U.S. District Court for the Eastern District of California handed down an opinion that rocked California water managers. In *NRDC v. Kempthorne*,¹⁹ the court held that the U.S. Fish and Wildlife Service “acted arbitrarily and capriciously by failing to address the issue of climate change in the biological opinion. This absence of *any* discussion in the biological opinion of how to deal with any climate change is a failure to analyze a potentially ‘important aspect of the problem.’”
2. In *Center for Biological Diversity v. Lubchenco*²⁰, the court discussed the plaintiffs’ petition to list the ribbon seal as endangered in the context of a motion to transfer the case to Alaska. The conservation groups argued in their petition that the seal deserved protection under the ESA because global warming was shrinking the sea ice on which the seal depended for survival.
3. In 2008, in response to a petition filed by a conservation group, the Department of Interior listed the polar bear as threatened and designated critical habitat under the Endangered Species Act. One of the bases for the listing was the loss of Arctic sea ice critical to the bears’ survival. The Department attributed the sea ice loss to global climate change. *See* Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout its Range, 73 Fed. Reg. 28212-01, 2008 WL 2047801 (May 15, 2008); Designation of Critical Habitat for Polar Bear, 74

¹⁷ U.S. Climate Change Science Program Final Report, Synthesis and Assessment Product 4.4, Preliminary Review of Adaptation Options for Climate-Sensitive Ecosystems and Resources 9-18 to -21 (June 2008), available at http://www.epa.gov/ord/npd/pdfs/gcrp-factsheet_SAP-4-4.pdf.

¹⁸ *Id.* at 9-61.

¹⁹ 506 F. Supp. 2d 322, 367-70 (E.D. Cal. 2007); *see also Pacific Coast Fed. Of Fishermen’s Assoc. v. Gutierrez*, 606 F.Supp.2d 1122 (E.D. Cal. 2008) (denying conservationists’ summary judgment motion seeking a new biological opinion with global warming analysis, but federal defendant had already agreed to prepare that analysis).

²⁰ 2009 WL 4545169 (N.D. Cal. 2009).

Fed. Reg. 56058-01, 2009 WL 3459450 (Oct. 29, 2009); *Center for Biological Diversity v. Kempthorne*, 2008 WL 1902703 (N.D. Cal. April 28, 2008) (ordering U.S. Fish and Wildlife Service to issue final determination on conservation group's listing petition for polar bear).

- Federal Obligations to Consider the Impacts of Climate Change under NEPA:

There is a strong argument that federal agencies must analyze under NEPA how federal actions contribute to climate change, and how proposed activities on federal lands add to the cumulative effects of climate change. Indeed, federal agencies are increasingly conducting such analyses.

Two specific NEPA provisions provide thematically important context for the analysis of predicted changes on public lands: 1) 42 U.S.C. § 4332(C)(iv), which requires a detailed statement regarding “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity;” and 2) 42 U.S.C. § 4332(C)(v), which requires a detailed statement regarding “any irreversible and irretrievable commitment of resources which would be involved in the proposed action should it be implemented.” The complementary concepts of “long-term productivity” and “irreversible and irretrievable commitment of resources” speak to a legislative intent to require agencies to manage resources for future conditions, and to ensure that information is fully developed before the agency forecloses management, or conservation, options.

Lack of conclusive, comprehensive evidence about the impact of climate change does not absolve the federal decision from its NEPA obligations; instead the federal agency must affirmatively state that existing evidence is inconclusive and summarize the conclusions of that evidence. If the information is essential to making a reasoned choice among alternatives, and the cost of obtaining the information is not exorbitant, the agency must provide that information in an EIS. Even where the cost is exorbitant, the agency has the obligation to explain the relevance of the incomplete or missing information, a summary of existing credible scientific data, and the agency’s “evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.”²¹

A number of recent cases have begun to lay the groundwork for requiring NEPA analysis of climate-related impacts:

1. In *Center for Biological Diversity v. National Highway Traffic Safety Admin.*,²² the court remanded the agency’s fuel standard regulation because it did “not evaluate the ‘incremental impact’ that [stated] emissions will have on climate change or on the environment more generally in light of other past, present and reasonably foreseeable actions” such as other fuel standards. Importantly, the court held that the agency’s decision setting fuel standards was the “proximate cause” of greenhouse gas emissions, and triggered an obligation under NEPA to assess climate impacts, even if the agency’s decision resulted in an “individually minor” impact.²³

²¹ 42 C.F.R. § 1502.22.

²² 538 F.3d 1172, 1216 (9th Cir. 2008) (holding a federal agency’s environmental analysis of the impact of new fuel standards violated NEPA by failing to consider climate change).

²³ *Id.* at 1217–18.

2. In *Mid States Coal. for Progress v. Surface Transp. Bd.*,²⁴ the Eighth Circuit held that increased coal consumption and global warming emissions were reasonably foreseeable effects of railroad expansion to transport coal and should have been analyzed under NEPA.

3. In *Border Power Plant Working Group v. Dep't of Energy*²⁵, the court remanded an environmental assessment for analysis of the environmental impact of greenhouse gas emissions associated with a proposed power plant.

4. In *Conservation Northwest v. Rey*,²⁶ the court upheld the Forest Service's analysis of the impacts of a management plan on global warming, but also noted the "undoubtedly pressing need to account for climate change" in an agency's NEPA analysis.

5. In *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701 (9th Cir. 2009), the Court upheld an environmental assessment that listed the effects of climate change on polar bears and Pacific walruses in areas with oil and gas development.

- Administrative Responses

Since its issuance on January 19, 2001, Interior Department Secretarial Order 3226 has required agencies to "consider and analyze potential climate change impacts" when undertaking long-range planning exercises, including management plans and other activities developed for public lands. Unfortunately, the order has been routinely ignored by federal agencies, in particular the BLM, which in 2008 released six land use plans in Utah with little attention to climate change.

Secretary Kempthorne amended the order on January 16, 2009, but still required an analysis of climate change for certain land management activities. Secretary Salazar ultimately reinstated Secretarial Order 3226 and reiterated the importance of analyzing the impacts of climate change when undertaking land management responsibilities. Secretarial Order 3289 (Sept. 14, 2009).

Further, Secretarial Order 3285 (March 11, 2009) elevated the development of renewable energy resources to a top departmental priority and established the Task Force on Energy and Climate.

In contrast to the BLM, the U.S. Fish and Wildlife Service has proactively embraced its responsibilities to include climate considerations in its management strategies. The Service released its draft strategic plan for climate change in September 2009, which outlines new adaptation measures that the Service would implement to increase the chance of species survival as the climate changes.²⁷

So far, so good. But the Department has far to go before it can be confident that public lands, especially BLM lands, will be well managed in an era of climate change. No comprehensive or site-specific planning has yet occurred on BLM lands, and BLM has not implemented specific actions like those recommended above. This will, almost certainly, change. The question is when.

²⁴ 345 F.3d 520 (8th Cir. 2003).

²⁵ 260 F.Supp.2d 997, 1028-29 (S.D. Cal. 2003).

²⁶ ---F.Supp.2d ---, 2009 WL 4897727 (W.D. Wash. 2009)

²⁷ See http://www.fws.gov/home/climatechange/strategic_plan.html.

- Legislative Proposals

Bills now pending in Congress have embraced the notion that climate change is a relevant and necessary consideration for land use planning and management. For example, the American Clean Energy and Security Act, H.R. 2454,²⁸ is well-known for its proposed “cap and trade” system to control greenhouse gas emissions, but it also would establish a new scientific panel to address how to enhance the ability of natural resources to adapt to climate change and requires federal agencies to develop natural resource adaptation plans.

ENERGY DEVELOPMENT: A “FRESH LOOK”²⁹

In addition to elevating the development of renewable resources to a priority focus within the Department, Interior Secretary Salazar announced new reforms in the oil and gas leasing program on January 6, 2010. Many of these new reforms grew out of the Department’s review of the oil and gas leasing program in Utah³⁰ and the facts ultimately leading to a U.S. District Court’s injunction against 77 Utah leases in January 2009. In brief, the new reforms include:

- Comprehensive interdisciplinary reviews that consider site-specific conditions for each lease sale;
- Greater public involvement;
- An emphasis in leasing in areas that are already developed;
- Reduced reliance on categorical exclusions for NEPA analysis; and
- The creation of an Energy Reform Team that will identify and oversee implementation of energy reforms.

All signs are that the Department of Interior is taking a much more active role in ensuring that energy development is treated as but one of a number of federal resources, which include wilderness, recreation, water resources, wildlife and others. Gone for now is a single-faceted management philosophy in which oil and development is the BLM’s “No. 1 priority,” to use the words of an early Bush administration memo to the BLM.

That is not to say that energy policy swings on a pendulum between all-or-nothing winners or losers depending on the occupant of the White House. Keep in mind that even if BLM protected all the wilderness quality lands it identified in its 2008 plans, a full 86% of the proposed oil and gas wells could still be drilled under BLM’s 2008 land use plans (although the proposed reforms may modify that). Thus, the controversy centers primarily on the relatively few oil and gas proposals that intrude on wilderness-quality lands – the most scenic and ecologically sensitive in Utah.

²⁸ See H.R. 2454, 111 Cong. (2009).

²⁹ “We need a fresh look – from inside the federal government and from outside – at how we can better manage Americans’ energy resources.” Comment by Secretary of Interior Ken Salazar, Dep’t of Interior Press Release announcing new reforms (January 6, 2010), <http://www.doi.gov/news/pressreleases/Secretary-Salazar-Launches-Onshore-Oil-and-Gas-Leasing-Reforms.cfm>

³⁰ See

http://www.eenews.net/public/25/13728/features/documents/2009/10/08/document_pm_01.pdf.

WILDERNESS ISSUES

Wilderness issues will likely revolve around not only the potential congressional designation of new wilderness areas under the Wilderness Act of 1964, but also how to manage lands that qualify for wilderness designation but await congressional action. Debates concerning what, if any, development is appropriate for the latter category will continue to preoccupy all stakeholders.

- Background summary, with Utah BLM case study:

In 1976, Congress extended wilderness eligibility to primarily desert landscapes managed by the BLM in the Federal Land Policy and Management Act.³¹ To facilitate Congress' evaluation and eventual designation of wilderness on BLM lands, FLPMA requires the BLM to inventory and identify all of the lands under its management that remained eligible for wilderness protection.³² The BLM began this process in the late 1970s, ultimately concluding that of the nearly 24 million acres of BLM lands in Utah, only 3.2 million qualified as wilderness;³³ these lands were hereafter known as wilderness study areas ("WSAs").

In the 1980s and 1990s, national and regional conservation organizations conducted their own wilderness inventory of Utah BLM lands and concluded that approximately nine million acres of BLM lands still met the wilderness criteria. These lands are included in America's Redrock Wilderness Act, now pending in the U.S. Congress.

In 1996, the Interior Department initiated another inventory to ascertain whether BLM's earlier inventories improperly overlooked wilderness-eligible lands.³⁴ Two years later, reviewers found that BLM wrongfully omitted 2.6 million acres of lands that possessed wilderness character. Since that time, BLM has identified additional areas as having wilderness character in the course of routine project approvals and land use planning.³⁵ In total, between the initial wilderness study areas, administratively added wilderness study areas, the 1996 inventory and the latter planning inventories, BLM has identified approximately seven million acres in Utah as having wilderness character.

- The No More Wilderness Policy:

Meanwhile, in March of 2003, then-Interior Secretary Gale Norton and then-Governor Michael Leavitt entered into a settlement agreement and filed a proposed consent decree in the remnant of a case initially filed to halt the 2006 wilderness inventory.³⁶ In that agreement, Secretary Norton renounced the Department's authority to identify or manage as WSAs any lands found to have

³¹ 43 U.S.C. Section 1700 *et seq.*

³² 43 U.S.C. § 1701.

³³ These lands have been managed since as wilderness study areas, whose pristine character must be protected from all "impairment" until Congress either designates them wilderness or releases them from their WSA status. 43 U.S.C. Section 603(c).

³⁴ *See Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998) (detailing history of the Utah wilderness review process).

³⁵ *Southern Utah Wilderness Alliance v. Norton*, 457 F.Supp.2d 1253 (D. Utah 2006) (requiring BLM to review wilderness character of lands proposed for leasing).

³⁶ *Id.*

wilderness character. In doing so, the Department broke with long-standing precedent by which the BLM had administratively designated and protected WSAs. The Department further agreed to expunge any mention of WSA designation from the ongoing Utah BLM lands. The settlement was controversial, and conservationists quickly challenged it in court. Ultimately the Tenth Circuit Court of Appeals ruled that the appeal was not ripe for review.³⁷

- BLM's 2008 Resource Management Plans

After the 2003 Norton-Leavitt settlement, BLM continued to develop land use plans which included no reference to WSAs. The BLM did continue to inventory lands for their wilderness character – it just did not extend WSA status to those lands, and included only a small fraction of the eligible lands in other semi-protective categories. As noted above, BLM's plan for the Moab Field Office only protected about ten percent of wilderness-quality lands from roads and development.

Conservation groups have challenged the BLM's application of the 2003 settlement agreement in *Southern Utah Wilderness Alliance v. Allred*. To date, the Department of Interior has not rescinded the Norton-Leavitt settlement, but has stated that new wilderness guidance will be issued.³⁸ Because the settlement agreement left millions of acres of scenic landscapes across the West vulnerable to development, it will continue to be a “hot topic” for public lands advocates. Reversal of the settlement may also require the remand of BLM's 2008 land use plans for further decisions about whether to protect qualifying lands as WSAs.

CONCLUSION

Management of BLM lands will for the foreseeable future revolve around issues of energy development (both renewable and conventional), climate and wilderness. These are not the only issues, however. Conflicts over road access and “improvement” across federal public lands, as well as related off-road vehicle use, will also be a significant driver of new policies and will continue to spur litigation.

BLM lands, once the lands that no one -- other than the hardiest of ranchers and prospectors -- wanted, are a well-kept secret no more. They are now valued for their breath-taking beauty and opportunities for solitude as much as they are for the energy resources they hold. And in the right mix, both resource extraction and preservation are legitimate purposes for these lands. The struggle to find that mix, while costly and filled with emotion, is a part of a maturation process in which preservation has belatedly, but finally, found its voice and its constituency.

³⁷ *Utah v. Dep't of Interior*, 535 F.3d 1184, 1192 (10th Cir. 2008).

³⁸ See n. 31 *supra*.