Department of the Interior

Initiate Reorganization of the Department of the Interior

RECOMMENDATION

The budget of the Department of the Interior (DOI) is small relative to total federal spending, but the DOI's management of a vast portion of federal lands and regulatory actions, particularly under the Endangered Species Act (ESA), have enormous consequences, including the erosion of property rights and impediments to development of energy and other natural resources, as well as tremendous economic costs. Extensive reforms are needed to return the agency to a proper limited role. The following changes would constitute incremental progress toward that goal:

- Correct abusive national monument designations;
- Use performance standards or consolidation to address chronic maintenance backlogs;
- Dispose of excess Bureau of Land Management (BLM) lands;
- Eliminate the unnecessary National Landscape Conservation System;
- Make DOI landholdings and federal regulatory reach transparent;
- Make proposed settlement agreements transparent;
- Require agency science-based decisions to comport with the Information Quality Act;
- Control grants directly through the office of the Secretary of the Interior;
- Aggressively implement Executive Order 13777; and
- Improve implementation of the Endangered Species Act at the administrative level.

RATIONALE

Among its many and expanding missions, the DOI is responsible for the stewardship of the majority of federal lands. In order of size, these include lands under the BLM, the U.S. Fish and Wildlife Service (USFWS), and the National Park Service (NPS), as well as the Outer Continental Shelf. All told this is over 480 million acres[1]—almost the size of Mexico[2]—excluding some 1.7 billion acres of the Outer Continental Shelf.[3]

While these lands occur disproportionally in the western U.S., the long-term management trend has been to centralize control in Washington. The federal estate suffers from chronic maintenance backlogs, overregulation, bureaucratization, politicization, and other forms of mismanagement. Over the long run, the size of the federal estate needs to be reduced to those lands that uniquely merit federal ownership. For example, more than 85 percent of Nevada cannot be so special as to justify federal ownership.[4] Many federal lands are a result of historical legacy rather than a rational choice that was driven by some larger policy objective. As a first step, the Interior Secretary should not initiate actions that increase the total acreage held by any DOI agency. With a no-net-growth policy in place, potential avenues for responsible devolution of management and ownership of excess lands should be explored. A number of other initial steps can be taken to more responsibly manage DOI lands; address wasteful grants, stifling regulations, lawsuit abuse, and poor scientific standards; and improve implementation of the Endangered Species Act at the administrative level, although correcting the law's more fundamental flaws will require substantial legislative change.

Correct Abusive National Monument Designations. The Interior Secretary should rescind some national monument designations and reduce others in size. Opponents of rescinding or revising past designations have relied on a 1938 Attorney General's opinion that asserts that such changes cannot be made under the Antiquities Act. This assertion is baseless, as numerous national monuments have been reduced substantially.[5] Additionally, a thorough legal analysis has discredited the arguments put forth in the 1938 opinion[6] and provoked only ineffectual rebuttals.[7]

National monuments are to be designated on "lands owned or controlled" by the federal government, yet several of the largest monuments are ocean areas including two jointly administered by the USFWS and National Oceanic and Atmospheric Administration.[8] One, Northeast Canyons and Seamounts Marine National Monument, is 4,913 square miles[9] and the

subject of a lawsuit brought by a coalition of New England fishermen because of the harm the designation poses to commercial fishing.[10] This monument should be rescinded. National monuments are also supposed to "be confined to the smallest area compatible with the proper care and management of the objects to be protected."[11] Numerous Administrations have abused the act, essentially establishing large parks by fiat rather than through Congress. Bears Ears National Monument is one whose size should be substantially reduced.

The White House should work with Congress to correct the shortcomings of the Antiquities Act. At a minimum, no designations should be made over the objection of the governor of the state in which a national monument would be established. Additionally, national monument designations should be provisional, requiring ratification by Congress within a year to remain in effect.

USE PERFORMANCE STANDARDS OR CONSOLIDATION TO ADDRESS CHRONIC MAINTENANCE BACKLOGS.

Deferred maintenance of federal land and assets is a chronic problem. The NPS reported $11.3 billion in deferred maintenance in 2016.[12] The USWS and BLM also have substantial backlogs.[13] The Secretary should aggressively address backlogs by incorporating appropriate performance measures into consideration for bonuses, step increases, or promotions for appropriate decision makers. Alternatively, the Secretary could remove the maintenance budget from all or specific management units with particularly large or chronic maintenance issues and administer maintenance directly through the Secretary's office.

Dispose of Excess BLM Lands. The BLM incorporates into land management plans lists of land that may be suitable for disposal.[14] Given the age and accuracy of plans varies—lands so identified should be reviewed and to the maximum extent possible those lands that can be sold, transferred, or otherwise removed from BLM's roles should be. A reauthorized Federal Lands Transaction Facilitation Act should provide that funds generated from land sales are available to address maintenance backlogs.

Eliminate the National Landscape Conservation System (NCLS). The NLCS is an unnecessary program through which the BLM bundles lands for promotional purposes, and which nudges the agency into becoming another version of the NPS. All NLCS lands already have special designations and management regimes, including national monuments, wilderness areas, wild and scenic rivers, and national scenic and historic trails.[15] The White House should seek elimination of this program.

Make DOI Landholdings and Regulatory Reach Transparent. The DOI's geographic information systems (GIS) data on federal landholdings, including easements, land management, and special designations that are both regulatory and non-regulatory, should be aggregated and presented prominently in a way that the non-specialist can access this data and get an accurate picture through an online searchable map.[16] A number of different online mapping tools are available on DOI websites, such as the U.S. Geological Survey's map of ownership patterns,[17] the USFWS's designated critical habitat map[18] and National Wetlands Inventory,[19] and the NPS's national heritage area map.[20] Some designations (critical habitat and wetlands) include lands not owned by the federal government but show areas that are subject to federal environmental regulation.

Make Proposed Settlement Agreements Transparent. The USFWS has a history of entering into settlement agreements with extreme environmental groups. For example, more than half of the ESA lawsuits involving statutory timelines were brought by just two organizations—Wild Earth Guardians and the Center for Biological Diversity.[21] Respectively, 83 percent and 93 percent of these suits were settled by the DOI. Such settlements can have broad legal and regulatory consequences. The Secretary should make it departmental practice that no settlement agreement is signed until the proposed agreement has been published, either in the *Federal Register* or prominently posted on the department's website, after the public has had 60 days to comment.

Require Agency Science-Based Decisions to Comport with the Information Quality Act. The Secretary should ensure that the best science is being used by requiring as a matter of policy that all decisions ostensibly based on science comply with the Information Quality Act (IQA). This would ensure that data underlying agency actions are generally available to the public, and that failure to comply with IQA guidelines would be arbitrary and capricious. DOI agencies have a history of making purportedly scientific decisions for which the underlying data are essentially secret, making substantial reproduction by qualified third parties impossible.[22]

Control Grants Directly Through the Office of the Secretary. A large and wide variety of grants are administered by the many DOI bureaus.[23] Determining the nature and extent of the DOI's grants will

be both complicated and time consuming. As a first step, to the degree allowed by law, secretarial approval should be required before any grant is issued, and unnecessary grant programs should be terminated.

National heritage areas (NHAs) were originally anticipated to receive seed money only and no further federal funding. In practice, once designated by Congress, appropriations to NHAs continue to flow after the initial authorizations expire. Administrations that favored the program and Administrations that opposed the program have proposed eliminating funding, knowing that Congress will restore it. The NPS has furthered perpetual funding with implausible analysis of NHA economic benefits. For example, advocates for funding of five Pennsylvania NHAs assert that NPS studies show that funding has resulted in nearly $1 billion in economic activity, more than 11,000 jobs, and nearly $70 million in local tax revenues.[24] This would be an amazing rate of return given that the FY 2016 appropriation to nearly 50 NHAs was $19.8 million.[25] If NHAs were truly this valuable, the NPS should be able to raise substantial revenues from agreements for use of its logo and consultation reimbursements. As if to provide an illustration of how unnecessary this program is, the entirety of Tennessee was designated the Tennessee Civil War National Heritage Area.

The NPS should focus on its core mission of managing some 59 national parks and 358 other units, as well as its massive maintenance backlog.[26] This program is essentially tourism promotion, and the White House should seek elimination of federal funding for NHAs, if not the program itself.

Climate research programs have spread throughout the federal bureaucracy, and the DOI is no exception. The DOI's Cooperative Landscape Conservation and Tribal Climate Resilience programs are unnecessary and should be eliminated.

Aggressively Implement Executive Order 13777. Executive Order 13777 requires the appointment of regulatory reform officers and regulatory reform task forces within each federal agency to advance a deregulatory agenda.[27] Regulatory reform officers should establish and maintain regular contact with counterparts at agencies with overlapping or coinciding regulatory programs. For the DOI, regulatory reform officers and task forces should have regular lines of communication and cooperate with their counterparts at the Department of Agriculture and the U.S. Forest Service, the Environmental Protection Agency, the Department of Defense and the U.S. Army Corps of Engineers, the Department of Commerce and the National Marine Fisheries Service, and the Department of Transportation. Regular exchange of information will improve the likelihood of successful deregulatory efforts.

Improve the Endangered Species Act at the Administrative Level. Under the ESA, the Secretary of the Interior is vested with authorities to conserve endangered and threatened species. One such responsibility is to ensure that federal agencies' discretionary actions do not jeopardize endangered or threatened species or adversely modify their critical habitat.[28] Rather than delegate the authority for these often-significant decisions to low-level field biologists, the determinations should be made by the Secretary with the advice of the Director of the U.S. Fish and Wildlife Service as necessary. Additionally, rather than depending on USWFS staff to assess the impact of agency actions in biological assessments or biological opinions, the Secretary could require the agencies undertaking the actions to provide these reviews, upon which the Secretary's determination would then be based.

By a blanket regulation,[29] the USFWS applied the more stringent protections provided for endangered species to all threatened species, directly subverting the system established by the ESA. The Secretary should replace this regulation with one that ensures that a prohibition against the "take"[30] of threatened species is applied to individual species by promulgation of a unique 4(d) rule for the species. Such rules should only be promulgated when clearly needed and supported with data.

As a matter of policy, prior to reintroducing endangered or threatened species into any state, the Secretary should require the approval of the governor of the affected state.

ADDITIONAL READING

- Robert Gordon and Diane Katz, "Environmental Policy Guide: 167 Recommendations for Environmental Policy Reform," The Heritage Foundation, 2015.
- The Heritage Foundation, "Blueprint for Reform: A Comprehensive Policy Agenda for a New Administration in 2017."
- The Heritage Foundation, "Environmental Conservation: Eight Principles of the American Conservation Ethic," 2012.
- Diane Katz, "An Environmental Policy Primer for the Next President," Heritage *Backgrounder* No. 3079, December 14, 2015.

ENDNOTES

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2. Central Intelligence Agency, World Factbook, "Country Comparison: Area," https://www.cia.gov/library/publications/the-world-factbook/rankorder/2147rank.html (accessed May 25, 2017).
3. The Heritage Foundation, "Environmental Conservation: Eight Principles of the American Conservation Ethic," 2012, https://www.scribd.com/document/218460828/Environmental-Conservation-Full-Book1.
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5. There is a history of substantial reductions to national monuments on both a percentage basis, almost 90 percent in one case, and, in terms of gross acreage, another national monument reduced by over 300,000 acres. National Park Service, "Antiquities Act 1906–2006: Monuments List," https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (accessed June 2, 2017).
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8. Antiquities Act of 1906, Section 2.
9. National Park Service, "Antiquities Act 1906–2006: Monuments List."
10. News release, "New England Fishermen Challenge Obama's Marine National Monument," Pacific Legal Foundation, March 7, 2017, https://www.pacificlegal.org/release-3-7-17-massachusetts-lobstermen-1-1536 (accessed June 2, 2017).
11. Antiquities Act of 1906, Section 2.
12. National Park Service, "Deferred Maintenance Reports," https://www.nps.gov/subjects/plandesignconstruct/defermain.htm (accessed June 2, 2017).
13. Congressional Research Service, "Deferred Maintenance of Federal Land Management Agencies: FY2005–FY2014," April 21, 2015, https://naturalresources.house.gov/uploadedfiles/deferredmaintenance.pdf (accessed June 2, 2017).
14. Bureau of Land Management, "Lands Potentially Available for Disposal," https://www.blm.gov/programs/planning-and-nepa/planning-101/lands-potentially-for-disposal (accessed June 2, 2017).
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20. National Park Service, "National Heritage Areas," https://www.nps.gov/maps/full.html?mapId=01a03739-ab0c-40eb-bc3d-6791d3bb67fa (accessed June 2, 2017).
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27. News release, "Executive Order 13777, Enforcing the Regulatory Reform Agenda," The White House, February 24, 2017, https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda (accessed June 6, 2017).
28. Endangered Species Act, Section 7.
29. 50 C.F.R. § 17.31. Prohibitions. "U.S. Fish and Wildlife Service, Protection for Threatened Species of Wildlife," Federal Register Vol. 43 (April 28, 1978), 1818. For a discussion, see Johnathan Wood, "Take it to the Limit: The Illegal Prohibiting of Take and Threatened Species under the Endangered Species Act," Pace Environmental Law Review, 2015, https://www.animallaw.info/article/take-it-limit-illegal-regulation-prohibiting-take-any-threatened-species-under-endangered (accessed June 6, 2017).
30. Endangered Species Act, Section 9. Under the ESA, to harm an endangered species, which is called to "take," is prohibited.