

**THE IMPOSITION OF NEW
REGULATIONS THROUGH THE
PRESIDENT'S MEMORANDUM ON
MITIGATION**

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND
INVESTIGATIONS

OF THE

COMMITTEE ON NATURAL RESOURCES

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

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**OVERSIGHT HEARING ON THE IMPOSITION
OF NEW REGULATIONS THROUGH THE
PRESIDENT'S MEMORANDUM ON
MITIGATION**

**Wednesday, February 24, 2016
U.S. House of Representatives
Subcommittee on Oversight and Investigations
Committee on Natural Resources
Washington, DC**

The subcommittee met, pursuant to notice, at 2:06 p.m., in room 1334, Longworth House Office Building, Hon. Louie Gohmert [Chairman of the Subcommittee] presiding.

Present: Representatives Gohmert, Labrador, Westerman, Hice, LaHood, Bishop; Dingell, and Polis.

Mr. GOHMERT. This hearing will come to order. I would like to start by thanking our witnesses for being here to answer questions on the President's Memorandum entitled, "Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment."

**STATEMENT OF THE HON. LOUIE GOHMERT, A
REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS**

Mr. GOHMERT. As we all know, this President has not been shy with his use of, as he says, his telephone and his pen. His liberal use of those implements, and his willingness to play fast and loose with executive authority, necessitates a close inspection of his policies made outside the legislative process.

In this particular case, the President issued a memo directing the Departments of Defense, Interior, Agriculture, the EPA, the National Oceanic and Atmospheric Administration, and all agencies within them to develop a "clear and consistent approach" to mitigate the impacts of the projects they approve. Such a goal is not particularly troubling at all; but I believe we have broad consensus that when an impact is made to our natural resources, the party responsible has the obligation to reclaim the site of development in a conscientious manner.

However, the Administration has not shown much, if any, desire to actually develop our resources. We have made tremendous strides in the production of energy in the past decade, not because of this President, but in spite of his policies, and, most importantly, the blessing of viable energy options on state and private land.

At the earliest moments of this Administration, we were blindsided with the cancellation of leases important to the sustainability of rural communities, a number of which are in my district. Shortly thereafter, we saw a 20-year moratorium on the development of some of this Nation's highest grade uranium, when all of the science, and some might even say a consensus, said it was safe to

produce. Political pressure won; and, yet again, the country and rural communities lost out.

These are just two examples of a pattern that has brought us here today with less than a year remaining in this president's no-energy policy. It isn't to say I am suspicious when this Administration says they have a new way to increase the efficiency of permitting and development, but I honestly have no reason to take them at face value. It is too bad that our instinctual reaction is to look for ulterior motives; but after 7 years of disappointment, disingenuity, and failure, it is warranted.

Today, we have invited three witnesses from the Administration. Not only are we permitting them to sit on their own Federal panel, apart from non-Federal witnesses, as they consistently request, but they are the only witnesses.

It is important to note that the regulations needed to carry out the policies of this Memorandum are currently being written, but it is fair for us to ask in which direction they are headed and how the policies will be implemented. That being the case, we look forward to hearing from our constituents as these new policies become public in the coming months, to see if what is produced is consistent with what this qualified panel explains.

I would like to see policies that promote efficient development of our natural resources and provide for their appropriate mitigation, but what this Congress cannot accept is another unilateral expansion of the executive branch and the influence of land managers outside their own fiefdoms.

[The prepared statement of Mr. Gohmert follows:]

PREPARED STATEMENT OF THE HON. LOUIE GOHMERT, CHAIRMAN, SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS

I'd like to start by thanking our witnesses for being here to answer questions on the President's Memo entitled "Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment." As we all know, this President has not been shy with his use of, as he puts, "the telephone and the pen." His liberal use of those implements, and his willingness to play fast and loose with executive authority necessitates a close inspection of his policies made outside of the legislative process.

In this particular case, the President issued a memo directing the Departments of Defense, the Interior, Agriculture, the EPA, the National Oceanic and Atmospheric Administration; and all agencies within them to develop a "clear and consistent approach" to mitigate the impacts of the projects they approve.

Such a goal isn't particularly troubling. I believe we have broad consensus that, when an impact is made to our natural resources, the party responsible has the obligation to reclaim the site of development in a conscientious manner.

However, this Administration hasn't shown much, if any, desire to actually develop our resources. We have made tremendous strides in the production of energy in the past decade; not *because of* this President, but *in spite of* his policies, and, most importantly, the blessing of viable options on state and private land.

At the earliest moments of this Administration, we were blind-sided with the cancellation of leases important to the sustainability of rural communities. Shortly thereafter, we saw a 20-year moratorium on the development of some of this Nation's highest grade uranium when all of the science, and some may even say a consensus, said it was safe to produce. Political pressure won; and, yet again, the country and rural communities lost. These are just two examples of a pattern that has brought us here today with less than a year remaining in this president's no-energy policy.

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for ulterior motives; but, after 7 years of disappointment and failure, it is warranted.

Today, we have invited three witnesses from the Administration. Not only are we permitting them to sit on their own Federal panel, apart from non-Federal witnesses as they consistently demand; but they are the only witnesses. It's important to note that the regulations needed to carry out the policies of this Memorandum are currently being written, but it is fair for us to ask in which direction they are headed and how the policies will be implemented. That being the case, we look forward to hearing from our constituents as these new policies become public in the coming months to see if what is produced is consistent with what this qualified panel explains.

I'd like to see policies that promote efficient development of our natural resources and provide for their appropriate mitigation, but what this Congress cannot accept is another attempt to increase the unilateral expansion of the executive branch and the influence of land managers outside of their fiefdoms.

I thank the witnesses and look forward to their testimony.

Mr. GOHMERT. So, I look forward to your testimony today.

At this time, I recognize the Ranking Member, Mrs. Dingell, for her opening statement.

STATEMENT OF THE HON. DEBBIE DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mrs. DINGELL. Thank you, Mr. Chairman, and thank you to our witnesses for taking the time to be with us today.

While I am pleased that the subcommittee is holding its first hearing in nearly 7 months—I missed you, Mr. Chairman, I think we have to do more work together—I am somewhat perplexed that we are examining the Presidential Memorandum on Mitigation, a simple restatement of an important conservation tool that has facilitated over \$3 billion in investment in conservation initiatives, and that has had the support of both Democratic and Republican administrations.

My background and experience in the private sector has made me a believer in public-private partnerships, and has taught me the value that mitigation can bring both to businesses and the environment. My business experience also made me a strong believer in corporate responsibility, and I know that we can undertake important development projects while also protecting our environment. During my time at General Motors, we underwent many mitigation projects that ensured our natural resources were protected while development projects moved forward at the same time.

Mitigation is a solution, not a problem. Companies and developers have a choice: they could completely scrap a project because it conflicts with important environmental statutes, or they can offset the impact of their activities. These policies are not just supported by Democrats. They are widely supported by the business community and by Republican administrations.

A quick look at the numbers helps illustrate this support. Today, there are over 140 private endangered species conservation banks and over 1,500 private Clean Water Act banks. The Army Corps of Engineers has found that the use of mitigation banks has led to a more than 50 percent improvement in the timeliness of issuing permits. It is hard to argue with these results.

I have to say that I am somewhat baffled by the perspective offered here on the other side of the aisle today, because I see the

Presidential Memo as a restatement of what we are already doing, but with an emphasis on greater coordination between the Federal agencies. This is something that all of us support, including the business community and previous Republican administrations. Why wouldn't we want to ensure that different Federal agencies have consistent mitigation policies?

I am looking forward to hearing confirmation from our witnesses today that the Presidential Memorandum does not create any new regulations or claim any new statutory authorities, but rather is an attempt to make the process run a bit smoother by identifying a set of consistent standards to improve existing mitigation practices. My colleagues on the Majority side seem to have the opposite impression. I hope today we set the record straight, and we can all maybe agree on the same thing, Mr. Chairman.

Thank you, and I yield back the balance of my time.

[The prepared statement of Mrs. Dingell follows:]

PREPARED STATEMENT OF THE HON. DEBBIE DINGELL, RANKING MEMBER,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

Thank you for the recognition, Chairman Gohmert, and thank our witnesses for taking the time out of your busy schedules to be here today.

While I am pleased that this subcommittee is holding its first hearing in nearly seven months, I am somewhat perplexed that we are examining the Presidential Memorandum on Mitigation—a simple restatement of an important conservation tool that has facilitated over \$3 billion in investment in conservation initiatives and that has had the support of both Democratic and Republican administrations.

My background and experience in the private sector has made me a believer in public-private partnerships and has taught me the value that mitigation can bring both to businesses and the environment. My business experience also made me a strong believer in corporate responsibility, and I know that we can undertake important development projects while also protecting our environment. During my time at General Motors, we underwent many mitigation projects that ensured our natural resources were protected while development projects moved forward at the same time.

Mitigation is a solution, not a problem. Companies and developers have a choice—they could completely scrap a project because it conflicts with important environmental statutes, or they can compensate for their activities. These policies are not just supported by Democrats—they are widely supported by the business community, and I'm telling you that from experience.

A quick look at the numbers helps illustrate this support. Today, there are over 140 private endangered species conservation banks, and over 1,500 private Clean Water Act banks. And the Army Corps of Engineers has found that the use of mitigation banks has led to a more than 50 percent improvement in the timeliness of issuing permits. It is hard to argue with these results.

I have to note that there seems to be a disagreement between the different sides of the aisle today, because I see the Presidential Memo as a restatement of what we're already doing but with an emphasis on greater coordination between Federal agencies—something that the business community also supports. Why wouldn't we want to ensure that different Federal agencies have consistent mitigation policies?

I am looking forward to hearing confirmation from our witnesses today that the Presidential Memorandum does not create any new regulations or claim any new statutory authorities, but rather is an attempt to make the process run a bit smoother by identifying a set of consistent standards to improve existing mitigation practices. My colleagues seem to have the opposite impression and I am looking forward to setting the record straight.

Mr. Chairman, thank you for the courtesy, and I yield back the balance of my time.

Mr. GOHMERT. I thank the Ranking Member. At this time I will now introduce our witnesses.

Ms. Christy Goldfuss is the Managing Director of the White House Council on Environmental Quality; Mr. Michael Bean is the Principal Deputy Assistant Secretary for U.S. Fish, Wildlife, and Parks at the Department of the Interior; and finally, Mr. Brian Ferebee is the Associate Deputy Chief of the National Forest System at the U.S. Forest Service.

Let me remind the witnesses that, under our Committee Rules, oral statements must be limited to 5 minutes, but your entire written statement will appear in the hearing record.

When you begin, the lights on the witness table will turn green. When you have 1 minute remaining, the yellow light will come on. Your time will have expired when the red light comes on, and I would ask you to please conclude your statement at that time.

Your written statement will be made a part of the record, regardless of whether you finished or not.

The Chair now recognizes Ms. Goldfuss for her opening testimony.

**STATEMENT OF CHRISTY GOLDFUSS, MANAGING DIRECTOR,
COUNCIL ON ENVIRONMENTAL QUALITY, THE WHITE HOUSE**

Ms. GOLDFUSS. Chairman Gohmert, Ranking Member Dingell, and members of the subcommittee, thank you for this opportunity to appear before you today to discuss this Administration's work on mitigation. I am really excited to discuss this policy, because we do see this as a good government approach.

We all have a moral obligation to the next generation to leave America's natural resources in better condition than when we inherited them. It is this same obligation that contributes to the strength of our economy and quality of the life we live today. American ingenuity has provided the tools that we need to avoid damage to the most special places in our Nation, and to find new ways to restore areas that have been degraded.

The Presidential Memorandum on Mitigation signed on November 3, 2015, reinforces the important point that development and environmental protection go hand in hand. Mitigation, which is the practice of avoiding, minimizing, and compensating for environmental impacts, and only compensating when all else is avoided, is necessary to protect and preserve our land, water, and wildlife. Specifically, this Memo encourages good government actions and better coordination across Federal agencies to produce faster permitting times and stronger environmental outcomes.

The Memo is not a regulation or new requirement. Rather, it encourages agencies to, within their existing legal authorities, ensure consistent standards and institutionalize best practices that reduce the time and cost required to complete permitting and review.

This Administration is not the first to recognize the importance of advanced planning to compensate for negative impacts to our environment. For more than 45 years, both Democratic and Republican administrations have sought to improve government policies that both encourage development and strengthen environmental outcomes. In fact, some of our country's most significant advancements in restoration and mitigation policies have come from Republican leaders committed to protecting America's natural resources.

Notably, I would like to point to an Earth Day speech in 2004, when President George W. Bush set an ambitious goal to move beyond the “no net loss” policy for wetlands to ensure that, as a whole, wetland areas would, instead, increase.

Beyond the obligations to protect our natural resources for future generations, key pillars of good government are consistency and efficiency. Building on this Administration’s commitment to ensuring efficient permitting, CEQ facilitated an inter-agency dialog to identify best practices with the goal of establishing compatible policies across all agencies that manage natural resources within their existing statutes.

Why the focus? We know Federal mitigation policies produce results. For example, when compensatory mitigation is required, the Army Corps of Engineers has found that the use of mitigation banks leads to a more than 50 percent reduction in permitting times. Yet, more importantly, it is only in very limited circumstances that any restoration or compensation is required, as projects are now better designed to avoid those impacts all together.

As a result of these efforts to build on existing policies and ensure efficiency across the Federal Government, the Memo articulates a common policy through a set of eight core principles to be interpreted and incorporated into agency policies. These principles are all outlined in my written testimony, so I won’t go through them now.

Decades after the first mitigation policies were created, we are continuing to find innovative ways to effectively avoid, minimize, and compensate for damages to natural resources. Building on the President’s commitment to good government and the unprecedented steps that this Administration has taken to protect our land, water, and wildlife for future generations, the Memo provides a more streamlined process and reduced permitting times, while improving environmental outcomes.

Chairman Gohmert, Ranking Member Dingell, and members of the committee and subcommittee, I appreciate the opportunity to testify before you today, and look forward to answering your questions.

[The prepared statement of Ms. Goldfuss follows:]

PREPARED STATEMENT OF CHRISTY GOLDFUSS, MANAGING DIRECTOR OF THE COUNCIL
ON ENVIRONMENTAL QUALITY

Chairman Gohmert, Ranking Member Dingell, and members of the subcommittee, thank you for the opportunity to appear before you today to discuss this Administration’s work on the Presidential Memorandum entitled, “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment,” which I will refer to as the Mitigation PM.

Mitigation—the practice of avoiding, minimizing, and compensating for environmental impacts—and specifically this Presidential Memorandum, are good government actions to coordinate approaches across Federal agencies to produce faster permitting times and stronger environmental outcomes. To develop the Mitigation PM, the White House, through The Council on Environmental Quality (CEQ), coordinated with the resource agencies to pull together commonly accepted, high-level principles for mitigating impacts on natural resources. The result of that effort is the Presidential Memorandum issued on November 3, 2015. The Presidential Memorandum is not a regulation or new requirement. Rather it encourages agencies to, within their legal authorities, have consistent standards for mitigation and to institutionalize best practices that reduce the time and cost required to complete permitting and review.

This Administration is not the first to recognize the importance of advanced planning for mitigating adverse impacts to our environment. For more than 45 years, both Democratic and Republican administrations have sought to improve government policies to encourage development while simultaneously promoting strong environmental outcomes.

MITIGATION AS GOOD GOVERNMENT

This Administration has prioritized streamlining and reducing timelines for permitting across all agencies. The Administration has worked to create more certainty and predictability for businesses, while delivering better social and environmental outcomes in that process. The President's Executive Order No. 13604, "Improving Performance of Federal Permitting and Review of Infrastructure Projects" (EO) issued in March of 2012 and the Presidential Memorandum of August 31, 2011, "Speeding Infrastructure Development through more Efficient and Effective Permitting and Environmental Review" (PM), directed the Council on Environmental Quality (CEQ) to coordinate efforts to improve the performance of Federal agencies in reviewing major projects. In that role, CEQ has been working with agencies to institutionalize best practices that reduce the time and cost required to complete permitting and review.

The interagency dialog convened around infrastructure permitting identified the need for consistent natural resource mitigation policies across agencies to permit projects effectively. Those discussions facilitated much of the development of the Mitigation PM and indicated consensus that the Administration should incorporate long-standing best practices of avoiding, minimizing, and compensating for natural resource damages across the Administration. In particular, the PM presents the opportunity to spur investment in conservation or wetland banking, so that compensatory mitigation is readily accessible to businesses who are permitting projects.

We know Federal mitigation policies produce results. That's why, since 2008, businesses and agencies have proactively sited and designed projects to avoid impacting wetlands. When compensatory mitigation is required, the Army Corps of Engineers has found that the use of mitigation banks leads to more than a 50 percent improvement in permitting speed compared to situations where the permittees plan and implement their own off-site mitigation.

DEVELOPMENT OF THE PRESIDENTIAL MEMORANDUM ON MITIGATION

Building off of the infrastructure permitting conversations, CEQ facilitated a dialog among agencies to develop the best practices across agency authorities and missions, with the goal of establishing compatible mitigation policies. The conversations aimed to harmonize agency efforts by coalescing around a set of common, well-accepted principles, which could be incorporated across different and, at times, conflicting agency policies. By analyzing lessons learned through the implementation of the infrastructure permitting EO and PM and the decades of implementing existing mitigation policies, agencies identified barriers associated with mitigation that, if addressed, could make infrastructure permitting work better. The result of those efforts is the Mitigation PM, which articulates a common policy through a set of core mitigation principles and common terms that will be interpreted and incorporated into agency policies.

Eight of the core principles identified through the process and outlined in the PM are:

- Using a mitigation hierarchy—to avoid, minimize, and only then compensate for any remaining impacts;
- Using large-scale plans, when available, and analysis to assist in identifying the impacts of proposed projects;
- Establishing a net benefit, or at least a no net loss goal for the management of natural resources;
- Giving preference to advance compensation mechanisms;
- Considering the extent to which beneficial environmental outcomes are demonstrably new;
- Increasing public transparency and establishing measurable performance standards;
- Addressing the long-term durability of mitigation measures; and
- Ensuring consistent implementation.

In addition to streamlining policy and producing environmental benefits, an Administration-wide mitigation policy aims to drive the development of private markets to achieve natural resource policy objectives. Where the Administration can incentivize investment in our natural resources and set clear government standards to define when such investments have met their mark, we create the opportunity for the private sector to deliver public benefit potentially better and faster than government. As noted before, in cases where compensatory mitigation is needed and private sector wetland and stream mitigation banks can provide those offsets in advance, permitting can be 50 percent faster.

To encourage investment, the Administration has worked to recognize the risks that investors take and understand the importance of certainty and predictability in private investment. That is why the Mitigation PM's focus on quantifying impacts, giving a preference for mitigation in advance of impacts and producing consistent standards across Federal agencies to create certainty for investors. The private sector's role in providing mitigation has grown under existing policies. Since 2008, the number of mitigation banks providing stream mitigation credits has more than doubled and the number of mitigation banks providing wetland credits has increased by 52 percent. The clarity the Mitigation PM provides will continue to expand opportunities for the private sector and deliver faster permitting for permittees.

BIPARTISAN HISTORY OF MITIGATION

As noted before, mitigation is not a new idea and mitigation policies have been implemented for decades by Republican and Democratic administrations. The concept of mitigation dates back to the 1930s. In 1970, CEQ first defined mitigation in guidance and in 1978, CEQ established a comprehensive definition of mitigation, which continues to be used. In 1981, a wildlife mitigation policy was put in place by the U.S. Fish and Wildlife Service for all non-endangered wildlife and a White House task force directed agencies to take steps to streamline and speed Clean Water Act permitting. The 1982 amendments to the Endangered Species Act allowed non-Federal applicants to impact listed wildlife after, creating Habitat Conservation Plans that avoided, minimized, and offset their impacts with beneficial actions elsewhere.

President George H.W. Bush declared a national goal of 'no net loss' of wetlands and later took steps to build that goal into our Clean Water Act policies, including action taken to establish a definition of 'no net loss.' Wetland mitigation policies continued to evolve through a series of actions under President Clinton.

George W. Bush's administration launched a series of actions associated with wetland, endangered species, and public lands mitigation. An endangered species banking policy—a bank is a site, or suite of sites, where resources (e.g., wetlands, streams, and habitat) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts—was created in 2003. Today there are more than 140 approved endangered species banks.

Under the Clean Water Act in 2008, a joint rule from the Army Corps and EPA, which was directed by Congress, created similar high standards for different types of compensatory mitigation. With this compensatory mitigation policy, the regulations created a clear preference for restoration in advance of any harm to the environment, providing a faster and more effective means of permitting, dramatically expanding the private market of mitigation banks, and helping agencies meet their restoration goals. Today, there are more than 1,500 approved Clean Water Act mitigation bank sites across the country.

CONCLUSION

Decades after the first mitigation policies were created, we are continuing to find innovative ways to effectively avoid, minimize, and compensate for natural resource damages through market-based tools. The Presidential Memorandum continues the good government practice of mitigation by encouraging alignment of agencies' policies to provide a more streamlined process and reduce permitting time, while improving environmental outcomes.

Chairman Gohmert, Ranking Member Dingell, and members of the committee, I appreciate the opportunity to testify before you today and look forward to answering your questions.

QUESTIONS SUBMITTED FOR THE RECORD TO CHRISTY GOLDFUSS, MANAGING
DIRECTOR, COUNCIL ON ENVIRONMENTAL QUALITY

Questions Submitted by Chairman Gohmert

Question 1. The Administration has stated that one goal of this mitigation policy is consistency across agencies regarding mitigation. However, officials from CEQ and the Department of Interior told committee staff during a recent briefing that each agency will define the parameters of mitigation policy in each of their respective regulations. Are you concerned that each agency writing its own parameters or definitions could result in *inconsistent* parameters or definitions?

Answer. No. The Memorandum establishes a set of core principles that should be reflected across the policies of each agency, while still allowing agencies to develop and implement such policies consistent with each agencies individual statutory and regulatory mandates.

Question 2. The Presidential Memorandum directs agencies adhere to the mitigation hierarchy of avoidance, minimization, and then compensation, while also telling agencies to “give preference to advance compensation mechanisms.” Does this signify a re-ordering of the hierarchy that will emphasize compensation over avoidance and minimization?

Answer. No, the Memorandum re-enforces the long standing mitigation hierarchy of avoidance, minimization, and then compensation. The preference for advance compensation mechanisms means a preference for offsetting foreseeable harmful impacts to natural resources in advance, when avoidance and minimization cannot be achieved.

Question 3. The memorandum calls for “large-scale plans and analysis” to inform the identification of areas where development may be appropriate or “where natural resource values are irreplaceable.” Does the Administration’s budget request include this direction and what is the estimated cost?

Answer. The Memorandum does not call for large-scale plans and analysis. Where those plans or analyses are available, it calls for agencies to take advantage of information that could be helpful to avoidance, minimization or compensatory mitigation. We believe agencies often do so already, but sometimes seek to develop new plans rather than relying on existing information, or that Federal agencies do not always look for information in non-Federal resources. In particular, state plans can be valuable in many circumstances and the Memorandum includes language that encourages Federal agencies to look for useful information in such non-Federal plans. A positive example of this is the use of state Greater Sage Grouse plans in informing Bureau of Land Management plans finalized in 2015.

Question 4. The Presidential Memorandum directs agencies to “take advantage of available Federal, state, tribal, local, or non-governmental large-scale plans” to guide decisionmaking for mitigation, including avoidance of irreplaceable natural resources. Could you provide examples of non-governmental organizations that could provide such information?

Answer. There are likely quite a number of such plans. During the development of the Memorandum, CEQ was aware of private sector plans that already exist and contain useful information about mitigation priorities, plans and analyses, but we note that the Presidential Memorandum does not require reliance on any specific resource.

Two examples of a successful existing plan is NiSource Inc.’s large habitat plan, which covers 15,000 miles of pipeline in 14 states and The Nature Conservancy’s “Energy by Design” mapping that has been produced under contract from the Jonah Interagency Mitigation and Reclamation Office in Wyoming. Both examples of plans that appear to contain helpful information that could be used to assist agencies in identifying how proposed projects may impact natural resources, as well as to guide better decisionmaking for mitigation.

Question 5. The Forest Service was given 180 days to develop guidance in response to this Memorandum. Why were they given only 180 days?

Answer. USDA worked closely with the White House and our other interagency partners on the topic of mitigation, starting with the Administration’s work in making infrastructure permitting process faster and more transparent. This commitment was developed with USDA; we are not aware of any concerns they expressed that the timeline was too fast or slow.

Questions Submitted by Ranking Member Dingell

Ms. Goldfuss did not submit responses to the Committee by the appropriate deadline for inclusion in the printed record.

Question 1. Is it the Administration's position that the private sector and public sector should compete to provide compensatory mitigation "products"?

1a. If so, should every provider be held to the same substantive and procedural requirements?

1b. How do you prevent the so-called "race to the bottom" where providers compete on price by cheapening the quality of their products?

Question 2. The Department of Justice and Department of the Interior have filed papers with the Federal district court in Texas describing serious failings in the lesser prairie chicken conservation program. According to the government's filings, no core area "stronghold" habitat has been permanently conserved. None of the connecting corridors between strongholds have been permanently protected.

2a. Is the lesser prairie chicken program a model for what the Administration hopes to do for sage-grouse or other species?

2b. Why is that program so troubled? What needs to be fixed?

Question 3. Is the U.S. taxpayer subsidizing compensatory mitigation for the energy industry, mining companies or others by allowing developers or conservation bankers to get "credit" for mitigation that is paid for by the NRCS or other government programs?

3a. How can you prevent double-counting?

3b. For example, how do you know that the lesser prairie chicken program isn't claiming "credit" for conserving areas that already have protection under NRCS's program in the same areas?

Mr. GOHMERT. Thank you. At this time, the Chair recognizes Mr. Bean for his testimony.

You have 5 minutes.

STATEMENT OF MICHAEL BEAN, PRINCIPAL DEPUTY ASSISTANT SECRETARY, U.S. FISH AND WILDLIFE SERVICE, U.S. DEPARTMENT OF THE INTERIOR

Mr. BEAN. Chairman Gohmert, Ranking Member Dingell, members of the subcommittee, thank you for this opportunity to testify today concerning the Department's policies and practices relating to mitigation and the recent Presidential Memorandum on that subject.

The Department is committed to facilitating responsible economic development, both on public lands and elsewhere, while protecting and conserving both natural and cultural resources. Effective mitigation practices are key to accomplishing those dual goals.

As my written statement describes in more detail, the Department and its constituent agencies—but particularly the Fish and Wildlife Service—have been given congressionally-directed mitigation responsibilities as far back as 1934 with enactment of the Fish and Wildlife Coordination Act. This Act requires that wildlife conservation receive equal consideration with other features of water resource development programs.

The Fish and Wildlife Service issued a formal mitigation policy in 1981. The purpose of that policy was to guide the implementation of the services and mitigation responsibilities under the

Coordination Act, the National Environmental Policy Act, and other laws. It remains in effect today.

As my written testimony also details, the experience gained by our sister agencies, the U.S. Army Corps of Engineers and the Environmental Protection Agency, under section 404 of the Clean Water Act, has been very informative for the Department's ongoing efforts to improve its own mitigation policies. The mitigation rule published by those two agencies in 2008, in the Bush administration, dealt thoughtfully and constructively with a broad array of mitigation issues. It improved the transparency and predictability of mitigation decisions.

Based on the Department of the Interior's own mitigation experience, and that of its sister agencies, Interior Secretary Sally Jewel issued a secretarial order in the fall of 2013 on improving mitigation practices and policies of the Department. In that order, the Secretary directed the Department and each of its bureaus to follow a common set of principles for its mitigation decisions, and to use a landscape-scale approach to guide the siting of compensatory mitigation efforts.

Mr. GOHMERT. Excuse me. Would you mind moving that microphone to where you are speaking into it more directly? That would be very helpful. Thank you.

Mr. BEAN. OK, thank you.

The Department policy issued last fall is one of many steps to be completed in response to the Secretarial Order. That policy set forth a number of principles to guide mitigation decisions. Among them were the sequence of avoidance first, then minimization of impacts, and finally, compensation for unavoidable impacts should generally be followed. Another was that all mechanisms for compensatory mitigation should be held to the same standards. Yet another was that beneficial impacts of mitigation should endure at least as long as the impacts being mitigated.

Rather than break new ground, these and other principles represent best practices gained from decades of experience, and can be found in policy documents dating back to prior administrations.

Consistent with Secretarial Order 3330 and departmental policy, the Department's bureaus are revising their mitigation policies to ensure that they are responsive to emerging best practices and compatible with similar policies being developed by sister agencies and states. The departmental policy was issued contemporaneously with the issuance by the President of a Memorandum.

That Memorandum is consistent with and reinforces the mitigation work already ongoing at the Department, encourages private investment and restoration for mitigation purposes, and provides expanded mitigation options for development interests. The Memo was designed to ensure consistency and transparency as agencies across the Federal Government develop mitigation measures. The Department is committed to working collaboratively and sharing its experience in developing mitigation measures that provide certainty and predictability to project proponents.

The Department is continuing its work with partner agencies, including the Department of Agriculture, to share and adopt a common set of best practices to create a regulatory environment that

allows us to build the economy while protecting healthy ecosystems.

In sum, Mr. Chairman, the dual goals of advancing safe and responsible development, while promoting the conservation of America's lands and natural resources for generations to come, can be furthered through intelligent mitigation policies. The Department is working to ensure mitigation is supplied consistently, predictably, and effectively, so that permit applicants and developers can proceed with projects that achieve their needs, while protecting our Nation's valuable natural and cultural resources.

Thank you for your interest. I look forward to answering your questions.

[The prepared statement of Mr. Bean follows:]

PREPARED STATEMENT OF MICHAEL BEAN, PRINCIPAL DEPUTY ASSISTANT SECRETARY
FOR FISH AND WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR

Chairman Gohmert, Ranking Member Dingell, and members of the subcommittee, I am Michael J. Bean, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks at the Department of the Interior (Department). It is my pleasure to testify before you today regarding the Department's policies and practices relating to mitigation and the recent Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment.

The Department is committed to facilitating responsible economic development, both on public lands and elsewhere, while protecting and conserving the natural and cultural resources that Americans cherish. Development and conservation are both essential to support a vibrant and sustainable economy. For decades, the Department has sought to achieve responsible, balanced development through the application of mitigation—seeking to first avoid or minimize adverse impacts to resources of concern through careful siting and innovative design features, and then to compensate for residual impacts to those resources through corresponding offsets. In partnership with other Federal agencies and states, the Department has deployed innovative mitigation measures to address some of our most significant resource challenges including large-scale oil and gas development, solar energy generation, and most recently, the conservation of the greater sage grouse. The Department has issued policy direction to ensure that mitigation efforts follow consistent principles and standards throughout its programs and across all lands, and guidance so that the Department can better support responsible economic development, in a manner consistent with both our conservation mission and as the effective steward of many public lands and resources.

BACKGROUND: A BRIEF HISTORY OF MITIGATION POLICY AND PRACTICE

The Department has far-reaching management responsibilities across our Nation's lands and waters. The Department serves as the steward for 20 percent of the Nation's lands, oversees the responsible development of over 20 percent of U.S. energy supplies, is the largest supplier and manager of water in the 17 western states, and maintains relationships with over 500 federally-recognized tribes. Over 400 units of the National Park System preserve and protect nearly 27,000 historic structures and more than 700 cultural landscapes as well as nearly 100,000 archeological properties. The Department also oversees national trails, heritage areas, and sacred sites that intertwine public, tribal, and private landownership. No less important, the Department is charged by law to conserve nearly 1,600 endangered and threatened species, and all of the Nation's migratory bird species.

Given the inherent and sometimes difficult conflicts associated with the Department's responsibilities for both facilitating development and conserving the natural and cultural resources of the Nation's lands and waters, effective mitigation of the impacts of development is critical in enabling the Department to fulfill its statutory mandates. Those statutory mandates go back many decades. For example, the Fish and Wildlife Coordination Act of 1934 included requirements that were the first formal expressions in law of a duty to minimize the negative environmental impacts of major water resource development projects and to compensate for those impacts that remained—giving birth to the core ideas of what we now label as environmental mitigation.

The Coordination Act was a response to an era of big dam building and reflected a concern for the impact of those dams on salmon and other anadromous fish. As

originally enacted in 1934, it required consultation with the Bureau of Fisheries (as the Fish and Wildlife Service was then known) prior to the construction of any dam to determine if fish ladders or other aids to migration were necessary and economically practical to minimize impacts on fish populations. It required as well the opportunity to use the impounded waters for hatcheries to offset impacts that could not otherwise be avoided.

The duties imposed by the Coordination Act were reinforced and expanded by the National Environmental Policy Act of 1969 (NEPA). Under NEPA and its implementing regulations, all Federal agencies have a duty to assess the impacts of the major actions they propose to undertake and to consider reasonable alternatives to reduce or eliminate those impacts. The U.S. Fish and Wildlife Service, as the Federal agency charged by Congress in the Fish and Wildlife Act of 1956 with the responsibility for management, conservation and protection of fish and wildlife resources, routinely recommends mitigation measures to other Federal agencies through the NEPA process.

The experience gained in implementing the Coordination Act and NEPA informed the promulgation by the Service of a formal mitigation policy in 1981, a policy still in effect today. The following year, in 1982, Congress gave a significant new mitigation responsibility to the Service when it amended the Endangered Species Act (ESA) to authorize permits allowing the taking of endangered species incidental to otherwise lawful activities. Before it may issue such a permit, however, the Service must find that the permit applicant has developed a conservation plan that will mitigate the impacts of such taking “to the maximum extent practicable.” These habitat conservation planning provisions of Section 10 of the ESA have proven sufficiently flexible to provide the basis for permitting both small, single-landowner development projects and broader regional conservation plans encompassing multiple projects undertaken by multiple landowners or project proponents.

Contemporary understanding of mitigation has thus benefited from decades of scientific advances and experience implementing the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and other laws, in particular the Clean Water Act (CWA), Section 404 of which requires a permit from the Army Corps of Engineers for the discharge of dredged or fill material in wetlands and other waters of the United States.

IMPROVING MITIGATION EFFECTIVENESS

Early mitigation efforts had a mixed record of success. That so many of the anadromous fish populations of the Pacific Northwest are now in danger of extinction is compelling evidence that the fish ladder and hatchery solution to the challenge of big dams did not prevent dramatic resource losses. In addition, an extensive literature¹ documents the frequent failure of early wetland compensatory mitigation efforts due to poor siting, inadequate monitoring, lack of long-term assurances, and other problems. The Corps of Engineers and the Environmental Protection Agency dealt constructively and broadly with these issues in a widely praised mitigation rule issued in 2008 by the previous administration.

That 2008 rule articulated many of the principles that have been subsequently incorporated into the Department’s policies, improving consistency, transparency and predictability on how mitigation measures will be applied. For example, the 2008 mitigation rule ensures a level playing field among providers of compensation by holding all forms of compensatory mitigation to equivalent standards regardless of whether the compensation is provided by a mitigation bank, an in-lieu fee program, or by the permit applicant. The 2008 rule also focuses on how and where compensatory mitigation is planned, implemented, and managed to improve its ecological success and sustainability. The Department’s policy, and bureau policies in development, will reflect and build upon this extensive history of mitigation as applied under Section 404 of the Clean Water Act.

In the fall of 2013, Secretary Jewell released Secretarial Order 3330, *Improving Mitigation Policies and Practices of the Department of the Interior*. Secretary Jewell directed the Department and each of its bureaus to follow a common set of principles for its mitigation decisions and to use a landscape-scale approach to guide the siting of compensatory mitigation efforts.

The Departmental policy issued last fall was one of many steps to be completed in response to Secretary’s Order 3330, reaffirming the Department’s authority to require and determine the scope of compensatory mitigation; establishing a goal for the conservation outcomes of mitigation investments; enumerating standards when

¹Compensating for Wetland losses under the Clean Water Act, National Research Council (2001).

implementing landscape-scale mitigation approaches; and, outlining responsibilities of bureaus and offices in fulfilling the goals established in SO 3330. Furthermore, consistent with Secretarial Order 3330 and the Departmental Policy, the Department's bureaus are also working to revise and finalize their mitigation policies to ensure they are responsive to emerging best practices and compatible with similar policies being developed by sister agencies and states.

The Departmental policy was issued contemporaneously with issuance by the President of a Presidential Memorandum, *Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment*. This Memorandum is consistent with and reinforced the mitigation work already ongoing at the Department, encourages private investment in restoration and public-private partnerships, and helps foster opportunities for businesses or non-profit organizations with relevant expertise to successfully achieve restoration and conservation objectives across all lands. The Memorandum was designed to ensure consistency and transparency as agencies across the Federal Government develop mitigation measures. The Department is committed to working collaboratively and sharing its experience in developing mitigation measures that provide certainty and predictability to project proponents. The Department is continuing its work with partner agencies, including the Department of Agriculture and the Environmental Protection Agency, to share and adopt a common set of best practices to create a regulatory environment that allows us to build the economy while protecting healthy ecosystems.

As previously noted, concurrent with the release of the Presidential Memorandum, the Department issued formal policy and guidance to its bureaus and offices to best implement mitigation measures associated with legal and regulatory responsibilities and the management of Federal lands, waters, and other natural and cultural resources under its jurisdiction, using the best available science and landscape-scale approaches. The Departmental policy is intended to improve permitting processes and help achieve beneficial outcomes for project proponents, impacted communities and the environment. By implementing this policy, the Department will effectively avoid, minimize, and compensate for impacts to Department-managed resources and their values, services, and functions; provide project developers with added predictability and efficient, timely environmental reviews; improve the resilience of our Nation's resources in the face of climate change; encourage strategic conservation investments in land and other resources; increase compensatory mitigation effectiveness, durability, transparency, and consistency; and better utilize mitigation measures to help achieve our goals.

When assessing appropriate mitigation options, the Department relies upon a long established general mitigation hierarchy—first seeking to avoid impacts, then minimizing them, and then compensating for unavoidable impacts that could impair resource functions or values. The Department works proactively with project proponents to assist them in designing and siting projects so that proposed projects can have fewer adverse impacts to resources of concern. For example, for broad-scale siting, the BLM's Land Use Plan decisions, Rapid Ecoregional Assessments, and many geospatial files provide a means to identify areas, at a landscape scale, with little to no resource conflicts and where siting may result in fewer potential impacts. By avoiding adverse impacts in the first place, there is no less need to take further action to minimize or compensate for such impacts. As another example, the U.S. Fish and Wildlife Service's voluntary Wind Energy Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development. They provide developers with resources to evaluate risk and make siting and operational decisions, resulting in fewer projects planned in high risk areas. They also incorporate best management practices to assist wind energy developers in minimizing impacts to wildlife resources.

Frequently, however, it is not practical to avoid adverse impacts altogether. In these cases, the Department works with project proponents to minimize impacts by altering design features and implementing best management practices. Finally, the Department may consider implementing compensatory mitigation to benefit important, scarce, and sensitive resources when adverse impacts are expected to remain. Compensatory mitigation is not considered until after all appropriate and practicable avoidance and minimization measures have been applied, consistent with the general mitigation hierarchy and the 2008 Mitigation Rule. Together, cooperative work with the applicant and the implementation of the mitigation hierarchy can lead to successful development projects with improved outcomes for local communities, the project proponent, and the environment.

DEPLOYING EFFECTIVE MITIGATION

The principles and approaches described above have been instrumental in achieving effective mitigation outcomes. For example, the Department has mitigated project impacts by responsibly siting solar development through the Western Solar Plan, which established Solar Energy Zones for development, identified key design features, and called for regional mitigation strategies to direct compensatory investments. In March 2014, the BLM released the first of these regional mitigation strategies for the Dry Lake Solar Energy Zone in Nevada. This strategy supported the BLM's first ever competitive offer of public lands for solar energy development, a sale that brought in \$5.8 million in high bids from project developers. By identifying mitigation responsibilities upfront, the BLM provided increased certainty to project developers and increased the efficiency of its public review of these projects. Just recently, employing this mitigation approach, the Bureau completed this review and approved the three projects within 10 months, less than half the amount of time approval took under the previous project-by-project system.

Innovative mitigation approaches are also helping the Department and 11 western states conserve greater sage-grouse habitat and support sustainable economic development across the West. This past September, the U.S. Fish and Wildlife Service concluded that the iconic rangeland bird did not warrant protection under ESA, due to the collective efforts by the states, partner agencies, and other partners. The U.S. Forest Service and BLM issued Records of Decisions finalizing 98 land use plans to outline a framework for sage-grouse conservation, including required mitigation for certain impacts to greater sage grouse habitat and the commitment to collaboratively develop mitigation strategies with states and partner agencies across the sagebrush landscape. These collaborative strategies will identify and direct mitigation investments to protect and restore sage-grouse habitat in areas of highest value. A similar cooperative partnership in Wyoming has led to the approval of the first greater sage-grouse mitigation bank earlier this year.

Similarly, a recent landmark agreement among the U.S. Fish and Wildlife Service, the BLM, and Barrick Gold of North America in Nevada established a conservation bank that allows the mining company to accumulate credits for successful mitigation projects that protect and enhance greater sage-grouse habitat on the company's ranch lands. As a result, Barrick gained certainty that the credits from early conservation actions can be used to offset impacts to habitat from the company's planned future mine expansion on public lands. The Barrick agreement sets an important precedent for public-private mitigation partnerships and a model for the development of advance mitigation strategies at the Federal and state levels. Moreover, the agreement is particularly noteworthy because it uses a transparent and repeatable methodology to measure both project impacts and the benefits of compensatory actions to offset them.

FOSTERING PRIVATE INVESTMENT

There are opportunities for private investment to play an important role in expanding mitigation options, reducing mitigation costs, and improving mitigation effectiveness. For example, as long ago as the 1980s, entrepreneurial investors began to recognize that it might be possible to anticipate and meet future mitigation needs under the Clean Water Act associated with future transportation projects, commercial development, or other activities. By restoring or enhancing wetlands in advance of such projects, they hoped to be able to offer project proponents a mitigation alternative in the form of purchasing credits earned for such anticipatory measures. From this recognition the concept of mitigation banking was born. In brief, a mitigation bank is a location-appropriate site where natural resources (typically wetlands or endangered species) are conserved (sometimes after being displaced at a separate location) and managed in perpetuity for the purpose of suitably offsetting unavoidable impacts to the same types of resources elsewhere.

Mitigation banking has come to play a very important role in the administration of the Clean Water Act. More than 1,400 mitigation banks have been approved by the Army Corps of Engineers. Details regarding each of these banks, as well as related "in-lieu fee" mitigation programs are available on the Army Corps of Engineers RIBITS Web site (RIBITS stands for Regulatory In-lieu fee and Banking Information Tracking System). According to a 2015 study by the Army Corps' Institute for Water Resources, 41 percent of the projects for which compensatory mitigation was required during the period 2010 to 2014 met those mitigation requirements through the purchase of bank credits. Another 11 percent did so by using credits from in-lieu fee mitigation programs. Thus, project proponents clearly perceive these forms of compensatory mitigation to be preferable to the traditional approach in which the permittee carries out its own compensatory mitigation action.

Although there are many fewer endangered species mitigation banks, such banks are becoming increasingly common for compliance with ESA as well.

Building on the Department's commitment to mitigation and public-private partnerships, and as a part of the President's Build America Investment Initiative, Secretary Jewell announced the establishment of the Natural Resources Investment Center (Center) to spur partnerships with the private sector to develop creative financing opportunities that support economic development goals while advancing our resource stewardship mission. The Center will facilitate this effort by building on current activity to incentivize private investments in the infrastructure and conservation of water, species, habitat, and other natural resources. The Center will use market-based tools and innovative public-private collaborations to increase investment in water conservation and critical water infrastructure, as well as promote investments that conserve important habitat in a manner that advances efficient permitting and meaningful landscape-level conservation.

The Center will harness the expertise of the Department's bureaus, including the Bureau of Reclamation, U.S. Fish and Wildlife Service, Bureau of Land Management, National Park Service, Bureau of Indian Affairs and U.S. Geological Survey, and will tap external private sector experience to deliver on its objectives. The Center would be a critical tool for outreach and ingenuity, ensuring that the policy frameworks and projects the Department is undertaking not only accommodate the various market forces at play, but act as incentives for market investment in restoration and conservation.

CONCLUSION

In closing, Mr. Chairman, advancing safe and responsible development and promoting the conservation of America's Federal lands and natural and cultural resources for generations to come is a shared responsibility for all of us. The Department is working to ensure mitigation is applied consistently, predictably, and effectively, so that permit applicants and developers can proceed with projects that achieve their need while protecting our Nation's valuable natural and cultural resources.

Thank you for your interest and for the opportunity to testify today, I am happy to answer any questions.

QUESTIONS SUBMITTED FOR THE RECORD TO MICHAEL BEAN, PRINCIPAL DEPUTY ASSISTANT SECRETARY, U.S. FISH AND WILDLIFE, U.S. DEPARTMENT OF THE INTERIOR

Questions Submitted by Chairman Gohmert

Question 1. Once your agency's regulations for the implementation of the Memorandum go into effect, will those projects who are in the midst of the permitting process be required to resubmit or revise their project plans to meet the "net benefit/no net loss" standard retroactively?

Answer. As directed by the Memorandum, the U.S. Fish and Wildlife (Service) and Bureau of Land Management (BLM) are revising and developing mitigation policies. Neither agency is undertaking rulemaking related to this issue.

Section 3.3 of the Service's proposed revised mitigation policy (March 8, 2016; 81 FR 12380–12403) states:

"This policy does not apply retroactively to completed actions or to actions specifically exempted under statute from Service review. It does not apply where the Service has already agreed to a mitigation plan for pending actions, except where: (a) new activities or changes in current activities would result in new impacts; (b) a law enforcement action occurs after the Service agrees to a mitigation plan; (c) an after-the-fact permit is issued; or (d) where new authorities, or failure to implement agreed-upon recommendations warrant new mitigation planning. Service personnel may elect to apply this policy to actions that are under review as of the date of its final publication."

If the Service has agreed to a mitigation plan, and none of the exceptions listed above apply, the Service will not request that project proponents submit revised project plans to be consistent with the revised policy.

The BLM released interim policy on mitigation in 2013, which encompasses many of the same principles as the Memorandum. Even though the BLM maintains the discretion to consider revised or additional mitigation requirements at most points

in the permitting process, in order to uphold the statutes and regulations that guide its actions, the BLM anticipates that only a small minority of projects that they authorize would receive renewed attention on mitigation due to the Memorandum or the finalized BLM mitigation policy. In these rare cases, the BLM would not require the project proponent to revise their plans; rather, it is likely that the BLM would analyze different mitigation requirements in action alternative(s) in the applicable National Environmental Policy Act (NEPA) analysis.

Question 2. If a project has been approved, begun construction or operation, and has mitigation measures in place already by the time agency rules and regulations are enacted, will those mitigation measures have to be revised or supplemented to meet the “net benefit/no net loss” standard?

Answer. Under the Service’s proposed revised mitigation policy, if a project has been approved and mitigation measures are in place, the Service would not revise or supplement a project’s mitigation measures unless one of the exceptions applies, as described in section 3.3 of the proposed policy (described above in response to Question 1).

For the BLM, if a project has been approved and mitigation measures are in place, mitigation measures would not be revised or supplemented for that authorization. If additional authorizations are necessary for a project, then there is a possibility that new mitigation measures would be required, subsequent to applicable NEPA analysis.

Question 3. The Memorandum requires agencies to “set measurable performance standards” to assess the effectiveness of mitigation. How will you implement this, and what kind of performance standards are your agencies likely to enact?

Answer. The Service’s proposed revised mitigation policy states that mitigation options delivered through any compensatory mitigation mechanism should include, among other things, performance standards to determine whether the measure has achieved its intended outcome. Compensatory mitigation recommendations and requirements will include a provision for the development of a mitigation plan or equivalent that specifies: measurable objectives; effectiveness monitoring; additional adaptive management actions as may be indicated by monitoring results; and reporting requirements. In this context, agencies will establish measurable objectives and use monitoring to assess if those objectives are being met. Adaptive management will be used to adjust the mitigation as needed to meet the specified objectives, and agencies will track the effectiveness of the mitigation through reports submitted by those carrying out the mitigation.

The proposed revised mitigation policy is intended to be an umbrella policy under which the Service may issue more detailed policies or guidance documents covering specific activities in the future. For example, as specified in section 4(c) of the Memorandum, the Service will finalize a policy focused on compensatory mitigation processes under the Endangered Species Act. Standards presented in that policy, when published for public comment, will align with standards in the Memorandum and the proposed revised mitigation policy.

For the BLM, performance standards are an important part of ensuring that mitigation is effective in achieving its outcomes. Performance standards help the BLM interpret monitoring data on mitigation measure to know if the outcomes are being achieved. These performance standards will vary by resource and by project and will generally be based on the BLM’s understanding of the impacts to the resource that warranted mitigation and the desired condition for the resource. The performance standards will typically be identified through NEPA analysis, decision documents, and/or in the term and conditions of land use authorizations.

Question 4. The Memorandum states that “agencies should give preference to advance compensation . . . prior to harmful impacts of a project.” Many times third parties get involved in these situations and litigate permits from ever existing. What will paying up front, before any impact even occurs, do to provide certainty for an organization seeking a permit?

Answer. Mitigation implemented in advance of impacts through the use of mitigation banks is based on demonstrated achievement of project goals and therefore reduces the risk and uncertainty inherent in compensatory mitigation. Mitigation that is successfully implemented in advance of impacts provides ecological and regulatory certainty that is rarely matched by a proposal of mitigation to be accomplished concurrent with, or subsequent to, the impacts of the actions. It is for these reasons that the 2008 compensatory mitigation rules under the Clean Water Act give preference to the use of mitigation bank credits over other forms of mitigation. Timely and high-quality compensatory mitigation provides greater assurances that

mitigation will be successful and reduces legal risks. In addition, in authorizing mitigation using shared common principles, agencies act with greater consistency, which also reduces litigation risks.

Questions Submitted by Ranking Member Dingell

Question 1. Your testimony emphasizes the Department's desire to promote competition among different providers of mitigation offsets, and to have a level playing field for all the providers.

1a. What problems have you encountered in creating fair markets so far?

Answer. A critical barrier to creating consistent and equivalent markets for compensatory mitigation for resources managed by the Department has been the lack of comprehensive policy and guidance in this area. While the Department has always been committed to hold mitigation providers to equivalent standards and ensure a level playing field, doing so has been challenging without comprehensive policy or guidance to our field staff.

Applications for permits and authorizations typically come into specific field offices. While these offices work to ensure mitigation requirements are consistent across other field offices in similar ecosystems or landscapes, further policy and guidance will be helpful.

The Department has spearheaded several actions to create more consistency and equivalency when permitting, including work to establish consistent mitigation policies across bureaus, particularly the Fish and Wildlife Service and the Bureau of Land Management, and efforts to use landscape-scale planning (such as sage grouse conservation, Solar Energy Zones, among others). Planning at landscape-scales allows bureaus to work with stakeholders and industry to transparently identify likely impacts of future projects, and better characterize the rules-of-the-road for compensatory mitigation requirements. Such work is then used to help make more transparent decisions at the project scale, and promote markets for mitigation providers that are fairer, more accessible, and less risky.

1b. Are there specific steps you anticipate taking to make sure that your program doesn't create de facto monopolies for particular agencies or investors or organizations?

Answer. The Department's mitigation policies are all directed at creating equivalent markets for mitigation providers and ensuring the best compensatory mitigation possible for impacted resources. The Department recently released a Departmental Manual (DM) on Implementing Mitigation at the Landscape-scale (600 DM 6), which states "to implement effective and consistent compensatory mitigation measures, bureaus and office should: (a) hold all mechanisms for compensatory mitigation (e.g. mitigation banks, in-lieu fee programs, permittee-responsible mitigation, and others) to high, and equivalent standards . . ."

Using equivalent standards reinforces the policy that the Department is not in the business of bolstering one type of compensatory mitigation provider over another. Rather we are most keen on developing a level playing field for all mitigation providers, and in ensuring the best compensatory mitigation possible for impacted resources.

The DM further elaborates on the equivalency between compensatory mitigation providers by stating that all providers must, at a minimum, be held to 13 identified standards. The use of stated standards furthers the equivalency, consistency, and efficiency of the permit process. These standards are also identical to the standards identified and used by the highly regarded mitigation framework developed by the Army Corps of Engineers and the Environmental Protection Agency for Section 404 of the Clean Water Act (CWA 404). Any forthcoming mitigation policies from the Department's bureaus and offices will also use these standards.

1c. Should government agencies or private investors or NGOs or maybe other parties be given some kind of preference in order to make the market competitive or to ensure the most successful conservation results or should everyone play by the same rules?

Answer. As noted above, all mitigation providers should play by the same rules and we will use consistent, equivalent standards to ensure a level playing field. With that said, Department and bureau policies do provide a stated preference for mitigation conducted in advance of project impacts (known as 'advance mitigation'). If bureaus can document actions by mitigation providers that deliver an additional benefit to targeted resources (through restoration and/or protection), such actions can be certified as a mitigation credit. These credits can then be sold to project de-

velopers in need of such restoration and/or protection, *in advance* of allowable impacts from their projects. Any mitigation provider who can deliver advance mitigation (and adhere to the aforementioned standards) is eligible for this type of preference.

The Department and bureau policies provide a preference to this form of compensatory mitigation, as advance mitigation benefits (1) the impacted resource by reducing or eliminating the time lag between the impact and the uplift, and (2) the project developers by allowing them to purchase credits rather than conduct the compensatory mitigation themselves, thereby saving time and money. Again, this model of a stated preference for advanced mitigation is consistent with the mitigation requirements of CWA 404.

Mr. GOHMERT. Thank you very much.

At this time, Mr. Ferebee, you are recognized for 5 minutes.

**STATEMENT OF BRIAN FEREBEE, ASSOCIATE DEPUTY CHIEF,
NATIONAL FOREST SYSTEM, U.S. DEPARTMENT OF
AGRICULTURE**

Mr. FEREBEE. Chairman Gohmert, Ranking Member Dingell, and members of the committee, thank you for the opportunity to discuss the efforts of the Forest Service to mitigate the recent Presidential Memorandum on Mitigation.

The Forest Service's goal is to enable responsible economic development on National Forest System lands, while protecting natural and cultural resources. Our laws, including the Organic Act and the Multiple-Use Sustained-Yield Act, authorize the Agency to appropriately minimize effects from the use of National Forest System lands and to sustain goods and services the public receive from those lands.

The Forest Service currently works with proponents and the public to identify and mitigate impacts to a broad range of resources from activities on National Forest System lands. We first look to avoid impacts, then minimize impacts, and finally, to compensate residual impacts to the important resources. This is known as implementing the mitigation hierarchy. We proactively work with proponents in the design and siting phase in order to reduce adverse impacts to resources.

If adverse impacts can be avoided, no further mitigation actions are necessary. However, sometimes it is not practical or possible to avoid adverse impacts, and we work with proponents to minimize impacts to the extent practicable. Only at that point, do we consider compensatory mitigation to address remaining impacts to important or sensitive resources. In that case, the Agency identifies appropriate mitigation actions through project review and engagement with other Federal agencies, states, tribes, the proponent, and the public.

We have found that proactive work with the proponent in the implementation of the mitigation hierarchy can lead to successful projects with improved outcomes for local communities, the proponent, and the National Forest System.

While individual units of the Forest Service have been successful in developing and implementing proponent-driven projects that involve compensatory mitigation, the Forest Service, overall, does not have as much experience as other agencies. The Presidential Memo calls for the Forest Service to develop policy on mitigation. The

direction provides an opportunity for my agency to learn from past experiences and develop a consistent systematic approach to mitigation in the future.

As public input is important when developing new policies and procedures, we will engage our stakeholders, including the proponents, as we move forward.

We are also focusing on learning from those with extensive expertise in this area, including Federal agencies, states, tribes, and non-profits. A new Agency policy will help us make our implementation of the full suite of mitigation options more consistent, predictable, and effective.

Thank you for the opportunity to present this testimony to you today, and I look forward to answering any of your questions.

[The prepared statement of Mr. Ferebee follows:]

PREPARED STATEMENT OF BRIAN FEREBEE, ASSOCIATE DEPUTY CHIEF, NATIONAL FOREST SYSTEM, U.S. DEPARTMENT OF AGRICULTURE

Thank you for the opportunity to discuss the efforts of the Department of Agriculture, specifically the Forest Service, to facilitate responsible economic development on National Forest System (NFS) lands while protecting the natural and cultural resources that Americans enjoy. The Forest Service has sought for many years to avoid or minimize impacts of projects on NFS land through careful siting and innovative design features. These steps include measures to reduce and compensate for the effects of hydropower projects on fish and wildlife and clearing agreements with electric utilities to reduce the risk of fires within utility corridors. Our best practices incorporate criteria to avoid and minimize adverse impacts, to the extent possible, and consider compensation to address residual impacts to provide certainty and transparency to our partners. The Forest Service is working to develop a science-based agency policy to provide a consistent approach to mitigation. A mitigation policy following established and consistent principles and standards throughout our programs will continue to enhance responsible economic development on public lands in accordance with our multiple use mandate.

BACKGROUND

The Forest Service manages 193 million acres of national forests and grasslands in 44 states and Puerto Rico. The Forest Service manages occupancy and use of the NFS lands. In so doing, NFS lands support the production of goods and services that create jobs and promote economic development in communities across most of the 50 states. Activities on Forest Service lands contribute more than \$36 billion to America's economy and support nearly 450,000 jobs.¹

Under the Organic Administration Act of 1897 and the Multiple-Use Sustained-Yield Act of 1960, the Secretary of Agriculture has the authority and responsibility to protect and manage the renewable surface resources of the National Forest System for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. In defining multiple use and sustained yield, Congress called for "harmonious and coordinated management of the various resources, each with the other without permanent impairment of the productivity of the land" and for "achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the National Forests without impairment of the productivity of the land."² In the National Forest Management Act, Congress required the Forest Service to develop land management plans, which provide for multiple uses and the diversity of plant and animal communities, and that permits and contracts for the use of National Forest System lands be consistent with those land management plans.³ These laws and associated regulations authorize the agency to minimize effects on surface resources, as appropriate, for occupancy and use of NFS lands.

¹ USDA Forest Service, March 2013. Chief Tidwell comments before the House Committee on Agriculture, Subcommittee on Conservation, Energy and Forestry, March 13, 2013; and National Visitor Use Monitoring Results USDA Forest Service National Summary Report (data collected FY 2007 through FY 2011).

² Multiple-Use Sustained-Yield Act of 1960, Public Law 86-517.

³ National Forest Management Act, 16 U.S.C. § 1604(g)(3), (i).

Executive Order 13604 (March 28, 2012), titled Improving Performance of Federal Permitting and Review of Infrastructure Projects, requires all Federal agencies to take all steps within their authority, consistent with available resources, to execute Federal permitting and review processes with maximum efficiency and effectiveness, ensuring the health, safety, and security of communities and the environment while supporting vital economic growth. Mitigating impacts on natural resources is an integral part of this streamlining process.

On November 3, 2015, President Obama issued a Presidential Memorandum titled “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment.” The Memorandum set a national policy to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities. The Memorandum will be implemented through agency policies addressing adverse impacts on natural resources by avoiding and minimizing impact, and then compensating for those impacts that do occur. The objective of these efforts is to ensure clarity, improved transparency, and consistency for proposed activities affecting landscapes. The Forest Service intends to promote uniform mitigation practices. Those efforts include improving information sharing and mitigation support tools by working with other Federal agencies, states, tribes, and partners to identify and share information in order to define natural resources baselines and monitor the effectiveness of mitigation actions.

Building on past experience with mitigation, in June the Chief of the Forest Service directed agency staff to develop a working group and explore a Forest Service mitigation framework, consistent with other agencies.

The Forest Service currently works with project proponents and the public to identify and mitigate impacts to the broad range of resources on NFS lands. Where Congress has issued explicit direction for the protection of certain resources, including wetlands, endangered species, cultural resources, national parks, and air quality, the Forest Service works closely with partner agencies to ensure that appropriate mitigation is identified and implemented. For proposed projects on NFS lands, the Forest Service identifies appropriate mitigation actions during project design based on agency policy, applicable land management plans, and through review and engagement with states, tribes, and the public. When assessing appropriate mitigation options, the Forest Service first seeks to avoid impacts, then minimize them, and then compensate for such impacts where avoidance is not practicable. The Forest Service seeks compensation for unavoidable impacts that could impair the productivity of the land and the values it sustains. The Forest Service works proactively with proponents in designing and siting projects in order to propose projects with reduced adverse impacts to resources. If adverse impacts can be avoided, no further actions to minimize or compensate are necessary. At times, it is not practical or possible to avoid adverse impacts altogether. In these cases, the Forest Service works with project proponents to minimize impacts by modifying project design features. Finally, the Forest Service may consider compensatory mitigation. Proactive work with the project proponent and affected communities, and the implementation of the mitigation hierarchy, can lead to the implementation of successful development projects where the priorities of all citizens are considered.

IMPLEMENTING EFFECTIVE MITIGATION

For decades the Forest Service has used mitigation to allow responsible development to proceed while minimizing damage to resources. For example, the Agency worked cooperatively with Washington State Department of Transportation, Federal Highways, and a number of other Federal and state agencies and tribes to mitigate the redevelopment of Interstate 90 through the Okanogan-Wenatchee National Forest. The goals of the project were to improve safety, reduce avalanche closures, stabilize slopes, increase capacity, replace pavement, and enhance wildlife connectivity. Through collaborative efforts with the agencies, tribes, and the public, mitigation was incorporated into the project design. This included wildlife and aquatic crossings, minimizing the highway footprint, preserving habitat through acquisition of land in critical wildlife corridors, restoring wetland, floodplain, and upland forest, and long-term wildlife monitoring.

Similarly, the Forest Service has worked with the Boeing Company, the city of Charleston (SC), the U.S. Army Corps of Engineers, the Nature Conservancy and the Open Space Institute to purchase and restore a large inholding in the Francis Marion-Sumter National Forest. This purchase and restoration will compensate for wetlands filled by Boeing at the Charleston airport in order to construct an airplane

painting plant. This is an example of how compensatory mitigation can produce jobs as well improve the health and resiliency of natural resources.

The Forest Service is currently working to create a mitigation policy that incorporates best practices and is compatible with similar policies developed by other Federal agencies and states. We intend to issue initial direction as described in the Presidential Memorandum this year with the goal of refining it in subsequent years.

CONCLUSION

The Forest Service has a proven track record of using sound science and data in applying mitigation to support responsible development, conserve and restore important resources, and move forward with efforts to make our implementation of the full suite of mitigation options more consistent, predictable, and effective. Thank you for the opportunity to present this testimony, and I would be glad to answer any questions.

QUESTIONS SUBMITTED FOR THE RECORD TO BRIAN FEREBEE, ASSOCIATE DEPUTY
CHIEF, NATIONAL FOREST SYSTEM, U.S. DEPARTMENT OF AGRICULTURE

Questions Submitted by Chairman Gohmert

Question 1. Once your agency's regulations for the implementation of the Memorandum go into effect, will those projects who are in the midst of the permitting process be required to resubmit or revise their project plans to meet the "net benefit/no net loss" standard retroactively?

Answer. The Forest Service has actively incorporated mitigation in its decision-making for many years, primarily through avoidance and minimization. The Agency has not had a formal national policy clarifying its intent and approach to mitigation. Currently, the Agency is developing such a policy and will release a draft for public comment. The Agency anticipates that the draft policy will provide that projects for which the Agency has formally initiated the decisionmaking process before the policy is finalized will not be affected by the policy unless the proponent chooses to modify the proposal to an extent that would necessitate restarting the process. Therefore, the Agency anticipates that its policy will be designed to operate prospectively and not affect projects or activities with existing contracts, permits or other legal instruments.

Question 2. If a project has been approved, begun construction or operation, and has mitigation measures in place already by the time agency rules and regulations are enacted, will those mitigation measures have to be revised or supplemented to meet the "net benefit/no net loss" standard?

Answer. Currently, the Forest Service actively incorporates mitigation in its decisionmaking and project approval process. In its draft policy, the Agency anticipates clarifying that projects that the Agency has approved before the policy is finalized would not be affected by the policy unless the proponent chooses to make modifications that would require a new Agency approval.

Question 3. The Memorandum requires agencies to "set measurable performance standards" to assess the effectiveness of mitigation. How will you implement this, and what kind of performance standards are your agencies likely to enact?

Answer. The Forest Service is reviewing its existing authorities, regulations, and policies in light of the Presidential Memorandum and developing a formal mitigation policy. We will also be engaging with the public to get input. As part of this process, the Agency will be identifying its approach to assessing the effectiveness of mitigation and the development of performance standards. The Forest Service has used performance standards in many contexts for some time, including in implementation of the 2012 land management planning rule. We anticipate that the performance standards for mitigation would be similar to those in the 2012 planning rule.

Question 4. The Memorandum states that "agencies should give preference to advance compensation . . . prior to harmful impacts of a project." Many times third parties get involved in these situations and litigate permits from ever existing. What will paying up front, before any impact even occurs, do to provide certainty for an organization seeking a permit?

Answer. The Forest Service is reviewing its existing authorities, regulations, and policies in light of the Presidential Memorandum and developing a formal mitigation

policy. We will also be engaging with the public to get input. As part of this process, the Agency will be identifying its approach to advance compensation.

That being said, the Forest Service anticipates that mitigation for most projects will be addressed through the first two steps in the mitigation hierarchy—avoidance and minimization. For many years, the Agency has worked with proponents, other agencies with jurisdiction, and the public up front to identify and mitigate impacts from proposed projects consistent with existing authorities and valid existing rights. For those large proponent-driven projects that result in residual impacts to critical resources, some type of compensatory mitigation may be appropriate. In those cases, utilizing an advance compensation mechanism could help streamline the decision-making process. For example, in cases where compensatory mitigation is needed and private sector wetland and stream mitigation banks can provide those offsets in advance, U.S. Army Corps of Engineers data shows permitting averages 50 percent faster than compensatory actions taken on the site by the permittee themselves.

The Forest Service has participated in a number of multi-agency projects where up front coordination and planning has resulted in streamlined approvals. A recent, high-profile example, would be the redevelopment and enhancement of the Interstate 90 corridor across Snoqualmie Pass discussed in our written testimony. The Forest Service worked cooperatively with Washington State Department of Transportation, Federal Highway Administration, and a number of other Federal and state agencies and tribes to mitigate the unavoidable impacts from the redevelopment of Interstate 90 through the Okanogan-Wenatchee National Forest. Through collaborative efforts with the agencies, tribes, and the public, mitigation was incorporated into the project design and the project is currently being implemented.

Question 5. How is the Forest Service responding to the Memorandum's requirement to produce new guidance for regulations within 180 days, and what is the status of your task?

Answer. The Forest Service is reviewing its existing authorities, regulations, and policies in light of the Presidential Memorandum and developing a mitigation policy. We will also be engaging with the public to get input. The Forest Service anticipates that it will be able to propose a mitigation policy for public comment late this spring.

Question 6. How does the Forest Service view this mission to support private investment in restoration? The memo directs the Forest Service to "strengthen mitigation policies." How is the Forest Service deficient in current policies?

Answer. For many years, the Forest Service has engaged in voluntary and contractual partnerships with tribes, states, Federal agencies, nonprofits, businesses, and communities to promote and achieve mutual goals and build skills, knowledge, and relationships that provide the foundation for future work together. Coordination and communication with partners has been at the forefront of Forest Service response to its land management mission. Collaborative efforts, including supporting private investment in our National Forests and Grasslands, is a cornerstone in the Forest Service's successful management. The Forest Service has practiced avoidance and minimization—the first two steps in the mitigation hierarchy—in local unit administrative activities and in authorizing uses of National Forest System lands. In addition, for large infrastructure development projects (e.g., powerlines, pipelines, major dams, etc.), the Agency has also occasionally included compensatory mitigation—the last step in the mitigation hierarchy—when there were unavoidable residual impacts to critical resources. However, the Agency has not had a national mitigation policy. The Presidential Memorandum has helped the Agency begin to develop a more systematic approach to mitigation with the goal of improving efficiency and clarity in decisionmaking while maintaining the multiple uses and sustained yield of goods and services from National Forest System lands.

Question 7. Does the Forest Service see a need to increase participation in advance compensation or compensatory mitigation in order to fulfill its mission? Could you explain how this memo impacts the sort of projects that the Forest Service permits?

Answer. For decades the Forest Service has used mitigation to allow responsible development to proceed while minimizing damage to resources and sustaining the yield of goods and services the public expects from National Forest System lands. The Forest Service has generally focused on the first two steps of the mitigation hierarchy (avoid and minimize). Compensatory mitigation has occasionally been used for large-scale, proponent driven projects when there are unavoidable impacts to critical resources. For these types of projects, the Forest Service generally works with other Federal or state agencies (e.g., Federal Highway Administration or a

state department of transportation for a highway project, FERC for a pipeline). The Agency does not anticipate changing this approach with a new national policy.

Mr. GOHMERT. Thank you, Mr. Ferebee. At this time, I will begin the questions for 5 minutes.

Ms. Goldfuss, the Memo in issue here today tells agencies to use landscape and watershed-scale planning when considering mitigation. How do you plan to define what constitutes Federal landscape or watershed?

Ms. GOLDFUSS. Thank you, Mr. Chairman, for the question. Let me just start out by saying that it is not the intention of the Memo to define these actions. A memo is a tool to organize the activity across existing statutes.

Mr. GOHMERT. OK. Well——

Ms. GOLDFUSS. There are several stages——

Mr. GOHMERT [continuing]. The question was how were we going to define it?

Ms. GOLDFUSS. That would be a question that my colleagues could answer for you, because it will be based on their existing statutes.

Mr. GOHMERT. So, you send out the Memo, and you use the terms, “landscape” and “watershed”; and you are going to let everybody who gets the Memo define those the way they want to, seriously?

Ms. GOLDFUSS. A Presidential Memo is a non-binding agreement. This is simply the President’s communication with his agencies on what he sees as priorities.

Mr. GOHMERT. Well, see, that is one of the concerns that some of us have. Normally, and especially from someone that has handled felony cases for years, we want specificity in the law, so we know the limits of the government, the limits of where it is going. When we see vague, ambiguous language, or words that have not been defined in the law, and there seems to be an abundance of those type of words, it seems like sometimes, in this Administration, people are looking for words that have never been legally defined, so that the sky can be the limit.

That is one of the concerns here with the use of “watershed” and “landscape.” Whose landscape are we talking about? What extent of landscape are we talking about? And, the fact that you would lay it off on the other agencies causes me even more concern, because, holy cow, you are not being finite in what you are designating in your Memo should be done.

When you leave it to each agency to just brainstorm and come up with what you think the watershed or the landscape—what does it feel like today? Maybe one agency feels one way one day, and differently the next. I would suggest that if you are going to use language that is vague, ambiguous, and not otherwise legally defined, then somebody needs to define it before you send instructions out to the agencies.

Was the purpose, Ms. Goldfuss, to make it intentionally obtuse, so that people would use their own definition and, perhaps, go beyond the normal Federal limits?

Ms. GOLDFUSS. No, a Presidential Memo cannot do that. In this case, there are several different statutes, like FLPMA and the Forest Management Planning Rules—

Mr. GOHMERT. OK, but in any of those statutes do they use the term “Federal landscape” or “watershed” in describing what should be considered for mitigation?

Ms. GOLDFUSS. The statutes have definitions that vary. It is up to each agency to look at their own statutes and regulations for those definitions.

Mr. GOHMERT. So, when this Memo is constructed, you are telling me you do not want to be bound by any statutes or laws; you want to just go ahead and start fresh and create a new horizon? That is what it sounds like. That is really scary for people that are concerned about the over-reach of the government.

Ms. GOLDFUSS. It is just not possible to use a memo like this to have that over-reach. It is bound by existing laws that Congress passed, and that these agencies institute the regulations to carry it out. So, it is not possible, and a memo does not have that binding legal authority that you are—

Mr. GOHMERT. The Memo calls for “large-scale plans and analysis” to inform the identification of areas where development may be appropriate or “where natural resources values are irreplaceable.” Does the Administration’s budget request include this direction? What is the estimated cost?

Ms. GOLDFUSS. I cannot answer that for you, I am sorry. I can take that back and see what we have.

But that definition of irreplaceable is—

Mr. GOHMERT. Well, who came up with those words?

Ms. GOLDFUSS. Yes. And once again, this is a memo directed to our agencies—

Mr. GOHMERT. Who came up with the words, is the question.

Ms. GOLDFUSS. Oh, who came up with the words?

Mr. GOHMERT. Who came up with the words?

Ms. GOLDFUSS. Well, CEQ, along with the agencies, our role is to coordinate across these agencies to see what their best practices are. And through that work, which really started in an effort to streamline infrastructure permitting, we have been convening the agencies for quite some time. As we went through that process, we learned a lot about what are the best practices, and that is what we put in this Memo.

Mr. GOHMERT. So—

Ms. GOLDFUSS. So, that is where the words came from.

Mr. GOHMERT [continuing]. They are the ones that previously used the terminology I have been asking about. You got it from these other agencies, put it in your Memo, and nobody has accurately defined that. Is that what I am hearing?

Ms. GOLDFUSS. Once again, I would say it is up to each agency that has a mitigation policy—

Mr. GOHMERT. Well, that was not the question.

Ms. GOLDFUSS [continuing]. To define the terms based on their statutes.

Mr. GOHMERT. It is where the language came from. My time has expired for this round. At this time I would recognize the Ranking Member for questions.

Mrs. DINGELL. Thank you, Mr. Chairman. I want to go back to what you were talking about in a little while, but I want to get some things on the record.

Someone asked Mr. Bean some questions. I do think that we all agree that we want to see all of the agencies work together better; and, I think there is a strong foundation of law that this Memorandum was based on. So, I want to ask some questions so we can see where we are getting.

In general, Mr. Bean, will the need for mitigation from the development of natural resources on public lands result in a project being stopped?

Mr. BEAN. No, it will not. It will facilitate—

Mrs. DINGELL. Can you speak louder, so we can all hear you, please?

Mr. BEAN. Sorry. The answer is no. It will facilitate projects going forward.

Mrs. DINGELL. So it actually could speed something up?

Mr. BEAN. Yes. Yes, ma'am.

Mrs. DINGELL. In general, does the use of mitigation best practices, in a natural resource management context, as called for in the Presidential Memorandum, increase or decrease the chances that a project will have an adverse ecological impact?

Mr. BEAN. It decreases those changes by minimizing and avoiding those impacts.

Mrs. DINGELL. Does the use of mitigation best practices increase or decrease the chances that a species gets listed under the Endangered Species Act as threatened or endangered?

Mr. BEAN. It should decrease that chance because, again, it avoids or minimizes adverse impacts that would otherwise contribute to endangerment.

Mrs. DINGELL. Does the use of mitigation best practices increase or decrease certainty for developers, mining companies, oil and gas companies, and other resource users?

Mr. BEAN. The purpose and intended effect of this is to increase certainty, increase predictability, and increase transparency.

Mrs. DINGELL. Does the use of mitigation best practices increase or decrease costs and time associated with uncertainty and lack of flexibility for developers, mining companies, oil and gas companies, and other resource users?

Mr. BEAN. As I believe you indicated in your opening statement, it has been shown to decrease time and cost in the Clean Water Act context under the section 404 permits.

Mrs. DINGELL. When industry is expected to mitigate impacts to natural resources from development on public lands, does that increase or decrease the chances taxpayers will be left with the bill for restoring those lands and other resources?

Mr. BEAN. It decreases the chance and adheres to the polluter-pays principle.

Mrs. DINGELL. So, Mr. Bean and others there, if I am hearing right, mitigation is not a road block to the development of our public resources at all; it is a tool to help ease that development and balance it with conservation goals. Mitigation creates a certainty for developers, it decreases the likelihood of an Endangered Species

Act listing, and it decreases damage to lands, while protecting taxpayers and the public lands that they cherish.

This sounds like a win-win to me for everybody, for the environment, for the developers and the business community, and a win for the American people. So, let me go to another question.

Mr. Bean, the Department of Justice and the Department of the Interior have filed papers with a Federal district court in Texas describing failings in the lesser prairie chicken conservation program. According to the filings, no Corps area of stronghold habitat has been permanently conserved. None of the connecting corridors between strongholds have been permanently protected. Why is that, and what needs to be fixed?

Mr. BEAN. Representative Dingell, I do not have the facts at my disposal for that question, but I would note one thing about that lesser prairie chicken conservation plan, which the state of Texas and four other states are party to. I would note that that plan incorporates many of the principles reflected in the President's Memorandum. It is a landscape-scale plan, by which I mean it encompasses the entirety of the range of the lesser prairie chicken across those five states, it provides a consistent transparent science-based methodology for determining mitigation requirements, mitigation is to be done in advance of impacts, mitigation is to be durable with those impacts, and it aims to achieve a net conservation gain in the form of an increased lesser prairie chicken population.

So, the states of Texas, Oklahoma, Kansas, Colorado, and New Mexico are using the very same principles that are reflected in the President's Memorandum in that particular example.

Mrs. DINGELL. Thank you. I don't have enough time to get my question in and get an answer to it, so I will yield back and go ahead in a little while, Mr. Chairman.

Mr. GOHMERT. All right. I thank the Ranking Member. At this time the Chair recognizes the gentleman from Idaho, Mr. Labrador, for 5 minutes.

Mr. LABRADOR. Thank you, Mr. Chairman.

Ms. Goldfuss, thanks for being here. The Presidential Memorandum directs agencies to give preference to advance compensation. Can you please tell me how that might affect statutes like the Endangered Species Act or the Marine Mammal Protection Act, that provide for mitigation, but have not historically been interpreted to mandate the use of compensation?

Ms. GOLDFUSS. Yes. I will once again say that, in the context of those statutes which we look to the agencies to implement—and certainly my colleagues can add to this, but advance mitigation—we have seen in the case of the 2008 regulations that the Army Corps and EPA put out on mitigation that, by requiring, or not requiring, but asking for—

Mr. LABRADOR. But I am asking about advance compensation.

Ms. GOLDFUSS. Advance, yes. So, the advance compensation part is the piece that allows for the markets to have certainty and some sort of clarity that there is space for them to set up public-private partnerships.

In all of the work that we have done around those 2008 regs, working with industry and then coordinating with the agencies to

see what has created this space for mitigation banking to pop up over these years, it is really those tenants of making sure that the advance mitigation happens beforehand that allows the markets to come in and really step up to the plate.

Mr. LABRADOR. Thank you. With respect to the sage grouse, the FWS and the BLM avoided a listing by amending the resource management plans. My question is how the large-scale plan described in the Memo relates to these new RMPs containing the special restrictions for sage grouse? What assurance is there that this will not undo the work that is being done on the ground or add another layer of requirements on top of the already-existing RMPs?

Ms. GOLDFUSS. This will not change those plans. This is about how the agencies implement their mitigation policies. So if, in the course of their usual work, they amend those plans, that may be a question better suited for my colleagues.

Mr. LABRADOR. Does the Memo intend to direct the agencies to seek advance compensation for potential impacts to sage grouse under the RMPs?

Ms. GOLDFUSS. Once again, it is up to the agencies to determine how they will—

Mr. LABRADOR. So the answer is it could, correct?

Ms. GOLDFUSS. It is up to them. It is literally in the context of those existing statutes, they will make the determination of how to apply.

Mr. LABRADOR. So you are changing the plan in some way.

Mr. BEAN, what is the definition of “harmful effects”?

Mr. BEAN. I don’t know of any special definition. I would turn to a dictionary to answer that question.

Mr. LABRADOR. Isn’t that kind of dangerous, to put out a memo that has something that is undefined? Is this an objective standard, or a subjective standard?

Mr. BEAN. Well, I think it is—

Mr. LABRADOR. Like what I consider harmful may be different than what you consider harmful.

Mr. BEAN. I will acknowledge that we may have a different view of harmful. I think the experience gained since 1981, when the Fish and Wildlife Service has had a mitigation policy in place—

Mr. LABRADOR. What does that experience tell us the definition of “harmful effect” is?

Mr. BEAN. [No response.]

Mr. LABRADOR. You do not have one. That is the point I am trying to make. You do not have a definition for that.

Mr. BEAN. There is no definition, per se.

Mr. LABRADOR. Well, that is—

Mr. BEAN. In practice, there is a clear pattern and trend to show that that is the case only when there is a serious threat to the well-being of a species or its habitat.

Mr. LABRADOR. OK. So, will there be a process for those disagreements to be resolved? If you and I disagree on the definition of “harmful effect,” who is going to make the ultimate determination?

Mr. BEAN. The Fish and Wildlife Service is in a position, in some cases, of recommending to other agencies the mitigation that is appropriate, pursuant to the NEPA or Coordination Act process. In that case, the other agency—

Mr. LABRADOR. So, an administrative agency is going to make a decision based on an undefined term. Is that what you are telling us?

Mr. BEAN. I would not—

Mr. LABRADOR. Thank you.

Mr. BEAN [continuing]. Characterize it that way, no.

Mr. LABRADOR. Yes, that is exactly what is happening. The Memorandum also uses the term “natural resource damage.” Can you provide some examples of Forest Service activities that may be considered natural resource damages?

Mr. BEAN. You want the Forest Service to answer that?

Mr. LABRADOR. You, Mr. Bean, on what your agency would consider natural resource damages.

Mr. BEAN. Natural resource damages, I believe, refers to those damages caused by oil spills or chemical spills for which recovery by state and Federal trustees is permissible under law.

Mr. LABRADOR. Mr.—is it Ferebee?

Mr. FEREBEE. Yes.

Mr. LABRADOR. How would you define that term?

Mr. FEREBEE. The Forest Service speaks in terms of adverse impacts to resources. We would define that by activities that could affect the productivity of the resources in a way that the Forest Service would no longer be able to provide goods and services for the American public under the Multiple-Use Sustained-Yield Act, which is what was required.

Mr. LABRADOR. Ms. Goldfuss, who will determine which resources are important, scarce, or sensitive? Are these terms defined in statute?

Ms. GOLDFUSS. There are many statutes that are covered. I would point you to Federal land—

Mr. LABRADOR. Are they defined? Are they defined in the statute?

Ms. GOLDFUSS. Each of these statutes will have varying definitions, which is why we do not use or seek to define in the Presidential Memorandum. Instead, this is the way the President sets out goals for his agencies, who have existing statutes that were passed by Congress and regulations that apply to then follow through on those pieces.

Mr. LABRADOR. But are those definitions in the statutes? I know they have goals, but are there—

Ms. GOLDFUSS. There is a long list of statutes, and I do not have all those definitions.

Mr. GOHMERT. All right. Time has expired. The Chair recognizes the gentleman from Colorado, Mr. Polis, for 5 minutes.

Mr. POLIS. Thank you so much, Mr. Chairman. I am excited here to have this hearing regarding compensatory mitigation. As everybody knows, this is a mainstream item. It is not some fringe wish list item.

Of course, it is good for the environment, but it is also great for development, the economy, and has been used for decades under Republican and Democratic administrations. It is based on the fundamental premise of economics, and that is compensation for unfunded externalities. Decades ago development would be stopped if a project negatively impacted a natural resource. Mitigation offers

a new creative option that can protect resources and compensate for externalities, as well.

Now, the Memorandum we are discussing today is not a rewrite of public land use. It is certainly not a new rule. Rather, it just solidifies and provides more consistency and predictability to efforts that are already underway—generally, the approach that we want to hear from our private-sector partners. Instead of a patchwork approach, this will improve the implementation of mitigation through a comprehensive approach. And, it is very important to improve coordination between our public and private entities.

This Memorandum does not mandate that Federal agencies require more compensatory mitigation, no. It, rather, identifies consistent standards and principles to provide for better predictability over existing mitigation practices.

My first question is for Ms. Goldfuss. Animal habitats, private landowners that are paid a free-market price for a scarce resource, investors with a reasonable degree of certainty get a return on their investment, and industry will use this mitigation in the marketplace—those are all key stakeholders who benefit from this policy. Do you agree that free-market investment tied to high standards for mitigation delivers better and more predictable outcomes?

Ms. GOLDFUSS. Yes. And we have seen that play out in the mitigation banking schemes that have come out through the 2008 regulations that were carried out between the Corps and EPA. It is really an exciting area for investors, and is one of the communities that we spoke to a lot as we coordinated with our agencies, but then also worked with outside industry folks that are experts in this area.

Mr. POLIS. Mr. Bean, I would like to ask about a topic that is near and dear to the hearts of this committee: sage grouse. We have held hearings on sage grouse; it is a hot-button issue in my home state of Colorado.

I also think it is a good example of how mitigation can work. Last year, the Fish and Wildlife Service found the greater sage grouse not warranted for listing under the Endangered Species Act because several Federal agencies came together with states and private landowners in an unprecedented conservation effort to plan for its long-term protection and recovery.

I wanted to ask you if mitigation factored into those plans, and whether it played a constructive role in helping the Service reach its decision to avoid listing on the Endangered Species Act?

Mr. BEAN. Yes, sir, it did. Each of those plans includes an appendix that deals with mitigation. Several of the states have been very progressive in developing mitigation programs of their own.

I would cite, in particular, Nevada, which has a very sophisticated and comprehensive mitigation program for sage grouse. Colorado, your state, is working on a so-called habitat exchange, which is a form of mitigation banking. And, Wyoming and Montana are working on similar programs. All of those were part of the many pieces of the puzzle that led the Fish and Wildlife Service to conclude that listing was not warranted, and that, in fact, the bird did not need the protection of the Endangered Species Act.

Mr. POLIS. Back to you, Ms. Goldfuss. I understand the guidance builds on existing practices for over a century of requiring mitigation for development. I was wondering—the mitigation banking has mostly been conducted on private land. How do we incentivize private-sector investment in additional mitigation banks on private and public lands? And I was wondering if you have any examples you could point to of successful incentivization programs.

Ms. GOLDFUSS. Yes. Let me start out—first of all, thank you for the question on how this would impact public lands. Both of my colleagues might be able to add here. Really, the success in mitigation banking has been focused on private lands, and that is what led to a lot of the principles that are in the Memorandum. And there is an open question about how this will—certainly in sage grouse plans—but the actual investment piece, how that works on public lands.

Just recently, the Department of the Interior launched a Natural Resources Finance Center that will help harness some of the expertise of the finance community to figure out what the policies are and what the financial mechanisms could be that would allow some of this money and sort of the mitigation banking concept that we see on private lands, how that can apply on public lands.

So, a lot of that approach of public-private partnership that these principles are designed to really give that certainty to investors, we are hoping to see what the next step is on public lands in that area.

Mr. POLIS. My final question to Mr. Ferebee, who will not have too much time to answer. I represent a district with over 65 percent Federal land. I wanted to ask. How do our local communities stand to benefit from the smarter approach to mitigation that is put forward in this Memo?

Mr. FEREBEE. While the Forest Service has experience with compensatory mitigation, we have never had a national policy. So, we believe there will be predictability with a national policy, consistency with a policy, and we will be a little bit more efficient and effective when we work with our Federal partners, state partners, as well as the private sector.

Mr. POLIS. Thank you. I yield back.

Mr. GOHMERT. Thank you. At this time the Chairman of the Full Committee, the gentleman from Utah, Chairman Bishop, is recognized for 5 minutes.

The CHAIRMAN. Thank you. Mr. Ferebee, if I could I ask you a question. According to CEQ's testimony, this Memo is not a regulation and it is not a new requirement. I don't really know what it is, then, but it is not a memo or a new regulation.

But as you develop policies in your agencies to be responsive to this Memo, will the public be able to distinguish this non-regulation from an actual regulation in the way it is going to be enforced?

Mr. FEREBEE. Yes. Thanks for the question. The Forest Service, of course, is in the process of developing a national policy. What we hope to come from that is a better understanding of where the Forest Service sits around using the mitigation hierarchy.

The vast majority of our projects that have a potential to affect resources really get addressed in the first two steps, both in

avoidance and minimization. So, we see a smaller subset of projects falling in around compensatory mitigation. I think that will be clear as we work through this national policy and how we plan to engage.

The CHAIRMAN. But it is not a regulation. That is what you are going to do, internally.

Mr. FEREBEE. Correct.

The CHAIRMAN. So, you are not going to do it because she gave you a piece of paper, you are going to do this internally.

Mr. FEREBEE. We are going to do it internally, because we think it is—

The CHAIRMAN. But the paper itself—does the paper give any other clarification than that, or does it have to be activated by you?

Mr. FEREBEE. It has to be activated by—

The CHAIRMAN. So, if I trust you, and you are a good guy, then this can be positive for people?

Mr. FEREBEE. Yes.

The CHAIRMAN. And if I do not trust you and you are a bad guy, this could be negative for people.

Mr. FEREBEE. One could view it that way, correct.

The CHAIRMAN. Well, I was listening to a multiple choice test given to Mr. Bean earlier in this hearing, and he failed.

Ms. Goldfuss, let me ask you a question, then. If you were still at the agency level, would you accept this type of a directive as a suggestion or would you work to implement this exactly as it was delivered by the President?

Ms. GOLDFUSS. Well, if I were still at an agency I would say we look for the goals and, really, what the priorities for the Administration are.

The CHAIRMAN. C is—

Ms. GOLDFUSS. And then we work under—

The CHAIRMAN. C is not an option.

Ms. GOLDFUSS [continuing]. Our existing statutes. My previous agency was the Park Service, and we worked under the Organic Act, and that would determine how we implemented this guidance.

The CHAIRMAN. So, you wouldn't necessarily go with what was delivered to you. You would use your own discretion.

Ms. GOLDFUSS. The agencies have to use their own discretion based on the statutes that they need to—

The CHAIRMAN. At which case the Memo becomes pretty superfluous, doesn't it?

Ms. GOLDFUSS. The memo is a management tool that the President uses to communicate with his heads of the agencies.

The CHAIRMAN. That is really kind of cool, except they have that management tool already. They do not need another memo to do what they are already doing. If the Memo had significance, they would have to change what they are doing, but they already have the flexibility to do it. Therefore, the Memo is insignificant.

Let me go to another area quickly with you before I run out of time. No, keep your microphone on, this is to you.

Ms. GOLDFUSS. Sorry.

The CHAIRMAN. On Monday, my governor met with the President about a national monument designation in Utah. And the President's words to him were, "My instruction to my cabinet has

always been, you check with the governors in localities that are impacted. If they have ideas about how to achieve a mission in a more flexible way, we should exercise it.”

So, the question I have, is CEQ actively working on a national monument proposal for Bears Ears in San Juan County in my state?

Ms. GOLDFUSS. I cannot talk about any specific proposals that we are working on out of CEQ or out of the Administration with regard to national monuments. I can say that was a very positive exchange between the Governor and the President, and he did point to great lines of communications—

The CHAIRMAN. You are not saying yes or no, you are just saying you can’t tell me, right?

Ms. GOLDFUSS. I am—we have met with you, Mr. Chairman, and Mr. Chaffetz on your proposal. We are aware that you have proposed maps, and we have seen those, but we have made no comment on that proposal at this time.

The CHAIRMAN. But your answer is still, “I am not going to tell you,” right? There is no yes or no.

Let me throw out a couple of things at you just to think about as you are driving home, like new memos, you have plenty of time to do that.

We did send you a draft of our proposal on January 14, and then Mr. Chaffetz and I requested a meeting on February 11. We have seen no comments back from you on our proposal for that—Bears Ears, specifically.

Ms. GOLDFUSS. Yes.

The CHAIRMAN. And we have also not been able to have a chance to meet with you since that February 11 designation. I would certainly hope you would organize that, if we could.

But let me also say one other thing. Every other monument that has been used or abused by this Administration, as they have been designated, has had at least one member of their delegation who publicly supported this idea. You found one person dumb enough to do it. On this particular proposal, there is nobody in the Federal delegation that supports a monument. The Governor does not support a monument. There is no State Senator or State Representative from this area that supports a monument. The only elected Navajo at the state or county level is in this area, and she opposes a national monument. In fact, the chapters who reside in Utah from the Native Americans, they oppose a national monument.

I would certainly hope that you would keep the standard that you have in the past at least that high, and not try and lower it for the state of Utah; because the opposition is almost unanimous. You have to go to a couple of back-benches in the legislature before you can find somebody that is even somewhat positive to this. And, since you have been having meetings with these groups, I hope you would keep that basis in mind, especially when the President says, “If there is a more flexible way, you work with the locals, and you do it.”

In fact, that has always been one of the things you have touted in the past.

I apologize for going over 21 seconds. I want to hear the next multiple-choice questions.

Mr. GOHMERT. Well, at this——

Ms. GOLDFUSS. Congressman, I just want to say that I apologize that we have not been able to sit down with you since February 11, but I know that we can take it back and figure out a time to schedule, because it was——

The CHAIRMAN. I know you are waiting to meet with us with bated breath.

Ms. GOLDFUSS. We did have a good meeting, though.

The CHAIRMAN. No, you had a good meeting.

[Laughter.]

The CHAIRMAN. See you next time.

Mr. GOHMERT. We will not ask for a definition of the word “good.”

[Laughter.]

Mr. GOHMERT. But instead we will recognize the former Arkansas Razorback football player, Mr. Westerman, for 5 minutes.

Mr. WESTERMAN. Thank you, Mr. Chairman, and thank you, panel, for being here.

Ms. Goldfuss, you made a statement reminiscent of Teddy Roosevelt that I will say I actually wholeheartedly agree with, that we should be good stewards of our natural resources, and leave them in a better condition than we found them in for the next generation.

However, Roosevelt was a conservationist who believed that our resources were there for our use, and we were to manage them as good stewards. In all due respect, from what I see from our current Administration, there is a great contrast in Roosevelt’s brand of conservation and this Administration’s model of preservation and a total hands-off approach.

So, if we cut to the chase, this Memo and plan looks to me like it could be used as an impediment for any use and management of our resources, which would prohibit us from being able to have any kind of conservation efforts.

The famous mathematician, physicist, and philosopher, Pascal, once said that words arranged differently have different meanings, and meanings arranged differently have different effects. There are a lot of problems with some of the words that are in this Memo. And, I know you have said that the Memo does not really mean anything, that the agencies can figure out what they mean; but the Memo talks about a resource of irreplaceable character, and that minimization and compensation may not be adequate forms of mitigation. Could you help me understand what is meant by irreplaceable character? Ms. Goldfuss?

Ms. GOLDFUSS. Sorry. Let me say, when it comes to “irreplaceable” in the section of the Memo that addresses this, specifically, when we look at the hierarchy. First, when you have a project, you try to avoid any impacts. Then, the next step, if you cannot avoid impacts to the resources, your hope is that you can minimize the impact to those resources.

The last case, when you have no choice but your project must damage the resource, then you compensate. So, in this particular section of the PM, what we reference are areas of special value. And that is defined differently by the statutes that each of the agencies are designated to implement.

Mr. WESTERMAN. So, when we talk about——

Ms. GOLDFUSS. So, we are saying irreplaceable——

Mr. WESTERMAN [continuing]. Irreplaceable, are we talking about mitigation? How do you mitigate something that is irreplaceable?

Ms. GOLDFUSS. In that case, we say where it is irreplaceable, at a minimum, this is where we get to the “no net loss.” No net loss would mean we want to at least have strong mitigation. And then, if at all possible, even greater environmental value by the area that is restored.

So, you have to offset your damage, if it is of a high value——

Mr. WESTERMAN. Can you provide some examples of something that has irreplaceable character?

Ms. GOLDFUSS. This Memo is not about defining those pieces. That is up to the agencies and their existing statutes. So——

Mr. WESTERMAN. You wrote a memo that you don’t know what the memo means?

Ms. GOLDFUSS. We know which statutes it applies to, and which agencies, and they are under obligation, under the statutes that Congress passes for them, to institute their regulations that define many of these terms.

Mr. WESTERMAN. Could the category of irreplaceable include minerals or other similar resources?

Ms. GOLDFUSS. Congressman, I am not going to get into all the different definitions of what is irreplaceable.

Mr. WESTERMAN. Well, how are we supposed to understand, if you wrote the Memo, and you don’t know what it means?

Ms. GOLDFUSS. Well, we know which statutes it applies to, and that in each of those statutes there are varying definitions of what these agencies carry out as their land management responsibilities. And that is when we talk about a landscape-scale approach.

So, what are the areas across the landscape that you want to avoid because the impacts would be so great to the water quality or quantity? What are the impacts that you want to avoid?

Mr. WESTERMAN. Right, I——

Ms. GOLDFUSS. And that is where the agencies look at their——

Mr. WESTERMAN. I worked in the private sector and I understand what wetland mitigation is. I understand how that works. I understand how you can replace habitat. But how do you mitigate something that is irreplaceable? My concern is that if you leave this definition wide open, then anything can become irreplaceable. There is no way to mitigate it. And then you are back to preservation, and you are not using your resources, you are just taking a hands-off approach.

So, Mr. Bean and Mr. Ferebee, how would your agencies intend to define what is considered irreplaceable?

Mr. BEAN. Well, I have referred several times already this afternoon to a 1981 policy of the Fish and Wildlife Service, a 35-year-old policy still in effect today. It uses the term “irreplaceable resources.” It has used that term for 35 years. The experience to date is if a resource is deemed to be irreplaceable, the Service recommends avoidance. Don’t harm it.

There are relatively few resources that are of that character, but——

Mr. WESTERMAN. So, you could——

Mr. BEAN [continuing]. There are some.

Mr. WESTERMAN. It would mean a hands-off approach if it was deemed irreplaceable?

Mr. BEAN. The recommendation for the Fish and Wildlife Service would be to avoid impacts to an irreplaceable resource—

Mr. WESTERMAN. And Fish and Wildlife, the Forest Service, and other agencies will determine what irreplaceable means, because we really don't know right now?

Mr. BEAN. Well, actually, if we consult a dictionary—

Mr. WESTERMAN. And I have used all my time, Mr. Chairman.

Mr. BEAN. Sir, we can determine what it is. To replace is to restore to a former place, position, or condition, or to supply an equivalent for. So, an irreplaceable resource is one that cannot be restored to a former place or position. That is a standard dictionary definition. When we use terms, we intend them to have the meaning normally ascribed in the dictionary. That is what it means.

Mr. GOHMERT. The time of the gentleman has expired. I will recognize the gentleman from the land and party of Lincoln, Mr. LaHood, for 5 minutes.

Mr. LAHOOD. Thank you, Mr. Chairman, and I want to thank the witnesses.

In reviewing this Memorandum and the mitigation plan, I have heard in the questioning here this morning the number of times that you have talked about using the discretion, taking it under advisement on the implementation of this. And, I was looking at the Department of the Interior Department Manual. I guess it is 600DM6. And under 6.6, which is titled, "Principles," the manual talks about, "Such use includes authority to decline authorization of projects if applicants cannot adequately mitigate impacts to levels required to achieve established goals."

And when I look at that, it seems to me that you can object any plan or project, based on what is in that language, if it does not achieve your goals. That, to me, seems to conflict with what you are saying here. Can you talk about that?

Mr. BEAN. Yes. I think the purpose of that is to clearly spell out that there are some circumstances in which, if the mitigation that the applicant is prepared to provide is insufficient, the option exists to deny the permit or deny the authorization request. The Service does not do that often, but it has the authority to do that, and has used that authority sparingly.

Mr. LAHOOD. And, when you say that authority, that authority is based on that provision I just read if it does not meet the goal, correct?

Mr. BEAN. I would say it pre-exists what is in that departmental manual language that you read. Yes, sir.

Mr. LAHOOD. Then why would you need to have this language in there?

Mr. BEAN. The purpose of the departmental manual language was really to codify, to collate, to bring into one place, the principles, the policies, and the practices with respect to mitigation in the Department.

Mr. LAHOOD. Yes. I guess, with all due respect, it seems that that language—again, that is in this manual—is kind of an umbrella policy for anything. You could say that about any time it is

denied or approved it could be under that auspices. Is that fair to say?

Mr. BEAN. That would be fair to say, but one would have to be blind to the history of implementation over the last several decades in which permit denials have been exceedingly rare.

Mr. LAHOOD. Let me move to another area here. Under this Memorandum, your agencies are directed to write regulations to implement the new “net benefit no net loss standard for mitigation.” Yet, this standard is not found in the laws that govern Federal land use, such as the Federal Land Policy and Management Act, which requires projects to cause “no unnecessary or undue degradation of the lands and their resources” to be approved.

I guess, in looking at this, does that mean that this Memo has effectively raised the bar for what it takes to get a permit beyond the standards set forth in law by Congress? I guess that is to you, Ms. Goldfuss.

Ms. GOLDFUSS. Thank you for the question. We do not see it as raising the bar. We see this as coordinating the best practices that the agencies have used, as we have learned, CEQ, under the President’s guidance, coordinated with agencies around infrastructure permitting. And many of these mitigation policies came about through that work that we did with the agencies.

So, this was already underway. We have seen what works. We have seen what cut permitting times in half underneath the 2008 regulations that the Corps and EPA carried out. So, it is through those successes that we have worked across with the other land management agencies to see if this will work for them.

Mr. LAHOOD. What assurances can you give that this does not raise the bar?

Ms. GOLDFUSS. This is the President’s communication with his agencies. So, it is up to them. I guess I would ask you—Raise the bar on what?

Mr. LAHOOD. Well, I mean, in looking at the clear language of the law there, and what it says—

Ms. GOLDFUSS. This is not a law, this is a memo to the agencies.

Mr. LAHOOD. I understand that. But in looking at what it takes to get a permit, it looks like it goes beyond the standards set forth by Congress.

Ms. GOLDFUSS. That is not possible. It is not legal. It would not be possible for the Memo to go beyond existing statute.

Mr. LAHOOD. I guess I wish I had more confidence in that.

Looking at the Federal Land Policy and Management Act, or other statutes that require Federal lands to be managed for multiple uses—but when I look at this Memorandum, it would allow for only the approval of uses that meet the level of “net benefit, no net loss.” I guess, therefore, doesn’t this policy represent a movement away from the multiple use principles that have guided Federal land and water management?

Ms. GOLDFUSS. No, not at all. Once again, FLPMA stands. Land management policy stands for each of these agencies. And, in fact, when we lay out this hierarchy of first avoid impacts, then mitigate whatever impacts you have, that means, basically, at the end of the

day, you have both. You have a strong environmental outcome, and you have faster permitting times.

Our goal here has been to do both. And through our infrastructure permitting work that we have done with the agencies, we have seen that we can do both. So first, pick a smart place to build your project. Then, if you have no other choice but you are going to impact resources, then offset them somewhere else so that we can still have water quality, and we can still have strong land that we can leave for future generations.

Mr. LAHOOD. I get—

Ms. GOLDFUSS. That is the goal.

Mr. LAHOOD. And last, in the end, though, the provision I mentioned at the beginning, if it does not achieve the goal, there is still discretion there to reject it or accept it.

Ms. GOLDFUSS. That is all based on existing statute. This Memo does not change that.

Mr. LAHOOD. Thank you.

Mr. GOHMERT. All right, thank you. The gentleman's time has expired. At this time, I will begin a second round.

Mr. Bean, you had indicated earlier the importance of consistency and transparency. So, in the name of transparency, would you tell us what stakeholders that your agency collaborated with during the development of this Memorandum, and what stakeholders you will consult with as you develop the regulations to implement the mitigation policy?

Mr. BEAN. The Fish and Wildlife Service is currently working to revise its 1981 policy. It is also working to revise its 2003 policy on compensatory mitigation under the Endangered Species Act. And, it is also working to finalize proposed policy with respect to pre-listing mitigation credits for endangered species. In each of those cases, the Service will—in one case already has—put out for public comment its proposed revisions, or its proposed policies.

Mr. GOHMERT. OK. So far you have not answered my question at all. What stakeholders did your agency consult with—

Mr. BEAN. In developing these policy proposals that will be out for public review?

Mr. GOHMERT. Yes.

Mr. BEAN. I am not aware of any outreach in particular to stakeholders for those policies. Those were internally generated proposals that now go through a public notice and comment process. We will hear from stakeholders.

Mr. GOHMERT. So—

Mr. BEAN. We have already heard from stakeholders with respect to the pre-listing mitigation—

Mr. GOHMERT. Are you telling us that in preparation of the development of this Memorandum, that you did not consult with any stakeholders?

Mr. BEAN. I referred to three policy proposals: one, a revision of the 1981 general mitigation policy; two—

Mr. GOHMERT. But I am talking about specific stakeholders that you consulted with about—

Mr. BEAN. For those three policies?

Mr. GOHMERT [continuing]. Revising those—

Mr. BEAN. No. For those three policies, I am not aware of any.

Mr. GOHMERT. So you feel like there is enough expertise within your agency that you can just come out with memorandum and policy without consulting any of the people involved, any of the stakeholders, any of the landowners—

Mr. BEAN. No, I would not—

Mr. GOHMERT [continuing]. Any of the—

Mr. BEAN. I would not say that. I would say—

Mr. GOHMERT [continuing]. State and local government, that you can come up with a policy that will not improperly or adversely affect them unnecessarily by consulting just the people—

Mr. BEAN. No, I would not say that, sir.

Mr. GOHMERT [continuing]. In the little bureaucratic office?

Mr. BEAN. What I would say is the Service would look to 35 years of experience of existing policy in determining what revisions are appropriate. It would look to the experience of the Corps of Engineers and EPA and their 2008 policy to learn what has worked well for them. So, all of that information—

Mr. GOHMERT. So, again, you are telling me all Federal agencies, but you are not telling me anybody—not state, local, landowners—that you have consulted with about something that is going to have a powerful and potentially devastating effect on people as you go forward with your policies.

Let me move over. Ms. Goldfuss, again, in following up on Mr. Bean's mention of transparency. We know, for example, historically, that John Adams told Thomas Jefferson, "You do the first draft of the Declaration of Independence, you are the best writer we've got." He did, he did it alone, and he gave it to John Adams. John Adams was blown away it was so good. Apparently, he made no changes, they both showed it to Benjamin Franklin. Franklin made some interlineations, and I understand they may actually have the original that he wrote on.

With regard to this Memo, who was it that did the first draft?

Ms. GOLDFUSS. I am not sure I can share exactly the first person. I will say we have many stakeholders through the process that we did talk to around the Memorandum. Also, in the infrastructure permitting—

Mr. GOHMERT. OK, so—

Ms. GOLDFUSS [continuing]. Capacity we have worked with—

Mr. GOHMERT. Then maybe you can share with us which stakeholders you consulted.

Ms. GOLDFUSS. One of the most interesting pieces of what has come out of this mitigation banking setup is how the states are engaging. One example is Barrick Gold, who has a very interesting proposal, where they have their very own mitigation bank. So, they are conserving species on their own land, and then, as they expand their gold mine, they will be able to take credit for the species that they are restoring elsewhere.

It is those industries that have been successful, and this is not philanthropy, this is—

Mr. GOHMERT. Do you have specifics, there—

Ms. GOLDFUSS [continuing]. Real return on investment, in terms of what we have seen with mitigation—

Mr. GOHMERT. But specifically, who were the stakeholders you consulted?

Ms. GOLDFUSS. This was a long process, so I cannot say off the top of my head every single stakeholder we talked to. But we spoke to states, we spoke to industry, we spoke to——

Mr. GOHMERT. And you cannot tell me anybody specifically?

Ms. GOLDFUSS [continuing]. Many types of organizations.

Mr. GOHMERT. But——

Ms. GOLDFUSS. Well, I just mentioned Barrick Gold as one of the organizations.

Mr. GOHMERT. Oh, OK, OK.

Ms. GOLDFUSS. We have spoken to oil and gas companies that I know the Agency has worked with to see what has worked for them as well.

But really, it is industry that has found this mitigation banking works well for them, conservation banking works well for them. They are the——

Mr. GOHMERT. Specific industry, did you say, or just industry in general, everybody?

Ms. GOLDFUSS. Barrick Gold is a gold mining company.

Mr. GOHMERT. I know, you have mentioned——

Ms. GOLDFUSS. There are other companies. Then there are oil and gas companies, small——

Mr. GOHMERT. Well, that is pretty vague. Environmental groups, what environmental groups?

Ms. GOLDFUSS. It may surprise you, but there is sometimes concern from environmental groups that this will lead to more development. So, they are not necessarily the largest proponents of this. We have worked with some organizations that themselves own land or are part of mitigation banking efforts.

Mr. GOHMERT. All right. I am shocked. Shocked, I tell you. And with that I will yield 5 minutes to the Ranking Member, Mrs. Dingell.

Mrs. DINGELL. Thank you, Mr. Chairman. Actually, I have been on the other side of it, when the environmental groups were not happy with mitigation, so I can be a witness to that happening.

I am worried about much of the criticism we have heard today about the Memo being vague. I feel like if it was specific, you can bet we would hear the criticism that it is too prescriptive. It is too vague. If Obama sinks, he is a witch; if he floats, he is a witch. I think we have a little of that today, and it bothers me.

Mr. Chairman, I am going to ask unanimous consent to enter the following documents into the record: a peer-reviewed study on the economic benefits of compensatory mitigation; a letter of support for the President's Mitigation Memo from several conservation groups; and a series of individual statements of support from the President's Mitigation Memo.

[No response.]

Mr. GOHMERT. Without objection.

Mrs. DINGELL. Thank you, Mr. Chairman. And I want to read to you a letter from the National Mitigation Banking Association, when this Memorandum came out, said, "This Presidential Memorandum strikes the right balance between economic development and restoring the Nation's natural resources endowment."

And then later in it, "With this new policy we expect to double the pace of private investment from the 2014 rate of 85,000 acres per year to 200,000 acres per year within the next 5 years."

So, for the record, I wanted to read that. And I would just enter that into the record.

Mr. GOHMERT. Without objection.

Mrs. DINGELL. Thank you.

But I would also say that the Presidential Memo's guidelines rest on a solid foundation of existing law and policy, which I think is not coming through, such as the FLPMA's mandates to provide for multiple use, sustained yield, and avoid unnecessary and undue degradation of public land resources, as well as NEPA's requirement for Federal agencies to identify impacts and consider ways to avoid, minimize, and offset them through mitigation. This foundation makes a rulemaking unnecessary.

I think what this Memorandum is trying to do is to bring agencies that are all working on the same project together, and get everybody rowing—you know, if you are in the boat, getting everybody rowing in the same direction based on existing law.

So, I think the President was trying to show leadership, something you keep saying he wants to do; but when he does, you are never happy.

Let me go back to something I was talking to Mr. Bean about a few minutes ago.

Mr. Bean, I want to go back to one of the questions in the previous series and ask you to expand a little. You mentioned that mitigation reduces the chance of damage to environmentally sensitive land and waters. That seems counter-intuitive, because mitigation is only necessary when adverse impacts cannot be avoided.

Can you explain the different ways that that works? And is the Dry Lake Solar Energy Zone in Nevada that you mention in your written testimony an example of how it might work?

Mr. BEAN. Let me be clear about some frequently confused terminology. Mitigation refers to avoidance, minimization, and compensatory actions. It is not limited to just compensatory actions. So the standard hierarchy, if you will, is first avoid, to the extent practicable; then minimize to the extent practicable; and whatever remains is then to be compensated for with compensatory measures.

That is the reason that projects that initially have some substantial detrimental impacts upon the environment can be altered, can be sited differently, can be modified in various ways to reduce those impacts; and to the extent there are remaining negative impacts, those can then be offset. That is how mitigation works.

And it is the role of banking and other similar efforts to deal with that last step, that compensatory mitigation step.

Mrs. DINGELL. Thank you.

Ms. Goldfuss, we keep getting all this criticism of the Presidential Memo. My reading and studying of it says that the guidance builds on existing practices of 100 years of requiring mitigation for development. How does this improve on the status quo?

Ms. GOLDFUSS. This improves on the status quo by setting out the market conditions that allow for good public-private partnership. That advanced action, setting out how you are going to mitigate your impacts up front, allows industry to set up a credit

process, so that someone can protect a land, a wetland, or a stream, ahead of time. Then, when a mining company comes in and needs to move forward with their project in that wetland, they can get the credit and move forward with their project, which speeds up the permitting times.

As you mentioned, these are long-standing statutes that build on a balanced approach that gives us both stronger environmental outcomes and faster permitting times. That is the goal, and the hierarchy and the statutes behind this go back to the 1930s.

Mrs. DINGELL. Thank you, Mr. Chairman. My time is up.

Mr. GOHMERT. Thank you. The gentleman from Idaho is recognized for 5 minutes.

Mr. LABRADOR. Thank you, Mr. Chairman. I will just follow up on that comment. You keep saying, "these long-standing statutes." Can you give me a list of—for example, I think it was Mr. Westerman who asked you what the term "irreplaceable character" is, and you said that there is a list of statutes. Where is that in the statutes, "irreplaceable character"?

Ms. GOLDFUSS. [No response.]

Mr. LABRADOR. The term—

Ms. GOLDFUSS. Each of the statutes? The agencies will have to define it, based on the statutes. We have several—

Mr. LABRADOR. Well, I want the term.

Ms. GOLDFUSS [continuing]. And I can list for you—

Mr. LABRADOR. This is ridiculous, what you are saying. The term has to be defined. We did not give you authority to just come up with a term. We gave you authority to define what we gave you authority to do. What you are doing, is you are trying to tell us and tell the American people what a certain term means without any definition; that is just going to give you open-ended analysis of what you can do or you cannot do.

We give you the authority, it is not the other way around. So can you tell me in the statute where that term is defined?

Ms. GOLDFUSS. Well, as Mr. Bean pointed out previously, there is an "irreplaceable" term in the Endangered Species Act. There is other terminology—

Mr. LABRADOR. Irreplaceable—

Ms. GOLDFUSS [continuing]. And "irreplaceable" is defined—exactly how does Fish and Wildlife define it? I know you know it off the top of your head.

Mr. BEAN. The term "irreplaceable" is used in the 1981 Fish and Wildlife Service mitigation policy. It has been in use for 35 years. It is not in the statute, it is in the existing policy of 35 years—

Mr. LABRADOR. That is policy, that is not—

Mr. BEAN [continuing]. Dating back—

Mr. LABRADOR [continuing]. The statute. We are the ones who are supposed to define it, not you.

I want a list in the statute where "irreplaceable character" is defined. Is that in the statute? Yes or no.

Mr. BEAN. As far as I know, the answer is no.

Mr. LABRADOR. OK.

Mr. BEAN. But there are other terms—

Mr. LABRADOR. I want the term that we asked about already. We also asked you about "important, scarce, or sensitive." Is that in the statute?

Mr. BEAN. It is in the Federal Land Policy Management Act, yes, sir.

Mr. LABRADOR. So it is not in the statute?

Mr. BEAN. I think it is important—yes, it is in the statute.

Mr. LABRADOR. And it is defined in the statute?

Mr. BEAN. No, I am afraid Congress used those words without defining them.

Mr. LABRADOR. OK. That is our fault, and we can agree on that. That is something that I want to change. But you are using terms—has that term been defined by the courts at any time?

Mr. BEAN. I don't know the answer to that question, sir.

Mr. LABRADOR. OK. That is the problem that I have with this, is that we are actually going through this analysis that is so subjective instead of objective. You can define it any way you want, and then I can define it any way I want. I do think it is up to us, as Members of Congress, to define these terms. But the more you extend these terms, and the more you go out there, it is going to be more difficult for us to have any control of what is happening, which is actually—the people elected us, not you.

So here is another question. Does landscape include non-Federal property?

Mr. BEAN. My understanding is it could, depending upon the resource involved. For example, I mentioned the lesser prairie chicken. The landscape relevant to the conservation of that is primarily non-Federal property.

Mr. LABRADOR. There is now some concern that impacts of Federal land off of Federal lands would now require mitigation, assuming a nexus with a Federal permit. What is the intent of this Memo with regard to impacts that are not on Federal land or Federal property?

Anybody can answer this question.

Ms. GOLDFUSS. All right. The Memo does not apply to non-Federal entities. The Memo, as we have said over and over again, applies only to existing statute.

Where we have seen success, and some of what we have learned, has specifically been on private land, where you have investors or industry buying property that they restored to a higher level to then offset their damages elsewhere. That is how you get the mitigation banking idea, is that they restore the property to offset their damage.

That is mostly done on private land, because you have to have an asset. That sort of is your value behind the credit, if that makes sense.

Mr. LABRADOR. OK. The Memorandum states that the new standard of a net benefit or a minimum no net loss should be applied to resources that are important, scarce, or sensitive. Explain again where you obtained that criteria from.

Ms. GOLDFUSS. Net benefit and no net loss are terms. Net benefit has been around, and I believe was first defined, under George H.W. Bush. Then, the idea of moving beyond net benefit, specifically related to wetlands, something I referenced in my oral

testimony, is an idea that we have seen around for quite some time, and George W. Bush referenced.

Mr. LABRADOR. OK. I believe it was the no net loss that was used by Bush. Are they found in any other resource management statutes, or this was just something the Bush administration changed?

Ms. GOLDFUSS. These are goals that are set out for the agencies that, when they are in these situations where resources are going to be degraded, the goal is to then offset so you have no net loss of wetlands or, in some of the rarest situations, you actually have a benefit.

Mr. LABRADOR. Right, thank you. I yield back.

Mr. GOHMERT. Thank you. Just one more brief line.

Mr. Ferebee, memos are supposed to be with regard to legislation and clarifying matters of legislation that are in effect, or if there is some deficiency that has been gleaned from the enforcement of existing legislation. And I am curious. Do you know what deficiency in the Forest Service existed that may have necessitated this Memorandum?

Mr. FEREBEE. Thank you, Mr. Chairman, for the question. The Forest Service sees the value of what the Memo is asking the Forest Service to do by really establishing a mitigation framework, so that we can be more consistent when we engage and operate with proponents so they can really understand—

Mr. GOHMERT. So, the Forest Service was not being specific, you were just generally vague in the way that the Forest Service was doing their job, so you needed somebody to come in with a vague memorandum to tell you how to do it?

Mr. FEREBEE. I would not—

Mr. GOHMERT. Is that what you are saying? Because the question was, “What was the deficiency in the Forest Service that necessitated this Memo?”

Mr. FEREBEE. Without a national framework or national policy, how we approached mitigation project to mitigation project varied.

Mr. GOHMERT. So, all these years we did not have an adequate framework for mitigation? That is what you are saying?

Mr. FEREBEE. I would say we used the mitigation framework differently in different situations. So, what the Agency—

Mr. GOHMERT. The Forest Service used different mitigation in different mitigation situations?

Mr. FEREBEE. An example would be, as we talked about, the steps in the mitigation process would be avoidance first, minimization second, and then compensatory mitigation third. We could have situations, quite honestly, where folks went to compensatory mitigation first, for an example.

So, the Forest Service stating its position in the framework of how to use the mitigation framework is what we wanted to accomplish, which we think helps in our relationships with other Federal and state agencies and the tribes, when we are working on projects jointly. We think it helps our employees to understand how we want to go about implementing the mitigation framework.

Mr. GOHMERT. So that I understand, the Forest Service then, because you were unable to be consistent when it came to mitigation, did you request this Memorandum from CEQ?

Mr. FEREBEE. The Forest Service had begun the process of starting to establish conversations around the values and the need for a national policy.

Mr. GOHMERT. I am not sure I understand. Were you seeking guidance and basically asking for a memo like this?

Mr. FEREBEE. I would not suggest the Forest Service was seeking guidance. But the Forest Service does see value in what the Memorandum—

Mr. GOHMERT. Well, but that—

Mr. FEREBEE [continuing]. Is attempting to accomplish.

Mr. GOHMERT. Seeing value is a whole different issue. I am trying to understand what necessitated the Memo, and you are telling me your mitigation practices were inconsistent. So, I am wondering if that spurred you on to request of CEQ that they give you a memo that you could use because the Forest Service was just not doing a good job of consistency in mitigation. Is that what we are finding out here?

Mr. FEREBEE. No. What I am sharing with you is, after the Forest Service looked at our practices, engaged with our proponents, looked at what was going on in other state and Federal agencies, we thought there was an opportunity with a national policy to bring a little bit more consistency, predictability, efficiencies, and effectiveness—

Mr. GOHMERT. OK, so you did request the Memo.

Mr. FEREBEE. No, as I indicated previously, the Forest Service had begun conversations around this need prior to the Memo.

Mr. GOHMERT. OK. So you began conversations prior to the Memo, which led to the need for the Memo. Is that what you are saying?

Mr. FEREBEE. I cannot speak to the need of the Memo, other than I can share with you the value we see coming out of what the Memo—

Mr. GOHMERT. I am just trying to figure out what spurred this on, and what deficiency in your agency might have spurred this on and also, as I asked, whether or not you sought or asked for guidance through a memo like this. And you said you did not ask for it.

Mr. FEREBEE. No, the Forest Service had conversations and, as I indicated previously, we acknowledged that there were some opportunities to become a little bit more effective and efficient with how we handled proponent-driven projects—

Mr. GOHMERT. OK, so you—

Mr. FEREBEE [continuing]. When it comes to mitigation—

Mr. GOHMERT [continuing]. Notified CEQ, “We are just not doing a good job of consistency on mitigation, so give us something that will help us, because we cannot police ourselves without a new memo”? I really want to know what it was that spurred this thing on.

Mr. FEREBEE. All I can share with you is what the Agency believes is the value that comes from the Memo of which we had initiated—

Mr. GOHMERT. But that is the value—

Mr. FEREBEE [continuing]. Conversations prior—

Mr. GOHMERT [continuing]. After you get the Memo. I am talking about what led up to it.

Mr. FEREBEE. I am not in a position to articulate exactly why the Memo was really generated, other than to say the Forest Service had been in conversations. And as a part of those conversations, we acknowledged there was opportunity to become a little bit more efficient and effective when it comes to mitigation.

Mr. GOHMERT. Thank you. I ask the Ranking Member be recognized for 5 minutes.

Mrs. DINGELL. Thank you, Mr. Chairman. I guess I would just like to say that I think the Memo came out of leadership, because I think we are always saying we wish we saw better coordination between the agencies. The Department of Defense is a very different department than the Department of the Interior. How do you take the existing foundation and goals and put everybody in the boat and all rowing in the same direction? That is what I viewed this as being.

I would like to add and ask that the record be kept open a little longer, just for all the members of the committee and the subcommittee, the number of mitigation banks in their district which will show where restoration is happening at no expense to the taxpayers. The Chairman will find that he has 12 mitigation banks in his district. I have none. I have to figure out why I don't have any.

I want to go back, Mr. Bean, to the second half of my question that you did not get to, which is one of the major successes we have seen with this approach is the Dry Lake Solar Energy Zone in Nevada, where permitting times for projects were cut in half. What other opportunities do you see to replicate this experience? And isn't that what this is really about?

Mr. BEAN. Yes, that is what this is about. And, in fact, to address that line of questioning that the Chairman was just pursuing a moment ago—this came about in large part because the Administration's perception that for large projects like transmission projects that cross multiple jurisdictions—across Forest Service land, across BLM land, across private land, across state boundaries—permitting time was too long, permitting complexity was too great; there was a need to address mitigation as a contributor to that permitting time and permitting complexity.

So, this Memorandum, I believe, grew out of a perception that we can do a better job permitting these large-scale projects that cross multiple jurisdictions by coordinating our response to mitigation by coordinating how we approach mitigation. I think you are absolutely right, and the Dry Lake example is a good example of the benefits from this approach to mitigation.

I would also point out with respect to the mitigation banks that you mentioned a moment ago, a good many of them in virtually every state are sponsored by and operated by state transportation departments. That is because they look ahead to their need to build out a road system in the decades coming. They anticipate that they will affect wetlands in building those roads, and they need to have mitigation in place so that when it comes time to build the roads, they can simply draw down on credits from a bank.

It has been a supremely effective way to put in place a mechanism of advance compensation that allows permit decisions and construction activities on highways to proceed quickly.

Mrs. DINGELL. Thank you, Mr. Bean.

Mr. Chairman, I am going to yield back the balance of my time. I think we have subjected these witnesses to enough today.

Mr. GOHMERT. OK.

Mrs. DINGELL. I think they are trying to do a good job. They work hard.

Mr. GOHMERT. I thank the Ranking Member specifically, and thank our witnesses for being here today.

Members of the committee may have additional questions that they would submit to you in writing. Under Committee Rule 4(h), the hearing record would be held open for 10 business days for these responses, and if there are additional questions, we need to get the answers within 10 days.

Seeing that, if there is no further business?

[No response.]

Mr. GOHMERT. Hearing none, without objection, the committee stands adjourned. Thank you.

[Whereupon, at 3:31 p.m., the subcommittee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

The White House
Office of the Press Secretary
For Immediate Release
November 3, 2015

Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment

MEMORANDUM FOR THE SECRETARY OF DEFENSE

THE SECRETARY OF THE INTERIOR

THE SECRETARY OF AGRICULTURE

THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

THE ADMINISTRATOR OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

We all have a moral obligation to the next generation to leave America's natural resources in better condition than when we inherited them. It is this same obligation that contributes to the strength of our economy and quality of life today. American ingenuity has provided the tools that we need to avoid damage to the most special places in our Nation and to find new ways to restore areas that have been degraded.

Federal agencies implement statutes and regulations that seek simultaneously to advance our economic development, infrastructure, and national security goals along with environmental goals. As efforts across the country have demonstrated, it is possible to achieve strong environmental outcomes while encouraging development and providing services to the American people. This occurs through policies that direct the planning necessary to address harmful impacts on natural resources by avoiding and minimizing impacts, then compensating for impacts that do occur. Moreover, when opportunities to offset foreseeable harmful impacts to natural resources are available in advance, agencies and project proponents have more options to achieve positive environmental outcomes and potentially reduce permitting timelines.

Federal agencies can, however, face barriers that hinder their ability to use Federal resources for restoration in advance of regulatory approval of development and other activities (e.g., it may not be possible to fund restoration before the exact location and scope of a project have been approved; or there may be limitations in designing large-scale management plans when future development is uncertain). This

memorandum will encourage private investment in restoration and public-private partnerships, and help foster opportunities for businesses or non-profit organizations with relevant expertise to successfully achieve restoration and conservation objectives.

One way to increase private investment in natural resource restoration is to ensure that Federal policies are clear, work similarly across agencies, and are implemented consistently within agencies. By encouraging agencies to share and adopt a common set of their best practices to mitigate for harmful impacts to natural resources, the Federal Government can create a regulatory environment that allows us to build the economy while protecting healthy ecosystems that benefit this and future generations. Similarly, in non-regulatory circumstances, private investment can play an expanded role in achieving public natural resource restoration goals. For example, performance contracts and other Pay for Success approaches offer innovative ways to finance the procurement of measurable environmental benefits that meet high government standards by paying only for demonstrated outcomes.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, and to protect the health of our economy and environment, I hereby direct the following:

Section 1. Policy. It shall be the policy of the Departments of Defense, the Interior, and Agriculture; the Environmental Protection Agency; and the National Oceanic and Atmospheric Administration; and all bureaus or agencies within them (agencies); to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities. Agencies shall each adopt a clear and consistent approach for avoidance and minimization of, and compensatory mitigation for, the impacts of their activities and the projects they approve. That approach should also recognize that existing legal authorities contain additional protections for some resources that are of such irreplaceable character that minimization and compensation measures, while potentially practicable, may not be adequate or appropriate, and therefore agencies should design policies to promote avoidance of impacts to these resources.

Large-scale plans and analysis should inform the identification of areas where development may be most appropriate, where high natural resource values result in the best locations for protection and restoration, or where natural resource values are irreplaceable. Furthermore, because doing so lowers long-term risks to our environment and reduces timelines of development and other projects, agency policies should seek to encourage advance compensation, including mitigation bank-based approaches, in order to provide resource gains before harmful impacts occur. The design and implementation of those policies should be crafted to result in predictability sufficient to provide incentives for the private and non-governmental investments often needed to produce successful advance compensation. Wherever possible, policies should operate similarly across agencies and be implemented consistently within them.

To the extent allowed by an agency's authorities, agencies are encouraged to pay particular attention to opportunities to promote investment by the non-profit and private sectors in restoration or enhancement of natural resources to deliver measurable environmental outcomes related to an established natural resource goal, including, if appropriate, as part of a restoration plan for natural resource damages or for authorized investments made on public lands.

Sec. 2. Definitions. For the purposes of this memorandum:

- (a) "Agencies" refers to the Department of Defense, Department of the Interior, Department of Agriculture, Environmental Protection Agency, and National Oceanic and Atmospheric Administration, and any of their respective bureaus or agencies.
- (b) "Advance compensation" means a form of compensatory mitigation for which measurable environmental benefits (defined by performance standards) are achieved before a given project's harmful impacts to natural resources occur.
- (c) "Durability" refers to a state in which the measurable environmental benefits of mitigation will be sustained, at minimum, for as long as the associated harmful impacts of the authorized activity continue. The "durability" of a mitigation measure is influenced by: (1) the level of protection or type of designation provided; and (2) financial and long-term management commitments.

(d) “Irreplaceable natural resources” refers to resources recognized through existing legal authorities as requiring particular protection from impacts and that because of their high value or function and unique character, cannot be restored or replaced.

(e) “Large-scale plan” means any landscape- or watershed-scale planning document that addresses natural resource conditions and trends in an appropriate planning area, conservation objectives for those natural resources, or multiple stakeholder interests and land uses, or that identifies priority sites for resource restoration and protection, including irreplaceable natural resources.

(f) “Mitigation” means avoiding, minimizing, rectifying, reducing over time, and compensating for impacts on natural resources. As a practical matter, all of these actions are captured in the terms avoidance, minimization, and compensation. These three actions are generally applied sequentially, and therefore compensatory measures should normally not be considered until after all appropriate and practicable avoidance and minimization measures have been considered.

Sec. 3. Establishing Federal Principles for Mitigation. To the extent permitted by each agency’s legal authorities, in addition to any principles that are specific to the mission or authorities of individual agencies, the following principles shall be applied consistently across agencies to the extent appropriate and practicable.

(a) Agencies should take advantage of available Federal, State, tribal, local, or non-governmental large-scale plans and analysis to assist in identifying how proposed projects potentially impact natural resources and to guide better decision-making for mitigation, including avoidance of irreplaceable natural resources.

(b) Agencies’ mitigation policies should establish a net benefit goal or, at a minimum, a no net loss goal for natural resources the agency manages that are important, scarce, or sensitive, or wherever doing so is consistent with agency mission and established natural resource objectives. When a resource’s value is determined to be irreplaceable, the preferred means of achieving either of these goals is through avoidance, consistent with applicable legal authorities. Agencies should explicitly consider the extent to which the beneficial environmental outcomes that will be achieved are demonstrably new and would not have occurred in the absence of mitigation (i.e. additionality) when determining whether those measures adequately address impacts to natural resources.

(c) With respect to projects and decisions other than in natural resource damage cases, agencies should give preference to advance compensation mechanisms that are likely to achieve clearly defined environmental performance standards prior to the harmful impacts of a project. Agencies should look for and use, to the extent appropriate and practicable, available advance compensation that has achieved its intended environmental outcomes. Where advance compensation options are not appropriate or not available, agencies should give preference to other compensatory mitigation practices that are likely to succeed in achieving environmental outcomes.

(d) With respect to natural resource damage restoration plans, natural resource trustee agencies should evaluate criteria for whether, where, and when consideration of restoration banking or advance restoration projects would be appropriate in their guidance developed pursuant to section 4(d) of this memorandum. Consideration under established regulations of restoration banking or advance restoration strategies can contribute to the success of restoration goals by delivering early, measurable environmental outcomes.

(e) Agencies should take action to increase public transparency in the implementation of their mitigation policies and guidance. Agencies should set measurable performance standards at the project and program level to assess whether mitigation is effective and should clearly identify the party responsible for all aspects of required mitigation measures. Agencies should develop and use appropriate tools to measure, monitor, and evaluate effectiveness of avoidance, minimization, and compensation policies to better understand and explain to the public how they can be improved over time.

(f) When evaluating proposed mitigation measures, agencies should consider the extent to which those measures will address anticipated harm over the long term. To that end, agencies should address the durability of compensation measures, financial assurances, and the resilience of the measures’ benefits to potential future environmental change, as well as ecological relevance to adversely affected resources.

(g) Each agency should ensure consistent implementation of its policies and standards across the Nation and hold all compensatory mitigation mechanisms to equivalent and effective standards when implementing their policies.

(h) To improve the implementation of effective and durable mitigation projects on Federal land, agencies should identify, and make public, locations on Federal land of authorized impacts and their associated mitigation projects, including their type, extent, efficacy of compliance, and success in achieving performance measures. When compensatory actions take place on Federal lands and waters that could be open to future multiple uses, agencies should describe measures taken to ensure that the compensatory actions are durable.

Sec. 4. Federal Action to Strengthen Mitigation Policies and Support Private Investment in Restoration. In support of the policy and principles outlined above, agencies identified below shall take the following specific actions.

(a) Within 180 days of the date of this memorandum, the Department of Agriculture, through the U.S. Forest Service, shall develop and implement additional manual and handbook guidance that addresses the agency's approach to avoidance, minimization, and compensation for impacts to natural resources within the National Forest System. The U.S. Forest Service shall finalize a mitigation regulation within 2 years of the date of this memorandum.

(b) Within 1 year of the date of this memorandum, the Department of the Interior, through the Bureau of Land Management, shall finalize a mitigation policy that will bring consistency to the consideration and application of avoidance, minimization, and compensatory actions or development activities and projects impacting public lands and resources.

(c) Within 1 year of the date of this memorandum, the Department of the Interior, through the U.S. Fish and Wildlife Service, shall finalize a revised mitigation policy that applies to all of the U.S. Fish and Wildlife Service's authorities and trust responsibilities. The U.S. Fish and Wildlife Service shall also finalize an additional policy that applies to compensatory mitigation associated with its responsibilities under the Endangered Species Act of 1973. Further, the U.S. Fish and Wildlife Service shall finalize a policy that provides clarity to and predictability for agencies and State governments, private landowners, tribes, and others that take action to conserve species in advance of potential future listing under the Endangered Species Act. This policy will provide a mechanism to recognize and credit such action as avoidance, minimization, and compensatory mitigation.

(d) Within 1 year of the date of this memorandum, each Federal natural resource trustee agency will develop guidance for its agency's trustee representatives describing the considerations for evaluating whether, where, and when restoration banking or advance restoration projects would be appropriate as components of a restoration plan adopted by trustees. Agencies developing such guidance will coordinate for consistency.

(e) Within 1 year of the date of this memorandum, the Department of the Interior will develop program guidance regarding the use of mitigation projects and measures on lands administered by bureaus or offices of the Department through a land-use authorization, cooperative agreement, or other appropriate mechanism that would authorize a project proponent to conduct actions, or otherwise secure conservation benefits, for the purpose of mitigating impacts elsewhere.

Sec. 5. General Provisions. (a) This memorandum complements and is not intended to supersede existing laws and policies.

(b) This memorandum shall be implemented consistent with applicable law, and subject to the availability of appropriations.

(c) This memorandum is intended for the internal guidance of the executive branch and is inapplicable to the litigation or settlement of natural resource damage claims. The provisions of section 3 this memorandum encouraging restoration banking and advance restoration projects also do not apply to the selection or implementation of natural resource restoration plans, except to the extent determined appropriate in Federal trustee guidance developed pursuant to section 4(d) of this memorandum.

(d) The provisions of this memorandum shall not apply to military testing, training, and readiness activities.

(e) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(f) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(g) The Secretary of the Interior is hereby authorized and directed to publish this memorandum in the *Federal Register*.

BARACK OBAMA

[LIST OF DOCUMENTS SUBMITTED FOR THE RECORD RETAINED IN THE
COMMITTEE'S OFFICIAL FILES]

- Ecosystem Partners, “White House Releases Mitigation Policy Encouraging Private Investment.” EIP News. November 3, 2015. Submitted by Rep. Dingell.
- Bob Wick, “New White House policy commits to protect irreplaceable resources and sets ‘no net loss’ standard for other important resources.” Wilderness.org. November 4, 2015. Submitted by Rep. Dingell.
- Defenders of Wildlife, “The Obama Administration, Department of Interior Reinforce Conservation in Agency Decision-Making.” November 3, 2015. Submitted by Rep. Dingell.
- Wetlands Research Assoc., “Presidential Memorandum Issues Support for Mitigation Banking and New Policy Guidelines.” January 22, 2016. Submitted by Rep. Dingell.
- List of Mitigation and Conservation Banks in the District of Subcommittee Chairman Gohmert by USACE. Accessed on February 24, 2016.
- List of Mitigation and Conservation Banks in the District of Full Committee Chairman Bishop by USACE. Accessed on February 24, 2016.
- Letter from the American Bird Conservancy addressed to Subcommittee Chairman Gohmert and Subcommittee Ranking Member Dingell. Dated February 22, 2016.
- Letter from the National Parks Conservation Association addressed to Subcommittee Chairman Gohmert and Subcommittee Ranking Member Dingell. Dated February 23, 2016.
- Letter from the Wilderness Society, the Nature Conservancy, and the Environmental Defense Fund addressed to Subcommittee Chairman Gohmert and Subcommittee Ranking Member Dingell. Dated February 24, 2016.
- Memorandum from the National Mitigation Banking Association expressing support for the President’s Memorandum, “Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment.” Dated February 24, 2016. Submitted by Ranking Member Dingell.

- Bendor, Todd, T. William Lester, Avery Livengood, Adam Davis, and Logan Yonavjak, “Estimating the Size and Impact of the Ecological Restoration Economy.” PLOS ONE 10.6 (2015). June 17, 2015. Submitted by Ranking Member Dingell.
- Statement of Ed Arnett in response to the oversight hearing titled, “The President’s Imposition of New Environmental Mitigation Requirements.” February 24, 2016.

