THE PRESIDENTIAL MEMORANDUM ISSUED ON
NOVEMBER 3, 2015 ENTITLED “MITIGATING
IMPACTS ON NATURAL RESOURCES FROM
DEVELOPMENT AND ENCOURAGING RELATED
PRIVATE INVESTMENT”

HEARING
BEFORE THE
COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
ONE HUNDRED FOURTEENTH CONGRESS
SECOND SESSION
MARCH 15, 2016

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THE PRESIDENTIAL MEMORANDUM ISSUED
ON NOVEMBER 3, 2015 ENTITLED “MITI-
GATING IMPACTS ON NATURAL RESOURCES
FROM DEVELOPMENT AND ENCOURAGING
RELATED PRIVATE INVESTMENT”

Tuesday, March 15, 2016

U.S. Senate,
Committee on Energy and Natural Resources,
Washington, DC.

The Committee met, pursuant to notice, at 10:09 a.m. in Room
SD–366, Dirksen Senate Office Building, Hon. Lisa Murkowski,
Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. LISA MURKOWSKI,
U.S. Senator from Alaska

The Chairman. Good morning. The hearing will come to order. The focus of our hearing this morning is a Presidential Mem-
orandum issued in November 2015 entitled, “Mitigating Impacts on
Natural Resources from Development and Encouraging Related
Private Investment.”

We originally scheduled this hearing in January to continue the
Committee’s dialogue on mitigation which began last summer with
a joint field hearing that we held with the Committee on Environ-
ment and Public Works. We were forced to postpone this hearing
when we went to the floor with our broad bipartisan energy bill,
but it has remained a priority for us and I am pleased that we
have it back before the Committee today. That is because mitiga-
tion, as a Federal practice, has become a tool that, all too often,
causes resource development projects to cost more and proceed
slowly, if at all.

For Alaskans seeking any form of development, whether it is a
road, a mine or of any energy resource, mitigation has become al-
most a household word. This is also true throughout many Western
states for grazing, timber harvest or again, any development across
regions where the Federal Government owns so much land.

The Presidential Memorandum provides a definition for mitiga-
tion, and I will quote here, “Mitigation means avoiding, mini-
mizing, rectifying, reducing over time and compensating for im-
acts on natural resources. As a practical matter all of these ac-
tions are captured in the terms avoidance, minimization and com-
ensation.” That is a long definition, but I think it is important to state because definitions are important. This definition of mitiga-
tion must be taken together with the President’s pronouncement of
a new mitigation principle. Again I will quote the Memorandum which says, “Agencies' mitigation policies should establish a net benefit goal or, at a minimum, a no net loss goal for natural resources the agency manages.”

It is true that President George H.W. Bush established a no net loss principle for wetlands, and that President George W. Bush challenged Federal agencies to expand wetlands outside the context of mitigation. This Memorandum dramatically asserts that agencies should establish a net benefit goal for mitigation, and applies that goal beyond wetlands to potentially all natural resources that an agency manages. For Alaskans and for the constituents of many Senators of this Committee, this spells trouble.

There is reason to fear this Memorandum will, at a minimum, elongate an already lengthy permitting process, and at worse, encourage agencies to shut down development completely. Many fear that development will become an exercise in pay to play and only the largest businesses, with the most clearly profitable or the most highly favored projects, will be able to afford that unfair gain.

The Administration will deny this and insist that its goal is to facilitate the balance, efficiency, interagency coordination and consistency across agencies that manage our Federal lands, especially as they issue permits for development. It discounts, it even discards, our concerns.

The Administration claims to want, and again, I am quoting the Memorandum, “Strong environmental outcomes while encouraging development and providing services to the American people.” Now none of us would deny the importance of that, but when one looks at this Administration’s actions it is hard to believe that this is the true goal.

To provide the Administration the opportunity to clarify its intent and address legitimate concerns, 18 of my fellow Senators and I sent the President a letter on February 24. I am providing a copy of that letter for the record of this hearing and each of the Administration’s witnesses.

[The information referred to follows:]
United States Senate

February 24, 2016

The Honorable Barack Obama
President
1600 Pennsylvania Avenue
Washington, D.C. 20500-0004

Dear Mr. President:

We write today concerning your Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (Memorandum). We are uncertain of the intended application of the Memorandum and share the concerns of our constituents who believe that the Memorandum will likely impede rather than advance the salutary goals it asserts: increasing private investment and streamlining federal permitting. We also have questions that were prompted by recent briefings to our staff by officials from the Council on Environmental Quality (CEQ), Bureau of Land Management, Fish and Wildlife Service, and Forest Service.

In a number of respects, the Memorandum notes appropriately that its application is subject to applicable legal authorities, existing missions, or agency objectives. Thus our first question asks, to what extent do agencies’ legal authorities prohibit or modify the application of the principles and mandates outlined in the Memorandum? We respectfully request that you direct each agency to provide a timely response to this question and direct a member of your staff to work with us to obtain responses from the agencies. A response that incorporates specific authorities from each of the affected agencies is necessary to evaluate the effect of the Memorandum.

During the staff briefings, the agencies indicated that the Memorandum is intended to streamline processes and establish consistency across agencies while preserving an ability to tailor mitigation efforts to the specific geographic location at hand. Indeed, the Memorandum itself seeks to ensure that “Federal policies are clear...and are implemented consistently within agencies.” Given the differing legal authorities of the agencies, how does the Memorandum, with terms that CEQ noted are at times by design subject to interpretation, result in an umbrella of “consistent standards and guidance” for landscape-scale conservation while simultaneously affording “right tailored approaches” in individual instances? Additionally, “best available science” is a metric referenced by multiple agencies as the tool to determine appropriate
mitigation measures. How does your Administration define “best available science”? Please provide citations to this definition.

The foregoing list of questions is by no means exhaustive. However, we look forward to learning, as promptly as possible, more about what you expect the Memorandum to achieve and, more specifically, how its implementation will lead to “Federal policies that are clear, work similarly across agencies and are implemented consistently within agencies.”

Thank you for your consideration.

Sincerely,

Lisa Murkowski
United States Senator

Mike Lee
United States Senator

Steve Daines
United States Senator

James Risch
United States Senator

Orrin Hatch
United States Senator

John Barrasso
United States Senator

Cory Gardner
United States Senator

Rick Scott
United States Senator

Dan Sullivan
United States Senator

Mike Crapo
United States Senator
TheCHAIRMAN. The letter asks three basic questions about the Memorandum. Through today, we have received no response. Regrettably, the Council on Environmental Quality, the White House agency that apparently took the lead on the preparation of the Memorandum, was unable to provide a witness for today’s hearing.

We will hear this morning from two panels of witnesses to help us try to make sense of this Memorandum and what it means for resource development. Our first panel will feature officials from two agencies under the Committee’s jurisdiction charged with implementing the Memorandum, and our second panel will feature some of those who stand to be impacted by it.

The Memorandum has already led to confusion, mistrust and, in the State of Alaska’s case at least, even fear rather than the clarity and the streamlining it advertises; therefore, we will act swiftly to continue oversight on this topic and to ensure that it does not become yet another obstacle to responsible development.

With that, I will turn to my Ranking Member, Senator Cantwell, for her comments this morning.

STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

SenatorCANTWELL. Thank you, Madam Chair, and thanks for holding this hearing.

Mitigation is very general but a fundamental aspect of environmental policy. Last November the President issued a Memorandum seeking more effective and consistent mitigation of negative environmental impacts from natural resource development.

Building on work already completed by the Department of the Interior, the President directed five Federal agencies to adopt clear, consistent mitigation plans. His Memorandum incorporates lessons learned over several decades from existing mitigation programs about how to provide more predictability and entice more private investment into conservation. I applaud this important, what I would consider, modest step forward and work with everyone at various stages of implementation and modernization.

As the great conservationist, Aldo Leopold, said and I should note that his daughter, Estelle, is a long time resident of Washington State and worked with the University of Washington, “Conservation will ultimately boil down to rewarding the private landowner, who conserves the public interest.”

Beginning in early in the 20th century, Congress has included some kind of mitigation requirement in many statutes governing public lands and natural resources. It is bedrock law, but this was not always the case. For virtually all of the 19th century, Federal law did not require corporations or government officials to mitigate impacts of mining, logging, drilling, omissions or construction.

It is not oversimplifying to say that the failure to mitigate is the reason we created our national parks, our national forests, why we passed the National Environmental Policy Act, the Clean Air Act and the Clean Water Act. We also established the Abandoned Mines Lands Program and created a Super Fund because failure to mitigate these impacts of factories and mines had an impact on all of us.
As we have learned in every state in this country, it is much more expensive to fix the unmitigated development after the fact, than it is to do the right thing up front.

So I hope that we don’t try to re-litigate all of these things, but my hope is that we move forward. Today, before we hear from our witnesses, I want to emphasize two points.

First, the Presidential Memorandum does not create any new mitigation requirements at any agency. It is merely guidance. At every agency, the legal requirements to mitigate harm to the environment were the same the day before the Memorandum as the day after. In fact, the Memorandum is peppered with caveats about how it should be applied. Phrases like “to the extent allowed by an agency’s authority” and “consistent with existing legal authorities” appear about ten times in a five-page document. So the President is acting well within the boundaries set by Congress.

The second point I want to emphasize is that the concepts in the Memorandum have long and bipartisan support over a long period of time. Beyond the general directive to make mitigation more consistent across Federal agencies, and I believe, to make sure that we are good stewards, there are two significant directives.

First, agencies should establish a “net benefit” goal or “at a minimum, no net loss.” Second, agencies should encourage advanced compensation mitigation, including mitigation banking. It was George H.W. Bush who established the “no net loss” policy for wetlands in an Executive Order in 1989. Fifteen years later it was George W. Bush who established the “net gain” policy for wetlands, moving beyond the goal of stemming the tide of habitat loss.

Now, I don’t think that monetizing nature is always the best way to manage it, but in many cases it has created an incentive that brings private sector investment into an equation that can result in better outcomes. And this is old news. Many of our colleagues over a period of time have worked for this.

Senator John Chaffe, the Chairman of the Environmental Public Works Committee, was a champion of mitigation banking. I ask unanimous consent to enter into the record a statement from his hearing 20 years ago on the topic.

The CHAIRMAN. Without objection.

[The information referred to follows:]
WETLAND MITIGATION BANKING

THURSDAY, MARCH 14, 1996

U.S. Senate,
Committee on Environment and Public Works,
Washington, DC.

The committee met, pursuant to notice, at 2:27 p.m. in room 406,
Senate Dirksen Building, Hon. John H. Chafee (chairman of the
committee) presiding.
Present: Senators Chafee, Warner, Faircloth, and Graham.

OPENING STATEMENT OF HON. JOHN H. CHAFEE,
U.S. Senator from the State of Rhode Island

Senator CHAFEE. We will get started. Senator Faircloth is the
chairman of the subcommittee dealing with this particular area,
the Clean Air, Wetlands, Private Property, and Nuclear Safety
Subcommittee. I'm glad Senator Faircloth could be here. He and I
have worked closely on this matter. The ranking minority member,
Senator Graham, will join us later today.
I want to welcome everyone. This hearing will examine the concept
of wetland mitigation banking under section 404 of the Clean
Water Act.
One of the most gratifying things about mitigation banking is
that it seems to enjoy such wide support. From what I've heard so
far, developers, environmental groups, think-tank scientists and
other affected interests seem to take a favorable view of mitigation
banking. Maybe when we finish this hearing, I won't be able to say
that but so far, that is what seems to be happening. In the matters
we deal with in this committee, that is not entirely common, to
have something everyone agrees upon.
I think that mitigation banking holds great promise as a valuable
tool in our efforts to reform our Federal wetlands conservation
programs. I'm anxious to learn more about it. It seems to me that
it allows a person who wishes to fill a wetland to compensate for
that loss through obtaining credits representing positive wetland
functions that have been generated at another site. We will get into
the question of where the other site is, how far away it is, or does
it have to be in the same watershed?
What are some of the virtues? It can reduce the time and expense
incurred by the permit applicant in working with Federal and
State officials. It frees limited agency resources to focus on
conserving wetland resources and maintaining water quality. A
mitigation bank can consolidate wetlands compensation where it is
most ecologically beneficial. Finally, mitigation banking helps to

(1)
achieve the goal of no-net-loss of the Nation's wetlands. As you know, that was a proposition enunciated by President Bush.

So I believe mitigation banking is a forward-looking approach that encourages the private sector to restore wetland resources. I must say in a time of dwindling agency budgets, particularly in the area of environmental protection, financial incentives offer a welcome change from traditional prescriptive measures.

Two days ago, Senator Faircloth and I went down to Prince William County and took a tour of a mitigation bank in that area. I must say nothing beats personal reconnaissance—it was a very valuable trip.

Today, we are going to hear from the Administration, from State and local officials, from mitigation bankers, developers, scientists, environmentalists, and economists, all who have worked with this issue. I look forward to the hearing a great deal.

Senator Faircloth, if you have a statement, this would be the proper time.
Senator Cantwell. One of those things that he said was, “One of the most gratifying things about mitigation banking is that it enjoys wide support. It can reduce the time and expense incurred by permit applicants in working with the Federal and state officials.” Senator Chaffe was not alone. Senator Kip Bond of Missouri said this about mitigation banking on the Floor in 1999, “As a matter of policy, we have a great opportunity with mitigation banking to protect wetlands by making wetland protection a profitable, private enterprise.”

Even Majority Leader then, Trent Lott, felt the same way. He called mitigation banks, “An incentive-based strategy for environmental protection that enjoys bipartisan support. Mitigation banks provide great environmental benefits better than piecemeal mitigation.”

I understand this hearing today, but I want to say that I think these issues have long been discussed by our former colleagues. They have recognized that once regulators can decide that a proposed mine and highway upgrade or oil-filled exploration or wind farm or other development should move ahead, it is really a simple question of how to just mitigate the resulting damage. For decades now most agencies have had different answers. The result has been a patchwork of ad hoc mitigation that neither matches the cumulative effects of the development nor provides any predictability. We can do better in this.

In the State of Washington, managing growth in Puget Sound has often been challenging. We currently have 18 wetland mitigation banks spread across ten counties. These banks have helped my state improve the patchwork approach.

As we will hear in a moment, the Interior Department has begun to approach mitigation more systematically as well. The establishment of solar energy zones in the Southwest, while not a perfect process, has been an early test of the concepts in the Presidential Memorandum.

Madam Chair, I hope that we will hear more from our witnesses today on this issue and continue to make sure that we are making improvements so that we are the good stewards that are required of us.

Thank you.

The Chairman. Thank you, Senator Cantwell.

We have two panels here this morning. On our first panel we have Mr. Michael Bean, who is the Principal Deputy Assistant Secretary for Fish and Wildlife. Mr. Bean is here on behalf of the Department of the Interior. I understand he will be able to speak to policy for the whole department including both the Fish and Wildlife Service side as well as Bureau of Land Management.

Also joining us is Mr. Brian Ferebee, who is the Associate Deputy Chief of the National Forest System, to discuss how the Department of Agriculture is incorporating the Presidential Memorandum into its mitigation work.

Gentlemen, thank you for joining us this morning.

Mr. Bean, if you want to proceed first with your five minutes, then we will go to Mr. Ferebee and have an opportunity for questions.

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

Mr. Bean. Thank you, Chairman Murkowski, Ranking Member Cantwell, members of the Committee. Thank you for the opportunity to testify before you today regarding 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 agencies, particularly the Fish and Wildlife Service, have been given Congressionally-mandated mitigation responsibilities as far back as 1934 with enactment of the Fish and Wildlife Coordination Act which 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 as far back as 1981. Its purpose was to guide the implementation of the service’s mitigation responsibilities under the Coordination Act, the National Environmental Policy Act and other laws.

Last week on March 7, the Service announced proposed revisions to its policy to provide a framework for more efficient and effective mitigation measures while facilitating a review and approval of development projects.

As my testimony also details, the experience gained by our sister agencies, the Army Corps of Engineers and EPA, under Section 404 of the Clean Water Act, have 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 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 Jewell issued an order in Fall of 2013 on improving mitigation policies and practices of the Department. In that order Secretary Jewell directed the Department and its Bureaus to follow a common set of principles for its mitigation decisions and use a landscape scale approach to guide deciding and compensatory mitigation efforts.

The policy issued last Fall was one of many steps to be completed in response to the Secretary’s order. That policy set forth a number of principles to guide mitigation decisions. Among them were that the sequence of avoidance first, then minimization of impacts, and finally compensation should generally be followed, and otherwise that all mechanisms for compensatory mitigation should be held to the same standards. 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 the Secretary’s order and Departmental policy, the Department’s Bureaus are revising their mitigation policies to ensure they’re 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 with the Presidential Memorandum. This 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 Agriculture and EPA, to share and adopt a common set of best practices to create an environment that allows us to build the economy while protecting healthy ecosystems.

In sum, 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 applied 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 and for the opportunity to testify today.

I’m happy to answer your questions.

[The prepared statement of Mr. Bean follows:]
STATEMENT OF
MICHAEL BEAN
PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS
U.S. DEPARTMENT OF THE INTERIOR
SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
“HEARING TO EXAMINE THE PRESIDENTIAL MEMORANDUM ON MITIGATION”

March 15, 2016

Chairman Murkowski, Ranking Member Cantwell, and Members of the Committee, 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 though careful siting and innovative design features, and then to compensate for residual impacts to those resources though 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 land ownership. 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. Because much of the lands in Alaska contain wetlands under the jurisdiction of the CWA, the Department works closely with the Army Corps of Engineers to ensure mitigation requirements are consistent with
CWA permitting. For other resources—such as key subsistence use areas on the North Slope of Alaska—the Bureau of Land Management (BLM) identifies appropriate mitigation actions during project design based on Departmental and agency policy, Resource Management Plans, Regional Mitigation Strategies, and through public review and engagement with state and local governments, tribes, Alaska Native corporations, and other stakeholders.

**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 literature 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 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. On March 7, 2016, the FWS announced proposed revisions to its mitigation policy to provide a broad and flexible framework to promote efficient and effective conservation measures that addresses the potential negative effects of development, while facilitating review and approval of development projects. The
public will have the opportunity to review and comment on the revised policy through May 9, 2016.

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 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 avoidence 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 eleven 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.

Last year in Alaska, the BLM issued a Record of Decision for the Greater Mooses Tooth project, the first oil and gas development project on Federal lands in the National Petroleum Reserve in Alaska. The decision issued by the BLM provided for up to 33 development and injection wells on a single well pad and incorporated a responsible package of mitigation measures, including a suite of best management practices to avoid or minimize project impacts and a voluntary $8 million contribution from the project proponent into a compensatory mitigation fund. Inclusion of this mitigation package helped to solve significant resource issues, including ensuring that the permitted project minimized impacts to the subsistence use in the project vicinity for local communities. The compensatory mitigation fund provides an important opportunity to help bolster subsistence resources across the landscape. Following approval of the project, the BLM continues to work with local Native communities, industry, state and Federal agencies, and the public to develop a regional mitigation strategy that will increase predictability and certainty for future development while ensuring ongoing protection of important resources in the northeast corner of the 23-million acre reserve.

**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% 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% 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**

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.

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1 Compensating for Wetland losses under the Clean Water Act, National Research Council (2001).
The CHAIRMAN. Thank you, Mr. Bean.
Mr. Ferebee.

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

Mr. Ferebee. Madam Chair, Ranking Member Cantwell and members of the Committee, thank you for the opportunity to discuss the efforts of the Forest Service to implement 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 affects from the use of National Forest System lands to sustain goods and services the public receives from those lands.

The Forest Service currently works with the proponent 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 to minimize impacts, and finally to compensate residual impacts to 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 the proponents to minimize impacts to the extent practical.

Only at that point do we consider compensatory mitigation to address remaining impacts to improve or to import no sensitive resources. In that case, the agency identifies appropriate mitigation actions through a project review and engagement with other Federal agencies, states, tribes, the proponent and the public. We find that proactive work with the proponent and the implementation of the mitigation hierarchy can lead to successful projects with improved outcomes for local communities, proponents 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 Memorandum 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 for the future.

As public input is important when developing new policies and procedures, we will engage with our stakeholders, including proponents, as we move forward. We are also focusing on learning from those with extensive expertise in this area, including other 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, and I'll be glad to answer your questions.

[The prepared statement of Mr. Ferebee follows:]

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Statement of
Brian Forebee
Associate Deputy Chief, National Forest System
U.S. Department of Agriculture before the
Senate Committee on Energy and Natural Resources
Hearing on the President’s Memorandum on Mitigation
March 15, 2016

Chairman Murkowski, Ranking Member Cantwell, and Members of the Committee:

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.

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

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of the land. 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. These laws and associated regulations authorize the agency to minimize effects on surface resources, as appropriate, for occupancy and use of NFS lands.

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

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5 Multiple-Use and Sustained Yield Act of 1960, Public Law 86-517
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.
The CHAIRMAN. Thank you, Mr. Ferebee.

Let's go ahead and begin this morning. Before I get into my questions, the letter that I mentioned in my opening statement that I, along with 18 other Senators, sent to the President on February 24th, have both of you seen that letter?

Mr. BEAN. Yes.

Mr. FEREBEE. Yes.

The CHAIRMAN. Recognizing that you have seen it, do you know where we are with a response to that inquiry? As you know there were three very specific questions that we had outlined. Are you, your respective agencies, working on a written response to our letter?

Mr. BEAN. I do not know the status.

The CHAIRMAN. Mr. Ferebee?

Mr. FEREBEE. I do not know the status either.

The CHAIRMAN. Have you been asked for input to the letter to respond to those questions?

Mr. BEAN. I have not as yet.

Mr. FEREBEE. I have not as yet either.

The CHAIRMAN. Okay. Well this is important for us to, exercise the level of oversight that, I think, is important. I would like to think that the President, or whether it is CEQ who is drafting the response, that they would certainly seek input from the agencies tasked with implementing this Memorandum. Hopefully from what we get with the hearing this morning, we will see greater commitment to a response.

I will begin with you, Mr. Bean, as you are speaking on behalf of Department of the Interior. To what extent do the agency's legal authorities prohibit or modify the application of the principles and mandates outlined in this Presidential Memorandum? That is actually one of the direct questions that we included in that letter.

Mr. BEAN. Yes. The policy, the Memorandum, is quite clear, I think, that in Section 1 its purposes are to be accomplished consistent with existing missions and legal authorities. In Section 5 of the Memorandum it states that it is not intended to supersede existing laws and shall be implemented consistent with applicable laws.

So I think the answer is that it has not changed, it is not intended to change, any legal authority that the Interior Department or other agencies have.

The CHAIRMAN. Given that, given the fact that you have differing legal authorities of the agencies, how does this Memorandum result in these consistent standards and guidance while at the same time giving what you are referring to as right-tailored approaches?

I will further clarify my question here because what the concern has been is that different agencies have differing interpretations of not only definitions of words, but of standards and guidance. So what the aim of this Memorandum is to do is to lead to policies that are clear, work similarly across agencies and are implemented consistently across agencies. How do you do that if you have differing legal authorities, different interpretations? How do you make that work?

Mr. BEAN. I'm happy to offer an answer to that, Senator.
I think the answer is that each agency can follow a set of general principles that are consistent across the agencies.

For example, the preference given to advanced compensation. From experience over the last several decades, it's quite clear that mitigation efforts don't always succeed. They sometimes fail.

The advantage of mitigation banking, for example, is that it ensures successful mitigation prior to impacts being authorized. So to the extent agencies have the authority to favor advanced mitigation, this policy encourages them to use that authority.

The policy also makes clear that there should be equal standards or comparable standards for various forms of mitigation. What I mean by that is as follows, when mitigation is required there are typically at least three ways it can be addressed.

The permittee or developer can carry out mitigation activities him or herself, or the permittee or developer can purchase credits from a mitigation bank or can make a contribution to what is known as an in lieu fee fund. But the point is that, whichever method is chosen, the standards should be the same so that there's a level playing field, so that's a principle that is reflected in this Presidential Memorandum as well.

The Chairman. But are the standards the same between what BLM applies versus what Forest Service applies?

Mr. Bean. I can't speak as to the Forest Service. I would say within the Interior Department the effort is to have similar principles guide mitigation decisions for all Interior agencies whether it's Fish and Wildlife Service, BLM or others.

The Chairman. Well, I know that that is the design of the Memorandum.

My five minutes are up and I want to press further in this because I think this is exactly our problem. It looks good on paper but convince me how the application actually comes to bear.

Senator Cantwell.

Senator Cantwell. Mr. Bean and Mr. Ferebee, one of the questions is about mitigation and durability. We obviously are in a very changing environment, particularly with climate change and habitat loss, ocean acidification, drought, fire, makes all the mitigation issues even more challenging. So how do agencies adapt to these projects under that kind of just dynamic change in the ecosystem?

Mr. Bean. I'll be happy to offer an answer to that.

I think you're correct that climate change does introduce a new element of uncertainty as to the future of mitigation projects and their ability. So to the best of our ability we try to take into account the projected future for a mitigation site to ensure that if it's going to be designated as mitigation, to compensate for some allowable development. It will endure over time.

The durability issue is most often raised in context of ensuring that commitments made on public lands can be sustained over time on private lands, conservation easements, conveyance, other property interests can be fairly effective ways of securing commitments that endure over time. On public lands the challenge is to have a commitment for compensation or for mitigation that survives the next planning cycle, but you're certainly right that climate change introduces a new element of uncertainty which we are just beginning to grapple with.
Senator Cantwell. Mr. Ferebee.

Mr. Ferebee. Thank you for the question, Senator Cantwell.

While the Forest Service is in the process of developing its national policy, the terms like durability are the types of terms that we are trying to think through, engage with our Federal and state partners, as well as the private sector, that see the type of work that they've done as they address this particular term as well as many other common terms that are used when it comes to mitigation.

And so, our answer to your question, given where we are with respect to just developing our national policy, is this term and many other terms are the types of terms that we are engaging with our partners in trying to learn from their experiences to ensure that we're developing a policy that's not only good currently, but good going forward in the future.

Senator Cantwell. Well when I just think about my own state and, believe me, we have had the most challenging questions for sure, science. Science has always been our guide.

While, I know, these are changing dynamics, I guess I would just continue to say that while the term durability here is a concern or interest or what have you, because of those changing dynamics, this is all based on science. That is what we have to continue to focus on.

One question I do have is maybe an over reliance on compensation. I do not have an example here where that has become a problem in our state, but beyond the mitigation hierarchy in which you want to make sure that there are agencies working together, how do you avoid making sure that somebody just does not prioritize market solutions as opposed to maybe just saying no to a project because you should have said no or the market solutions dominate over broader policies? Is that a concern?

Mr. Bean. My understanding is to take the example of the Corps of Engineers and their Clean Water Act Program that a relatively few of the permits that they issue require compensation because they have successfully avoided or minimized impacts to a point where they are insignificant. For those remaining projects that receive permits that require some element of compensation, over 40 percent of those in recent years have been able to compensate by a purchase of credits from mitigation banks.

So it's a relatively small subset, and that example of projects that are allowed to go forward based upon compensation and of those a substantial fraction choose the mitigation banking credit purchase option as a preferable alternative that speeds mitigation and facilitates permitting.

Senator Cantwell. I am glad you said that word because that is the notion that comes to mind to me is basically it forces people to think ahead and it allows for the development to happen in a faster time period because you decide, up front, what mitigation needs to happen across a broad area.

My time is expired, Madam Chair.

The Chairman. Senator Capito.

Senator Capito. Thank you, Madam Chair, and I want to thank our witnesses today.
Mr. Ferebee, I have a question in the Monongahela and the George Washington National Forests which are in West Virginia. Dominion recently had sited a pipeline, and it was undergoing the FERC process. It was going through, in and around the Cheat Mountain region, and the Forest Service objected to the planned route as part of the FERC process. The route was then altered. They have altered their route to add another 30 miles to the pipeline to avoid the specific areas.

Using that as an example, one of the concerns that I have with this Memorandum is the vague and, somewhat, variable applications. As a matter of fact, Ms. Goldfuss, with the Council of Environmental Quality, said recently in a House hearing that companies should simply pick a smart place to build their project. This particular pipeline and others I am sure around the country go through not just public lands, but through private lands as well when they are being sited. I would like to know what extent you think these new mitigation regulations could have, what kind of impact they might have on a project such as that, a project that is a public/private project?

Mr. Ferebee. Thank you for the question, Senator.

So the national policy that we’re currently working on will have no effect on currently being worked upon projects. We are having conversations internally as we develop our national policy to make sure our employees, that are engaging in activities that may require either avoidance, minimization or compensatory mitigation, understand, kind of, the thinking within the agency as we develop our policy so that we won’t have to go back to proponents and have modification of projects. So, our intent is to continue to work with those proponents, move those projects forward and not go back and revisit them.

Senator Capito. Well, in terms of the private land issue, is that something that is taken into consideration on something that is a 60-mile or it is longer than that? If you say you discontinue into the public land, you are not allowed to go into these areas, obviously that is going to have an impact on the private landowner on the other side. Is that something you think could be influenced by these mitigation requirements?

Mr. Ferebee. So, our experience and our practice typically is when we are engaging in those types of activities, we really try to bring all of the key players to the table so we can have a conversation and look at the landscape and the project that’s being proposed and try to work with the proponent to come up with the best alignment for both the proponent and all the affected, and potentially affected, landowners. And so private landowners would be a part of that conversation.

Senator Capito. So that they could be affected by that.

Let me ask you on the compensation issue, advanced compensation. That is certainly not a new concept. Those mitigation banks are utilized now and would be a part of this new Memorandum that has been issued.

Do you believe that the economic burden for some companies to develop these durable mitigation plans—when you are talking about buying into a mitigation bank—does that disadvantage a small business in any way? Does it become prohibitive to them and
only the larger, more well-funded entities are going to be able to
enter into these kinds of agreements?
I would like to hear comment from both of you on that.
Mr. Bean. I’d be happy to try to answer that, Senator.
I think the goal here is to have the mitigation requirement, the
compensatory mitigation requirement, reflect the impact of the de-
velopment project.
Senator Capito. Right.
Mr. Bean. And it would be respective of the size of the pocket-
book, if you will, of the developer.
Senator Capito. Right.
Mr. Bean. As a matter of principle what this and other policies
related to mitigation try to achieve is certainty that the impact
being mitigated is fully mitigated. So it’s irrespective of the size
of the developer or the project proponent. It has everything to do with
the size of the impact of the project itself on a particular resource.
Mr. Ferebee. The Forest Service, okay, there we go.
The Forest Service would take a very similar approach. We
would focus on the impact to be minimized to ensure that we re-
decom our responsibility.
Senator Capito. Right.
Mr. Ferebee. When it comes to meeting our multiple use, sus-
tained yield Agriculture responsibilities.
Senator Capito. Okay.
Thank you.
The Chairman. Senator King.
Senator King. Thank you, Madam Chair.
This is an interesting issue. I want to go back, not talk about the
Memo itself, but the fact of the Memo and what it is. It is not an
Executive Order, is that correct?
Mr. Bean. That’s correct.
Senator King. And it is careful, I note, at the end and at the be-
ginning to say that whatever is in the Memo is subject to all exist-
ing laws and authorities. That’s correct?
Mr. Bean. That’s correct.
Senator King. And it is careful, I note, at the end and at the be-
ginning to say that whatever is in the Memo is subject to all exist-
ing laws and authorities. That’s correct?
Mr. Bean. Yes, Sir, that’s correct.
Senator King. So again, the question arises. What is it?
I am familiar with Executive Orders. I am familiar with regula-
tions. I am familiar with guidance. I am familiar with statutes. I
am familiar with the constitutional provisions. But what is this
creature? What is the legality of this Memo? It sort of says here
is what we want you do to, but you do not have to do it if it is in-
consistent with your statute. I am not being argumentative, I just
want to understand where this fits into the, sort of, constitutional
scheme of the President’s authority.
Mr. Bean. Certainly it does not expect or require agencies to do
things they lack the authority to do. My understanding is to the
extent agencies have the discretion within their existing authorities
to act consistently with the Memorandum, the Memorandum di-
rects them to do so. But it does not either create new authority or
contradict existing authority. In that respect it’s very similar to an
Executive Order which also directs Federal agencies to use their
existing discretionary authorities in particular ways.
Senator King. I think the goals are salutary that the idea, I
mean, of the language encouraging agencies to share and adopt a
common set of their best practices to mitigate, et cetera. That makes sense. I mean, that is good Administration and good practice.

I am still unsure about the legal basis for, you know, consistent with my responsibilities it shall be the policy of the Department of Defense. In other words, the document seems a little schizophrenic in that it sounds prescriptive. Shall and then it says, unless the statute says you cannot. I do not want to dwell on this, but I think it is an interesting, sort of, separation of powers question.

Going to the substance. The problem that I see, and again, I think the goals are salutary, is we always seem to run into trouble with one-size-fits-all prescriptions. The Bureau of Land Management may have a whole different set of problems and a situation in Utah may be entirely different from a situation in West Virginia or Pennsylvania.

Do you feel that the policies and principles that are established are of enough general application that we will not get into a problem where an agency say, well the President has told us to do this, but that may not be the appropriate fit for that situation? Do you see the problem that I am seeking?

Mr. BEAN. Yes, Senator.

I believe that the purpose and effect of the President’s Memorandum is to articulate some general principles of broad applicability and not to focus narrowly on particular outcomes or particular projects, but rather to provide an overarching set of principles to guide how agencies apply their mitigation authorities.

I think it, to a large degree, simply assembles in one place, a number of existing best management practices that are the product of decades of experience by the Fish and Wildlife Service and others trying to implement mitigation programs.

Senator KING. I presume there is some sharing of these kinds of best practices now but the Memorandum, sort of, brings into focus that as a policy decision or as a policy directive of how the agencies are to carry out their responsibilities?

Mr. BEAN. Yes, that’s correct.

I think I referred a moment ago to the 2008 rule of EPA and the Army Corps of Engineers under the Clean Water Act which really was a well-considered and thoughtful rule to articulate, again, some fairly general standards for mitigation. The experience that those agencies have had implementing that authority as well as the Fish and Wildlife Service’s experience implementing its 1981 policy that really informed mitigation practice throughout the Federal Government and has enabled the President, in this Memorandum, to bring together those best management practices under a single Memo.

Senator KING. In a few seconds left, talk to me about advanced mitigation. Is that a situation where you predict what the effects are going to be and you say here is what we are going to do to ameliorate those effects?

Mr. BEAN. Yes.

Many states, probably most state transportation departments, now have mitigation banks to carry out mitigation in advance of future highway development projects. They know they’re going to be building highways in the future. They know they’re going to have
to mitigate for those, so they have begun to anticipate that by investing in conservation actions and creating banks up front. So it is a way of anticipating future needs and having, if you will, off-the-shelf mitigation to accomplish that.

Senator King. May I have one follow up question, Madam Chair?

The Chairman. Yes.

Senator King. How about a project that involves, in effect, comes with its mitigation in it, a renewable energy project, for example, that has benefits to the environment in minimization of emissions, et cetera.

Does that count as mitigation or do you have to have a specific other mitigation? In other words, you’re siting an energy project that may have an impact on a stream. Does this Memorandum conceive that the Fish and Wildlife Service will take into account the environmental benefits of that project as opposed to its environmental costs or is it treated as a strip mall development? Do you see what I am saying?

Mr. Bean. Yes, I understand your question, Sir.

I think that it will depend upon the resource that is affected. For example, in the case of a wind energy project which has clear environmental benefits in terms of reduced reliance on fossil fuels. If that project poses a risk of killing a Bald Eagle, the Fish and Wildlife Service will have to authorize that take of the Bald Eagle and it will have to ensure that minimization and compensation for that is part of the project itself. So the two aren’t necessarily addressing the same set of resource concerns.

And as a general matter, I think the objective is to have the sorts of benefits you describe in your hypothetical project acknowledge and take into account. But they may not be directly relevant to the particular resource impacts for which the Fish and Wildlife Service or other agencies are responsible.

Senator King. That is the problem.

I have had experience, for example, in hydro permitting where the Fish and Wildlife Service says we are only interested in the fish, and the environmental benefits of developing a renewable energy project and the reduction in asthma or whatever other benefits there are, that is not part of our equation. There is no balancing to be had. Comment on that.

Mr. Bean. Well in terms of the Fish and Wildlife Service applying the laws applicable to it, in that case, probably the Fish and Wildlife Coordination Act, the requirements of that law are that the Service at least recommend measures to give equal consideration to fish and wildlife impacts as project purposes. So the Service exercises its authority with respect to how that authority is circumscribed or defined by Congress.

So again, if it’s a Bald Eagle or if it’s an endangered species, the Fish and Wildlife Service is obligated by law to ensure that impacts to those particular resources——

Senator King. Those are the easy cases. I mean, that is a clear endangered species, but I am talking about more subtle, you know, trout population in the river.

The point I am trying to make is if you are doing a project that has environmental benefits, that should be part of the analysis of
mitigation as opposed to if you are building a real estate development that has no externalities in terms of environmental benefits.

Mr. BEAN. It certainly is taken into account as part of the NEPA process to evaluate the project and its alternatives. That’s probably the place where it is most salient.

Senator KING. Thank you.

Thank you, Madam Chair.

The CHAIRMAN. Senator Gardner.

Senator GARDNER. Thank you, Madam Chair, and thank you both for being here today. I have just a couple of questions.

I think in Mr. Ferebee’s statement you said this Memorandum was designed to ensure clarity. I would like to drive maybe a little bit more toward finding that clarity, if we could.

In the example from Senator King, the windmill, the wind turbine, takes an eagle and so the mitigation would be required up front by Fish and Wildlife Service. Could you walk me through, Mr. Bean, an example of what would be required of say, a coal mine? How would this effect a coal mine or coal lease?

Mr. BEAN. That would depend upon what resources were affected by the coal mine or coal lease.

The Fish and Wildlife Service, for example, would need to review that project if it took an endangered species. If it didn’t it would not be subject, I would guess, to Fish and Wildlife Service review, other than through the NEPA process.

Senator GARDNER. But would the coal mine have to prove to you first that it did not or would you be proving that to them under this mitigation? I mean, is this going to trigger some kind of an ESA-style consultation process across the Federal Government to the agencies that are now involved?

Mr. BEAN. I don’t think it will trigger any new process to the extent that a hypothetical coal mine on Federal land, for example, requires Federal approval. That would continue to be subject to the consultation process as it currently is. It would not be affected in any way by this Memo.

Senator GARDNER. Would the Memorandum require then that if you are looking at the net benefit goal, no net loss goal, the mitigation avoidance, minimization and compensation, would then an agency of the Federal Government be looking at perhaps the coal mines’ climate impact as a result of this Memorandum?

Mr. BEAN. I would say no, not as a result of this Memorandum. It probably would do so as a result of NEPA’s requirements however.

Senator GARDNER. Okay. So there would not be any kind of mitigation requirement on carbon or anything like that as a result of the Memorandum?

Mr. BEAN. That’s my understanding, correct.

Senator GARDNER. Is there any look at the economic impact of the Memorandum’s requirements?

Mr. BEAN. I don’t know what analysis of economic impact may have been done by the President or the Executive Branch. I don’t know.

Senator GARDNER. Okay.

Let me just ask you a series of questions here. Would access to a coal lease be more or less likely under this Memorandum?
Mr. Bean. I don’t think it will be affected one way or the other.

Senator Gardner. You don’t think so.

Mr. Bean. No, because what the Memorandum says several times is that it is to be implemented consistent with agencies’ authorities and is not to supersede or change existing law.

Senator Gardner. Do you think that a coal, oil or gas lease would be as timely as it is today or would it take more time to get the permit as a result of this Memorandum?

Mr. Bean. The objective is to provide for more timely review to expedite and facilitate permitting, in particular, large infrastructure projects really were the motivating factor behind this and other initiatives of the Administration. Projects like transmission lines that might cross multiple jurisdictions and require review by multiple agencies. The President recognized that we need to do a better job of expediting permit reviews for projects like that.

Senator Gardner. So you believe this will speed up the permitting process?

Mr. Bean. I believe it will, and I know that is its purpose, its intent.

Senator Gardner. And will those reviews be more costly or less costly with this Memorandum in place?

Mr. Bean. I believe that they will be money saving reviews.

Senator Gardner. Okay, what does that mean if we are talking about avoidance, minimization and compensation? How would you define this no net loss goal as it applies to say, a transmission line and how is that not going to cost somebody more money?

Mr. Bean. The compensation requirement is a requirement to take into account the impacts to a protected resource after all of the reasonable avoidance and minimization measures have been carried out. It’s a way, if you will, to internalize the externality in terms of its impact upon a protected resource.

So for a particular project it may result in, it will result in a cost, whatever the compensation is, but I don’t think that cost is going to be any greater as a result of this Memo than it is currently.

Senator Gardner. I guess I am trying to understand what exactly this Memo does then if it is designed just to make things faster, it seems to add a couple of new requirements though, no net loss goal, net benefits, sensitive areas. It talks about compensation and irreplaceable character. I just do not understand quite the purpose then that this Memorandum, sort of legal limbo that it is in, is accomplishing.

Mr. Bean. Let me give you one example.

The Memo encourages what is referred to as landscape-level decisions about mitigation. Historically the practice for mitigation has been to site mitigation, compensatory mitigation, as close to the area of impact as possible. In fact, over time however, it’s quite clear that isn’t always the most intelligent place to site compensatory mitigation. And in fact, if you take a step back and take a broader look at where needs for the protected resource are most acute, you might decide that it makes more sense, it does more good, to site the compensatory mitigation some distance from where the point of impact is.
So what this Memorandum does, among other things, is to encourage agencies to use that landscape-level approach in deciding where to site mitigation activity.

Senator GARDNER. So for instance, if there was a timber project in Western Colorado that was approved, the agencies would go through their analyses and perhaps it was decided that there needed to be some kind of compensatory action taking place. As a result, perhaps that compensation could occur in Pennsylvania?

Mr. BEAN. In theory, yes. I think that's probably unlikely in practice, but it certainly could be someplace distant from the timber project in Western Colorado. It could be somewhere 100 miles or 200 miles away.

Senator GARDNER. Is that a new requirement then on this that all of a sudden some, because this timber permit was approved here and they would have to do something in some other area, far removed from where they are doing. Is that something that takes place today?

Mr. BEAN. To the extent that today there are requirements to compensate for impacts that are not avoided or minimized, it's not a new requirement.

Senator GARDNER. Could you give me an example, perhaps, of say, a Western Slope Colorado timber project that has been required to do something like this already?

Mr. BEAN. Let me give you a different example from Colorado which is Colorado is one of five states that have together developed a conservation strategy for the Lesser Prairie Chicken.

And under that strategy, coal, excuse me, not coal, but oil and gas projects who elect to participate pay a fee for participation in that mitigation program. And those fees are collected by the State of Colorado and the other four states and used to purchase conservation activities, easements or other enhancement activities. And those are sited where they do the most good for the Lesser Prairie Chicken. That may not be in very close proximity to where the development that is being mitigated is taking place, but it is in the place that does the most good for the resource. So that's an example ongoing in which that's the principle of using a landscape level view of where the conservation needs are greatest to site mitigation investments, where they're most productive.

Senator GARDNER. Mr. Bean, I am glad you used that example because I think there has been some discussion on whether the U.S. Fish and Wildlife Service acknowledges the good science that the State of Colorado has done. I will take that as an endorsement of the science that Colorado has put forward.

Mr. BEAN. No question about the science.

The CHAIRMAN. Senator Warren.

Senator WARREN. Thank you, Madam Chair.

In November the President introduced a Memorandum about how agencies should mitigate the impact on the environment of their actions and the actions that they approve, and the document outlines some pretty common sense steps.

First, developers should try to avoid causing any damage to the environment. Second, if that doesn't work, they should minimize the harm. And third, for damages that can't be prevented they
should try to offset it in some way to make sure there's no net harm to the environment.

The Memorandum seems to aim for long lasting, meaningful offsets that the American people can be sure are actually happening. It seems like pretty basic stuff to me, but listening to some of the reaction to this Memorandum you might think this represents a shocking new initiative. So Mr. Bean, help me understand this. Is the type of mitigation described in the Presidential Memorandum a new policy for the Interior Department?

Mr. BEAN. No, it is not. The Fish and Wildlife Service has had since 1981 a general mitigation policy that incorporates many, if not most, of the elements of the President's Memorandum. So it is newly assembled in one place, if you will, and applicable broadly across the Federal agencies. But for the Fish and Wildlife Service there is not a lot that is new in it.

Senator WARREN. Okay.

And we have heard some suggestion that the mitigation policy outlined in the Presidential Memorandum somehow goes beyond current law. So Mr. Bean, could you describe the current authority that has allowed the Interior Department to require mitigation measures like those that are addressed in the Memorandum, the ones that are already there?

Mr. BEAN. Yes, Senator Warren.

I mentioned already several statutes that provide the authority for the Interior Department to recommend or require mitigation. They include the Fish and Wildlife Coordination Act which is a 1934 statute, the Endangered Species Act——

Senator WARREN. You said 1934?

Mr. BEAN. '34.

Senator WARREN. I just wanted to make sure I heard you. Keep going.

Mr. BEAN. Yes, 1934.

The Endangered Species Act, the Bald and Golden Eagle Protection Act, and others. The Service also routinely recommends to other Federal agencies through the NEPA process, mitigation measures for impacts to fish and wildlife resources, generally.

Senator WARREN. Alright, thank you.

Now there has been some talk that this Memorandum will somehow prevent future development of Federal land. So one more time, Mr. Bean, will this Memorandum prevent any projects from moving forward that would otherwise be able to proceed?

Mr. BEAN. I believe the answer to that is no.

Senator WARREN. Well, we have been using these mitigation efforts for a long time and they are backed up by solid law. Attempts to characterize this Presidential Memorandum as a radical, new, anti-development policy, sounds like to me it is just grasping at straws.

This Memo says that if developers are going to damage some of our nation's most precious resources then they should minimize or make up for the damage they do. Developers may squirm and kick about this, but it seems right to me.

Thank you. Thank you for being here.

Thank you, Madam Chair.

The CHAIRMAN. Thank you.
I would like to get back to some more specific examples because I think it probably helps to give some clarity here. You mentioned, Mr. Bean, the example of a transmission line when you were speaking to my colleagues. But recognizing that the Departments that the two of you are representing have different underlying statutes and missions, if you have got a transmission line that is going to cross lands that both of your agencies manage, which authorities then will determine which or what form of mitigation is sought? Which agency would determine then which appropriate mitigation measures you look to? Which agency determines the metrics that are going to be used? Which agency is the arbiter? How do you decide, kind of, who is on top here? What do you do?

Mr. BEAN. I'll be happy to try to answer that, Senator.

I don't think the question is who's on top? I think the question is how they would coordinate our respective reviews of the project?

The CHAIRMAN. Well, because you have just said to Senator Gardner that you think that this process allows for a more expedited process but, again, you have got different mission sets, you have got different agencies. You are all involved in this together. How do you decide this process in a way that is quick, efficient, clear and with some certainty?

Mr. BEAN. Through serious efforts to coordinate between agencies.

The CHAIRMAN. Okay. Tell me how that works, because I do not know. The Alaskans that are sitting right behind you will tell you coordination between Federal agencies is great on paper but it does not exist in reality. So convince me.

Mr. BEAN. I would say that in my experience dealing with renewable energy projects in the West, many of which entail Bureau of Land Management, Forest Service and other agency interests, sometimes Corps of Engineers' interest, there's been a fairly good record of coordination amongst those agencies to ensure that there is a common approach taken. And although each agency may have different jurisdictional responsibilities, the Corps, for example, focused on wetlands. The Interior Department focused perhaps on wildlife resources and others focused on other resources. In those examples, there's been a fairly successful effort to have a common approach that allows projects to proceed with due speed and intelligent review. I don't doubt that there are examples where it has failed or has not performed as well.

The CHAIRMAN. I guess I am trying to think of one where it has worked in Alaska, because in my head I am going to GMT–1. I am going to CD–5. I am going to Shell. I am going to our miners in the Fortymile. I am trying to find one example we can actually look to and say that there was a coordinated effort within the agencies where, despite differing interpretations, there has been a better process. I am looking for one example because in Alaska we have not seen where it has worked yet.

Let me ask another question, and I will include you in this, Mr. Ferebee.

When we had the briefings by your respective agencies on this Memorandum, staff indicated that best available science would be used to determine what mitigation measures land owners would
use. Do your agencies use the same definition for what qualifies as best available science?

Mr. BEAN. I don’t know that we have definitions, per se. I would say——

The CHAIRMAN. Well if you do not have a definition—and you say best available science is going to be used to determine what mitigation measures apply—how does this work?

Mr. BEAN. I would say, first of all, that the best available science requirement is inherent in our responsibilities under the Administrative Procedure Act.

The CHAIRMAN. Okay, if it is inherent in yours, and Mr. Ferebee, is it inherent in the Department of Agriculture to look to best available science?

Mr. FEREBEE. Yes, and the Forest Service has it described. And how we describe it——

The CHAIRMAN. Okay, so you have got a definition.

Mr. FEREBEE. Yes, we have it described.

The CHAIRMAN. Okay. Do you know if it is the same as within Interior?

Mr. FEREBEE. I do not know what the definition is.

The CHAIRMAN. Don’t you think that that would be important if you are trying to provide for this expedited process that gives greater clarity to make sure that you are operating off of similar definitions?

Mr. FEREBEE. I would say Senator, that as I think Mr. Bean said previously, I think agreeing on principles, understanding the differences around authorities but agreeing on principles and desire to end states a project—that’s the thing where we put most of our focus when we’re talking about compensatory mitigation efforts.

The CHAIRMAN. I would not disagree that agreeing on principles is good, but when you get down to implementation and you have agencies that have different interpretations or different definitions, whether it is a different definition of what is best available science, a different interpretation of irreplaceable natural resources, a different interpretation of landscape scale, a different interpretation of watershed scape, it makes it tough to get to the place where, Mr. Bean, you are suggesting that this cooperation/collaboration really all works.

My time has expired again, and I will turn to my colleagues here because we have got Senator Barrasso and then Senator Heinrich, and I am assuming Senator King you also wanted to ask a second round?

Senator KING. I am here for the second panel.

The CHAIRMAN. Okay.

Senator BARRASSO. Thank you very much, Madam Chairman.

Senator BARRASSO. Thank you very much, Madam Chairman. Mr. Bean, Mr. Ferebee, you know at the beginning of the hearing you were shown a letter and discussed the letter from February 24th about this Memorandum. It almost looked like this was the first time you had ever seen the letter. Is that true?

Mr. BEAN. No, Sir, I’d seen the letter previously.

Senator BARRASSO. It just seemed that the responses we are getting was that people maybe had not read it or comprehended it.
Nineteen Senators, bipartisan from the Committee, I would ask will you commit to providing a response by April 1st?

Mr. BEAN. I note the director, excuse me, the letter is directed to the President, so I really cannot commit the President to a particular date, no.

Senator BARRASSO. Will you be participating in the response to it?

Mr. BEAN. I do not know.

Senator BARRASSO. I mean, if it is related to this, we will see if the President decides to ignore it. Is that the idea? Should I just maybe, change it and then send it to you directly? Would that be helpful in getting a response by April 1st from the Administration?

Mr. BEAN. I'm sure you will get a response. I just don't know when, Sir.

Senator BARRASSO. Well we have seen this movie before where it is not even sure that we get a response.

It is interesting the Memorandum places undue emphasis on a new concept called “advanced compensation,” which the Memorandum describes as opportunities to offset foreseeable, harmful impacts to natural resources in advance.

The Memorandum goes on to directly link a potential reduction in permitting times to upfront mitigation. This means that project proponents may be required to pay millions in mitigation costs before their project even breaks ground. It seems to me just a way to hold projects hostage. Effectively saying that a permit will be delayed or not even considered at all unless some sort of advanced payment is made.

Mr. Bean, in the future is there any guarantee this advanced compensation will ensure a project is approved?

Mr. BEAN. Well, first let me say that advanced compensation is not a new concept. It’s been around since at least the mid-1990’s. And indeed, most states, including your own, I believe, the state transportation departments have indulged, have participated in advanced compensation by establishing mitigation banks for future highway projects. Those departments of transportation recognize that as they build highways in the future they will need to mitigate the impacts of those on wetlands, in particular. And so, most state DOTs, again, I believe including your own, have taken this initiative to establish mitigation banks to meet those future mitigation needs through advanced compensation.

Senator BARRASSO. Is this a way to basically just prevent projects from developing and moving forward?

Mr. BEAN. It’s a way to facilitate and expedite projects, Sir.

Senator BARRASSO. I want to discuss the concept of irreplaceable natural resources for a moment.

The Memorandum defines this term literally as something that cannot be restored or replaced. Does the Department consider finite natural resources to be irreplaceable?

Mr. BEAN. I don’t know that the Department has a position on that.

The Fish and Wildlife Service over the years has sometimes found some resources to be irreplaceable. For example, complex coral reefs on Hawaii, as one example, or in Colorado peat moss fans are among resources the Fish and Wildlife Service has found
to be irreplaceable because they accumulate over time in matter of inches over a millennium.

Senator BARRASSO. My current concern goes to things like coal, oil, gas, things that are resources. Using terms like irreplaceable natural resources without context to me is confusing. It is vague. It could be applied without discretion.

I think without a clear definition, and what you just described is very different than how others may interpret it, without a clear definition the agency could declare an entire landscape or watershed as irreplaceable.

How can we expect your employees on the ground to make decisions about mitigation when we fail to actually have a substantive definition for this irreplaceable natural resource?

Mr. BEAN. Well I would say that the Fish and Wildlife Service has had, since 1981, a policy that refers to irreplaceable resources and has not generated the sorts of confusion or inconsistency that you express a fear about.

Senator BARRASSO. So could you provide for the record a written distinction between the Department’s definition of an irreplaceable natural resource and a scarce or sensitive natural resource?

Mr. BEAN. I will be happy to try to do that.

I would note that the Congress itself and the Federal Land Policy and Management Act referred to scarcity of resource without defining that, so we’re in the same boat with respect to that.

Senator BARRASSO. Thank you, Madam Chairman.

The CHAIRMAN. Thank you, Madam Chairman.

Senator Heinrich.

Senator Risch.

Senator RISCH. Second panel.

The CHAIRMAN. We do have a second panel and I would like to turn to them. I have a longer series of questions that I will submit for the record, and I would encourage my colleagues to do the same.

But to both of you gentlemen, in the second panel we will be hearing from Sara Longan, who is the Executive Director for the Office of Project Management and Permitting in the Alaska Department of Natural Resources. In her recommendations, she has asked for a series of requests to be responded to by the Federal agencies, in terms of mitigation, such things as the requirement for a formal rulemaking process.

She has made the request that it is made expressly clear how new Federal mitigation policies might impact non-Federal lands. The Memo and resulting dialogue has provided few assurances that new Federal actions will not impose new Federal mitigation policies affecting state, private, Native corporation or tribal lands.

She also goes on to ask for clarifying guidelines as it relates to the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Act (ANILCA).

While these specific questions have not been raised directly here, know that I share Ms. Longan’s concerns and would like to have responses to that as well.

The CHAIRMAN. With that, gentlemen, we will thank you and bring up the second panel.
While everyone is getting seated, I will introduce the panel very quickly.

Dr. Sara Longan, who I just referenced, is the Executive Director of the Office of Project Management and Permitting at the Alaska Department of Natural Resources. She joins us to discuss her experience in Alaska helping to implement mitigation measures across both the Army Corps of Engineers and the Bureau of Land Management, and some of the lessons there.

We have Mr. Doug Lashley, who is the Managing Member of GreenVest, LLC, here to speak about wetlands restoration; Lynn Scarlett, who is the Global Managing Director of The Nature Conservancy; and Mr. Shaun Sims, I will ask my colleague from Wyoming to introduce him. And finally, Laura Skaer.

Ms. Skaer. Correct.

The Chairman. The Executive Director for the American Exploration and Mining Association.

Senator Barrasso, if you would like to introduce Mr. Sims?

Senator Barrasso. Thank you very much, Madam Chairman.

I am so pleased to introduce Shaun Sims. He is a fifth generation rancher from Evanston, Wyoming. He serves as President of the Wyoming Association of Conservation Districts and is an active member of the Wyoming Stock Growers Association.

He has served for more than a decade in his local Conservation District and was elected to the National Association of Conservation Districts Executive Board. Just last year Shaun and his wife, Lacey, were inducted into the Wyoming Agriculture Hall of Fame for their wonderful contributions to both agriculture as well as their communities in Wyoming.

Shaun wears many hats. He offers a unique perspective to the Memorandum that we are here to discuss today. So welcome to Shaun and to the other witnesses. Thank you very much, Madam Chairman, for convening this hearing.

The Chairman. Great, thank you.

With that, we will begin with Ms. Longan and ask that you all try to limit your testimony to five minutes. Your full statements will be included as part of the record.

Welcome to all of you.

Ms. Longan.

STATEMENT OF SARA LONGAN, EXECUTIVE DIRECTOR, OFFICE OF PROJECT MANAGEMENT AND PERMITTING, ALASKA DEPARTMENT OF NATURAL RESOURCES

Ms. Longan. Thank you.

Chairwoman Murkowski, Ranking Member Cantwell and members of the Committee, my name is Sara Longan. I am the Executive Director of the Office of Project Management and Permitting within the Alaska Department of Natural Resources. On behalf of Governor Bill Walker, thank you for this opportunity to testify.

Today’s testimony will highlight mutual mitigation interests the state shares with the Federal agencies participating in the Presidential Memorandum on mitigation. At the same time, we have significant concerns with regard to implementation of the Memo and resulting policies that may, unnecessarily, duplicate and excessively burden resource development opportunities in Alaska.
I hope to address specific challenges and encourage our Federal partners to think creatively and within their existing authorities to improve the current mechanisms already in place to avoid, minimize and mitigate unavoidable impacts to resources.

Collaboration among the agencies and impacted stakeholders is a must and should help foster a coordinated regulatory process that can be flexible and allow for responsible resource development while creating more effective modes of mitigation.

It is concerning that the Memo is seeking new mitigation goals when existing mitigation requirements already impose significant challenges to both regulators and developers in Alaska. It has long been recognized that the no net loss policy is a particular concern in Alaska where 63 percent of the nation’s wetlands are found. These wetlands are predominately pristine, which offers a tremendously small inventory of threatened or previously disturbed wetlands that would even be eligible for mitigation.

In 1994, the Army Corps of Engineers and the EPA produced the Alaska Wetlands Initiative Report, specifically noting Alaska’s unique challenges, concluding that a predictable and flexible regulatory program is essential. This report is referenced in the Clean Water Act 2008 Mitigation Rule; however, there is room for improvement to show how the Federal regulators are implementing their own advice by making the 404 program in Alaska more practical and flexible.

The Bureau of Land Management is developing new mitigation requirements to offset impacts from development within the National Petroleum Reserve Alaska, NPRA, which ultimately required mitigation fees in the sum of $8 million from ConocoPhillips Alaska for the proposed Greater Moose’s Tooth 1, or GMT–1, project. For the past decade and longer the GMT–1 project area has been subject to multiple National Environmental Policy Act, NEPA, analyses and integrated activity planning resulting in numerous stipulations and lease mitigation measures; however, these Federal Government protections are seemingly unrecognized by BLM as they implement additional mitigation requirements and now attempt to require more compensatory funds from developers.

Conoco voluntarily provides mitigation payments to communities impacted by GMT–1, including the critical supply of natural gas to the Native Village of Nuiqsut, which is a much cleaner and cheaper alternative to diesel burning. Multiple subsistence programs, education and workforce development and emergency response assistance programs are funded by Conoco in order to fulfill the company’s efforts in being a Good Neighbor.

It is imperative that new, compensatory mitigation fees required by BLM or any other Federal agency seeking to get into the business of compensation will not compete with the existing sources of voluntary support offered to impacted Alaskan communities. The NPRA grant program, required by Federal law, has administered over $150 million to the North Slope villages as a result of NPRA leasing. Other industry funding sources also exist.

The Federal agencies should fully understand any potential, unintended consequence that may result from implementing this Memo. Due to the history of regulatory challenges, briefly summarized here, we view the Memo as a step in the wrong direction. We
question the level of consultation the Federal Government undertook prior to its issuance.

Terms such as “harmful impacts” or “irreplaceable character” are left to potentially conflicting interpretation and implementation of multiple Federal agencies to determine what these terms mean as well as how to best implement policies in order to achieve these ambiguous and far reaching goals.

We urge the Federal agencies to undertake a regulatory cost analysis and NEPA review of this proposed, major Federal action to help determine commercial and cumulative impacts. A formal rulemaking process should be followed. The Federal agencies should make expressly clear how non-Federal lands might be impacted.

Thank you.

[The prepared statement of Ms. Longan follows:]
Testimony before the U.S. Senate Committee on Energy and Natural Resources

Hearing to Examine the Presidential Memorandum on Mitigation

March 15, 2016

Submitted by:
Sara Longan, Executive Director
Office of Project Management & Permitting
Alaska Department of Natural Resources

Testimony on behalf of:
The State of Alaska

I. Introduction

Chairwoman Murkowski, Ranking Member Cartwell, and honorable members of the Senate Committee on Energy and Natural Resources – My name is Sara Longan and I am the Executive Director of the Office of Project Management & Permitting within the Alaska Department of Natural Resources (AK DNR). On behalf of Governor Bill Walker, thank you for this opportunity to testify on the important topic of federal mitigation.

II. Overview of Testimony

The focus of today’s testimony is to identify a number of mutual mitigation interests the State of Alaska shares with the federal agencies participating in the recently issued Presidential Memorandum on Mitigation (the “Memo”). At the same time, we have significant concerns with regard to the implementation of the Memo and the resulting policies that may unnecessarily duplicate and excessively burden resource development opportunities in Alaska. I hope to address specific challenges and encourage our federal partners to think creatively and within their respective and existing authorities to improve the current mechanisms in place to avoid, minimize, and mitigate unavoidable impacts to resources. Collaboration among the agencies and open dialog with the public and suite of stakeholders is a must and should help foster a coordinated regulatory process that can be flexible and allow for responsible resource development, while creating more effective modes of mitigation.

4 - Governor Bill Walker Letter to Secretary Jewett, December 22, 2014
III. Regulatory Mitigation Challenges Already Exist in Alaska

It is concerning that the Memo is calling upon the federal agencies to achieve new mitigation goals when existing mitigation requirements already impose significant challenges to both regulators and developers in Alaska. The Clean Water Act section 404 mitigation program administered by the Army Corps of Engineers (the "Corps") and the Environmental Protection Agency has repeatedly been cited for its inefficient and sometimes impractical implementation in Alaska.

During a recent joint Senate field hearing held in Alaska, one Alaska Native Corporation representative referred to the 404 wetlands mitigation program as a "significant barrier" to Native Corporation projects where "six times the amount of mitigation" has been required to offset unavoidable project impacts, interestingly enough, from a proposed mitigation project. The specific project cited was a spur road requested by the local community to be used to gain access to subsistence areas and local jobs. In this scenario, mitigation projects trigger additional mitigation requirements, propelling community developers into a seemingly endless convoluted regulatory process and significantly increasing mitigation costs. Furthermore, mitigation was accomplished by placing conservation easements on significant acres of native corporation lands; thereby, locking up those same acres for future regional and community development needs.

Other resource development project applicants in Alaska have experienced challenges and delays in acquiring the 404 permit due to Clean Water Act mitigation requirements.

It has been long recognized that the "no net loss" policy is a particular concern in Alaska where 63% of the nation’s wetlands are found. Alaska’s wetlands are predominantly pristine, which offers a tremendously small inventory of "threatened" or "previously disturbed" wetlands that would be eligible for mitigation as is currently required. In 1994, the Army Corps and EPA produced the "Alaska Wetlands Initiative Report" specifically noting Alaska’s unique challenges. The report concluded that a "practicable" and "flexible" regulatory program was essential in Alaska. This report is referenced in the 2008 Mitigation Rule; however, there is room for improvement to show how the federal regulators are implementing their own advice by effectively making the 404 program in Alaska more practicable and flexible.

IV. The GMT-I Experience: Existing Mitigation Provided by Industry

Another emerging federal regulatory concern is taking many Alaskans by surprise. The Bureau of Land Management’s (BLM’s) evolving mitigation requirements to offset unavoidable impacts from development within the National Petroleum Reserve-Alaska (NPR-A) has been cited by Governor Bill Walker as being a "multi-layered bargaining regime", which ultimately required mitigation fees in the sum of $8 million dollars from Conoco Phillips Alaska, Inc. ("Conoco Phillips") for the Greater Moose’s Tooth-1 (GMT-I) project. For the past decade and longer, the

4. Governor Bill Walker, letter to Secretary Jewell, December 22, 2014
5. National Petroleum Reserve Alaska (NPR-A) Website Grant Programs http://www.conocoalaska.com/website/Grant/Section/NPR-A/GrantPrograms/GrantPrograms.html
GMT-1 project area has been subject to multiple National Environmental Policy Act (NEPA) analyses and Integrated Activity Planning activities, resulting in numerous stipulations and lease mitigation measures. However, these federal restrictions are seemingly unrecognized by BLM as they implement additional mitigation requirements and attempt to require more compensatory funds from developers.

ConocoPhillips Alaska voluntarily provides significant mitigation support and payments to communities impacted by GMT-1. One significant contribution includes the supply of natural gas to the village of Napaul, which is a much cleaner and cheaper alternative option to diesel-burning to generate heat and power. Multiple subsistence support programs, education and workforce development programs, emergency response assistance programs are funded by ConocoPhillips in order to fulfill the company's efforts in being a "good neighbor." A comprehensive list of community support programs and funding provided by Conoco to help mitigate impacts from GMT-1 and adjacent satellite development will be provided to the Committee and for the record.

It is imperative that new compensatory mitigation fees required by BLM or other federal agencies seeking to get into the business of "compensation" will not compete with the existing sources of voluntary monetary support offered to impacted Alaskan communities.

V. Avoid Duplication and Competition of Existing Funding Sources

It appears the Memo provides no direction on how to avoid duplicating government funding already in place to help compensate for unavoidable impacts. The Memo fails to recognize the millions of dollars the oil & gas industry already provides to help mitigate social impacts. The oil & gas industry through the NPR-A Grant Program required by federal law has administered over $130 million dollars to North Slope villages as a result from the NPR-A leasing activities that took place in 1999.5

Other industry funding sources exist and the federal agencies should fully understand any potential unintended consequences in the context of issuing the Memo, now requiring new and additional mitigation payments.

Industry representatives in Alaska are growing increasingly concerned with the exceeding cost associated with existing compensatory mitigation requirements. DNR shares this concern and now realize that with the advent of the Memo, new mitigation requirements have the potential to drive costs even higher running the serious risk of making once commercially feasible projects no longer economically viable.

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1 - Statement of Joseph Hulagash, Nuna’s Corporation, Testimony given to Senate Committee on Energy and Natural Resources, et al., August 17, 2015
3 - Alaska Wetlands Initiative http://www.fws.gov/akwetlands/index.html
4 - Gov. Bill Walker Meeting with Environmental Groups, December 22, 2014
VI. Transparency, Agency Collaboration and Public Involvement is a Must

We want to recognize BLM AK Region’s efforts to improve transparency as it relates to their policy setting and mitigation requirements for the GMT-I project. Likewise, we have appreciated the Army Corps AK Region’s leadership in working to collaborate more effectively with federal and state agencies and increase transparency while trying to make improvements to the Clean Water Act mitigation program. However, the State of Alaska is concerned that the Memo will now further complicate our efforts in Alaska to improve compensatory mitigation actions, which we view as being broken and in need of repair.

Due to the history of regulatory challenges surrounding existing federal mitigation requirements briefly summarized here, we view the Presidential Memo as a step in the wrong direction. We question the level of consultation the federal government undertook prior to its issuance. The same troubling regulatory terms, such as “no net loss” are memorialized in the Memo and now, equally troubling undefined and ambiguous terms, such as “harmful impacts” or “irreplaceable character” are included and left to the potentially conflicting interpretation of multiple federal agencies to determine what these terms actually mean and how to implement policies in order to achieve the ambiguous and far-reaching goals.

VII. Recommendations

The participating federal agencies should:

Conduct a NEPA review in order to fully understand the cumulative social and environmental impacts resulting from the multiple federal agencies taking a major federal action while developing additional requirements for compensatory mitigation.

Conduct a regulatory cost analysis to understand and report the additional cost burden to developers now required to pay additional fees for compensatory mitigation.

Undergo a formal rulemaking process to develop new or modify existing regulations to help clarify which regulatory process will be followed, under which federal authority, defining when (and how) compensatory mitigation will be required. Without developing and following a regulatory mechanism, for example what is already in place under the Clean Water Act, no parameters are in place to methodically determine how much compensatory mitigation may be required placing undue burden on regulators to arbitrarily develop compensatory cost estimates. Without following a formal rulemaking process, transparency is marginalized and the public has very little, to no say in how these new mitigation goals might be achieved.

3 – Alaska Waterbody review http://water.epa.gov/dam/docs/044a2e2b878f9b29d0c433a0477b5e50.pdf
4 – Governor Bill Walker letter to Secretary Jewell, December 22, 2014
6 – Alaska Impact Mitigation Plan
Make expressly clear how new federal mitigation policies might impact non-federal lands. The Memo and resulting dialog has provided few assurances that new federal actions will not impose new federal mitigation policies affecting state, private, Native Corporation, or tribal lands.

Revise the Memo or provide clarifying guidelines to incorporate the Alaska Native Settlement Claims Act (ANSCA) and Alaska National Interest Lands Conservation Act (ANILCA). Finding no mention of these two major federal laws in the Memo is concerning considering these laws must be followed during the implementation of the Memo in order to balance national conservation interests with the economic and social needs of the State and its citizens.

Consult state and local agencies to gain mitigation knowledge and lessons learned while implementing the mitigation goals and directives provided in the Memo. The state agencies in Alaska have utilized existing state authorities to effectively mitigate unavoidable impacts from development for decades.

1 - Statement of Joseph Nookiniq, Kesugi Corporation. Testimony given to Senate Committee on Energy and Natural Resources, et al., August 17, 2015
4 - Governor Bill Walker Letter to Secretary Jewell, December 22, 2014
Mr. Lashley, welcome to the Committee.

STATEMENT OF DOUG LASHLEY, MANAGING MEMBER, GREENVEST

Mr. Lashley. Good morning, Chairman Murkowski and Senator King and members of this Committee.

Thank you for your invitation to testify today regarding the Presidential Memorandum issued November 3, entitled, “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment.”

My name is Doug Lashley, and I am the Founder and CEO of a small business containing ten employees known as GreenVest. We are a private investment influence involving encouraging related private investment which is the subject of this Committee review.

GreenVest has been around for 22 years. We’re headquartered in Annapolis, Maryland. We also have offices in Raleigh, North Carolina and Edison, New Jersey. We primarily do work on the Eastern seaboard throughout the Mid-Atlantic region. We are known as an environmental mitigation banking firm.

In just the last three months GreenVest has hired three new people, we have written contracts for over $18 million worth of new mitigation project work and are extremely interested in seeing the momentum in good quality, compensatory mitigation continuing.

Mitigation banking is a key part of the Federal permitting process and the final part of the obligation to avoid, minimize and mitigate in the Federally-recognized mitigation hierarchy to offset project impacts. This form of advanced compensatory mitigation means that the environmental benefits are achieved before the project is permitted. Mitigation bankers restore wetlands and other areas with important natural resources.

Using our own capital, we then seek credits from the Federal permitting agencies. These credits can then be purchased by developers, and by developers I mean private, public and individual developer activities. A review of core permit data has shown in the last five years that the utilization of mitigation banks verses other types of mitigation can reduce the permit processing time significantly.

The approach used in our industry recognizes the ecosystem values of the watershed, its water, wetlands, habitats, riparian forests and provides multiple incentives for restoration and improvement of these ecosystem functions. Credit potential is established by restoring and enhancing degraded wetlands, streams, forests and upland habitats which will generate functional uplift to the natural systems and provide a means of realizing economic value from the properties.

This is the GreenVest core mission and business. We create credits for transportation agencies, counties, the energy industry and the private development community. One hundred percent of the work that we do results in permanent conservation easements with financial protections assuring long-term durability.
Our firm welcomed the Presidential Memorandum because it provides a framework to achieve efficiency within the various Federal agencies involved in permitting development projects. It’s also recognition that the good work that our industry has undertaken the last 20 years in helping generate good quality, compensatory mitigation is a key factor in helping expedite the restoration of our country's infrastructure.

With continued coordination from the Administration amongst all relevant Federal agencies, we can accelerate permitting in a balanced and efficient way by, in part, relying on the use of wetland and ecosystem service banks.

The work at GreenVest in the Mid Atlantic is helping negate some of the negative conditions that exist in our landscape while better achieving a balance between economic stability and growth within our communities. Integrated economic growth and ecological restoration ensures future sustainability in the United States and throughout the world. It is clear that in today’s complex financial markets economic strategies that involve the restoration and protection of natural resources will succeed and prosper.

Current regulations provide a framework to generate economic value through the protection of these resource values and the development of ecological assets. What is needed is more collaboration between permitting authorities as well as capital from the private sector. An increasing flow of private capital incentivized by consistent regulatory environment means more in increasing large scale projects.

We believe implementation of the Presidential Memorandum is a great opportunity for agencies that have an impact on the permitting process to find cost savings and efficiencies at a significant level. The Presidential Memorandum has already helped generate a significant level of interest in continuing to promote the investment of private capital as evidenced by the recent announcements about the infusion of both private endowments and Wall Street money in the $1 billion range.

The Department of the Interior has also just announced the establishment of a natural resource investment center to enhance the prospect that the private sector will invest in these projects. This type of continued involvement and recognition by government that the private sector entrepreneurial skills, creativity and bringing capital to the table will help address the need to balance economic growth with environmental quality and is fundamentally a sound policy.

I appreciate the opportunity to testify today and look forward to your questions.

Thank you.

[The prepared statement of Mr. Lashley follows:]
Testimony of Doug Lashley, Managing Member, GreenVest
Senate Energy and Natural Resources Committee
March 15, 2016

Good morning, Chairman Murkowski, Ranking Member Cantwell, and members of the Committee. Thank you for your invitation to testify regarding the Presidential Memorandum issued on November 3, 2015, entitled “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment.”

My name is Doug Lashley, and I am the founder and CEO of a small 10 person firm known as GreenVest. We are the aforementioned “private investment”. GreenVest has been around 22 years and is headquartered in Maryland with offices in Raleigh, North Carolina and Edison, New Jersey. We are known as an environmental mitigation banking firm. In just the last 3 months GreenVest has hired 3 new people, we have written contracts for over $18,000,000 worth of new project work, and are extremely interested in seeing this momentum continue.

Mitigation banking is a key part of the federal permitting process and the final part of the “avoid, minimize, mitigate” in the federally-recognized mitigation hierarchy to offset project impacts. This form of advanced compensatory mitigation means that the environmental benefits are achieved before the project is permitted. Mitigation bankers restore wetlands and other areas with important natural resources, then seek credits from federal permitting agencies. These credits can then be purchased by developers and permit seekers. A review of Corps’ permit data showed that using mitigation banks, versus other types of mitigation, can reduce permit processing times significantly.

This approach recognizes the ecosystem values of the watershed, i.e., its water, wetlands, habitats, riparian forests, etc., and provides multiple incentives for restoration and improvement of these ecosystem functions. Credit potential is established by restoring and enhancing degraded wetland, stream, forests and upland habitats which will generate functional uplift to the natural systems and provide a means of realizing economic value from the properties. This is GreenVest’s core business. We create credits for transportation agencies, counties, the energy industry and the private development community.

Our firm welcomed the Presidential Memorandum because it provides a framework for the various federal agencies involved in permitting development projects. It’s also recognition that the good work we have all done the last 20 years in helping generate good quality compensatory mitigation is a key factor in helping expedite the restoration of our country’s infrastructure. With continued coordination from the Administration and amongst all relevant Federal Agencies we can accelerate permitting in a balanced and efficient way.

... The work of GreenVest in the Mid Atlantic is helping negate some of the negative conditions that exist in our landscape while better achieving a balance between economic stability and growth within our communities. Integrating economic growth and ecological restoration and is vital to
ensuring future sustainability in the United States and throughout the world. It is clear that in
today's complex financial markets, economic strategies that involve the restoration and
protection of natural resources will succeed and prosper. Current regulations provide a
framework to generate economic value through the protection of these resource values and the
development of ecological assets. What is needed is more collaboration between permitting
authorities as well as capital from the private sector.

An increasing flow of private capital, incentivized by a consistent regulatory environment,
means more, and increasingly large-scale projects. Wetland, forest and stream mitigation
banking represents the most mature of the new ecosystem markets and holds lessons for how
policy can be a tool to enlist private capital to drive broader conservation. This consensus
building and collaboration is essential in order to instill continued confidence in the market we
have created.

We believe implementation of the Presidential Memorandum is a great opportunity for
agencies that have an impact on the permitting process to find cost savings and efficiencies at a
significant level. The Presidential Memorandum has already helped generate a significant level
of interest in continuing to promote the investment of private capital as evidenced by the
recent announcements about the infusion of both private endowments and Wall Street money
in the $1 Billion Dollar range. The Department of Interior also just announced the establishment
of a Natural Resource Investment Center to enhance the prospect that the private sector will
invest in these projects. This type of continued involvement and recognition by government
that private sector entrepreneurial skills, creativity and bringing capital to the table will help
address the need to balance economic growth with environmental quality is fundamentally a
sound policy.

I appreciate the opportunity to testify, and look forward to answering your questions.
The CHAIRMAN. Thank you.
Ms. Scarlett, welcome.

STATEMENT OF THE HONORABLE LYNN SCARLETT, MANAGING DIRECTOR, PUBLIC POLICY, THE NATURE CONSERVANCY

Ms. SCARLETT. Thank you very much, Chairman Murkowski and Ranking Member Cantwell and members of the entire Committee. Thank you for this opportunity to testify.
I have met with many people on this Committee during my nearly eight-year tenure at the Interior Department in the G.W. Bush Administration. During that time, I became familiar with mitigation policies of Interior bureaus. I saw the ways in which effective application of policies to avoid, minimize and mitigate impacts could support efficient, predictable agency decision-making.

I'm now Global Managing Director of Public Policy at The Nature Conservancy (TNC). Our global focus at TNC is on how to support economic development while preventing impacts to the most critical lands and waters in a predictable manner. Mitigation done well, we believe, can result in positive outcomes for businesses, communities and the environment.

We believe the November 2015 Presidential Memorandum on mitigation can support project efficiency and better environmental outcomes. These are twin objectives that we share. As others have stated today, mitigation is not a new concept in the U.S. policy arena, but the track record, as some have noted for efficient project review and robust environmental outcomes, could be improved.

Direct agency rules have stymied private sector projects and investment in restoration. Programs have fallen short of their potential to support good conservation outcomes and more project efficiency. Recognizing these shortcomings, the Bush Administration clarified a set of rules on wetlands mitigation. The focus was on more clarity and predictability.

We believe the Presidential Memorandum can actually help affirm these advances. We believe it can enhance consistency across the array of agency mitigation policies, where feasible, under existing law. The key emphasis on measurable performance standards in the past, lack of clarity and consistency has resulted in inadequate environmental outcomes but has also been bad for project developers causing project delays, increased costs and an unpredictable setting for developers.

We have long believed that these policies needed some common sense updates. We have core principles for mitigation policies and projects, and we would be happy to share them with you. Among these principles is that mitigation decisions should be applied in a landscape context, if possible, and use early planning. This approach enables developers to know in advance what areas should be avoided or prioritized. This enables more efficient project review when project proponents and agencies have clear expectations.

One good example, as several have mentioned, is the Western Solar Plan. That plan supports efficient project review and creates clear expectations for mitigation in advance. The approach, we're told, has reduced project permitting time by more than half.
We think the Presidential Memorandum could build on this type of success. Effectively implemented, the Memorandum could yield project review efficiencies, reduced Administrative effort, greater predictability and certainty for project proponents. Our focus will be on the implementation, that is, on the guidance that agencies develop under the Memorandum and of course, our long standing work in the field, working collaboratively with industry and others on advancing mitigation polices.

We think there's a potential to lead to better outcomes for the environment and communities and, of course, all of this consistent with existing law.

Thank you very much.

[The prepared statement of Ms. Scarlett follows:]
Madam Chairwoman Murkowski, Ranking Member Cantwell, and Members of the Committee;

Thank you for providing me with this opportunity to testify at this hearing on the Presidential Memorandum on Mitigation. I have had the opportunity to meet with many of you during my nearly eight-year tenure at the Department of the Interior in the G.W. Bush Administration, including over three years as Deputy Secretary and Chief Operating Officer of the Department.

During my time at the Interior Department, I became familiar with the mitigation policies of its bureaus and offices and the ways in which effective application of policies to avoid, minimize, and offset impacts can support efficient, predictable agency decision-making. I now serve as the global Managing Director of Public Policy at The Nature Conservancy, an organization with over 60 years of experience in pioneering conservation in coordination and cooperation with private landowners, businesses, and federal, state, local, and tribal governments across the nation.

The Nature Conservancy is the world’s largest conservation organization with over one million members. We impact conservation efforts on the ground in 69 countries around the world with the mission to conserve the lands and waters upon which all life depends. We strive for conservation approaches that benefit both people and nature.

With a rapidly growing world population and accompanying economic growth, the footprint of energy, mining, and infrastructure development is projected to impact 20 percent of the world’s remaining natural lands by 2050, affecting the well-being of both communities and nature. In the context of this development activity and economic use of land, our focus is on how to prevent impacts to the most critical lands and waters in a predictable manner, and, when impacts cannot be avoided or minimized, offset impacted resources to sustain biodiversity and the benefits that natural systems help provide, such as water purification, coastal resilience, and air quality.

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This is mitigation done right – smart planning, efficient government decision-making, and predictability for project proponents – and it can result in positive outcomes for businesses, communities, and the environment. We believe that the November 2015 Presidential Memorandum on mitigation helps to support such an approach.

The Role of Mitigation in Supporting Structured Decision-Making
Mitigation – the avoidance and minimization of impacts, and then offsetting or compensating for remaining impacts – is not a new concept in the U.S. policy arena. The National Environmental Policy Act (NEPA), passed by this body in 1969, is a procedural statute that requires agencies undertaking federal actions to analyze anticipated environmental impacts and identify mitigation measures. NEPA regulations define mitigation as a five-step process: Avoidance, minimization, rectification, reducing or eliminating the impact over time, and compensation by replacing or providing substitute resources or environments.

Mitigation policy evolved through its application under the Clean Water Act and the Endangered Species Act. These authorities require mitigation as a condition for receiving authorization to impact the environment as a means to meet statutorily defined goals. Through these provisions, a whole new private restoration market was born. These conditional mitigation programs support significant contributions to conservation and habitat restoration in the U.S.

Although these and other mitigation policies are intended to support thoughtful consideration of environmental impacts and economic activity, their track record for efficient project review and robust environmental outcomes has been lacking. In addition, the mechanisms for delivering compensatory mitigation have operated under different agency rule sets, which stymied private sector investment in restoration.

Recognizing these shortcomings, in 2008, the George W. Bush administration clarified a set of rules to which all wetland compensatory mitigation mechanisms would be held. The enhanced clarity and predictability provided by these rules have further invigorated the private restoration economy and serve as a hallmark for smart mitigation policy.

Support for Better Outcomes for Business, Communities and the Environment
Mitigation policies exist in some form or fashion across a wide variety of agency authorities and practices. However, it has long been understood that the approximately $3.8 billion dollars directed annually to conservation through existing programs fall short of their potential to support significant conservation outcomes. In 2001, the National Academy of Sciences looked at the track record of wetland mitigation and found that 50% to 53% of the implemented mitigation projects did not meet permit requirements. The Committee concluded that poor site selection and planning,

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noncompliance with permit conditions, and a lack of adequate performance standards all contributed to the failure of compensatory mitigation projects to offset wetland losses. Their solutions included the use of a watershed approach to guide site selection and holding compensation projects to meeting measurable performance standards.

These recommendations were incorporated into the wetland mitigation rules in 2008 and this set of rules has, as discussed above, become the benchmark for sound mitigation policy. The Presidential Memorandum is an acknowledgement of these advances in mitigation policy and seeks to see them applied uniformly across the array of existing agency mitigation policies. For this reason, the Presidential Memorandum directs agencies to utilize watershed- or landscape-scale plans to guide mitigation decisions and set measurable performance standards for projects and programs to access mitigation effectiveness.

In addition to past shortcomings with environmental outcomes, the disparities among different agencies’ mitigation policies also caused significant project delays, increased project costs, and created an unpredictable environment for developers. A transportation project that, for example, will bisect wetlands, impact threatened or endangered species, and fragment migratory bird habitat, may face a protracted permitting process and encounter a variety of mitigation requirements that operate under vastly different rules. Such confusing rules are neither good for the environment nor for businesses and the economy.

As a result, The Nature Conservancy has long believed that our national mitigation policy was in need of some common sense updates. Such updates – based on our on-the-ground experiences across all 50 states – can support more efficient project review and better outcomes for communities, businesses, and the environment. Although it is important to get the overall framework for mitigation right, ensuring that all mitigation policies operate under a clearly stated and predictable set of principles is an essential condition for success.

**Consistent Standards for Mitigation**

The Nature Conservancy has articulated a core set of principles to which we believe all mitigation policies and projects should adhere. These principles, laid out in *Achieving Conservation and Development: 10 Principles for Applying the Mitigation Hierarchy*, are not new. They are well established in the peer-reviewed science and policy literature, domestically and abroad.

Among these principles is the principle that the mitigation hierarchy (avoidance, minimization, and mitigation) should be applied in a landscape context and, when possible, should be guided by early planning. Potential conflicts between conservation

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and development are reduced when developers know in advance what areas should be avoided or prioritized, and project review is more efficient when project proponents and agencies have already laid out clear expectations for mitigation.

One particularly successful example is the Western Solar Plan. Approved by the Department of the Interior in October 2012, the Plan provides a single blueprint for utility-scale solar energy permitting on Bureau of Land Management (BLM)-administered lands across six southwestern states. The plan represents an unprecedented effort to use proactive landscape-scale planning to guide the development of solar energy on public lands to low conflict areas, support efficient project review, and create clear expectations for mitigation in advance. In 2014, BLM held an auction for the solar sites, which resulted in $5.8 million in bids from energy developers to develop six parcels covering 3,083 acres. In June 2015, BLM approved three large-scale projects on those parcels. This approach reduced the project permitting time by more than half.

In Southern California, the San Diego Association of Governments, which is made up of 18 cities and county governments, has demonstrated that early planning for mitigation yields tremendous cost savings. The organization’s Environmental Mitigation Program undertakes early planning for its transportation-related mitigation needs rather than addressing mitigation on a project-by-project basis. They estimated that while a project-by-project approach would cost close to $850 million, their early mitigation approach would save them $200 million.4 In 2013, the program reported that the approach led to the agency paying roughly half the estimated costs for meeting its mitigation needs.5

The Presidential Memorandum seeks to build on and institutionalize these types of successes. It does so by encouraging agencies to utilize existing landscape-scale plans to identify “areas where development may be most appropriate” and where high natural resource values should be best avoided. And it directs agencies to “give preference to advance compensation mechanisms that are likely to achieve clearly defined environmental performance standards.” These are measures of good mitigation practice that have demonstrated cost savings for governments and industry, greater predictability for project proponents, and because critical resources are avoided, better results for the environment and people.

The Conservancy also believes that mitigation policies should be guided by a clear goal that drives accountability in applying a mitigation approach of avoiding, minimizing, and offsetting impacts. The 2001 National Academy of Sciences study concluded that better mitigation performance would be achieved if mitigation goals were clear.

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In keeping with good mitigation practice, the Presidential Memorandum directs agencies to establish a clear goal for mitigation — net benefit or, at a minimum, no net loss, to the extent permitted by each agency’s existing legal authorities. The terms “no net loss” and “net benefit” are common standards used in mitigation policies. The “no net loss” goal was first articulated by George H. W. Bush in the wetlands context and the U.S. Fish and Wildlife Service used the net benefit goal in its 2008 Recovery Crediting Guidance. These goals are important because they are clear and they drive accountability in applying the mitigation hierarchy.

Without such a goal, compensatory mitigation requirements are unpredictable and default to protracted, negotiated settlements that may seem arbitrary or unlinked to specific outcomes that offset impacts. With such a goal, mitigation policies support a structured, rational, and transparent framework for ensuring that compensatory mitigation requirements are proportional to impacts.

We believe that when mitigation policies are held to a common set of principles they provide greater predictability for project proponents and the private restoration industry. The Presidential Memorandum articulates a clear set of principles to which all mitigation policies and projects should be held. If implemented, it could yield significant project review efficiencies and reduced administrative effort, greater predictability and certainty for project proponents and the private mitigation market, co-location of project infrastructure to avoid unnecessary and inefficient expansion of areas of impact, and scientifically sound and economically fair offsets for residual impacts, all leading to better outcomes for the environment and communities.
The CHAIRMAN. Thank you.
Mr. Sims, welcome.

STATEMENT OF SHAUN SIMS, PRESIDENT, WYOMING ASSOCIATION OF CONSERVATION DISTRICTS, AND MEMBER, WYOMING STOCK GROWERS ASSOCIATION

Mr. Sims. Thank you, Chairman Murkowski, Ranking Member Cantwell and Committee members. Thank you for the invitation to join you today and the opportunity to provide you with my thoughts and input on natural resource conservation, mitigation and multiple use.

I'm Shaun Sims, a fifth generation cattle and sheep rancher from Uinta County, located in Southwest Wyoming. I'm an elected Supervisor of the Uinta County Conservation District, President of the Wyoming Association of Conservation Districts and member of the Wyoming Stock Growers Association. I, along with my family, raise cattle, sheep and hay. Our family is committed to sound natural resource management, and we practice it every day on our ranch.

As part of our operation, we also host 28 wind turbines subsequently providing for alternative energy development. Our ranch operates in four counties, two states and in an area where there is active oil and gas development, among many other land uses. We also provide world-class mule deer and antelope populations, and have large swaths of sage grouse habitat that are considered core area, as designated by the State of Wyoming.

We believe multiple use and conservation of our resources works in concert with one another and not independently. We must make a living from our resources, and we must take care of our resources so that we can make that living.

I am deeply concerned with the November 3, 2015 Presidential Memorandum, “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investments” and the implications it may have on our family’s ranching operation and other industries in my state in the West. The underlying principles of avoidance, minimization and compensation are generally sound and are already being practiced at the local, state and Federal levels. The document seeks consistency within/across agencies. That can have merit; however, as we have seen with the sage grouse plans, it can also preclude effective, locally-driven conservation.

This Memorandum introduces some new concepts that cause me concern. First, the Memorandum introduces a new concept of increased private investment and resource restoration and enhancement. My sense is that this will be accomplished through mandatory or mandated compensatory actions not through the encouragement of economic activity that can enable resource users to be willing investors. I have witnessed firsthand what I refer to, and I realize this is a strong word, but frankly in my opinion, it is accurate, project approval through coercion.

Second, the definition of advanced compensation is based on the Memorandum and environmental benefits achieved before a project’s harmful impacts occur. This language leaves one questioning: whether the intent is to go beyond concurrent mitigation, which is current standard for most mitigation projects. Although
the definition of durability is consistent with current definitions as needing to be at least equal to the length of the impact, the document later states that agencies should address the resilience of the measures and benefits to potential future environmental change. This appears to establish a type of strategy of let’s guess what the future holds for resource changes and mitigate for those unknowns.

Based on the cursory review of the U.S. Fish and Wildlife Service’s proposed revisions, it is obvious mitigation for climate change is a major focus. The issue I see with this approach is that there are all sorts of dynamics in a natural environment that can change the face and condition of a resource base: fire, flood, drought and other naturally occurring events. How will anyone ever be able to provide mitigation of sufficient durability to account for any potential fire environment—any potential future environmental change when we’re talking about a dynamic system that is ever-changing itself?

In addition, the concept of mitigation to provide for a net environmental gain at this point is premature. This approach also assumes that baseline resource information exists at a level to provide certainty on how to get to net gain or no net loss. Although there are many efforts aimed at developing these baselines, I am not convinced they are sufficient to begin mandating and implementing in the timeframe contemplated by the Memorandum.

Also, landscape- or watershed-level approaches are discussed in the Memorandum. Again, this makes sense from a natural resource management perspective; however, I question what size of the landscape or the level of the watershed that is being contemplated.

Lastly, the Memorandum discusses irreplaceable natural resources. I am concerned that this is basically yet one more land designation designed to limit our productive use of our resource base. There appears to be no shortage of attempts by a designation of one sort or another to further limit the ability of farmers and ranchers, as well as other industries, to responsibly develop and utilize our resources.

Interpretation of these points is most concerning if left wide open, and depending on who is interpreting this, could have a chilling effect on future resource development.

Thank you, Madam Chairwoman and members of the Committee.

[The prepared statement of Mr. Sims follows:]
Chairman Lisa Murkowski, Ranking Member Cantwell, and Committee Members, thank you for the invitation to join you today and the opportunity to provide you with my thoughts and input on natural resource conservation, mitigation and multiple use.

I am Shaun Sims, a fifth generation cattle and sheep rancher from Uinta County located in southwest Wyoming, an elected Supervisor on the Uinta County Conservation District, President of the Wyoming Association of Conservation Districts President and member of the Wyoming Stock Growers Association.

I along with my family, raise cattle, sheep and hay. Our family is committed to sound natural resource management and we practice it every day on our ranch. As part of our operation, we also host 28 wind turbines subsequently providing for alternative energy development. Our ranch operates in four counties, two states and in areas where there is active oil and gas development among many other land uses. We also provide world class mule deer and antelope populations and have large swaths of sage grouse habitat which are considered core area as designated by the state of Wyoming.

We believe multiple use and conservation of our resources works in concert with one another and not independently. We must make a living from our resources and we must take care of our resources in order to make a living.

I am deeply concerned with the November 3, 2015 Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment and the implications it may have on my family’s ranching operation and others in my state and the west. The underlying principles of avoidance, minimization and compensation are generally sound and are already being practiced at the local, state and federal levels.

The document seeks consistency within and across agencies. That can have merit. However, as we have seen with sage grouse plans, it can also preclude effective, locally-driven conservation.

This Memorandum introduces some new concepts that cause me concern. I will review those and provide some specific examples based on my personal experience on how these types of bargaining concepts can be detrimental and are likely to impede future resource use and development.
First, the memorandum introduces a new concept of “increasing private investment in resource restoration and enhancement.” My sense is that will be accomplished through mandated actions, not through the encouragement of economic activity that could enable resource users to be willing investors. I have witnessed first-hand what I would refer to, and I realize this is a strong word but frankly in my opinion it is accurate, project approval through coercion.

As I previously mentioned our ranch has a wind farm located on our private land acres. In order for the development to occur, federal lands managed by the Bureau of Land Management had to be crossed. As a result this provided a federal nexus and involvement in the permitting as roads would be constructed across Bureau ground. The wind energy company and our ranch through the federal permitting addressed and mitigated for numerous species and resource issues, including a population survey for Black Footed Ferret, mitigation for the Mountain Plover in turbine site selection, mitigation for eagles, raptors and other avian species in turbine design as well as post construction mitigation of infrastructure of roads to minimize visual impacts and surface impacts.

After all of these mitigation factors were addressed and just prior to issuance of the permit, the permitting agency implied the permit would not be issued due to impacts to the view shed from an old cabin, located on our private land would be impaired due to the erection of the turbines, also on our private land. Only after we reminded them that it was our private cabin, private property and our view shed did they acquiesce and issue the permit. I anticipate under the direction provided in this presidential memorandum this type of scenario will only get worse.

Second, the definition of “advance compensation” as described in the memorandum: “environmental benefits achieved before a project’s harmful impacts occur” is concerning. This language leaves one questioning whether the intent is to go beyond concurrent mitigation which is current standard for most mitigation projects.

Although the definition of “durability” is consistent with current definitions, as needing to be at least equal to the length of the impact, the document later states that agencies should address “the resilience of the measures’ benefits to potential future environmental change”. This appears to establish a lets guess what the future holds for resource changes and mitigate for those unknowns, strategy. Based on a cursory review of the US Fish & Wildlife Service proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy published just last week on March 8 to implement the directive of this Presidential Memorandum, it is obvious mitigation for climate change is a major focus. The issue I see with this approach is that there are all sorts of dynamics in a natural environment that can change the face and condition of a resource base, whether its fire, drought, etc. How will anyone ever be able to provide mitigation, of sufficient durability, to account for any “potential future environmental change” when we are talking about a dynamic system that is ever changing?

In addition, the concept of a mitigation to provide for a net environmental gain, at this point is premature. This approach also assumes that baseline resource information exists at a level to provide certainty on how to get to net gain or no net loss. Although there are many efforts aimed at developing those baselines, I am not convinced they are sufficient to begin mandating and

Testimony Shaun Sims, Rancher, Uinta County, Wyoming
implementation in the time frame contemplated by the memorandum. In Wyoming, there are currently several private and governmental efforts working on this concepts and approaches, with fairly significant investments of time and resources. These should be allowed to be further developed and any changes in federal policy need to coordinate with these state and local efforts.

Also, landscape or watershed level approaches are discussed in the memorandum. Again, this makes sense from a natural resource management perspective, however I question what landscape or watershed level is contemplated.

Lastly, the memorandum discusses “irreplaceable natural resources”. I am concerned that this is basically yet one more land designation designed to limit our productive use of our resource base. There appears to be no shortage of attempts, via “designations” of one sort or another to further limit the ability of farmers and ranchers, as well as other industries, to responsibly develop and utilize our resources.

Thank you Madam Chairwoman and members of the Committee.
The CHAIRMAN. Thank you, Mr. Sims.
Ms. Skaer.

STATEMENT OF LAURA SKAER, EXECUTIVE DIRECTOR,
AMERICAN EXPLORATION & MINING ASSOCIATION

Ms. Skaer. Chairman Murkowski, Ranking Member Cantwell, members of the Committee, the American Exploration and Mining Association appreciates the opportunity to provide testimony today.

Before we address the Memorandum, we want to thank you for your leadership on critical minerals and much needed permitting reform. America has great mineral wealth and our members are ready, willing and able to find and produce the minerals America requires in an environmentally and socially responsible manner.

Let me be clear, we support mitigation. Unfortunately, the directives in the Memorandum will unnecessarily create confusion, cause delays, increase costs and hinder the ability of America to lessen its dependence on foreign sources of strategic and critical minerals.

For more than six years this Administration has sought to change the management of our public lands and natural resources from Congressionally-mandated multiple use to protection, preservation and soft recreation, while elevating wilderness values above wealth and job creating activities like mining, grazing and energy production.

It began with the internal Treasured Landscapes Memorandum in 2010, which placed a priority on wilderness preservation and creating national monuments, followed by Secretarial Order 3310 which Congress promptly defunded.

Fracking rules, co-leasing moratoria, millions of acres of new national monuments without local stakeholder input, massive mineral withdrawals including more than ten million acres, ostensibly for conserving sage grouse habitat—even though Fish and Wildlife acknowledges that mining is a secondary threat and this Memorandum on mitigation—all designed to prohibit job creation on industries and activities that disturb and degrade the land.

The Constitution gives Congress, not the Executive Branch, the authority to make laws for managing public land. The President’s authority is limited to implementing those laws. Congress has enacted a number of land management statutes with a single theme, managing for multiple use, sustained yield, while recognizing competing values, protection, preservation, fish and wildlife, outdoor recreation, with the need for minerals, energy, food and fiber.

This Memorandum goes far beyond implementation and is in direct conflict with the Mining Law, the Organic Act, the Federal Land Policy and Management Act, and the National Forest Management Act. These acts contain preventative standards such as prevent unnecessary or undue degradation or minimize disturbance where practicable and feasible. Both recognize there will be necessary and reasonable degradation.

Unnecessary or undue degradation in minimizing impacts clearly authorized onsite mitigation of direct impacts but do not authorize or require offsite mitigation, compensatory mitigation, advanced mitigation and certainly do not authorize or require net benefit, no net loss or avoidance if resources are determined to be irreplace-
able. A directive to avoid is a directive to veto. Congress could have adopted these standards but did not and chose to adopt preventative standards.

While the Memorandum claims no legal effect and purports to adhere to existing authorities, it is marching orders from the Chief Executive. Agency personnel will feel pressure to comply, which will result in uncertainty, project delays, increased costs and perhaps permit extortion where project proponents are pressured to provide compensatory mitigation or a net benefit in return for a permit.

Many terms such as important, scarce, sensitive, irreplaceable, and net benefit are subjective, vague, ambiguous, undefined and untethered to existing statute or regulation. Project proponents will face the same dilemma Alice faced in her exchange with Humpty Dumpty in Through the Looking Glass, which is to be master. That’s all.

In the Sage Grouse Land Use Plan Amendments without statutory authority, in direct conflict with FLPMA and at the insistence of the Fish and Wildlife Service, BLM inappropriately applied a net conservation gain or benefit mitigation standard in Sage Grouse habitat. This ESA standard was inserted at the last minute and was not vetted through the NEPA process. Furthermore, Fish and Wildlife has no authority to impose ESA recovery standards with respect to an unlisted species.

Also, without notice and comment and without regard to mineral potential, Fish and Wildlife required BLM to withdraw more than ten million acres from mineral entry, ostensibly to conserve Sage Grouse habitat of irreplaceable character. No analysis of mineral potential, no analysis of economic impacts, no analysis of cumulative impacts, and no opportunity for public comment.

So while the Memorandum purports to respect existing law, the Sage Grouse Land Use Plans demonstrate the pressure to comply with its directives even when those directives violate existing law. It is up to Congress to change mitigation policies and how the public lands are managed, not the Executive Branch.

Thank you. I look forward to your questions.

[The prepared statement of Ms. Skaer follows:]
Laura Skaer
Executive Director
American Exploration & Mining Association

Testimony of the American Exploration & Mining Association on the November 3, 2015
Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and
Encouraging Related Private Investment

Chairman Murkowski, Ranking Member Cantwell and Members of the Committee, the
American Exploration & Mining Association (AEMA) appreciates this opportunity to provide
testimony on the Presidential Memorandum: Mitigating Impacts on Natural Resources from
Development and Encouraging Related Private Investment.

AEMA (formerly Northwest Mining Association) is a 121-year old, 2,200 member national
association representing the minerals industry with members residing in 42 U.S. states, seven
Canadian provinces or territories, and 10 other countries. AEMA is the recognized national voice
for exploration, the junior mining sector, and maintaining access to public lands, and represents
the entire mining life cycle, from exploration to reclamation and closure. Our broad-based
membership includes many small miners and exploration geologists as well as junior and large
mining companies, engineering, equipment manufacturing, technical services, and sales of
equipment and supplies. More than 80% of our members are small businesses or work for small
businesses. Most of our members are individual citizens.

Our members understand the responsibility to be good stewards of the environment. Our
members take great pride in producing the minerals America requires in an environmentally and
socially responsible manner. Our members have developed best management practices and
technologies to avoid, minimize and mitigate mining’s impact on the environment and ensure
proper closure and reclamation of mines at the end of their productive life as required by existing
law and regulation.

As this Committee knows, mining is the beginning of the supply chain for manufacturing, energy
production, national defense, technological advancements, and all of the “stuff” that makes
modern civilization possible, like smart phones, computers, flat screens, medical devices,
housing and transportation. Mining also is essential to job creation. An abundant and affordable
supply of domestic minerals is critical to America’s future. The U.S. has become increasingly
dependent on foreign sources of strategic and critical minerals and this vulnerability has serious
national defense and economic consequences. According to the U.S. Geological Survey, the U.S.
is more than 50% import reliant for 40 critical minerals and 100% import reliant for 19 critical
and strategic minerals despite having the third largest source of mineral wealth in the world.

We appreciate and applaud the Chairman’s leadership on critical minerals and thank the
Chairman, Ranking Member and this Committee for including critical minerals provisions (S.
Act. Like you, we are hopeful you and your colleagues will pass this important, bi-partisan legislation in this Congress.

For the reasons set forth below, we are concerned that this Presidential Memorandum will make it harder to explore for and produce the minerals America requires. While on its face, the Memorandum purports to adhere to existing statutory authority, closer examination reveals that much of the Memorandum is in direct conflict with the Mining Law and existing land management statutes. One could argue the Memorandum is another attempt by this Administration to usurp Congress' constitutional authority over the public lands. The President's authority over the public lands is limited to implementing what Congress has delegated to the executive branch, yet the Memorandum reads as though all authority over public lands and natural resources is vested in the Chief Executive. This Memorandum goes far beyond implementing the laws enacted by Congress.

At a minimum, the Memorandum contains different standards than existing law, vague and undefined terms that will result in agency confusion, delays, increased costs, potential litigation, and in some cases project abandonment for those parties exploring for and producing minerals and carrying out economic development and multiple-use activities on the public lands.

Furthermore, it appears to be another attempt to create a one-size-fits-all policy that, like all such policies, is doomed to failure because each department named in the Memorandum and the various agencies and bureaus within those departments have different missions and statutory authorities. Multiple-use management is complex and often requires a balancing of competing values. Some activities are discretionary, while others involve statutory rights. Add to that mix the variations in geology, geography, terrain and climate across the public lands with the different types of disturbances, and it becomes clear that mitigation must be a site-specific, case by case determination, using the authorities, tools and standards Congress has provided in exercising its plenary power over the public lands.

The Memorandum reminds us of Secretarial Order 3310 where the Secretary of the Interior tried to change the management of public lands to favor wilderness over multiple-use and economic activities that create new wealth. Congress immediately defunded any ability to implement the Order and it was promptly withdrawn. Likewise, Congress should move to prohibit the implementation of this Memorandum.

**Congress has the Constitutional Authority to Manage the Public Lands**

Article IV, Section 3 of the United States Constitution states, in part, “the Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States...” (emphasis added). Congress has delegated some, but not all, of this authority to the Departments of the Interior and Agriculture, and their respective land management agencies, the Bureau of Land Management and the U.S. Forest Service, through the Mining Law of 1872 (30 U.S.C. 21, et seq), the Federal Land Policy and Management Act (FLPMA), the Organic Act of 1897 (16 U.S.C. 473 et seq), the National Forest Management Act of 1976 (NFMA) (16 U.S.C. 1600, et seq), the Multiple-Use Sustained-Yield Act of 1960 (MUSY) (16 U.S.C. 528 et seq), and the Surface Use Act (SUA) (30 U.S.C. 612(b)).
In these statutes, Congress has clearly stated that the public lands and National Forest Lands are to be managed for multiple-use and sustained yield. Congress also retained certain authority and put sideboards or limitations on the delegation of authority. These laws also provide the tools and standards the Departments, agencies and bureaus require to meet the Nation’s need for minerals, food, timber and fiber, to conserve and protect our natural resources, and to manage the public lands and balance these sometimes competing values.

Thus, the Presidential Memorandum is unnecessary and one must ask what is the real purpose or intent of the Memorandum, especially considering that many of the directives conflict with existing statutory authority.

In 1976, when Congress enacted FLPMA, it understood that managing for multiple-use would require balancing between competing policies and uses. Compare Section 102(a)(8) which states: the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use; (43 U.S.C. 1701(a)(8))

with section 102(a)(12) which states:
the public lands be managed in a manner which recognizes the nation’s need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 as it pertains to the public lands; (43 U.S.C. 1701(a)(12)).

In FLPMA, Congress provided the Secretary with the tools and direction for resolving these sometimes competing multiple-use values. There is a section establishing the California Desert Conservation Area (CDCA), another for Wilderness Study Areas (WSA), a process with public input for establishing areas of critical environmental concern (ACEC) and a process with public input for withdrawing lands from mineral entry and operation of various public land laws. Congress also made it clear that with the exception of the CDCA, WSA and the last sentence of section 302(b), “no provision of this section or any other section of the Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress.” 43 U.S.C. 1732(b).

The last sentence of §302(b) is important because it not only establishes the standard for managing disturbance and degradation of the lands, it is an important tool that helps the Secretary strike a balance between sometimes competing multiple-use values. Section 302(b) states: “In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation [UUD] of the lands.” (emphasis added). By adopting the UUD standard, Congress declared that FLPMA is a preventive statute, not an improvement or recovery statute like the Endangered Species Act (ESA), the Clean Water Act or Clean Air Act.

In adopting the UUD standard for managing the public lands, Congress understood there would be degradation of those lands. In other words, FLPMA authorizes necessary degradation and due
degradation, meaning that some degradation of the public lands will be necessary and due or reasonable under the circumstances. Congress could have, but did not require the public lands to be managed for a net resource benefit or to a no net loss of resources standard. As Justice Scalia explained in his concurrence in \textit{Whitman v. American Trucking}, “Congress...does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes.” 531 U.S. 457, 468 (2001). For example, the Comprehensive Environmental Response, and Liability Act of 1980 ("CERCLA") provides for recovery of Natural Resource Damages from potentially responsible parties to baseline condition (known as “primary restoration”).

While there is not a lot of guidance in FLPMA or its legislative history as to the meaning of UUD, with respect to locatable mineral activities authorized by the General Mining Law of 1872, BLM has defined UUD to mean conditions, activities, or practices that:

1. Fail to comply with one or more of the following: the performance standards in §3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and state laws related to environmental protection and protection of cultural resources;
2. Are not “reasonably incident” to prospecting, mining, or processing operations as defined in §3715.0-5; or
3. Fail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM-administered portions of the National Wilderness System, and BLM-administered National Monuments and National Conservation Areas.

Outside of these special management areas, BLM, under FLPMA, simply has no authority to require locatable mineral operations on the public lands provide a net benefit, net conservation gain or no net loss of natural resources. Furthermore, FLPMA does not authorize BLM to require compensatory mitigation that goes beyond the direct impacts from mining activities, to require offsite mitigation including advanced mitigation.

The preamble to the November 21, 2000 amendments to BLM’s 43 CFR 3809 Surface Management Regulations for activities under the General Mining Laws clarifies that neither the Mining Law, FLPMA nor the 3809 regulations require compensatory mitigation (65 Federal Register 70012). The preamble goes on to state: “BLM will approach mitigation on a mandatory basis where it can be performed onsite, and on a voluntary basis, where mitigation (including compensation) can be performed offsite” (id. Emphasis added).

On National Forest Lands, the 36 CFR 228 A regulations govern surface disturbance by locatable mineral operations pursuant to the General Mining Law of 1872. 36 CFR 228.8 \textbf{Requirements for environmental protection}, states “all operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on national forest surface resources including the following requirements:” Among the requirements are words such as “to the extent practical, harmonize;” “take all practicable measures;” “minimize so far as practicable, its impact on the environment;” and “minimize adverse impact upon the environment and forest surface resources.” Clearly, these requirements recognize there will be impacts to the environment and surface resources of National Forest Lands, and some of those impacts could be “adverse.” The
requirement is to minimize where practicable or feasible. There is no authority or requirement to manage for net conservation benefit, no net loss of natural resources, or require compensatory or advance mitigation.

The Presidential Memorandum Conflicts with Existing Land Management Law

In Section 1, the President declares:

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 mission and 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 (emphasis added).

Section 1 also requires agency policies to encourage advance compensation, and sec.3.(b) states:

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 whenever 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 (emphasis added).

Let’s take a closer look at the italicized words and phrases in the provisions of the Memorandum quoted above. Avoid and then minimize are consistent with statutory authorities, and is what our members do as part of the requirement to prevent UUD. Onsite mitigation is clearly within the land management agencies’ statutory authority and is part and parcel to preventing UUD. However, neither the BLM nor the Forest Service has the statutory authority to require compensatory mitigation, advance mitigation, or offsite mitigation, all of which is required by this Memorandum.

The Memorandum defines irreplaceable natural resources as “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.” The Memorandum requires agencies to promote policies that avoid impacts to irreplaceable resources. However, FLPMA already provides for the designation of Areas of Critical Environmental Concern (ACEC) through the land use planning process subject to public input through the NEPA process to protect irreplaceable resources. FLPMA also provides the Secretary with limited withdrawal
authority as another means to protect irreplaceable resources. The FLPMA withdrawal process also provides for public input and comment. The Memorandum would replace these congressionally mandated processes with an agency directive to identify and protect these resources without public input or comment.

There is no authority in the Mining Law, FLPMA or NFMA that would allow BLM or the Forest Service to require compensatory mitigation, advanced compensation or off-site compensation. Our fear is that the directives in the Memorandum will be used as a form of “permit extortion.” In other words, the agency suggests or with the power of a Presidential memorandum behind them, requires that providing advanced compensation, compensatory mitigation or off-site mitigation could speed up the permitting process. The Memorandum even hints at this by suggesting that the directives in the Memorandum will potentially reduce permitting timelines.

The directive to establish net benefit goal or no net loss goal for natural resources the agency manages that are important, scarce or sensitive clearly conflicts with FLPMA’s UUD standard and the Forest Service’s minimize disturbance to surface resources standard. The Memorandum’s standard of net benefit or no net loss is not found in any existing land management statute. There simply is no way the Mining Law, FLPMA, the Organic Act of 1897, NFMA or the respective surface management regulations can be interpreted to authorize net benefit or no net loss goals for managing natural resources.

FLPMA’s UUD standard clearly contemplates that mining and other multiple-use activities will degrade the public lands and authorizes degradation that is necessary to the activity and is due or reasonable under the circumstances, i.e., not excessive. The same is true of the Forest Services “where feasible, minimize adverse environmental impacts on national forest surface resources. Both standards contemplate a reasonable delta between existing baseline and post-project conditions.

Contrast the UUD and Forest Service standards with the no net loss or net benefit goals or standards in the Memorandum. What does this mean? Does it mean replacement above baseline conditions? How does one measure net benefit? And, is it 2:1; 5:1; 10:1 or 100:1? And at what scale, range wide, portion of the range, watershed, or landscape? What are the economic impacts of such a sweeping change? Requiring no net loss or, net benefit will make many projects uneconomical, adversely impacting America’s ability to meet its mineral requirements and preventing BLM from carrying out one of its multiple-use mandates.

One of our many concerns with the Memorandum is that it arbitrarily raises the bar for project development on public lands that is different from and in many cases in direct conflict to the congressional direction contained in these statutes. While the Memorandum claims to have no legal effect and purports to adhere to existing legal authorities, the reality is that it constitutes marching orders from the Commanding Officer to the troops. Federal land management professionals will feel pressure to comply with the directions in this Memorandum, even when those directions conflict with other statutory authorities and requirements. This creates legal uncertainty, confusion, and will result in project delays, slower permitting times, and increased costs.
Many Terms Are Vague, Ambiguous, Undefined and not Tied to Statutory Authority

Many of the terms used in this Memorandum to describe resources requiring mitigation, including ‘important,’ ‘scarce,’ ‘sensitive,’ and ‘irreplaceable’ are largely undefined. These vague terms create potential legal uncertainty relating to FLPMA and NFMA for scores of authorized multiple-use activities on federal lands.

All of these terms are capable of having different meanings to different people. This dilemma was best expressed by Humpty Dumpty and Alice in Lewis Carroll’s Through the Looking-Glass, Chapter 6, p.208 (1954):

“When I use a word,” Humpty Dumpty said, in a rather scornful tone, “it means just what I choose it to mean – neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master – that’s all.”

Project proponents will face the same dilemma Alice faced. The agency is master when it comes to defining vague, ambiguous and undefined words and applying standards that are not tethered to statutory authority.

What’s next? Policy Manuals? Instruction Memorandum? Continued advancement of this regulatory shift without congressional authority or public oversight and involvement?

Application of the Memorandum in the BLM Land Use Plan Amendments for Sage-Grouse

Despite the lack of statutory authority, BLM already is applying the directives in the Memorandum in their recently adopted Land Use Plan Amendments (LUPAs) for Sage Grouse Conservation. The final LUPAs inserted three last-minute requirements, one to manage the lands for a net conservation gain or benefit for the Greater Sage-Grouse and its habitat, another establishing Sagebrush Focal Areas (SFA) recommending the withdrawal of more than 10 million acres from mineral entry, and a 3% disturbance cap in sage-grouse habitat even though those concepts are nowhere to be found in the Draft Environmental Impact Statements (DEIS). For the purposes of this testimony, I will focus on the net conservation gain or benefit standard and the SFAs.

The net conservation gain or benefit standard, which is an ESA recovery standard, was inappropriately inserted into the land use plan amendments at the insistence of the U.S. Fish and Wildlife Service (FWS). The Sage-Grouse LUPAs state that BLM and the Forest Service are “to require and ensure” operations in sage-grouse habitat include “mitigation that provides a net conservation gain to the species.” The LUPAs further provide that if any habitat loss or degradation remains after avoiding and minimizing impacts, then compensatory mitigation will be required “to provide a net conservation gain to the species.”

Since the Greater Sage-Grouse is not a listed species, FWS has no authority to impose ESA recovery standards on the land management agencies. Furthermore, these requirements conflict with FLPMA’s “prevent unnecessary or undue degradation” standard and BLM’s long-standing
position that it cannot require compensatory mitigation under FLPMA or NEPA for locatable mineral activities on the public lands.

The SFAs were another last minute addition to the LUPAs at the insistence of FWS. SFAs are, according to FWS, lands of irrereplaceable character necessary for the persistence of the species. SFAs are, in effect, ACECs without having been vetted through the required public process. Coupled with the SFAs were a recommendation for withdrawing over 10 million acres from mineral entry, prohibitions on conventional and renewable energy, and grazing restrictions. Importantly, the SFAs set the table to catapult acknowledged secondary threats like mining and grazing to the top of the list, even though FWS acknowledges that mining does not have a significant effect on sage-grouse: “... Overall, the extent of mining projects directly affects less than 0.1 percent of the sage-grouse occupied range. Although direct and indirect effects may disturb local populations, ongoing mining operations do not affect the sage-grouse range wide.” 80 Fed. Reg. 59915 (October 2, 2015). The purpose of SFAs must be to prohibit economic activities important to the western sage-grouse states because this could not have been accomplished with an ESA listing.

As you may be aware, six lawsuits have been filed challenging the Records of Decisions (ROD) and various land use plan amendments. Plaintiffs include two governors, a state legislature, an attorney general, a state land board, counties in two states, grazing interests, mining interests and environmental NGOs. Two of the issues in five of the cases are 1) BLM violated FLPMA and NEPA when it adopted a net conservation benefit or gain standard which conflicts with FLPMA’s prevent unnecessary or undue degradation standard; and 2) BLM violated FLPMA and NEPA when it inserted SFAs into the final LUPAs.

BLM has provided the administrative record in two of these lawsuits and the record demonstrates BLM’s concern that the new and undisclosed net conservation benefit or gain standard could conflict with its existing authorities under FLPMA. Also, there is no analysis in the Final Environmental Impact Statements (FEIS) or RODs explaining net conservation benefit or gain and its impact on the human environment as required by NEPA. Furthermore, there is no analysis in the DEIS or FEIS of the impacts of withdrawing 10 million acres from mineral entry, no analysis of the geology mineral potential of those acres, or the cumulative impacts across the entire 10 state range. All of this was done in secret without public oversight or comment.

Although the Memorandum purports to adhere to existing statutory authorities, the Sage-grouse LUPAs demonstrate that the Administration is implementing the Memorandum in situations that clearly violate existing statutory authority. These examples also demonstrate the havoc this Memorandum will have on western rural communities.

Conclusion and Recommendation

It is clear the directives in the Memorandum circumvent the authorities and standards established by Congress for managing the public lands and is one more attempt by the current administration to usurp Congress’ constitutional and legislative authority. The proper procedure would be for the administration to work with Congress and convince Congress of the need to change the standards for managing public lands, including mitigation protocols. At the very least, the
directives in the Memorandum require rulemaking with public notice and comment pursuant to the Administrative Procedure Act.

Congress stopped the Department of the Interior from changing the management of public lands from multiple-use to managing for wilderness values when it defunded Secretarial Order 3310 in 2011. Congress should do the same with this Memorandum. AEMA encourages this Committee and Congress to take whatever steps are necessary and available to assert its constitutional plenary power over the public lands and clarify that the standards for managing public lands and National Forest Lands are those set forth in statute and not in this Presidential Memorandum. It is up to Congress if there is to be a change in mitigation policies and how the public lands are managed.

Thank you for this opportunity to testify on the important issues raised by this Presidential Memorandum. I am happy to answer any questions.
The Chairman. Thank you, Ms. Skaer.

I am going to yield to Senator Barrasso, and then we will turn to Senator King.

Senator BARRASSO. Thank you very much, Madam Chairman.

Mr. Sims, you mentioned project approval through coercion. We have heard Ms. Skaer talk about permit extortion. You are pretty mild compared to the things I heard at the Stock Growers picnic and Hall of Fame banquet this year when you were inducted. I mean, we were hearing about not just government coercion but, you know, government action to compel and in some ways, government action to corrupt because sometimes just trying to comply makes it almost illegal in terms of sort of the things that you have to do.

So, I just have a couple of questions with regard to what we are seeing here today. I am very pleased that you are here to talk to the Committee. In your testimony, you highlighted the importance of both multiple use management and conservation in your daily life. You have lived that. Your family has lived it in Wyoming.

If the Federal agencies fundamentally change their management mission from multiple use to something that prioritizes avoidance over everything else, how is that going to affect your work in the Conservation Districts?

Mr. Sims. When you develop resources, there is a level of disruption or what you would need to mitigate for. That is what Conservation Districts do best. We try to mitigate for those things, make the environment better. But we realize that we need to use those resources. That is part of the conservation, we're going to conserve those resources. We're going to conserve the environment that we're using that hosts those resources.

The issue I see is we have an avoidance, we have a minimization and we have a compensatory hierarchy with this, with the whole mitigation thing. I see a jump, a push, to go to the compensatory mitigation which does not necessarily benefit that project or that area that is being impacted when we're talking about a landscape that could be across the nation or in a Sage Brush Steppe.

So the avoidance portion of that, I don't think, allows us to develop those resources and do our jobs.

Senator BARRASSO. You raise some significant issues about future planning that is going to be required by this Memorandum's mitigation policies. In your view, did the agencies have the ability to address all these possible future environmental changes on the landscape?

Mr. Sims. I do not. I think when they talk about baseline and no net loss and the net gain, at this point, there are efforts in the State of Wyoming, I know, that will define these and show that level of habitats we have or those things, but they are far from completed. There's been a lot of work done on that.

Senator BARRASSO. You also express concerns with the concept of durability and the undue burden that this is going to play on projects.

The Memorandum defines durability loosely saying that the environmental benefits of mitigation must last, it says, at least as long as the harmful impacts of the project. This means that at some point some agency official can determine how long the harmful ef-
effects of the project will last. It is going to be their speculation. It seems possible that ongoing projects could be reexamined under these new terms.

I am wondering if you have heard of any projects that are completed in phases that may be delayed under these new policies?

Ms. Sims. Personally I have not. I know that some of the oil and gas, as they were developed, and they were continued to go. There was one instance where a road was moved from a Sage Grouse lek as part of the mitigation for a new portion of that project.

It's ironic. They moved the road from the Sage Grouse lek, moved it over to another area and the Sage Grouse moved over to where the new road was. It was due to the dust in the water, but they did try to mitigate for that. But that was a requirement to continue another portion of the project.

Senator Barrasso. It is amazing.

Thank you, Madam Chairman.

The Chairman. Thank you.

Senator King.

Senator King. Thank you, Madam Chair.

It seems to me this is an interesting hearing and discussion because this core question is, is this Memorandum regulatory or wreckatory? Is it advice to the agencies or does it create additional regulatory burdens? Certainly whoever helped the President with the drafting knew what they were doing legally because there are all kinds of statements at the end that says this does not increase authority, this does not expand existing regulation, it is simply advice to the agencies.

Ms. Longan, if it is non-regulatory, isn’t consistency, timeliness and predictability across Federal agencies a good thing? I have been working in regulatory affairs for 35 years, and I have always thought that was something that we wanted. My question is what new imposition does this Memorandum place upon the development process in Alaska or anywhere else?

Ms. Longan. Thank you for the question.

Yes, consistency and coordination among the Federal agencies that are operating under multiple or different authorities is always a good thing.

What I should underscore is that in Alaska the predominant form and legal authority to require compensatory mitigation comes from the Clean Water Act as well as from the Endangered Species Act. There are several other Federal agencies listed in this Memorandum that aren't currently requiring any form of compensatory mitigation. To that end, then, that is striking the developers in Alaska as something incredibly new and in addition to what is already required in our state.

Senator King. Well, it says right in it, this Memorandum is not intended to, and does not, create any right or benefits substantive of procedural, enforceable at law and equity by any party against the United States, etcetera. Nothing in this Memorandum shall be construed to impair or otherwise effect the authority granted by law to an Executive department.

It is called the Administration for a reason. They are supposed to administer the laws. That is part of implementation. I am having a hard time figuring out how this imposes new burdens. It
seems to me that is the core question that we are discussing here today.
You had eloquent testimony on this. Give me your thoughts, please?

Ms. SKAER. Well Senator, you have the Chief Executive issuing a Memorandum saying the word shall in it, you know? This is what we shall do, yet, the agencies all operate under different statutes that have different goals. Congress provided different standards for how you manage the public lands whether there is mitigation or not.

Senator KING. But isn't what the President is saying, he is clearly qualified. It says——

Ms. SKAER. Yes, it does.

Senator KING. As you are—to be consistent with Federal law, in so far as you are consistent, try to be——

Ms. SKAER. Okay.

Senator KING. Try to have the same rules for all these different agencies. Is that not a benefit to your——

Ms. SKAER. Well, except that you have different goals and different rules and different mitigation standards depending on whether it's a listed species under the Endangered Species Act or you're developing a mine or an energy project.

In the Sage Grouse Land Use Plans, there are six lawsuits now so the administrative record has been filed with the courts. We see great pressure from Fish and Wildlife, BLM, to adopt the net benefit recovery standard, and BLM saying that violates our statute. We can't do that under FLPMA. It prevents unnecessary undue degradation and Fish is saying if you want “not listed, not warranted,” you will do this.

And so——

Senator KING. Right.

Ms. SKAER. You know, it's clear that the statute provided one set of rules but the agencies were pushing in a different direction.

Senator KING. I have had the experience of having OSHA telling me my bulldozers had to have backup noise, backup signals and the Department of Environmental Protection saying no, that is a violation of the noise standard. So my suggestion was you guys go in a room and work this out, but I understand how you can have inconsistencies.

Ms. Scarlett, several strong words have been used and I think the words were extortion and pressure. What about the danger of advanced mitigation being used as a, kind of, pressure point. If you provide enough advanced mitigation, we will expedite or I do not think it would be that explicit? But human nature being what it is, address that concern that has been expressed here?

Ms. SCARLETT. Thank you very much.

At The Nature Conservancy, we see two dimensions of the mitigation policy as important and as going in tandem. One is the large landscape planning and advanced mitigation opportunities where applicable under the law. The other is more clearly stating goals.

In the context of clearly stated goals, that is what it is, what impacts you are striving to mitigate against, that allows the focus then to be on addressing those. That's quite a different process than one where you have no clear goals and therefore you get into
simply a negotiation. Well, $8 million sounds good, $6 million sounds good, so we think those things together actually can advance good outcomes.

I want to point to one example which will help us understand that. It predates, of course, this Memorandum, but it is the San Diego Association of Governments, 18 governments, lots of development in the area, transportation systems and so forth. They did a large landscape effort, advanced mitigation effort, so that they would be able to expedite transportation projects over many, many years. The effect of that has probably been to have development costs and also significantly reduce the timing. We think that's a best practice, and we think it's one consistent with what this is striving to do but striving to get all the agencies to more consistently apply that kind of approach.

Senator King: It seems to me the consistency, timeliness and predictability are virtues. The question is whether this Memorandum achieves that, but that seems to be the goal.

Thank you, Madam Chair.

The Chairman: Thank you, Senator King. I so appreciate the fact that you come, you listen, you ask these very probing questions. I think the goal is admirable, absolutely. I think you said it was salutary, and I would agree. I am just trying to understand whether or not this gets us there or not, so I appreciate your line of questioning.

Ms. Longan, I want to go back to you with regards to what we saw within the NPRA and the effort to align the mitigation interests between BLM and the Army Corps of Engineers within the NPRA. And again to try to drill down to see if, in fact, this Memorandum really gets us any closer because I think what we saw with the experience within the NPRA that the compensation requirement was $8 million. Ms. Scarlett, you said, in your example, $8 million right? Is $6 million right?

It was certainly my sense all throughout that when it came to that requirement that they were putting in front of Conoco, when it came to the compensation, it was what could they land on that Conoco would finally agree to?

One of the questions that I am asking Mr. Bean for on the record, was exactly how was that $8 million payment developed? What were the metrics that were used in determining exactly what that compensation would be, because as of this point in time, I have yet to be shown anything that would give clarity to anybody who is looking to do a project up there in terms of what metrics we are using? Do you have any clear sense as to how that $8 million in compensation was calculated or determined, or again, the metrics that were in place then?

Ms. Longan: No, it's not clear to the state, and we actually worked to serve BLM as a cooperating agency during the NEPA review for GMT–1. We do not know which metrics or parameters were used for BLM to derive the $8 million mitigation cost.

I want to take a moment to just recognize BLM Alaska's attempts to increase in transparency since they issued the decision for GMT–1. We do not know which metrics or parameters were used for BLM to derive the $8 million mitigation cost.
termine how best to now use those $8 million to effectively mitigate impacts.

It's important to realize that BLM cannot consistently follow metrics or parameters to estimate mitigation costs because those metrics are not in place in any regulation or well established policy, so it is unlikely, if not improbable, that BLM can be consistent in applying any metric that does not exist.

The CHAIRMAN. So, it is throwing the dart at the board and seeing where it lands at this point in time? Is it that random?

Ms. LONGAN. Our sense was that yes, it was that random, and there was a bit of a push and a rush to determine these mitigation costs, again, because I'm hearing about mitigation in advance. Well, in advance is a relative term. Anecdotally and in my observation, the mitigation is always, typically, in advance and needs to be established, if not occurring, before a permit is issued.

So in the case of GMT–1, BLM was under pressure as was the applicant to make decisions and issue the permits and authorizations under BLM authority, and mitigation certainly was, sort of, a last minute decision yet to be made.

The CHAIRMAN. It sounds like it fits into what was said earlier, permit through coercion. Then the fact that BLM is now using some of that $8 million to develop its landscape level, regional mitigation strategy. So in effect, what you have is the private party, Conoco, bearing the burden of paying for BLM to develop its regional mitigation strategy. I do not know if that is unprecedented, but it certainly is unusual.

I asked the question of Mr. Bean earlier when he was saying that the whole purpose of this Memorandum is to get to that point where it is expedited. It helps to reduce overall costs. It provides greater certainty. I suggested to him that I was searching in my head to try to think of an example, at least in our state, where we have seen the process made better because of this coordination/collaboration. I couldn't come up with anything. Can you share anything with the Committee here?

Ms. LONGAN. Sure, I will try.

In terms of coordinating the NEPA review and regulatory outcomes, GMT–1 comes close to being a good example, Senator. What was unfortunate in that is, again, there were multiple Federal agencies needing to issue permits and authorization. Really at the helm of that was BLM as well as the Corps of Engineers who has to issue 404 permits. As I stated in my oral testimony, that is a requirement almost all the time because Alaska, as you're very familiar, is so covered in wetlands.

So the government agencies back home in Alaska are trying very hard to collaborate and coordinate, and I am seeing impressive areas of improvement there. But herein we have the problem of unknown, unexpected and unclear guidelines or non-existing guidelines that require Conoco to pay for compensatory mitigation. The mitigation required for GMT–1, again, was in addition to what Conoco was very used to paying under the Clean Water Act. So the policies that BLM is still working to develop are very new to us in Alaska, and it's, sort of, policy on paper so it's hard for developers or even the State of Alaska to understand the process, and to un-
derstand exactly what mechanism is used to determine compensatory mitigation costs.

The CHAIRMAN. Fair enough.

Let me ask about the one recommendation in your letter here that asks that it be made clear how new Federal mitigation policies might impact our non-Federal lands, specifically state, private, Native corporation or tribal lands. What is your concern there?

Ms. LONGAN. Thank you for the question.

We have a strong concern that the Memo does not seem to provide guidance on how non-Federal lands might be impacted. We understand that this Memo is set forth to establish mitigation goals which we strongly support; however, we also understand that the decision-making is delegated to the Federal agencies.

Multiple Federal agencies are listed in this Memorandum. They are responsible for making those decisions, implementing policy where regulations do not exist and they are the ones who will then require how or if compensatory mitigation will impact state, Native corporation, tribal or private lands.

This is concerning to us. We are expecting that existing local and state authorities will not be marginalized by any new mitigation policy or outcome based on the issuance of this Memorandum.

The CHAIRMAN. I recall a conversation that I had with a tribal member down in Southeastern Alaska who is concerned about some of the mitigation requirements, and in their community with their tribal lands, the concern was the mitigation costs could actually be more than the cost of their overall project. This was a small, small tribal organization. So it is something, again, where there is certainly a lack of clarity here.

Let me ask Ms. Longan, Mr. Sims and Ms. Skaer, you have suggested that some of the definitions are troubling. I, in my comments to the agency witness, indicated that there was lack of clarity within agencies whether it was best available science.

Mr. Sims, you have mentioned the same concern shared by Senator Barrasso about how we define irreplaceable natural resources. In terms of those troubling definitions contained within this Memorandum, what gives you the most pause or cause for concern?

Ms. Skaer, you want to go?

Ms. SKAER. The avoid irreplaceable resources or resources of irreplaceable character, you know, mineral deposits, economic mineral deposits are rare and they're hard to find and they are where God put them. And sometimes God put them where there were some other resources of value. You can't avoid those if you're going to develop the minerals that America needs. So that seems to be one of those things that is in the eye of the beholder. What's irreplaceable to me may not be irreplaceable to you.

The other one is the net benefit or net conservation gain. How do we measure that? Is it two to one? Five to one? Ten to one? A hundred to one, you know? And what are the parameters for that? You know, there's so many of these definitions. They're not tied or tethered to existing statute or regulation where the agency can look at their regulations and say "okay, we defined mitigation to mean . . . " These are terms that are very subjective.

The CHAIRMAN. Mr. Sims.

Mr. SIMS. I would echo my panelist's comment on that.
The other thing, the durability, say you have a project and you’ve done everything you can think of. You’ve put in some compensatory mitigation and your project lasts 30 years or 50 years, and down the road it becomes evident that maybe what you did was not enough or it was but you did it in a full faith effort and you’ve expended those resources.

Mitigation, generally, if it’s not compensatory, costs money or it’s a change in design or it’s a change in the way you put it on the ground. So there’s all sorts of that mitigation, and now are these agencies going to be able to come back and say no, you need to change this or you need to add to this so the durability of your mitigation can continue on for the life of the project?

That unknown, that—how do you plan for that far ahead in a habitat or for a species conservation is very difficult to do.

The CHAIRMAN. Ms. Longan.

Ms. LONGAN. Thank you.

I also echo the comments from my fellow panel members. The term irreplaceable natural resources or resources that have an irreplaceable character is certainly most concerning to us. And it’s not the simplicity in actually defining these terms. That seems easy enough. The complexity comes with then multiple Federal agencies, again operating under multiple authorities that aren’t consistent, actually having to implement their policies in order to achieve that very ambiguous and vague term of not impacting resources with an irreplaceable character.

Harmful impacts is extremely subjective and vague to us also. What hasn’t been clearly stated is how the goals set forth to minimize harmful impacts may or may not interact or coincide with existing Federal laws and definitions, how it may or may not coincide or interact with existing mitigation requirements. For example, the outcomes from the NEPA process that obviously is going to work to avoid, minimize and mitigate harmful impacts or a definition close to that term. It is not expressly clear how these new mitigation goals, again, will coincide or interact with multiple Federal laws that already require mitigation.

The CHAIRMAN. Let me ask you, Mr. Lashley, about the issue that Mr. Sims has brought up about the durability requirement. What impact might this have on the work that you do, how the banking community might assess the risk and effectively assign a dollar value to a bank’s risk of assuming liability for the durability of a project’s mitigation efforts in perpetuity while also at the same time ensuring the mitigation measures are durable in light of unknown potential, future environmental issues? So you have got an uncertainty out there. How do you bank that or is that an issue for you yet?

Mr. LASHLEY. Thank you, Madam Chairman, for the opportunity to answer that question.

First, I applaud Mr. Sims for the work that he’s doing in Wyoming. It’s admirable, and I say that because it illustrates the complexity of having uniform standards. What’s good for the hydrology, the soils, the habitat, all of the ecosystem values that exist in Wyoming are completely different than in Alaska or Florida or Maine or Nevada.
And when it comes to durability and banking it is built into the existing law. So the use of the word durability, it's an adjective. It describes the fact that under almost all banking guidelines that exist today and some are still evolving, but under all banking guidelines that we work in affect water quality. So reduction of nutrients, protection of streams, protection and restoration of wetlands, in addition to forestry banking guidelines under most state rules, have a durability component.

We have to maintain and monitor the projects in order to secure credits. Our credits are released over a period of from five to ten years, I'm sorry, two to ten years, so our average bank project is a ten-year process.

We have financial assurances and bonds to make sure that corrective action is taken. If we don't take that corrective action to solve a climatic issue, a weather-related issue, then our credits are withdrawn from our ledger and they can't be used to offset new impacts.

At the end of the regulatory release of our projects, and keep in mind there's a permanent conservation easement on all the acreage that's within the bank domain, that the work that we're doing, we have to provide long-term, the word perpetual is used and nobody really can understand what perpetual is, although it means a very long time. We have to provide a fund that is handed over to a long-term steward, usually a non-profit, a river keeper, a bay keeper, and they have to maintain the site in perpetuity.

So durability is not new based on our interpretation of the Presidential Memorandum, it's something that we assume right now and build into our projects.

The CHAIRMAN. Ms. Scarlett, I think this will be my last question here this afternoon. I appreciate the staying power of this panel here.

When we talk about collaboration and coordination, in my mind, the better results come when you truly have all the stakeholders involved and engaged and a level of coordination with the state and the local entities. Western Governors Association has sent multiple letters to the Department of the Interior pushing this and given your background, your government service and in your current role, I would think that you probably agree that it only makes sense to have all stakeholders engaged here. But as I read it, the Presidential Memorandum is silent with respect to collaboration and engagement with states and local governments and private sector stakeholders, and only contains a kind of passing reference to that.

How would you recommend that we can ensure that Federal agencies really are collaborating and coordinating and engaging on mitigation with all of the stakeholders and really pulling in the states? If Ms. Longan, in her capacity in the Department of Natural Resources, is not involved in this process, it seems to me you've got a real deficiency and you have a process then, effectively, that does not work whether it is in Alaska, whether it is in Wyoming or elsewhere? How do we correct this, because in my view it is an error of omission. I hope it is not purposeful, but it is clearly not there now. What is your advice here?

Ms. SCARLETT. Yeah, thank you very much, Senator.
Collaboration is a hallmark of what The Nature Conservancy is all about. Everywhere we work that is the approach that we utilize. And as you may recall during my tenure at the Department of the Interior, a central tenant was cooperative conservation. Indeed, we put out or worked to have the President put out an Executive Order on cooperative conservations. So clearly that is critical.

I think for our attention at The Nature Conservancy on the Memorandum and, as you noted, there are some salutary underpinnings, that is trying to enhance project efficiency and at the same time also enhance environmental outcomes. The key, really, is going to be in the agencies and their follow on. The Memorandum is asking the agencies to actually develop follow on policy guidance.

So we intend to participate through the public comment process to ensure that guidance both provides some of the clarity that has been discussed here with respect to terminology but also is inclusive of the importance of stakeholder engagement and so on and so forth. So both in the follow on guidance that will be promulgated by the agencies and then of course, in the on the ground practices, we remain vigilant about the inclusion of stakeholder engagement.

The CHAIRMAN. I think we have heard good praise, high praise, for what is going on in the State of Wyoming. Certainly in Alaska, because we are so distinct and oftentimes our issues are just that much bigger or more complicated, I think it is important that we look to the states as well in terms of how they have been handling the issue of mitigation and have been for a long time, and obviously being good stewards in so many cases.

Again, I worry about those in Washington, DC sitting here as Federal agencies basically telling you in the West or us in the North how it is going to be. That is not a very collaborative process. I would certainly encourage that as we are working through many of the issues that have been raised, not only here in this Committee but in discussions around the country, that the best practices that we have seen in many of our states are looked to for a level of guidance.

I appreciate the input of all of you here this morning and know that we will await a response to the letter that 19 of us have signed to the Administration asking for greater clarity here. I am sure that there will be more questions for the record that will be submitted by my colleagues.

This is an issue that, particularly for us in the Western states, is as significant as anything because if the opportunity to develop, whether it is a coal lease, whether it is grazing lands, whether it is an opportunity to access our oil resources up North or whether it is putting in a new runway, if there is not some clarity and again, some general understanding as to how you proceed before you put your pen to paper, it is a great way to shut down just about everything.

My hope is that what we will see is greater certainty that allows our states, our tribes and our private entities a path forward that is reasonable. Because right now, what we are seeing is a lot of frustration and a lot of just real consternation about the practices that are being advanced back here from our Federal agencies.
I will end with Senator King’s words that the goals are laudatory or salutary, I think, was his description. Getting there is our challenge, and right now we are clearly not there yet. So we have got a ways to go.

With that, I thank you all and appreciate you being here.

[Whereupon, at 12:23 p.m. the hearing was adjourned.]
APPENDIX MATERIAL SUBMITTED

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(86)
Questions from Chairman Lisa Murkowski

**Question 1:** In the hearing, I asked you to what extent do agencies’ legal authorities prohibit or modify the application of the principles and mandates outlined in the Presidential Memorandum (Memorandum). You responded that the Memorandum does not supersede any legal authorities, which is what the Memorandum provides. However, recognizing that the Memorandum cannot and does not supersede any legal authorities and that, by its terms, it “shall be implemented consistent with applicable law...” please explain whether, and, if so, how, in practice, you anticipate that the Department of the Interior (Department) will change its work in connection with its administration of laws to which it is subject or charged with administering, including the Federal Land Management Policy Act (FLMPA) and the Mining Law of 1872? Please tell me which Department authorities modify or limit the Department’s application of the Memorandum, and how specifically those authorities are therefore likely to limit or modify the Department’s application of the Memorandum.

**Response:** The Presidential Memorandum directs DOI and it agencies to implement key principles when applying mitigation. Public lands management by the BLM, under the authority of FLPMA and the Mining Law (and other statutes and regulations, such as the Endangered Species Act and the National Historic Preservation Act), has historically included the application of mitigation. The Presidential Memorandum provides guidance to the BLM by instructing the agency to bring consistency, via the principles identified in the Memorandum, to its application of mitigation. The BLM has limited discretion for decisions with regard to locatable minerals and therefore in considering actions under the Mining Law, the BLM will continue to follow its existing regulations governing mitigation for operations under the Mining Law. See 43 C.F.R. Part 3809.

**Question 2:** Please provide examples of mitigation policies that are currently unclear or are implemented inconsistently by or within the agencies.

**Response:** Historically, the BLM has taken a piecemeal approach to mitigation, with policy written and applied program-by-program, office-by-office. This approach led to mitigation being applied differently across the boundaries for Field Offices and State Offices, leading to challenging and confusing permitting process for industry. This approach also led to impacts to the same resource being considered differently, depending on which type of public land use was causing the impacts.

The U.S. Fish and Wildlife Service’s (Service) existing Mitigation Policy (January 23, 1981; 46 FR 7644-7663) establishes policy for Service recommendations on mitigating the adverse impacts of land and water developments on fish, wildlife, and their habitats. It was written to help assure consistent and effective recommendations by outlining policy for the levels of mitigation needed and the various methods for accomplishing
mitigation. It has allowed Federal action agencies and private developers to anticipate Service recommendations and plan for mitigation measures early, thus avoiding delays and assuring equal consideration of fish and wildlife resources with other project features and purposes. On March 8, 2016, the Service proposed to revise the Mitigation Policy (81 FR 12380-12403). The revisions are an opportunity to reflect changes since 1981, including accelerating loss of habitat, effects of climate change and the application of a landscape-scale approach. The revised policy is intended to be a single, umbrella policy under which more detailed Service documents covering specific activities may be issued in the future.

The draft revised Mitigation Policy is consistent with the:
- Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015);
- Secretarial Order 3330 - “Improving Mitigation Policies and Practices of the Department of the Interior” (October 31, 2013); and the
- Departmental Manual Chapter on Implementing Mitigation at the Landscape-scale (October 23, 2015).

Adopting the common principles from these documents within the draft revised Mitigation Policy will foster clarity and consistency among the multiple federal agencies engaged in mitigation processes.

**Question 3:** For each of the terms listed below, please state whether the Department has or has not adopted a formal definition. (I understood your testimony to be that the Department does not have a formal definition for some of the following terms.) In the case of terms for which a formal definition has been adopted, please provide the definition with a citation. For terms that do not have formal definitions, please provide examples of how the term is applied in practice and a description of what the term means as a practical matter.

a. Irreplaceable natural resource;

**Response:** Although the Department has not adopted a formal definition of this term, it is used in the Fish and Wildlife Service’s mitigation policy that has been in effect since 1981. Examples of habitats that the Service has deemed to be irreplaceable include Colorado peatlands (or fens) and Hawaiian coral reefs that are old, structurally complex, and species-rich. These habitats are considered irreplaceable for similar reasons. Peat accumulates in most Colorado peatlands at a rate of less than one foot per thousand years and thus such habitats cannot be restored to their former condition except on a scale of centuries or millennia. For similar reasons, structurally complex, species-rich coral reefs in Hawaii cannot, as a practical matter, be replaced or restored on a time scale meaningful to people
living today. In short, the practice of the Service has not needed a formal definition because it has been consistent with ordinary dictionary definitions, in which to “replace” is to “restore to a former place, position, or condition,” and thus an “irreplaceable” resource is one that cannot practically be restored to a former place, position, or condition.

b. Landscape-scale;

**Response:** The definition for landscape can be found in the Departmental Manual Chapter on Implementing Mitigation at the Landscape-scale (600 DM 6). “For the purposes of this policy and related Departmental efforts, a “landscape” is as an area encompassing an interacting mosaic of ecosystems and human systems characterized by a set of common management concerns. The landscape is not defined by the size of the area, but rather by the interacting elements that are relevant and meaningful in a management context. The term “landscape” is not exclusive of areas described in terms of aquatic conditions, such as watersheds, which may represent the appropriate landscape-scale.”

c. Watershed-scale;

**Response:** Within the mitigation context, the Department does not have a definition of watershed-scale; however, please find a reference to watersheds in the definition of landscapes above.

d. Important resources;

**Response:** Congress referred in the Federal Land Policy and Management Act to “important” fish and wildlife resources, but did not define the term. In contrast, the FWS’s recently released Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy (proposed FWS mitigation policy) explains “importance” in the following term: In the context of resources managed by FWS, “the relative significance of the affected habitat, compared to other examples of a similar habitat type in the landscape context, to achieving conservation objectives for the evaluation species. Habitats of high importance are irreplaceable or difficult to replace, or are critical to evaluation species by virtue of their role in achieving conservation objectives within the landscape (e.g., sustain core habitat areas, linkages, ecological functions). Areas containing habitats of high importance are generally, but not always, identified in conservation plans addressing resources under Service authorities (e.g., in recovery plans) or when appropriate, under authorities of partnering entities (e.g., in State wildlife action plans, Landscape Conservation Cooperative conservation “blueprints," etc.).”

To ensure consistency in mitigation application across bureaus, we anticipate a
similar definition will be provided in the forthcoming BLM final mitigation policy.

e. Scarce resources; and

Response: Here too, Congress used the term “scarcity” in the Federal Land Policy and Management Act, but did not define it. A definition for scarcity can be found in recently released FWS Mitigation Policy: “The relative spatial extent (e.g., rare, common, or abundant) of the habitat type in the landscape context.” To ensure consistency in mitigation application across bureaus, a similar definition will be provided in the BLM final mitigation policy.

f. Sensitive resources.

Response: A definition for sensitive was not included in the proposed FWS mitigation policy. However a definition will likely be included in the BLM final mitigation policy.

Question 4: The Memorandum states that some resources may be “of such irreplaceable character” that it may not be “adequate or appropriate” to minimize or compensate for activities impacting those resources, and therefore agencies should promote avoidance.

a. Does the Department consider minerals and other finite natural resources to be “irreplaceable natural resources?”

Response: The DOI does not generally consider leasable, salable, and locatable minerals to be “irreplaceable natural resources” in the context of the Memorandum.

b. Does the Department consider minerals and other finite resources “of such irreplaceable character that . . . [the Department] should design policies to promote avoidance of impacts to these resources”?

Response: Generally, no. Please see previous response.

Question 5: Under what statutory authority does the Department have the authority to seek “a net benefit”?

Response: The Department’s authority to seek a net benefit in recommended or required mitigation actions is derived from the underlying statutory authority mandating the management of the impacted resource. Under these authorizations,
the bureaus and offices of the Department are responsible for managing different resources and for different uses.

For example, the Federal Land Policy and Management Act (FLPMA) mandates management of renewable resources in accordance with the principle of sustained yield, which is defined as the “maintenance in perpetuity of a high annual or regular periodic output” of such resources. Where, for example, past practices have degraded renewable resources so as to reduce their annual or regular periodic output to low levels, requiring that mitigation achieve a net benefit is consistent with the statutory mandate to achieve and maintain a high periodic output by increasing such resources to levels optimal for sustained production.

The FWS will encourage proponents to develop measures that result in a net gain toward achieving conservation objectives for the resources affected by their actions. Such proponents include, but are not limited to, Federal agencies when responsibilities such as the following apply to their actions:

- Carry out programs for the conservation of endangered and threatened species (Endangered Species Act (ESA), section 7(a)(1));
- Restore and enhance bird habitat (Executive Order 13186, section 3(e)(2));
- Consult with the Service regarding both mitigation and enhancement in water resources development (Fish and Wildlife Coordination Act, section 2);

Question 6: Please be specific in response to the following requests:

a. Please describe how the Department currently works together with other agencies in the application of mitigation.

Response: The Department has a rich history of working across agencies in the application of mitigation. For example, in developing the Department’s 2012 Western Solar Plan, the Department of Energy and the BLM jointly prepared a programmatic environmental impact statement (PEIS). The Western Solar Plan identifies robust mitigation measures for solar energy development on public lands and also called for the development of mitigation strategies for solar energy zones on public lands. Similar, the Interagency Rapid Response Team for Transmission works across the Federal family to improve the overall quality and timeliness of electric transmission infrastructure permitting, review, and consultation by the Federal government. This partnership involves work to coordinate mitigation needs across the relevant agencies. Finally, in all actions that involve section 404 of the Clean Water Act, the Department of the Interior works closely with the USACE.
b. Please also describe how the Department currently works internally across sub-agencies in the application of mitigation.

**Response:** The agencies within the Department of the Interior work in close collaboration on the consideration and application of mitigation. For example, the BLM coordinated with FWS when developing land use plans to conserve and enhance Greater sage-grouse habitat. These land use plans were a key element of the FWS’s determination that the species did not warrant an Endangered Species Act listing. The BLM and FWS have continued to coordinate closely to identify appropriate mitigation for proposed development activities that would impact Greater sage-grouse habitat, as contemplated by the BLM’s land use plans, and identify common mitigation goals, objectives, and approaches. This mitigation coordination for Greater sage-grouse continues in earnest, and also includes representatives from State Governments, the US Forest Service, and the Natural Resources Conservation Service.

c. Further, please tell me whether application of the Memorandum will change this practice, and if so, how it will change currently-applied mitigation practices.

**Response:** The application of the Memorandum will enhance this intra- and inter-Department coordination on mitigation. The identification of a common set of mitigation principles across the agencies, as identified in the Memorandum, facilitates more efficient and effective coordination.

**Question 2:** I understood you to say in your oral testimony that multiple agencies within the Department are already coordinating with respect to mitigation and that similar mitigation practices can be applied across multiple agencies with different authorities and missions. Is my understanding of your testimony correct? If not, why not? And, if so, please provide specific examples of inter-agency coordination that illustrate the basis for your testimony. With respect to each example, please answer the following:

**Response:** Your understanding of the oral testimony is correct; similar principles of mitigation can be applied across multiple agencies with different authorities. The authorities generally authorize the agencies to require mitigation, but do not provide prescription on how to apply mitigation. For example, the concept of durability of mitigation measures is a fundamental mitigation principle – mitigation should be durable, a principle that is consistent with multiple authorities that authorize mitigation.

Bureaus within the DOI have long worked together to successfully coordinate project authorizations and mitigation despite differing authorities and missions. For example, the BLM, FWS and other DOI agencies and non-DOI stakeholders coordinated closely in the
development of the BLM’s Regional Mitigation Strategy for the Dry Lake Solar Energy Zone, consistent with the Western Solar Plan. The BLM used input from the Service and other stakeholders to develop the Regional Mitigation Strategy’s findings and recommendations, which the BLM considered and incorporated into its decisions authorizing rights-of-way for solar energy development. Further information on this example of inter-agency coordination on mitigation is available at:


The following responses to your sub-questions apply generally to all examples of inter-agency coordination:

a. Which authorities dictate the form of mitigation sought?

Response: A variety of authorities contemplate the implementation of mitigation, including Federal Land Policy and Management Act, the Mineral Leasing Act, the Endangered Species Act, the Migratory Bird Treaty Act, the National Historic Preservation Act, and the Clean Water Act. The latter four authorities are good examples of where inter-agency coordination on mitigation is essential.

b. Which agency determines the final appropriate mitigation measures required?

Response: In general, the permitting agency determines the final appropriate mitigation measures.

c. Which agency’s metrics are to be used?

Response: In general, this is a collaborative aspect to mitigation, though usually the agency with primary authority over the resource determines the metrics.

d. Which agency is the arbiter, if an arbiter is required?

Response: In most cases, there is a clear responsible agency. For example, the U.S. Army Corps of Engineers is the final decision maker for mitigation under section 404 of the Clean Water Act.

Question 8: Title II of FLPMA requires a “systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences,” and requires the Bureau of Land Management (BLM) to “consider the relative scarcity of the values . . . and realization of those values.”
a. Do you consider current mitigation policies of the Department, and specifically BLM, to equally value integrated resources? If yes, please specify.

**Response:** The values placed on resources by the BLM vary in place and time. We consider the relative values of resources, informed by public and other stakeholder input, during land use planning and other NEPA processes by using an interdisciplinary, scientific approach. The BLM’s mitigation policy is largely implemented through these processes and associated decisions, at which time the BLM considers the relative value of the resources via a systematic, science-informed process.

b. How, if at all, will such mitigation policies change as a consequence of the Memorandum? If they do, how will mitigation take account of those integrated resources?

**Response:** The BLM’s forthcoming mitigation policy will provide additional guidance to the agency about how to consider the dynamic, inter-related nature of resources, via a scientific process, when determining mitigation needs in the land use planning and other decision-making processes, in compliance with NEPA.

**Question 9:**

A. Did the Department borrow mitigation principles and a regulatory framework for mitigation from the administration of the Clean Water Act when establishing the mitigation priorities expressed in Secretary Jewell’s Secretarial Order 3330?

**Response:** The Department sought input from a variety of sources in developing Secretarial Order 3330 and subsequent mitigation policies. Among mitigation practitioners, the mitigation framework established for section 404 of the Clean Water Act (CWA 404) has been known to be a well-functioning permit framework resulting in permit efficiencies and recognized benefits to impacted wetlands and streams. Lessons learned and best management practices identified through this body of work were helpful in thinking through similar concepts and problems governing Interior resources.

B. To your knowledge, did the principles and framework referred to above influence the development of the principles reflected in the Memorandum?

**Response:** Yes.

C. Was the Department the source of the following principles:
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a. avoid potential environmental impacts;

   Response: No. Avoiding impacts, the first step of the mitigation hierarchy, has been a long-established principle.

b. where impacts cannot be avoided, require projects to minimize impacts to the extent practicable;

   Response: No. Minimizing impacts that cannot be avoided, the second step of the mitigation hierarchy, has been a long-established principle.

c. where projects cannot be avoided, seek offset or compensation; and

   Response: No. Compensating for impacts that cannot be avoided or minimized, the third step of the mitigation hierarchy, has been a long-established principle.

d. when a natural resource is “irreplaceable”, avoid impact altogether?

   Response: This principle is set forth in the Fish and Wildlife Service’s 1981 mitigation policy, but may or may not have originated there.

D. If the Department was not the source of these principles, outlined in question 9.C. above, who or what was the source of those principles?

   Response: The mitigation hierarchy as outlined above comes from the Council on Environmental Quality’s (CEQ’s) regulations implementing the National Environmental Policy Act (NEPA), which were promulgated in 1978 (See 40 C.F.R. § 1508.20).

E. Does the Department have authority under FLPMA to borrow these regulations and principles, and apply them?

   Response: Yes, the Department has the authority under FLPMA to implement these principles in managing the public lands. Through the analytical framework of NEPA review, the BLM identifies reasonable mitigation options that prevent impacts from exceeding the FLPMA standard of “unnecessary and undue degradation.”

F. Has the Office of the Solicitor concurred?

   Response: Yes.
G. Has the Solicitor provided written guidance on this point?

Response: To date, the Solicitor has not issued formal written guidance on this point.

Question 10: There has been significant litigation over permitting under section 404 of the Clean Water Act in part because of a few terms that are not defined or not clearly defined by that Act. Is the Memorandum and the Department’s manual on mitigation based, at least in part, on mitigation sequencing developed in the context of permitting under section 404?

Response: As noted above, the mitigation sequencing of avoid, minimize, and compensate was originally described in the 1978 CEQ regulations implementing NEPA (See 40 C.F.R. § 1508.20), and then carried into the section 404 regulatory framework of the Clean Water Act.

a. If so, and given that the Memorandum itself uses a number of undefined or loosely defined terms, how will it be possible to keep the vagueness of the Memorandum from leading to similar disputes or leading to vastly different interpretations across the agencies?

Response: The problem of vagueness and inconsistency in the current application of mitigation is what the Memorandum, Departmental manual, and subsequent bureau mitigation policies seek to remedy. Mitigation has been applied differently by different offices and bureaus, even when resource impacts are similar or within close geographic proximity. These policies seek to provide a consistent framework for how mitigation needs are assessed and required, including the use of standardized terms and definitions wherever appropriate.

b. How will project proponents be able to know what is required of them?

Response: The Memorandum, Departmental manual, and subsequent bureau mitigation policies all direct bureaus and offices to, wherever possible and appropriate, bring mitigation information and decisions early into the scoping and permit process. The Department’s use of regional or landscape-scale mitigation strategies or plans constructed in advance of permits and authorizations further serves to transparently identify mitigation needs and provides upfront information to project proponents of best areas to avoid or develop, minimization tools to utilize, and potential compensatory mitigation needs for residual impacts.

Question 11: Please explain how mitigation unfolded with regard to the Greater Mooses Tooth 1 project in the National Petroleum Reserve-Alaska?
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a. Why did the mitigation plan take so long to develop, cost so much on the front end, and still require additional mitigation dollars on the back end despite the redesign of the project to make it conform to BLM’s initial mitigation desires?

Response: The GMTI project EIS was the first authorization of oil and gas production on Federal land within the National Petroleum Reserve-Alaska (NPR-A) and as a result, required time and effort to determine the most responsible path forward for allowing development to occur while also fulfilling our obligations to protect subsistence and other resources as directed by FLPMA, the National Petroleum Reserve Production Act (NPRPA), Alaska National Interest Lands Conservation Act (ANILCA), and other laws. The BLM worked closely with the State of Alaska, local Alaska Native villages and corporations, Federal partners such as the USACE, and other stakeholders through a public process to determine potential impacts to subsistence and other resources as part of this project authorization. The BLM does not understand the distinction you raise between “front end” and “back end.”

b.

i. How exactly was the $8,000,000 payment developed? Were specific metrics devised to determine the value of the natural resources that are expected to be impacted by the development?

Response: To offset identified impacts that could not be fully mitigated by avoidance and minimization measures, ConocoPhillips agreed to contribute $8 million dollars to BLM to establish a compensatory mitigation fund to provide for the development and implementation of a landscape-level regional mitigation strategy (RMS) and to finance mitigation projects as identified by that strategy.

The primary impacts to subsistence resources were identified through rigorous anthropological analysis in the NEPA process. As development of Federally managed oil and gas in the NPR-A is new, and therefore this impact and mitigation need is new, we consulted with agency experts and coordinated with ConocoPhillips to estimate the mitigation contribution.

ii. I understand that BLM is using part of the $8,000,000 to develop its landscape-level Regional Mitigation Strategy. Is this accurate? If so, under what circumstances is it appropriate for a private party to bear the burden of paying for BLM to develop its strategy? If yes, please provide your reasoning and please articulate how the Department is using part of
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that $8,000,000. Please also explain how the Department tracks those
dollars, and applies those dollars. (See related Question 22 below.)

Response: Yes, your understanding is correct. The Regional Mitigation
Strategy is being developed with a small proportion of the $8,000,000,
will determine how best to allocate compensatory mitigation funds to
address the impacts to subsistence and other resources that will be
impacted by the GMTI project. The impacts that the BLM seeks to
mitigate are the direct result of the economic pursuits of a private party,
and the BLM believes that it is reasonable to assign these costs to the
private party rather than to the American taxpayer. By developing a
Regional Mitigation Strategy to assess impacts and mitigation
opportunities through a stakeholder-driven process, the BLM will also be
able to better and more rapidly respond to future permit applications from
those private parties and at the same time reduce the risk of litigation.

The BLM has established a specific account for the $8,000,000 and is
tracking the spending closely, as done with all finances that the BLM
manages.

Question 12: Given that public comment, coordination, and collaboration are so
fundamental to FLPMA, what is the BLM’s process for determining whether policy or
guidance rises to the level of requiring formal public comment and coordination in the
context of a rulemaking versus administrative, unilateral formulation of instructions and
guidance, etc.?

Response: In determining whether notice and comment rulemaking procedures are
necessary for a given policy, the BLM, with counsel from the Department of the
Interior’s Office of the Solicitor, carefully considers the requirements of section 553 of
the Administrative Procedure Act (APA).

Question 13: “Best available science” is a metric referenced by multiple agencies as a
tool to determine appropriate mitigation measures. How does the Department define
“best available science”? Please provide citations for this definition.

Response: The term “best available science” is undefined in statute, e.g. the Endangered Species
Act, and the Department has not issued a formal definition of the term. Pursuant to
Congressional direction, the Department has implemented information quality guidelines
to ensure and maximize the quality, objectivity, utility and integrity of information
disseminated by its bureaus and offices. In order to ensure the accuracy and integrity of
its published scientific information, The Department follows a robust peer review process

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wherein the information undergoes internal peer review and is subject to public scrutiny. The Department maintains the highest standards possible for published information to ensure integrity and transparency.

**Question 14:** The Memorandum and resulting dialog with various stakeholders has provided few assurances to Alaskans that federal actions resulting from the Memorandum will not impose new federal mitigation policies affecting state, private, Native Corporation, or tribal lands. Please specify how the Memorandum, and federal mitigation policies generally, may impact non-federal land.

**Response:** The Service’s draft revised Mitigation Policy will not alter the relationship between the Service’s activities and non-federal lands. Currently, the Service applies certain authorities to make mitigation recommendations that do cover non-federal lands. For example, if a private landowner proposes to construct a project involving their authorized discharge of dredged or fill material into jurisdictional waters under section 404 of the Clean Water Act, the Service has the statutory authority under section 404(m) to make recommendations to mitigate the impact. This example of a process involving the Service’s federal authority related to mitigation and non-federal lands has been in place for decades and is unchanged by the Presidential Memorandum or the Service’s draft revised Mitigation Policy.

**Question 15:** Please articulate how the Department plans to incorporate and account for the Alaska Native Settlement Claims Act (ANCSA) and the Alaska National Interest Lands Conversation Act (ANILCA) in its policy, guidance, regulation, and directives that relate to mitigation.

**Response:** Mitigation requirements by the Department are considered on a case-by-case basis based on the impacts to resources that are anticipated and the requirements of applicable law, including, where applicable, ANILCA and ANC5A. For example, the Department must comply with the provisions of ANILCA when considering a proposed undertaking that that may affect access to subsistence resources in Alaska.

**Question 16:** To the full extent of your knowledge, what state and local government consultation occurred in the drafting of the Memorandum? What state and local government consultation, coordination and collaboration will the Department undertake as it develops policies and guidance in response to, and to incorporate, the policies and principles outlined in the Memorandum?

**Response:** Questions concerning the development of the Presidential Memorandum should be directed to CEQ.
Mitigation policies developed by the Department’s bureaus and offices have been or will be improved by input from the public, including opportunities for input by state and local governments. The FWS’s proposed mitigation policy was published in the Federal Register and is open for review and comment. The BLM has been developing its forthcoming mitigation policy while considering the comments it received on its interim mitigation manual, issued in January, 2013.

**Question 17:** Will National Environmental Policy Act review be conducted to fully understand the cumulative social and environmental impacts that are expected to result from the multiple federal agencies directed in the Memorandum taking a major federal action to develop additional requirements for compensatory mitigation?

**Response:** Questions concerning the applicability of the National Environmental Policy Act (NEPA) to the Presidential Memorandum should be directed at CEQ. The FWS intends to prepare an environmental assessment under NEPA as it works to finalize the proposed revised mitigation policy. We anticipate that agencies may identify, recommend, or require mitigation for certain actions that are subject to NEPA reviews.

**Question 18:** Will the Department or the Executive Branch conduct a regulatory cost analysis to understand the additional cost burden developers are required to pay for additional compensatory mitigation fees imposed directly as result of Departmental mitigation policies or indirectly as result of the Memorandum?

**Response:** The establishment of BLM’s forthcoming final mitigation policy and FWS’s proposed mitigation policy do not require regulatory cost analyses. Certain actions in the field that may identify, recommend, or require mitigation, such as the establishment of plans or issuance of permits or authorizations, may trigger NEPA reviews, which can (and typically do) include an economic impacts analysis.

**Question 19:** How will implementation of the Memorandum lead to Federal policies that are clear, work similarly across agencies, and be implemented consistently within the agencies?

**Response:** A main objective of work by CEQ and the Department in updating mitigation policies is to promote more consistency across and within bureaus and offices as to how the steps of the mitigation hierarchy are implemented and in the development of mitigation recommendations and requirements. These documents create consistency in how bureaus and offices implement mitigation in a number of important ways, including the use of a compensatory mitigation goal; use of standardized definitions and terms, and; adherence to a consistent set of standards to ensure equivalency among compensatory mitigation providers.
Question 20: As I mentioned in my opening statement, I am troubled by the Memorandum, as are many Americans, including many Alaskans. What specific assurances can you give us today on behalf of your Department to show us we are wrong to be concerned?

Response: Bureau mitigation policies have been worked on in a transparent fashion. The proposed FWS mitigation policy was published in the Federal Register and is open for review and comment from the public and other agencies. The BLM has been developing its forthcoming mitigation manual and handbook while considering the comments it received on its interim manual, issued in January 2013.

Question 21: Mr. Bean, my staff who attended your briefing to the Senate staff came away with the understanding that, in your view, minerals constitute or could constitute an “irreplaceable natural resource” as defined in the Memorandum. Is that understanding accurate? And, if not, why not? When Ms. Goldfuss testified before the House Natural Resources Committee, she did not answer the question of whether minerals constitute “irreplaceable natural resources.” Does the Department interpret minerals as “irreplaceable natural resources” for which avoidance of impact should be sought pursuant to the Memorandum?

Response: The DOI does not generally consider leasable, salable, and locatable minerals to be “irreplaceable natural resources” in the context of the Memorandum, in that DOI does not generally apply the mitigation hierarchy for impacts to these minerals.

However, in some rare cases a mineral resource might indeed be determined, though a public process and consistent with our legal authority, to be an irreplaceable natural resource. For example, I can imagine a scenario where a rare, above-ground geological formation may be considered sacred by Tribal members and valued for its aesthetic beauty by the general public, and therefore it might be identified as a resource to be avoided though a land use planning or other decision-making process.

Question 22: The Miscellaneous Receipts Act (MRA) provides that “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302(b). As a general matter, once money is deposited in the Treasury’s general fund, it cannot be withdrawn without a congressional appropriation. Thus, the MRA protects the constitutional principle of separation-of-powers and prevents executive branch agencies, such as those to which the Memorandum is addressed, from using money that has not been appropriated by Congress.

a. How are funds generated as a consequence of mitigation payments treated by the Department today?
Response: The BLM believes that funds generated as a consequence of mitigation payments constitute contributed funds that the Department may accept under applicable authorities that include the provisions of 43 U.S.C. § 1737(c).

b. How does the MRA apply to these funds?

Response: Section 1737(c) instructs the Department to credit receipts under that authority to a separate account in the Treasury. Accordingly, the Department is not required to deposit these funds in the General Fund pursuant to the Miscellaneous Receipts Act. Section 1737(c) further authorizes these funds to be appropriated and made available until expended. The BLM’s appropriations acts routinely include a provision appropriating the funds for expenditure by the BLM.

c. How, if at all, will these practices change as a consequence of the Memorandum? Please provide citations to support your answer.

Response: The Presidential Memorandum does not change these practices.

d. Has the Department or any of its constituent agencies prepared a legal analysis of the application of the MRA to mitigation payments received?

Response: Yes, the Office of the Solicitor has been consulted.

Questions from Senator John Barrasso

Question 1: When questioned whether the Department regards finite natural resources to be irreplaceable, you were unable to provide a clear response. As such, please provide a clear answer regarding the Department’s definition of “irreplaceable natural resources” and whether finite natural resources would be deemed “irreplaceable” under that definition.

Response: The DOI interprets “irreplaceable natural resources” as it is defined in the Presidential Memorandum, which states “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.”

We take the assumption that by “finite natural resources” you mean “minable, salable, and locatable minerals.” The DOI does not generally consider minable, salable, and locatable minerals to be “irreplaceable natural resources” in the context of the Memorandum.

However, in some rare cases a mineral resource might indeed be determined, though a public process and consistent with our legal authority, to be an irreplaceable natural
resource. For example, I can imagine a scenario where a rare, above-ground geological formation may be considered sacred by Tribal members and valued for its aesthetic beauty by the general public, and therefore it might be identified as a resource to be avoided though a land use planning or other decision-making process.

**Question 2:** Please provide the Department’s interpretation of “scarce or sensitive natural resources” and how those may compare or overlap with the Department’s interpretation of “irreplaceable” resources.

**Response:** One area where standardization was not intended is when determining what resources require mitigation. Under different laws and authorizations, the bureaus and offices of the Department are responsible for managing different resources and for different uses. The use of terms such as “importance,” “scarce,” “sensitivity,” or “irreplaceable” are meant as parameters to guide bureaus and offices in making similar decisions about what types of resources may require mitigation, not what specific resources should be targeted. Certainly, resources that are “irreplaceable” may also be those that are “scarce” or “sensitive.”

Where multiple bureaus and offices have responsibility in managing a particular resource, the utilization of a landscape-scale approach to planning and permitting better allows for more integrated and consistent management, including in the application of mitigation.

**Question 3:** The Fish and Wildlife Service recently announced a revised mitigation policy which will substantively change current conservation practices. Since the agency’s own press release touts new policies and new goals, it seems clear that the Fish and Wildlife Service will be revising and implementing new policy. It seems obvious that other agencies will do the same. The Memorandum does not call for collaborative development of new policies, only that new policies be shared. In your opinion, when conflicts among agencies arise as a result of new or reformed mitigation policies, which agency will make the final determination?

**Response:** The Department is working to ensure all mitigation policies developed by bureaus and offices are not in conflict with one another, apply consistent principles, and clarify rules for mitigation implementation, particularly when multiple bureaus and offices have responsibility in managing a particular resource.

**Question 4:** Under the terms of various agencies’ mitigation procedures, how is the “durability” of mitigation for current projects assessed? How does the Department intend to assess the concept of “durability” under new policies and procedures prompted by the Memorandum?
Response: The Department will require, as appropriate, mitigation that is durable for the duration of the impacts resulting from the associated permit or authorization. The Department generally assesses durability in three ways.

To be considered durable, mitigation measures must achieve and maintain their required outcomes, including being resilient to changing circumstances (e.g., climate change, fire, invasive species), for the duration of the impacts. Mitigation measures must include protection from actions that are incompatible with mitigation measures, such as those required by permit terms and conditions, land use planning, or legal designations. And lastly, durability requires financing mechanisms sufficient to maintain, monitor, and adaptively manage mitigation measures for the duration of the impact.

As appropriate, the Department will ensure that the responsible party is obligated to maintain the mitigation’s durability and correct any loss of durability, unless the outcome is not achieved due to a force majeure event (i.e., an event that cannot be reasonably anticipated or controlled, such as natural disasters outside of a predicted range of disturbance, additional governmental restrictions, etc.). If the loss of durability is not corrected, the Department will take appropriate follow-up actions, consistent with applicable law.

Question 5: In each of the agencies under the purview of the Department, at what level is “durability” currently assessed (i.e., field staff, regional staff, etc.)? How will this change under the new policies prompted by the Memorandum?

Response: As is currently the case, the responsibility to determine the durability of a mitigation measure lies with the line officer or authorizing official responsible for all other aspects of the project. Depending the scope and scale of a project, this individual can be located at different parts of a bureau’s organization. Implementation of new mitigation policies does not change this structure.

Question 6: Mr. Bean, since you were unsure whether the President will request your input during the response to the letter dated February 24, 2016 regarding the Memorandum, please answer the following:

1) to what extent does the Department’s legal authorities prohibit or modify the application of the principles and mandates outlined in the Memorandum?

Response: We have not found programs that will be in conflict with any of the provisions of the Memorandum. However, there will be appropriate differences in mitigation implementation as the Department’s bureaus and offices operate under different laws and authorizations, and are responsible for managing different resources and for different uses. For example, the BLM has limited discretion for decisions with
regard to locatable minerals and therefore in considering actions under the Mining Law, the BLM will likely limit or modify the application of the Memorandum.”

2) Given the differing legal authorities of the agencies, how does the Memorandum, with terms that CEQ noted are at times by design subject to interpretation, result in an umbrella of “consistent standards and guidance” for landscape-scale conservation while simultaneously affording “right tailored approaches” in individual instances?

Response: A main objective of work by CEQ and the Department in updating mitigation policies is to promote more consistency across and within bureaus and offices to how the steps of the mitigation hierarchy are implemented and in the development of mitigation recommendations and requirements. These documents create consistency in how bureaus and offices implement mitigation in a number of important ways, including the use of a compensatory mitigation goal; use of standardized definitions and terms, and; adherence to a consistent set of standards to ensure equivalency among compensatory mitigation providers.

3) How does the Department define “best available science”?

Response: The term “best available science” is undefined in statute, e.g. the Endangered Species Act, and the Department has not issued a formal definition of the term. Pursuant to Congressional direction, the Department has implemented information quality guidelines to ensure and maximize the quality, objectivity, utility and integrity of information disseminated by its bureaus and offices. In order to ensure the accuracy and integrity of its published scientific information, The Department follows a robust peer review process wherein the information undergoes internal peer review and is subject to public scrutiny. The Department maintains the highest standards possible for published information to ensure integrity and transparency.

Question 2: CEQ has testified that some terms were left intentionally vague to allow for individual agencies to develop their own interpretation. Will DOI personnel develop Department-wide definitions for all agencies under your purview, or will each of the agencies be left to devise their own, individual definitions and implementation strategies?

Response: In November, 2015, the Department released a Departmental Manual Chapter on Implementing Mitigation at the Landscape-scale (600 DM 6). The Manual included definitions for key terms that will be used by forthcoming bureau and office mitigation policies. Bureau and office policies will also identify and define other key terms as needed and as appropriate. In doing so, however, the Department will work to limit conflicts between terms to ensure consistency and standardization wherever possible in the implementation of mitigation.
Question 8: The Memorandum requires that mitigation principles, and general approaches, will be shared amongst agencies. At what stage during development or implementation will guidance documents, definitions, and other key principles be shared with other agencies?

Response: Bureau mitigation policies have been worked on in a transparent fashion. The FWS proposed mitigation policy was published in the Federal Register and is open for review and comment from the public and other agencies. The BLM has been developing its forthcoming mitigation manual and handbook while considering the comments it received on its interim manual, issued in January 2013.

Questions from Senator Steve Daines

Question 1: Please provide the listing of resources that will be included in the Department of the Interior’s definition of “irreplaceable natural resources”. If resources such as timber, coal, oil and natural gas are to be included, please provide details on how the agency’s actions will avoid such resources as provided for in Section 3(a) of the Memorandum.

Response: The DOI does not generally consider leasable, salable, and locatable minerals to be “irreplaceable natural resources” in the context of the Memorandum.

Question 2: The Department of the Interior has already released Department Manual 600 DM 6, Implementing Mitigation at the Landscape-scale, on the implementation of mitigation policy. This policy requires the department’s bureaus and offices to consider greenhouse gas emissions from projects and activities, methods of protecting resources that store carbon, and changing wildlife behaviors. How are the agencies and bureaus of the Department implementing this guidance in relation to leases for coal mining or oil and gas production?

Response: Secretary Sally Jewell recently announced that the Interior Department will launch a comprehensive review to identify and evaluate potential reforms to the federal coal program in order to ensure that it is properly structured to provide a fair return to taxpayers and reflect its impacts on the environment, while continuing to help meet our energy needs. Consistent with the practice during two programmatic reviews of the federal coal program that occurred during the 1970s and 1980s, the Interior Department will also institute a pause on issuing new coal leases while the review is underway. Any leases for coal mining conducted by bureaus and offices of the Department will be consistent with conditions and permits of existing leases and the outcomes of this review. Likewise for oil and gas production, the DM manual does not require the analysis of greenhouse gas emissions in project or permit decisions. It only suggests such consideration, where appropriate, to better understand project impacts to climate change.
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Questions for the Record Submitted to Mr. Michael Bean

**Question 3:** In Section 2(f) of the Memorandum, the definition of “mitigation” includes compensating for impacts on natural resources. Although compensatory mitigation is not a new concept to the Department of the Interior, does the department expect an increase in the amount of projects being approved with the use of compensatory mitigation? If so, how will the department account for compensatory mitigation within its budget? Will the department request a specific budget line item to cover potential compensatory mitigation or will this potential expense be charged against existing programs?

**Response:** A stated goal of the Department in the establishment of new mitigation policies is the transparency, efficiency, and consistency such guidance will bring to the permit process. Although a multitude of factors play a role in successful permitting and project development, mitigation principles espoused by these policies, such as efforts to produce better avoidance and the consideration of mitigation measures early in the permitting process, are intended to reduce permit times and could feasibly lead to more project determinations.

Efficiencies in permitting timelines however will not be advanced solely by the proper and effective use of compensatory mitigation, but rather the application of the full mitigation hierarchy (avoidance, minimization, compensation) at relevant scales and as early as possible in the permit process.

While there may be limited situations where actions initiated by the Department’s bureaus and offices could require compensatory mitigation, the Department’s mitigation policies seek to establish more effective mitigation framework for third parties requiring permits and authorizations. When such permits and authorizations require compensatory mitigation, costs would be borne by these third parties.

**Question 4:** Please provide the listing of resources that will be included in the Department of the Interior’s definition of “irreplaceable natural resources”. If resources such as timber, coal, oil and natural gas are to be included in this listing, please provide details on how agency actions will avoid such resources as provided for in Section 3(a) of the Memorandum.

**Response:** The DOI does not generally consider leaseable, salable, and locatable minerals to be “irreplaceable natural resources” in the context of the Memorandum.

**Question 5:** Have you identified any authorizing statutes for your programs or other land management agencies’ programs that will be in conflict with any of the provisions of the Memorandum? If so, please provide a listing of those statutes along with details on how the Memorandum causes a conflicts.
Response: We have not found programs that will be in conflict with any of the provisions of the Memorandum. However, there will be appropriate differences in the implementation of mitigation as the Department’s bureaus and offices operate under different laws and authorizations, and are responsible for managing different resources and for different uses. For example, the BLM has limited discretion for decisions with regard to locatable minerals and therefore in considering actions under the Mining Law, the BLM will likely limit or modify the application of the Memorandum.

Question 6: Section 3(a) of the Memorandum states that agencies should take advantage of large-scale plans and analysis to assist in identifying how proposed projects potentially impact natural resources and to assist with mitigation. Will the Bureau of Land Management interpret this section to include resource management plans, and if so, will the agency require revisions to all existing plans to account for its newly developed mitigation framework?

Response: Yes, the BLM will consider resource management plans, in addition to other available Federal, State, tribal, local, or non-governmental large-scale plans and analysis to inform these analyses.

No, the BLM is not going to revise resource management plans to specifically account for the newly developed mitigation framework. As resource management plans are revised or amended, under ordinary processes, the BLM will consider the new guidance during those processes.

Question 7: Will the Bureau of Land Management and other agencies be able to meet the timeframes set forth in Section 4(a) of the Memorandum for developing and implementing manual and handbook guidance as well as for publishing regulations concerning mitigation? If these timeframes are not adhered to, what actions may the Council on Environmental Quality take against the agency, if any?

Response: Section 4(b) of the Memorandum states: “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.”

Yes, the BLM will meet the timeframes set in this section to finalize the BLM’s mitigation policy. However, the BLM will not be drafting a regulation on this topic during this administration.

Questions from Senator Joe Manchin III
Questions: On March 1, I joined the Chairman and others members of this Committee in sending a letter to the President regarding the “Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment.” That letter requests clarification on the practical implications of the mandates and guidance that the Memorandum sets forth and I look forward to the Council on Environmental Quality’s response.

Additionally, I remain unconfident that the new policies set forth in this Memorandum are necessary. The stated intent of the Presidential Memorandum is to ensure federal regulations are consistent across federal agencies. The desired result is to increase private investment and streamline federal permitting while allowing these agencies to maintain the ability to tailor mitigation efforts in their specific location.

This begs the question, is the current process for mitigation on public lands deficient? Is your agency experiencing challenges when negotiating and working to achieve mitigation solutions with private sector developers? If so, please provide examples.

Response: In short, we do think that the current process for mitigation public lands was, in some cases, causing unnecessary delays in permitting and unsustainable outcomes for resources.

We have developed a great partnership with some private sector developers, and thus, we have seen efficient and effective permitting and mitigation for their projects. However, the inconsistent approach to mitigation across the agency merited some internal guidance in order to be able to re-create those great partnerships with all proponents seeking development of the public’s resources on public lands.
U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE
RESPONSES FOR THE RECORD

The Presidential Memorandum Issued on November 3, 2015 entitled “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment”
March 15, 2016

BEFORE THE
UNITED STATES SENATE
COMMITTEE on ENERGY and NATURAL RESOURCES

The USDA Forest Service received the following questions for the record from the U.S. Senate Committee on Energy and Natural Resources for written response. The questions and the responses are provided below.

Questions from Chairman Lisa Murkowski

**Question 1:** Please provide examples of mitigation policies that are currently unclear or are implemented inconsistently by or within the agencies.

Response: The Forest Service has actively incorporated mitigation in its decisionmaking for many years, primarily through avoidance and minimization. However, the Agency has not had a 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.

**Question 2:** For each of the terms listed below, please state whether the Forest Service has or has not adopted a formal definition. (I understood Mr. Bean’s oral testimony to be that the Forest Service does not have a formal definition for some of the following terms.) In the case of terms for which a formal definition has been adopted, please provide the definition with a citation. For terms that do not have formal definitions, please provide examples of how the term is applied in practice and a description of what the term means as a practical matter.

a. Irreplaceable natural resource;
b. Landscape-scale;
c. Watershed-scale;
d. Important resources;
e. Scarce resources; and
f. Sensitive resources.

Response: The Forest Service is currently in the process of developing its mitigation policy. As a part of that effort, the Agency will review its existing authorities, regulations, and policies and identify applicable existing definitions and proposed new definitions where necessary.
Question 3: The Presidential Memorandum (Memorandum) states that some resources may be “of such irreplaceable character” that it may not be “adequate or appropriate” to minimize or compensate for activities impacting those resources, and therefore agencies should promote avoidance.

a. Does the Forest Service consider minerals and other finite natural resources to be “irreplaceable natural resources?”

Response: The Forest Service is currently developing its mitigation policy and will release a draft for public comment. National Forest System lands are and will continue to be managed for multiple uses, as well as mineral and energy development. The Agency has and will continue to respect valid existing rights.

b. Does the Forest Service consider minerals and other finite resources “of such irreplaceable character that...[the Forest Service] should design policies to promote avoidance of impacts to these resources”?

Response: The Forest Service is currently developing its mitigation policy and will release a draft for public comment. National Forest System lands are and will continue to be managed for multiple uses, as well as mineral and energy development. The Agency has and will continue to respect valid existing rights.

Question 4: Under what statutory authority does the Forest Service have the authority to seek “a net benefit?”

Response: The Forest Service is reviewing its existing authorities, regulations, and policies in light of the Presidential Memorandum and developing its mitigation policy. The Agency will also be engaging with the public to get input. As part of this process, the Agency will determine the extent to which the Presidential Memorandum’s goal of seeking a net benefit from compensatory mitigation can be addressed under those authorities. The Multiple Use Sustained Yield Act (16 U.S.C. 531) directs the Secretary to manage:

all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.
Question 5: Please be specific in response to the following requests:

a. Please describe how the Forest Service currently works together with other agencies in the application of mitigation.

Response: The Forest Service has actively incorporated mitigation in its decision-making for many years, primarily through avoidance and minimization. The National Environmental Policy Act (NEPA) procedures require that the Agency consider alternatives to proposed actions that mitigate the impacts from the action. In addition, formal and informal consultation and collaboration with other Federal, State, Tribal, and local agencies often generates suggestions to mitigate impacts.

According to Council on Environmental Quality regulations (40 C.F.R § 1508.20), mitigation includes:

- avoiding the impact altogether;
- minimizing impacts;
- repairing, rehabilitating, or restoring the affected environment;
- reducing the impact over time; and
- compensating for the impact by replacing or providing substitute resources or environment.

Compensatory mitigation has been utilized by the Forest Service very rarely, and then primarily for large-scale, proponent-driven actions on National Forest System lands when there are unavoidable impacts to important or sensitive resources. For these types of actions, the Forest Service is generally working with other agencies, such as Federal Highway Administration or a State DOT for a highway project and FERC for a pipeline. For these types of actions, the Forest Service may serve as either the lead agency or a cooperating agency, depending on the circumstances of each action.

b. Further, please tell me whether application of the Memorandum will change this practice, and if so, how it will change currently-applied mitigation practices.

Response: The Forest Service is currently developing its mitigation policy and will release a draft for public comment. In its draft policy, the Agency anticipates emphasizing cooperation with other federal, state, tribal, and local agencies in implementing mitigation.

Question 6: I understood Mr. Bean's oral testimony to be that multiple agencies already coordinate with respect to mitigation and that similar mitigation practices can be applied across multiple agencies with different authorities and missions. Is my understanding of his testimony correct? If not, why not? And, if so, please provide specific examples of inter-agency coordination that illustrate the basis for your opinion.

Response: The Forest Service has actively engaged with other Federal, State, Tribal, and local agencies in the context of large projects that involve mitigation of adverse impacts across multiple jurisdictions and authorities. This engagement with other agencies occurs on proposed actions on National Forest System lands both large and small. Recent large proposals include the

With respect to each example, please answer the following:

a. Which authorities dictate the form of mitigation sought?

Response: 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.

When there are multiple jurisdictions and authorities, the goal has been to coordinate across those jurisdictions and authorities to arrive at appropriate mitigation that adequately addresses impacts and meets the needs of all the agencies and the proponent through avoidance, minimization, and compensation. For the Forest Service, the foundation of those authorities lies in the Organic Administration Act of 1897 and the Multiple Use-Sustained Yield Act of 1960. The Forest Service cannot speak to the authorities of other agencies.

b. Which agency determines the final appropriate mitigation measures required?

Response: In past coordinated projects involving mitigation, the goal has been to coordinate across the jurisdictions and authorities to arrive at appropriate mitigation that meets the needs of all the agencies and the proponent through avoidance, minimization, repair, and compensation. In the Forest Service’s experience, this can usually be accomplished collaboratively. Once mitigation measures have been identified, each agency has to make sure that the proposed mitigation meets their needs based upon their authorities and mission.

c. Which agency’s metrics are to be used?

Response: In past coordinated projects involving mitigation, the goal has been to coordinate across jurisdictions and authorities to arrive at appropriate mitigation that meets the needs of all agencies and the proponent through avoidance, minimization, and compensation. In the past, metrics have also been identified through this collaborative process.
d. Which agency is the arbiter, if an arbiter is required?

Response: In past coordinated projects involving mitigation, the goal has been to coordinate across jurisdictions and authorities to arrive at appropriate mitigation that meets the needs of all the agencies and the proponent through avoidance, minimization, repair, and compensation. Once mitigation measures have been identified, each agency ensures that the mitigation meets their needs based upon their authorities and mission. If issues remain, the agencies have to work out solutions based upon their authorities and mission.

**Question 7:** There has been significant litigation over permitting under Section 404 of the Clean Water Act in part because of a few terms that are not defined or not clearly defined by that Act. Is the Memorandum based, at least in part, on mitigation sequencing developed in the context of permitting under Section 404?

Response: The Forest Service is not aware of any conversations regarding the extent to which the Clean Water Act Section 404 process informed the development of the Memorandum.

a. If so, and given that the Memorandum itself uses a number of undefined or loosely defined terms, how will it be possible to keep the vagueness of the Memorandum from leading to similar disputes or leading to vastly different interpretations across the agencies?

Response: The Forest Service is currently in the process of developing its mitigation policy. In developing its policy, Forest Service will review its existing authorities, regulations, and policies and identify applicable existing definitions and proposed new definitions where necessary.

b. How will project proponents be able to know what is required of them?

Response: The Forest Service is currently developing its mitigation policy and will release a draft for public comment. All interested parties will be invited to engage on the development of the policy. The Agency anticipates that the draft policy will include provisions requiring upfront clarity and long-term certainty for project proponents and partners.

**Question 8:** “Best available science” is a metric referenced by multiple agencies as a tool to determine appropriate mitigation measures. How does the Forest Service define “best available science”? Please provide citations for this definition.


**Question 9:** The Memorandum and resulting dialog with various stakeholders has provided few assurances to Alaskans that federal actions resulting from the Memorandum will not impose new federal mitigation policies affecting state, private, Native Corporation,
or tribal lands. Please specify how the Memorandum, and federal mitigation policies generally, may impact non-federal land.

Response: The Forest Service is currently developing its mitigation policy and will release a draft for public comment. The Agency anticipates that the draft policy will include provisions requiring upfront clarity and long-term certainty for project proponents and partners. In addition, the Agency anticipates that the draft policy will emphasize cooperation with other federal, state, tribal, and local agencies in implementing mitigation. For large projects that cross multiple jurisdictions and authorities, the Agency anticipates that improved clarity and certainty will help the Agency collaborate with other agencies and the proponent to identify appropriate mitigation.

**Question 10:** Please articulate how the Forest Service plans to incorporate and account for the Alaska Native Settlement Claims Act (ANCSA) and the Alaska National Interest Lands Conversation Act (ANILCA) in its policy, guidance, regulation, and directives that relate to mitigation.

Response: The Forest Service is currently in the process of developing its mitigation policy. As a part of that effort, the Agency will review its existing authorities, regulations, and policies, including ANCSA and ANILCA. The Agency has and will continue to respect valid existing rights.

**Question 11:** To the full extent of your knowledge, what state and local government consultation occurred in the drafting of the Memorandum? What state and local government consultation, coordination and collaboration will the Forest Service undertake as it develops policies and guidance in response to, and to incorporate, the policies and principles outlined in the Memorandum?

Response: The Forest Service is not aware of the extent to which state and local government was involved in the development of the Memorandum.

In developing its draft policy, the Forest Service will invite input from all interested parties, including state and local governments and tribes. The Agency will release a draft for public comment.

**Question 12:** Will National Environmental Policy Act review be conducted to fully understand the cumulative social and environmental impacts that are expected to result from the multiple federal agencies directed in the Memorandum taking a major federal action to develop additional requirements for compensatory mitigation?

Response: The Forest Service is currently in the process of developing its mitigation policy. As a part of that effort, the Agency will review its existing authorities, regulations, and policies, including NEPA. Since the Agency has practiced mitigation for decades, the Agency does not at this time anticipate that a new mitigation policy would constitute a major federal action significantly affecting the quality of the human environment.
Question 13: Will the Forest Service or the Executive Branch conduct a regulatory cost analysis to understand the additional cost burden developers are required to pay for additional compensatory mitigation fees imposed directly as result of Forest Service mitigation policies or indirectly as result of the Memorandum?

Response: The Forest Service is currently in the process of developing its mitigation policy. As part of its development, the Agency will determine if a regulatory cost analysis is needed. Regardless, the Forest Service would welcome any relevant information on the subject during the public comment process.

Question 14: How will implementation of the Memorandum lead to Federal policies that are clear, work similarly across agencies, and be implemented consistently within the agencies?

Response: When there are multiple jurisdictions and authorities, the goal is to coordinate across those jurisdictions and authorities to arrive at appropriate mitigation that meets the needs of all agencies and the proponent through avoidance, minimization, and compensation. The Presidential Memorandum establishes a consistent set of expectations around mitigation for the Executive Branch agencies. Since the Forest Service has no national mitigation policy, the Memorandum provides the Agency with the opportunity to learn from others, identify best practices and incorporate those into its policy.

Question 15: As I mentioned in my opening statement, I am troubled by the Memorandum, as are many Americans, including many Alaskans. What specific assurances can you give us today on behalf of the Forest Service to show us we are wrong to be concerned?

Response: 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. This has occurred without any national agency policy. The Memorandum has provided the Agency with the opportunity to identify best practices and incorporate those into its policy.

In developing its draft policy, the Forest Service will invite input from all interested parties, including state and local governments and tribes. The Agency will release a draft for public comment.

Question 16: The Miscellaneous Receipts Act (MRA) provides that “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302(b). As a general matter, once money is deposited in the Treasury’s general fund, it cannot be withdrawn without a congressional appropriation. Thus, the MRA protects the constitutional principle of separation-of-powers and prevents executive
branch agencies, such as those to which the Memorandum is addressed, from using money that has not been appropriated by Congress.

a. How are funds generated as a consequence of mitigation payments treated by the Forest Service today?

Response: The Forest Service may only accept and retain goods, services, or funds in conformance with all statutory, regulatory and policy requirements. The Forest Service currently has very few projects that include compensatory mitigation. For the small number of projects that do involve compensatory mitigation, the compensation is usually addressed through in-kind activities, rather than the direct transfer of funds to the Forest Service. In the rare case of money transferred to the Forest Service, it would be accepted and spent under one of our existing authorities determined appropriate for the specific project.

b. How does the MRA apply to these funds?

Response: In the small number of projects where the Forest Service accepts funds as part of a project involving compensatory mitigation, we would determine the appropriate existing authority for accepting and spending those funds to achieve the needed mitigation. Any funds submitted that are not authorized for retention would necessarily be treated as subject to the MRA.

c. How, if at all, will these practices change as a consequence of the Memorandum? Please provide citations to support your answer.

Response: The Presidential Memorandum directs agencies to undertake operate within existing legal authorities as to both (1) mitigating impacts on natural resources from development, and (2) encouraging related private investment. The Forest Service is reviewing its existing authorities, regulations, and policies in light of the Presidential Memorandum and developing its mitigation policy. The Agency will also be engaging with the public to get input. The agency does not expect that its practices regarding financial requirements and responsibilities will change as a result of the new policy.

d. Has the Department of Agriculture or any of its constituent agencies prepared a legal analysis of the application of the MRA to mitigation payments received by the Forest Service?

Response: In the small number of projects where the Forest Service accepts funds as part of a project involving compensatory mitigation, the agency must determine in advance that it has appropriate legal authority to accept and retain such funds.
Questions from Senator John Barrasso

Question 1: How does the Forest Service define “irreplaceable natural resources”? Will finite natural resources be considered “irreplaceable” under that definition?

Response: The Forest Service is currently developing its mitigation policy and will release a draft for public comment. As a part of that effort, the Agency will review its existing authorities, regulations, and policies and identify applicable existing definitions and proposed new definitions where necessary. National Forest System lands are and will continue to be managed for multiple uses, as well as mineral and energy development. The Agency has and will continue to respect valid existing rights.

Question 2: Please provide the Forest Service’s interpretation of “scarce or sensitive natural resources” and how those may compare or overlap with the agency’s interpretation of “irreplaceable” resources.

Response: The Forest Service is currently in the process of developing its mitigation policy. As a part of that effort, the Agency will review its existing authorities, regulations, and policies and identify applicable existing definitions and proposed new definitions where necessary.

Question 3: The Fish and Wildlife Service recently announced a revised mitigation policy which will substantively change current conservation practices. Since the agency’s own press release touts new policies and new goals, it seems clear that the Fish and Wildlife Service will be revising and implementing new policy. It seems obvious that other agencies will do the same. The Memorandum does not call for collaborative development of new policies, only that new policies be shared. In your opinion, when conflicts among agencies arise as a result of new or reformed policies, which agency will make the final determination?

Response: When there are multiple jurisdictions and authorities, the goal is to coordinate across those jurisdictions and authorities to arrive at appropriate mitigation that meets the needs of all the agencies and the proponent through avoidance, minimization, and compensation. Once mitigation has been identified, each agency has to make sure that the mitigation meets its needs based upon its authorities and mission. If issues remain, the agencies have to work out solutions based upon their authorities and mission.

Question 4: Under the terms of various agencies’ mitigation procedures, how is the “durability” of mitigation for current projects assessed? How does the Forest Service intend to assess the concept of “durability” under new policies and procedures prompted by the Memorandum?

Response: The Forest Service is currently developing its mitigation policy and will release a draft for public comment. The Forest Service is not in a position to respond for other agencies.
Question 5: At what level is “durability” currently assessed (i.e. field staff, regional staff, etc.)? How will this change under the new policies prompted by the Memorandum?

Response: The Forest Service is currently developing its mitigation policy and will release a draft for public comment. Since the Agency currently has no national mitigation policy, there is no established approach to assessing durability. The Agency anticipates its draft policy will address mitigation durability.

Question 6: Mr. Ferebee, since you are unsure whether the President will request your input during the response to the letter dated February 24, 2016 regarding the Memorandum, please answer the following: 1) to what extent do the Forest Service’s legal authorities prohibit or modify the application of the principles and mandates outlined in the Memorandum? 2) Given the differing legal authorities of the agencies, how does the Memorandum, with terms that CEQ noted are at times by design subject to interpretation, result in an umbrella of “consistent standards and guidance” for landscape-scale conservation while simultaneously affording “right tailored approaches” in individual instances? 3) How does the Forest Service, and ultimately the Department of Agriculture, define “best available science”?

Response: 1) The Forest Service is reviewing its existing authorities, regulations, and policies in light of the Presidential Memorandum. That process is not yet complete, so the Agency is not able to identify the extent to which its legal authorities would affect its interpretation of the Memorandum; however, as the Memorandum directs agencies to work within their existing legal authorities we do not anticipate any conflicts. 2) The Presidential Memorandum establishes a consistent set of expectations around mitigation for the Executive Branch agencies. Since the Forest Service has no national mitigation policy, the Memorandum provides the Agency with the opportunity to learn from others, identify best practices, and incorporate those into its policy. 3) The Forest Service uses the term “best available scientific information” in its land management planning rule, and anticipates using that term in its mitigation policy, which is currently under development. That term is explained in the planning rule directives – Forest Service Handbook 1909.12 Zero Code 07 (http://www.fs.fed.us/im/directives/fsb/1909.12/wr_1909.12_zero_code.docx).

Question 7: The Memorandum requires that mitigation principles, and general approaches, will be shared amongst agencies. At what stage during development or implementation will guidance documents, definitions, and other key principles be shared with other agencies?

Response: The Forest Service is currently developing its mitigation policy and will release a draft for public comment. Since the Agency currently has no national mitigation policy, there is opportunity to learn from others, identify best practices, and incorporate those into its policy. The Agency plans to collaborate with the other federal agencies during the development of its policy, which should help align its approaches with those of the other agencies to the extent possible given the differing authorities of each agency.
Questions from Senator Steve Daines

Question 1: How does the Forest Service intend to define the terms “landscape-scale” and “watershed-scale” as used in its “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment” Memorandum of November 3, 2015?

Response: The Forest Service is currently in the process of developing its mitigation policy. As a part of that effort, the Agency will review its existing authorities, regulations, and policies and identify applicable existing definitions and proposed new definitions where necessary.

Question 2: The Memorandum directs agencies to 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 resources objectives. Please explain how the Forest Service will address meeting these goals with the implementation of projects or activities such as timber harvesting or mining.

Response: The Forest Service has actively incorporated mitigation in its decisionmaking for many years, primarily through avoidance and minimization. The Agency has not had a 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.

Appropriate mitigation has been incorporated into bid documents for timber harvests. Mitigation for minerals development has been based upon the details of the proposed activity and has been identified during the project review and NEPA analysis. The mitigation has then been incorporated into Agency recommendations to BLM or its approval of hardrock plans of operation. The Agency anticipates that the draft mitigation policy will not change those approaches.

Question 3: Please provide the listing of resources that will be included in the Forest Service’s definition of “irreplaceable natural resources”. If resources such as timber, coal, oil and natural gas are to be included, please provide details on how the agency’s actions will avoid such resources as provided for in Section 3(a) of the Memorandum.

Response: The Forest Service is currently developing its mitigation policy and will release a draft for public comment. As a part of that effort, the Agency will review its existing authorities, regulations, and policies and identify applicable existing definitions and proposed new definitions where necessary. National Forest System lands are and will continue to be managed for multiple uses, including timber production, as well as mineral and energy development. The Agency has and will continue to respect valid existing rights.

Question 4: The Council on Environmental Quality has stated that the Memorandum will streamline and reduce an agency’s time and cost required to complete permitting and review. Please provide specific examples of how this Memorandum will assist the Forest
Service in reducing the amount of time that it takes to approve projects such as the harvesting of timber?

Response: The Forest Service has actively incorporated mitigation in its decisionmaking for many years, primarily through avoidance and minimization. The Agency has not had a 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. Since the Agency currently has no national mitigation policy, there is opportunity to learn from others, identify best practices, and incorporate those into its policy. The Agency anticipates that the draft policy will include provisions requiring upfront clarity and long-term certainty for project proponents and partners, which should help streamline approval processes for most projects. Since appropriate mitigation has been incorporated into bid documents for timber harvests for many years, the Agency anticipates that the draft policy will not change that approach.

**Question 5:** In Section 2(f) of the Memorandum, the definition of “mitigation” includes compensating for impacts on natural resources. Although compensatory mitigation is not a new concept to the Forest Service, does the agency expect an increase in the amount of projects being approved with the use of compensatory mitigation? If so, how will the Forest Service account for compensatory mitigation within its budget? Will the agency request a specific budget line item to cover potential compensatory mitigation or will this potential expense be charged against existing programs?

Response: The Forest Service is currently developing its mitigation policy. However, the Agency has used mitigation for decades 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 only occasionally been used for large-scale, proponent driven projects when there are unavoidable impacts to critical resources. At this time, the Agency does not anticipate a substantial increase in workload to accommodate a new mitigation policy and does not anticipate a significant effect on the agency budget.

**Question 6:** Section 3(a) of the Memorandum states that agencies should take advantage of large-scale plans and analysis to assist in identifying how proposed projects potentially impact natural resources and to assist with mitigation. Will the Forest Service interpret this section to include forest management plans, and if so, will the agency require revisions to all existing plans to account for its newly developed mitigation framework?

Response: The Forest Service has incorporated mitigation into land management planning for many years through designated management areas and associated plan components. The Agency does not anticipate this approach changing with a new national policy.

**Question 7:** Will the Forest Service be able to meet the timeframes set forth in Section 4(a) of the Memorandum for developing and implementing manual and handbook guidance as well as for publishing regulations concerning mitigation? If these timeframes are not
adhered to, what actions may the Council on Environmental Quality take against the agency, if any?

Response: The Forest Service anticipates publishing a proposed mitigation regulation on or before June 1, 2016, with a final regulation by October 2016. The agency plans to begin focused work on detailed directives only after we receive and process the comments on the proposed regulation. We anticipate publishing directives by November 2017.

**Question 8:** In accordance with Section 4(a) of the Memorandum, what is the regulatory process that the Forest Service intends to follow for updating its policies concerning mitigation? Specifically, will the agency seek to publish regulations in the Federal Register as a proposed rule followed by a final rule; an interim final rule followed by a final rule; or as a direct final rule?

Response: The Agency is currently developing its policy and will release a draft for public comment and tribal consultation. Following public comment and tribal consultation, the Agency will develop a response to comments and revise the proposed policy. The response to comments and final policy would then be released.

**Question 9:** Specifically, will stakeholders from the public and private sectors be given an opportunity to contribute at all stages of the process? During the rulemaking process, will the agency use the maximum allowable timeframes for comment periods to provide all opportunities possible for public review and comment?

Response: In developing its draft policy, the Agency will invite input from all interested parties and will release a draft for public comment with adequate time for consideration and response from all interested parties.

**Question 10:** The Memorandum calls for agencies to develop policies and standards that are consistent across all agencies and that are implemented transparently. What is the plan for the Forest Service to work with the other affected departments and agencies such as the Department of the Interior to ensure that a common set of best practices to mitigate for harmful impacts to natural resources is achieved and provide for consistent management of mitigation on federally managed public lands?

Response: The Forest Service is currently developing its mitigation policy and will release a draft for public comment. Since the Agency currently has no national mitigation policy, there is opportunity to learn from others, identify best practices, and incorporate those into its policy. The Agency plans to collaborate with the other federal agencies during the development of its policy, which should help align its approaches with those of other agencies to the extent possible given the differing authorities of each agency.

**Question 11:** The Department of the Interior has already released Department Manual 600 DM 6, Implementing Mitigation at the Landscape-scale, on the implementation of mitigation policy. This policy requires the Department’s bureaus and offices to consider greenhouse gas emissions from projects and activities, methods of protecting resources that
store carbon, and changing wildlife behaviors. Does the Forest Service plan to address these issues in the same manner that the Department of the Interior has done so, and if so, will any requirements apply to land use permits for hard rock, coal mining or oil and gas production? Will it apply to timber harvest?

Response: The Forest Service is aware of the Interior Department Manual 600 DM 6. Since the Forest Service currently has no national policy on mitigation, the Agency plans to learn what it can from the other agencies as it develops its draft policy for public comment, consistent with its authorities. The Agency has incorporated appropriate mitigation into bid documents for timber harvests for many years, and does not anticipate this approach changing with a new national policy. The agency also recognizes the benefits of forest management in maintaining the resiliency of forest carbon stocks, creating carbon storage in harvested wood products, and offsetting fossil fuel usage when byproducts are used for bioenergy.

**Question 12:** Have you identified any authorizing statutes for your programs that will be in conflict with any of the provisions of the Memorandum? If so, please provide a listing of those statutes along with details on how the Memorandum causes conflicts.

Response: The Forest Service is reviewing its existing authorities, regulations, and policies in light of the Presidential Memorandum. That process is not yet complete, so the Agency is not able to identify the extent to which its legal authorities would affect its interpretation of the Memorandum; however, as the Memorandum directs agencies to work within their existing legal authorities we do not anticipate any conflicts.

Questions from Senator Joe Manchin III

**Questions:** On March 1, I joined the Chairman and others members of this Committee in sending a letter to the President regarding the “Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment.” That letter requests clarification on the practical implications of the mandates and guidance that the Memorandum sets forth and I look forward to the Council on Environmental Quality’s response.

Additionally, I remain unconvinced that the new policies set forth in this Memorandum are necessary. The stated intent of the Presidential Memorandum is to ensure federal regulations are consistent across federal agencies. The desired result is to increase private investment and streamline federal permitting while allowing these agencies to maintain the ability to tailor mitigation efforts in their specific location.

This begs the question, is the current process for mitigation on public lands deficient? Is your agency experiencing challenges when negotiating and working to achieve mitigation solutions with private sector developers? If so, please provide examples.
Response: 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. However, the Forest Service has had no national policy for mitigation. The Agency anticipates that development of a national mitigation policy with public involvement should provide for increased upfront clarity and long-term certainty for project proponents and partners.
Questions from Chairman Lisa Murkowski

**Question 1:**

A. How, as a practical matter, do you envision multiple agencies with varying authorities and missions will be able to consistently apply the mitigation measures as the Presidential Memorandum purports to require?

The Presidential Memorandum (“the Memo”) does not provide clear guidance to the participating federal agencies on which mechanism or coordinated procedure to follow in order to consistently implement any subsequent policy, regulation, or practice in order to fulfill the goals or mission set forth in the Memo. There is no lead coordinating agency identified or developed in order to help achieve consistent implementation among participating federal agencies operating under unique authorities and sometimes drastically different agency missions, statutes, regulations and policies. Without this guidance, it is unrealistic to assume existing or newly developed mitigation requirements will be consistently implemented as a result of the Memo. Furthermore, absent clearly defined implementing procedures, there is little to no assurance provided that existing mitigation requirements under the Clean Water Act or Endangered Species Act, for example, will not be duplicated by requiring additional mitigation requirements and compensatory fees that will now be required by emerging agency policies, in some cases, from federal agencies that never previously required “compensatory mitigation.”

A lead coordinating agency should be identified in order to provide a forum where participating federal agencies can “work similarly across agencies” to share best practices on mitigation as called for by the Memo. The Council of Environmental Quality (CEQ) should be considered as a potential lead agency and should be responsible for achieving the goals lined out in the Memo, where it states agencies will be fully coordinated and resulting mitigation policies will be clear and consistent, similar across and within agencies." Furthermore, the Memo calls for each agency to “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.” This is an unrealistic goal considering “equivalent” and “effective standards” have not been defined or established through a coordinated formal rulemaking process. Therefore, it is likely each federal agency will develop individual policies, producing contradicting and conflicting standards under their respective federal authorities. This design will almost certainly result in failure to meet the goals of the Memo and its intent as well as increase the need for multiple federal agencies to
U.S. Senate Committee on Energy and Natural Resources

Hearing on March 15, 2016: The Presidential Memorandum Issued on November 3, 2015 entitled “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment” Questions for the Record Submitted to Ms. Sara Longan

troubleshoot conflicting mitigation outcomes; thereby, increasing the complexity and extending the agency permit review process and associated timelines.

B. If one agency’s authorities require one set of measures that are not authorized by another agency’s authorities, how do you expect that to be resolved?

It is unclear how the participating federal agencies will resolve conflicting or contradicting mitigation requirements or outcomes. The Memo does not provide a conflict resolution process, which presents a matter further confounded by not providing a single point of contact or lead coordinating agency. Without clear guidance on how to resolve conflicting outcomes, one might assume resolution may not occur or will be handled differently, inefficiently, and on a case-by-case basis throughout the Nation.

C. Given your experience trying to align the mitigation interests of the Bureau of Land Management (BLM) and the U.S. Army Corps of Engineers for a project in the National Petroleum Reserve-Alaska (just two of the agencies directed by the Presidential Memorandum), are you concerned about future management practices given that the Presidential Memorandum directs five different agencies to align their mitigation efforts?

The challenges industry faced while permitting the Greater Moose’s Tooth-1 (GMT-1) project in Alaska’s National Petroleum Reserve-Alaska (NPR-A) may only be exacerbated as a result of emerging and unclear mitigation requirements, now potentially duplicated when required by additional federal agencies otherwise not currently engaged or experienced in following existing regulatory programs that require compensatory mitigation. In retrospect, the difficulties to align BLM and the U.S. Army Corps of Engineer’s mitigation requirements for GMT-1 appeared to be a result of BLM prematurely following draft policy to require compensation. Absent having a fully developed policy that adheres to a formal rulemaking process and incorporates stakeholder input, it will be inherently difficult for BLM to apply consistent and transparent mitigation policies. Moving forward under the auspices of the Memo, this pre-existing challenge to align in Alaska will only worsen as now other federal agencies are expected to develop new, in some cases unknown mitigation requirements.

After BLM issued the Record of Decision (ROD) for the GMT-1 project, which ultimately required $8 million dollars for compensatory mitigation in addition to the
Clean Water Act 404 mitigation fees, BLM AK Region is attempting to increase their stakeholder outreach and transparency as they work to complete and finalize the draft NPR-A Regional Mitigation Strategy (RMS). However, it is unclear how any federal agency can adhere to the Memo’s stated goals to coordinate and align mitigation policies when each agency is individually and separately developing their respective mitigation policies. Without following a multi-agency coordinated process to analyze or help inform effective mitigation strategies, similar to what is already achieved through the National Environmental Policy Act (NEPA) process, it is unreasonable for such a vast suite of federal agencies to align when each agency’s policy development timelines are different and there is seemingly no process in place to offer a clear and coordinated approach to a new multi-layered regulatory directive.

To address or consider future impacts on federal management practices, it appears there is not sufficient information or clear direction provided in the Memo to make this determination. The Memo seems to suggest developing new mitigation policies in some places, whereas other language indicates forcible direction requiring the federal agencies to take action. The Memo states “this Memorandum compliments and is not intended to supersede existing laws and policies,” which contradicts the earlier statement where it states “agencies shall (emphasis added) adopt a clear and consistent approach (consistent with existing mission and legal authorities)...recognizing that existing legal authorities contain additional protections for some resources that are of such irreplaceable character that minimization 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.”

The inability to understand how the Memo may actually affect future land management practices in Alaska is a great concern. It appears the Memo places extraordinary confusion on top of the multiple existing land and resource management practices currently required by multiple federal laws. The Memo should clearly describe how new mitigation policies will not interfere, duplicate, or contradict existing enforceable actions that may result from land or resource management actions including those required by, but not limited to: the Federal Land Policy and Management Act (FLPMA), Surface Mining Control and Reclamation Act (SMCRA), Natural Resource Damage Assessment (NRDA), Integrated Activity Planning (IAP), Regional Management Planning (RMP), and Rapid Ecological Assessments (REAs).
D. Do you see the Presidential Memorandum leading to swifter and more consistent permitting reviews?

While the Memo clearly states more efficient permit processes will occur as a result of these new mitigation goals and policies, it is unclear exactly “how” or “if” these efficiencies might be achieved. For example, in Alaska the Clean Water Act 404 mitigation program follows regulations set forth in the 2008 Mitigation Rule to avoid, minimize, and mitigate unavoidable impacts to aquatic resources. Many other states follow U.S. Fish and Wildlife Service policies and mitigation requirements, applicable to the Endangered Species Act to mitigate impacts of land and water developments on fish, wildlife, plants, and their habitats.

The Memo calls for additional federal agencies, such as the Environmental Protection Agency (EPA), National Oceanic And Atmospheric Administration (NOAA), and the Department of Agriculture to now also require compensatory mitigation and develop policies to avoid, minimize, and mitigate “harmful effects to land, water, wildlife, and other ecological resources (natural resources)” caused by land- or water-disturbing activities. This is clearly a robust expansion of existing federal authorities that already require compensatory mitigation for resources and activities that are defined by regulation. There is great ambiguity throughout the Memo, and there will likely be disagreements among agencies and stakeholders as to how the Memo directs (or requires) mitigation of these natural resources, and what actually constitutes a natural resource.

It would be disingenuous to interpret the Memo as not requiring any “new” form of compensatory mitigation when it is explicitly requiring compensation for unavoidable impacts to “ecologic resources” from agencies that have not previously required compensatory mitigation. Furthermore, “ecological resources” is another vague, interchangeably used and highly subjective term. The Memo clearly expands the potential for additional and broad-based resource types (in addition to those aquatic resources already defined by regulation) to trigger compensatory mitigation, now required by multiple new, emerging federal policies from multiple newly participating federal agencies. This convolution does not typically lend to increased efficiencies and reduced permit times. Instead, the Memo and its charge to numerous federal agencies will very likely result in reduced efficiencies, longer permit timelines, and significantly increased costs to those interested in engaging in “land- or water-disturbing activities” - another vague, highly subjective, and undefined term.
To further complicate matters and perhaps cause immediate misalignment among the participating federal agencies, the Memo calls for agencies to conduct large-scale plans and analysis to identify development areas and areas where natural resource values are “irreplaceable.” The term “irreplaceable” is another highly subjective term that will be measured, determined, and implemented differently by each federal agency. It is unclear how methodologies to conduct “large-scale plans” will occur and how or if they will be incorporated into the numerous existing land management planning processes already conducted by multiple federal land and resource management agencies.

Therefore, the Memo will not produce swifter and more consistent permitting reviews, particularly considering no lead federal agency or coordinated process has been established. My oral and written testimony describes the existing regulatory hurdles and delays associated with the Clean Water Act 404 mitigation program in Alaska. Adding numerous layers of additional compensatory mitigation requirements without establishing clearly defined terms or guidance on Memo implementation and resolution, the new mitigation requirements will only exacerbate the existing regulatory challenges we face in Alaska.

**Question 2:** Your testimony suggests that Alaska is unique. Indeed, it is unique in the application of federal laws, as well as in its biological, chemical and geographical composition, vastness, remoteness, percentage of private land ownership, and population distribution to name a few characteristics. Given all the unique characteristics of Alaska, if you are so inclined, please elaborate on the concerns about the implementation in Alaska of the Presidential Memorandum that you identified in your testimony.

There are multiple unique characteristics that have proven to impose regulatory challenges further described in the written and oral testimony. For example, it is widely recognized that implementing the Clean Water Act 2008 Mitigation Rule and adherence to the “no net loss” policy is a distinct challenge in Alaska where 63% of the Nation’s wetlands are found. However, perhaps in contrast to Lower 48 state trends, there is a very low inventory of previously disturbed or threatened wetlands even eligible for mitigation as required by the 2008 Rule.

The Memo expounds upon these existing regulatory maladies as they relate to “no net loss” and calls for additional federal agencies to adhere to the entire mitigation hierarchy (avoidance, minimization, compensatory mitigation) for “ecological or natural resources” to now achieve “net benefit goals,” or at a minimum, a “no net loss goal.” This directive further complicates the existing ill-fitting regulatory requirements for Alaska and places
undue burden on a broader suite of federal regulatory agencies, likely unable to meet the unrealistic and unreachable mitigation goals lined out in the Memo.

Furthermore, it is of particular concern that the Memo nowhere references the Alaska Native Settlement Claims Act (ANSCA) or the Alaska National Interest Conservation Lands Act (Act) implying that these critical federal laws were not considered when this Memo was produced. This omission should further bring into focus the challenges created when national level policy is developed without consulting state, regional, or local subject matter experts.

From Alaska’s perspective, it is a grave concern that the Memo does not make expressly clear how new federal mitigation policies might impact non-federal lands. The Memo and resulting dialog has provided few assurances that new federal actions will not impose new federal mitigation policies affecting state, private, Native Corporation, or tribal lands. This is another demonstration of poor planning and premature regulatory enforcement or action via incongruent policies where a transparent and coordinated rulemaking processes should have been allowed. The potential impacts of the uncertainty and potential impacts on non-federal lands is a pronounced concern in Alaska where the composition of private land ownership (12.1%) is small when compared to federal (63.8%) and state (24.1%) owned lands.

In Alaska, many experienced and well informed agencies and individuals have gained knowledge and experience by implementing effective mitigation practices and lessons learned. Stakeholder outreach could have greatly contributed to establishing more realistic and effective mitigation goals, similar to the intended goals of this Memo, but within a framework of a more strategic plan that could actually produce more effective mitigation practices.

1 - Presidential Memorandum §1
2 - Presidential Memorandum §2
Question from Chairman Lisa Murkowski

**Question:** Please tell us approximately what the cost differential is for a project proponent to pay to offload the liability to a bank versus just paying for the mitigation measure to be completed and monitored? If you need to provide the figures from a few specific examples, or provide an average percentage differential, please feel free.

Thank you for your inquiry regarding the differences between types of mitigation. As you know, there are three kinds of compensatory mitigation – mitigation banking, permittee responsible mitigation (PRM) and in lieu fee (ILF) - although banking has been expressed as a preference in the Army Corps of Engineers 2008 Mitigation Rule, and that was reinforced in the November 3, 2015, Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment. This response focuses on mitigation banking and PRM, and the distinctions between them are crucial to understanding the varieties in cost. In Lieu Fee mitigation occurs when a permittee provides funds to a third party sponsor, which is a natural resource management organization like a land trust. That third party is responsible for securing adequate mitigation and regulatory approval. The preference for mitigation banking shows a recognition by the regulatory community that PRM and ILF provide less certainty about how and when mitigation will occur, as well as how effective it may be.

**Wetland Mitigation Banking** is a market based approach established under Section 404 of the Clean Water Act that allows a public or private entity, called a bank sponsor, to restore and preserve wetlands, streams and other aquatic resources for the purpose of providing compensatory mitigation for both authorized impacts as well as negligent and intentional activities involving impacts to the environment. Mitigation banking activities result in the advanced restoration of natural resource functions and values where the bank sponsor carries the investment risk. It’s this risk that private parties and public entities under PRM must assume which historically has never been sustainable.

Credits represent the composite of lifted ecological function and value within the mitigation bank, while debits represent the loss of the ecological function being replaced. The number of credits generated at a mitigation site is determined using procedures outlined in regulatory guidance and rules adopted by both federal and state regulators. Site specific conditions dictate what level of enhancement, creation, preservation and restoration will be feasible on a site. This agreement, reached between the bank sponsor and the regulators, is set forth in a a Memorandum of Understanding known as a Mitigation Banking Instrument (MBI). This instrument establishes the ecological benefit to be realized from the design plan, the total number of credits generated within the bank, and the schedule for release of those credits. The cost of generating multiple credits for
use by multiple parties on one bank site is more efficient and economical then deploying multiple parties at different times to establish PRM on multiple sites.

Permittee Responsible Mitigation (PRM) is an approach to solving mitigation requirements one at a time for the benefit of a specific permit applicant. Based on factors raised by regulatory officials, law firms and engineers who have client projects mandating a quick alternative to the cumbersome process of providing mitigation, the following factors need to be considered with any proposed PRM activity:

**Land Acquisition:** Identify, acquire and hold title to land or habitat easements

**Planning:** Environmental planners, professional wetland scientists, restoration ecologists, wildlife and aquatic biologists develop plans and obtain permits for on-site and off-site mitigation involving wetland, aquatic, riparian and upland habitats.

**Design/Build:** Scientists and restoration ecologists work with the engineers representing the permittee to customize the design of a site to meet regulatory expectations and ensure successful implementation of restoration projects including bonding, financial assurance and hold harmless agreements. Assurances are underwritten by insurance policies and escrow accounts.

**Land Stewardship:** Designate an entity to actively manage the completed ecosystem restoration, including biological monitoring, habitat enhancement, public access and water management.

There are significant differences in these three forms of mitigation, and so the timeframes for completion of the mitigation and the costs vary. Costs also vary greatly state by state and region by region around the country. This is based on differing land costs, whether mitigation is tidal or freshwater, the costs and quality of labor, the varieties in weather, topography as well as compliance and standards for success imposed by different federal and state agencies etc.

Mitigation banks are approved by federal agencies including the Army Corps of Engineers, Environmental Protection Agency, U.S. Fish and Wildlife Service and in the case of tidal systems the National Oceanographic Administration (NOAA). In almost every Corps District in the country the state has a representative involved in the bank approval process. This process results in a specific number of compensatory mitigation credits that can then be used to mitigate for projects requiring permits under existing federal natural resource law. Mitigation banks provide strong resource restoration because they are completed in advance of the impact occurring, include financial assurances that the mitigation will be implemented, are durable for the life of the impact, include clearly defined science-based goals, and provide compensatory actions that
would not have otherwise occurred. These safeguards and performance standards are two compelling reasons why the law names the use of credits as a preference.

Of note, the permit applicant does not incur any cost for mitigation banking credits until the credit purchase has been agreed upon and finalized. Payment under this agreement cannot occur until the permit applicant has secured their permits and approvals. The benefit of contracting to purchase credits provides certainty to the permit applicant both with regard to a fixed cost as well as acceptance of the credit as appropriate mitigation by the regulatory agency. The upfront costs of identifying waters or lands for mitigation, working with federal agencies to receive approval, and improving the property are all born by the mitigation banker. Initially PRM may appear to be less costly than mitigation banking, but there is significant long term uncertainty as to the overall cost, including whether or not it will be acceptable as mitigation to regulators.

Mitigation credits are released by the agency as available for sale when the mitigation bank reaches key ecological milestones normally over a 5-8 year period. The value of the credit is determined by the free market, and can vary based upon supply and demand for the resource. This does mean that purchasing a bank credit initially appears more expensive because all of the risk for delivering the mitigation project is transferred to the bank sponsor.

The entity purchasing a wetland credit is receiving both price and liability protection for the mitigation, versus uncertain long term costs and liability from the use of PRM. For example, my firm has been engaged by energy sector clients in the Mid-Atlantic region who have experienced the failure of PRM and subsequent enforcement actions by federal agencies. These permit applicants have incurred both the initial cost of PRM (billing over a 4-5 year period) and further cost of purchasing credits to comply with federal law. In some cases the failed mitigation can impact continuation of projects that have a long term construction time line because they are lineal. An example would be a pipeline project, a major expansion of a highway over many miles or the construction of a bridge. This contingent exposure does not occur when credits are purchased.

The timeframe for receiving a permit also varies by type of mitigation, which factors into the overall cost of the project for the permittee. A landmark study by the National Research Council in 2001 found that mitigation banks performed better than all other types of impact mitigation. A recent study by the Institute for Water Resources provides further evidence of banks’ efficiency for permit applicants. This study, using Army Corps data on permits awarded, shows that mitigation banking is the most efficient source of compensation when looking at the time it takes to get a permit. In fact, compared to off-site permittee-responsible mitigation, the use of mitigation banks allows permits to be awarded twice as fast. There are cost savings to the permit applicant in the timeliness of approval.
In short, measuring the price differential between mitigation bank credits and other forms of mitigation is extremely difficult because every permit request requires a different approach. Each kind of mitigation requires its own considerations, the most important from the permit applicant perspective being whether the permit is granted. Mitigation banking provides that certainty as early in the permitting process as possible. Please advise if any additional testimony or supplemental information needs to be provided.

Doug Lashley
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April 8, 2016

United States Senate Committee on Energy & Natural Resources
Hearing to Examine the Presidential Memorandum on Mitigation
Question for Lynn Scarlett, Managing Director, Public Policy

Due: April 12, 2016
Sent to: Darla Ripchensky (Darla_Ripchensky@energy.senate.gov)

Question from Chairman Murkowski:

“Best available science” is a metric referenced by multiple agencies as a tool to determine appropriate mitigation measures. How does The Nature Conservancy define “best available science”?]

Response from Lynn Scarlett:

The Nature Conservancy has over 600 scientists at work across the world. As such, our work is both informed and driven by science. The organization does not have an official definition for “best available science.” We are, however, committed to remaining accountable to evidence, which is a hallmark of “science-based” decisions and organizations. Our conservation planning approach – Conservation by Design 2.0 – includes an explicit consideration of the quantity and quality of evidence supporting hypothesized conservation outcomes to improve our conservation strategies and to inform measurement of impacts. This means relying upon credible information. Generally, credibility is indicated by acceptance in the relevant field of study. Although a commonly used standard for credible science is publication in peer reviewed journals, best available science may also include, as appropriate, white papers, reports, primary data, interviews, government records, traditional knowledge, and other information. Scientific information constantly evolves as new research findings are reported. In addition, in the context of what are often significant complexities, scientists sometimes reach different conclusions or interpretations. Yet resource managers often must make management choices despite complexities and uncertainties. It is important, therefore, that the reasons for basing a decision on a particular interpretation or one predominant body of evidence be clearly described and transparent.

Best available science is considered a term of art that allows decision-makers to draw upon the most current, credible science in developing plans, reviewing projects, making management decisions, etc. Use of such a standard helps ensure that our decision-making process allows for consideration of new scientific information at the time decisions are made.
Question from Chairman Lisa Murkowski

Question: Please share what you consider to be ideal coordination and collaboration among local, State, and Federal stakeholders. Please also explain why you think that coordination and collaboration benefits the practice of mitigation.

Chairman Lisa Murkowski

I appreciate the opportunity to supply additional testimony for the record. In response to your question “Please share what you consider to be ideal coordination and collaboration among Local, State, and Federal stakeholders?”

I would suggest that as a project is proposed on federal ground or has a federal nexus that would require mitigation that the State and Locally elected officials be involved as early in the process as possible. State and Locally elected officials represent those people and resources most effected, and also have valuable knowledge of custom and culture and should have as much input as is possible.

As a project is proposed and avoidance of an “irreplaceable natural resource” is decided there needs to be an open collaborative process that Local and State government, and project proponents can come to this same conclusion.

When a project is developed and mitigation measures are developed consideration must be given to those measures that go in to the development of the project itself. Some examples of these types of mitigation in an oil or gas project can be well placement, multiple well heads on a single location, directional drilling, road and access locations, color of collection tanks, etc…these all have some level of expense. Most resource development projects have mitigation already built in to the design and development phase of the projects but it always seems to be taken for granted and more requirements are put in place that can increase the cost of the projects beyond economic feasibility. The Local and State officials should be involved from the beginning and have real input into the decision of what is sufficient mitigation of project design and approval.

Projects that are required to provide “Compensatory Mitigation” for impacts that cannot be mitigated through the development and planning phases shall involve Local government and State officials in any decisions regarding the use of compensatory mitigation. The Local and State officials have the ability to bring valuable information and ideas of what the uses of the compensatory mitigation funds and those monies that can be used to best offset the impacts of a project. I believe that any compensatory mitigation should be used as close as is reasonably possible to the project and its impacts.
Local and State governments can provide direction and facilitate the discussion with interested private landowners willing to provide mitigation efforts on their properties.

I would suggest that as a project is proposed the Federal Agency invite those Local and State Governments with jurisdiction over the areas involved to be a part of the decision making process. Locally elected officials are elected to represent their constituents and can provide valuable historical Custom and Culture of the area involved. Local governments are well situated to bring ideas for mitigation strategies and implementation of those strategies. State government can provide significant information and resources through its agencies to assist in the development and implementation of mitigation strategies. The combination of the project developer, Local, State, and Federal Agencies working together would provide a coordinated, collaborative process that will produce better results for all involved.

To achieve this would require formation of a mitigation development group consisting of those Local and State Governments that would be impacted by a project. This group would hear the project proposal and decide if mitigation is warranted and if so develop a mitigation plan with the project developer. I also believe that this group could provide much needed oversight of government actions if structured correctly.

The second question “Please also explain why you think that coordination and collaboration benefits the practice of mitigation.”

By involving Local and State governments in project development will provide for a larger view of any issues and more importantly remedies and mitigation to those issues. Local and State governments can provide information and ideas to this process. Local governments have the capability of assisting the project developer and the Federal agencies in the decision making process and addressing issues that may arise. They also provide for the representation of the local population and as a liaison to private landowners who may be able to assist in mitigation efforts for a project on federal lands. Development of our natural resources is very important to our State and our Local economies, providing jobs and an economic base so that citizens can prosper. The challenge is being able to develop these resources while striking a balance with the needs of the habitats and lands being impacted.

By coordinating the planning stage of a project with Local and State government will allow for a broader more comprehensive look at each project and what is the needs of the project, the community, the habitats, and those most affected by the development or project.
Chairman Murkowski, thank you for your questions and the opportunity to respond.

Sincerely,
Shaun Sims
Laura Skaer  
Executive Director  
American Exploration & Mining Association

U.S. Senate Committee on Energy and Natural Resources  
Hearing on March 15, 2016: The Presidential Memorandum Issued on November 3, 2015 entitled “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment”  
Question for the Record Submitted to Ms. Laura Skaer

Question from Chairman Lisa Murkowski

Question: Ms. Goldfuss testified before the House Natural Resources Committee that it is the responsibility of a project proponent to “pick a smart place to do your project.” Do you believe that the underlying mining law and FLPMA require miners to mine the most environmentally “smart” places?

The Mining Law of 1872 and FLPMA recognize that mines can only be built where mineral deposits are located. Mineral deposits are rare and hard to find. According to the National Academy of Sciences, National Research Council, “Only a very small portion of Earth’s continental crust (less than 0.01%) contains economically viable mineral deposits. Thus, mines can only be located in those few places where economically viable deposits were formed and discovered.” Hardrock Mining on Federal Lands, National Research Council 1999. P. 2-3.

Modern mining is protective of the environment. The National Research Council study cited above concluded, “The overall structure of the federal and state laws and regulations that provide mining-related environmental protection is complicated but generally effective.” Id. P. 5. Further evidence that modern mining is protective of the environment is the BLM and USFS answers to the Chairman’s March 8, 2011 letter to Secretaries Salazar and Vilsack, wherein the BLM stated that it had approved 659 plans of operation since 1990 and none of those mines are on the CERCLA NPL. Similarly, the USFS answered that it had permitted 2,685 hardrock mines plans of operation since 1990 and none of those cites had been placed on the CERCLA NPL. This is an undeniable track record for modern mining.

The Mining Law authorizes the use and occupancy of public lands open to mineral entry for all purposes reasonably incident to prospecting, exploration, mining and processing. The land management standard Congress incorporated into FLPMA recognizes that mining will cause degradation of the land. FLPMA’s requirement is that the Secretary must prevent unnecessary or undue degradation. Obviously, this standard recognizes there is necessary degradation and requires the degradation to be reasonable under the circumstances. FLPMA and the regulations promulgated provide for mitigation of onsite impacts as part of the responsibility to prevent unnecessary or undue degradation.

Thus, miners mine where mineral deposits are found. Mineral deposits are rare and hard to find, and they are where God put them. The smart place to mine is where the minerals are, and that may not necessarily be, in someone else’s view, an environmentally “smart” place. Fortunately, Congress has recognized this in the Mining Law and FLPMA.
March 21, 2016

The Honorable Lisa Murkowski
Chair, U.S. Senate Committee on Energy & Natural Resources
United States Senate
Washington, DC 20510

The Honorable Maria Cantwell
Ranking Member, U.S. Senate Committee on Energy & Natural Resources
United States Senate
Washington, DC 20510

Dear Chairman Murkowski and Ranking Member Cantwell:

Thank you again for the opportunity to testify at the March 15, 2016 hearing to examine the Presidential Memorandum on Mitigation. I submit the following for the record to further articulate The Nature Conservancy’s position on several of the issues raised during the hearing.

We agree with Chairman Murkowski and Senator King that the goals of the Presidential Memorandum – namely, encouraging agencies to share and adopt a common set of best practices to mitigate for harmful impacts to natural resources and to enhance permitting efficiency – are salutary. To achieve these goals, agency policies adopted in response to the Presidential Memorandum must provide greater clarity and improve predictability for developers, support more efficient government decision-making, and yield better outcomes for the environment and communities.

The Nature Conservancy believes the successful adoption of sound mitigation policies across federal agencies can deliver on these salutary goals. To help ensure success, we will continue to work with the agencies as they update their mitigation policies. We believe these efforts should reflect the following characteristics:

- **Clear goals and predictable standards.** Such standards help avoid reliance on unpredictable compensatory mitigation requirements that result from protracted, negotiated settlements. We believe that compensatory mitigation decisions should be based on a structured, rational, and transparent framework that ensures that when compensatory mitigation is required, any required offsets are proportional to clearly articulated impacts.
- **Strong role for states and other local stakeholders.** We believe that agency policies should reflect the value of collaboration and a strong role for states, local governments, and other stakeholders. Further, we support and will continue to encourage agencies to develop these policies through open public processes.
- **Predictable and efficient policy implementation.** Many of the current inefficiencies in the implementation of mitigation policy result from field staff not having the experience, knowledge, or skills to successfully design predictable local mitigation guidance and implement decisions in an efficient manner. We believe this limitation can be remedied by providing technical support and training for agency staff on best practices for mitigation implementation and collaborative decision-making.
Thank you again for the opportunity to testify and share the views of The Nature Conservancy on this important issue. With increasing demands on our natural resources from a growing population, it is even more important to prevent impacts to the most critical lands and waters, and, when impacts cannot be avoided or minimized, ensure that impacts to natural systems are offset in a rational and predictable manner. Mitigation done right is characterized by smart planning, efficient government decision-making, and clear expectations for project proponents, and it can result in positive outcomes for businesses, communities, and the environment.

Sincerely,

Lynn Scarlett