

W O R C

Western Organization of Resource Councils

Senate Energy and Natural Resources Committee

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Testimony of DarAnne Dunning on behalf of
Western Organization of Resource Councils
Northern Plains Resource Council

Hearing to oversee Secretarial Order 3315

Chairman Bingaman, Vice Chairwoman Murkowski, and members of the Senate Energy and Natural Resources Committee, my name is DarAnne Dunning. I am representing today the members of the Western Organization of Resource Councils, a seven-state grassroots organization made up of landowners and citizens who live and work in and near the coal fields in the western U.S. Thank you for the opportunity to testify and for including our voices in this important discussion today.

The members of the Western Organization of Resource Councils live in and around the coal mining regions of Wyoming, North Dakota and western Colorado, as well as in Montana, and we would be profoundly affected by Secretary Salazar's proposal which is before you for consideration today, to integrate the Office of Surface Mining into the Bureau of Land Management.

I grew up in southeastern Montana where my family has been ranching since the 1880s, originally raising horses and now cattle. Our family ranch is a few miles south of the proposed coal tract development on Otter Creek, which is the largest new proposed mine in the lower 48. The area is also close to the existing coal mines at Colstrip and Decker and in northern Wyoming. I currently reside in Helena, Montana, where I am in private practice as an attorney and part of my practice focuses on energy and natural resources issues in the Northern Plains and Powder River Basin in Montana. I am a member of Northern Plains Resource Council, one of the 7 statewide groups that make up WORC.

Our engagement with this topic goes to the inception of the Surface Mine Control and Reclamation Act (SMCRA). I bring with me in spirit the ranchers and farmers – some of them neighbors and dear family friends – who traveled from the Northern Plains and Powder River region to Washington, DC, throughout the 1970s and walked the halls of this beautiful capitol enlisting the support of first our Western delegations and then the wider assembly of Congressmen and women from all regions to achieve important reforms in the regulation and oversight of surface mining in the United States. Several of them stood in the Rose Garden of the White House in August 1977 when President Jimmy Carter signed SMCRA into law, along side citizens from the coal fields of Kentucky, Tennessee, and West Virginia. The adoption of the SMCRA was a landmark achievement where ordinary people could take their case and make a difference in

whether mining would continue to devastate their homes and farms or the coal industry would be held to a rigorous and fair standard across the nation. SMCRA gave unprecedented powers to citizens in implementing and enforcing the law.

Our members had a significant impact on how the law was written to ensure that surface mining reclamation west of the Mississippi would reflect the unique distinctions of our semi-arid climate where water is precious and the native grasslands and rare prairie forests have evolved uniquely over time to withstand our harsh, dry and brittle climate.

They also joined with citizens from the Appalachian region who had seen the coal industry overwhelm state and local government regulators and operate with impunity as they polluted waters and left gaping holes and spoil piles across the landscape. These citizens voices rose together to insist on a regulatory framework that was open to the ongoing presence and engagement of people who live near and are affected by coal surface mining operations. They worked with Congress to craft legislation that ensured an independent federal enforcement agency and one that was intentionally ordained by Congress to be transparent and accessible to the citizens who are so affected by the dramatic disturbance of surface mines in their communities.

Secretary Salazar's proposed integration of the Office of Surface Mining into the Bureau of Land Management raises a number of red flags that caution us against this move. These concerns go to the heart of the effective functioning and workability of SMCRA.

Three immediate and compelling concerns raised by this proposal are

- (1) the fundamental conflicts in mission and purpose of the two agencies which could be severely compromised if they are rolled into one agency,
- (2) the addition of a large and inflexible bureaucratic layer of government that would compromise OSM's functionality, insulate it and make it less responsive to citizen involvement, and
- (3) whether the Department of Interior can integrate OSM into the Bureau of Land Management without amending SMCRA.

BLM and OSM have distinct and, to some degree, conflicting missions. BLM's mission is to manage the use of public land resources primarily in the West, including coal, and get fair market value for them. BLM is responsible for the leasing of the vast majority of the West's coal reserves. OSM regulates coal mining on both public and private lands, although most active with private lands in the East. It is charged with ensuring that reclamation of all coal-mined lands occurs and that it is done under rigorous and strict standards with full transparency and oversight by states and the public at large. OSM is fundamentally a regulatory agency, while BLM's role in part is to manage federal coal reserves, which includes leasing activities that bring revenue to the federal government. Both are necessary functions, but separating them in two distinct agencies is important for avoiding conflicts of interest, such as those that have arisen in leasing high-risk off-

shore oil reserves. We need to ensure that OSM's regulatory functions, which include ensuring realistic mining and reclamation plans that do not compromise the welfare of citizens or the protection of the environment, are not compromised by similar conflicts of interest.

One lesson of the Deepwater Horizon oil spill in the Gulf of Mexico is that the federal government failed in its mission to enforce public safety in its oversight of oil well drilling because its role in promoting the leasing and development of federal oil in the Gulf sublimated its regulatory responsibilities. In response, the Minerals Management Service has been divided into three sections, including two, independent bureaus. Yet, Secretary Salazar now proposes two combine the separate leasing and regulatory functions of coal mining into one bureau in BLM. BLM is 20 times the size of the Office of Surface Mining. The sheer mass of this agency and its employees and distinctive mission threatens to enmesh OSM in an impenetrable and difficult to navigate bureaucracy that poses enormous challenges to citizen participation. Our experience in the West is that the path for a citizen to reach a responsible official within the Office of Surface Mining is relatively straightforward. In contrast, because of its size and broad portfolio of responsibilities and many sub-divisions, both geographic and topical, BLM presents a complicated challenge to citizens wanting to engage the agency on vital decisions that affect them, their property, health and livelihoods.

At this time, BLM is in the process of an aggressive push to dispose of approximately 6 billion tons of the public's coal in Montana and Wyoming. This massive disbursal of the public's reserves to private companies raises several important questions that shed light on why it might not be appropriate to place mine oversight, regulation and enforcement within the BLM.

- The leases are being offered on a lease by application piecemeal process, despite the clear directives of the Federal Coal Leasing Amendments Act and federal court rulings to manage federal coal leases regionally, mindful of cumulative impacts.
- The lease by application process undermines the agencies ability to gauge the market for federal coal, as competition at these lease sales is almost unheard of. Two recent sales this past summer in the Southern Powder River Basin underscore this point. Two nearby mining companies (Alpha and Peabody) bid against each other, resulting in significantly higher bonus bids. (Belle Ayr North, July, 2011 .95/ton and West Caballo, August, 2011, \$1.016/ton)
- BLM decertified the Powder River Basin in the late 1980s and, despite the massive increased activity in leasing applications and the fact that the Powder River Basin is the largest source of coal in the US, has not re-certified the area as a coal producing region.
- BLM's coal leasing program has not undergone any serious independent scrutiny since the 1980s and is ripe for review, particularly in the area of how it determines what constitutes fair market value for the public's coal.
- BLM is pushing forward with coal leases despite a clear record that mines seeking more federal coal have not complied with the contemporaneous reclamation as required under SMCRA. OSM has identified in recent years the increasing gap

between acres disturbed and acres released from Phase III bonds, which is the determinative measure that the land has met the standards of the act. Phase III bond release indicates that a viable sustainable vegetative community has stood the test of time in the harsh climate conditions of our region. For instance, in Wyoming only 3.5% of disturbed acres have reached Phase III bond release.

The dominant culture within the Bureau of Land Management has been as a promoter of coal in the region and its consistent stance in this respect makes it singularly unsuitable to absorb OSM which is charged with regulation and enforcement and must be independent and transparent.

For example, a recently proposed coal exchange in Montana (Nance-Brown AVF Coal Exchange) approved by the BLM ignores the rights of surface owners to withhold consent to surface mining of their privately owned, deeded land where it overlies federal coal. BLM is explicitly mandated under Sec. 714 of SMCRA to consult with private surface owners in split estate federal coal and may convey that coal for surface mining purposes. While the federal government was obliged by a court order to exchange federal coal with the coal owned by Nance-Brown deemed unsuitable for surface mining, the idea that this exchange could take place under privately held surface without consent is outrageous. Such arrogance on the part of BLM in regard to its obligations under the law ignores Congress clear intent and disrespects private property rights.

Finally, there are potential issues with integrating OSM into BLM without amending SMCRA. OSM was specifically established as a separate entity to protect its regulatory function. In addition, Section 201 of SMCRA prohibits integrating OSM within and federal agency “whose purpose is promoting the development or use of coal or other mineral resources.” Yet, one of BLM’s purposes is the development of coal through leasing.

I urge you to look into the many questions raised by the proposal. We oppose moving forward with the order until these questions can be addressed and much greater investigation of the proposal and consultation with all of the affected stakeholders, including the citizens of the coalfields, can be addressed.

Thank you for your time and the opportunity to comment on this important matter.