Anderson, Ryan

From: Bailey, Michael
Sent: Thursday, October 29, 2015 3:05 PM
To: Brnovich, Mark
Subject: FW: ELS Farewell Lunch for Dennis

Re Carpenter departure

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Austin, Chris
Sent: Thursday, October 29, 2015 2:32 PM
To: Lopez, Connie; Northup, Dawn; Bailey, Michael; Prescott, Karen; Welch, Leslie
Subject: ELS Farewell Lunch for Dennis

You are invited to lunch on Tuesday, November 3rd, at 12:00, 3rd Floor Conference Rooms. See you there.

Chris Austin
Assistant to Dennis Carpenter and Kirstin Story

Office of the Arizona Attorney General
State Government Division
Employment Law Section
1275 W. Washington, Phoenix, AZ 85007
Desk: 602.542.7636 | Fax: 602.542.7644
Chris.Austin@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Thursday, October 29, 2015 11:22 AM
To: Brnovich, Mark
Subject: phone call

I tried to return your call – open for the next 20 minutes, then headed to look at a new option for building.

Michael G. Bailey
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Anderson, Ryan

From: Bailey, Michael
Sent: Thursday, October 29, 2015 8:58 AM
To: Anderson, Ryan
Subject: FW: Comment Letter to the Proposed Stream Protection Rule
Attachments: Proposed Stream Protection Rule Comment Letter 2015 10 26 AS FILED.PDF

Michael G. Bailey
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From: Tasha N. Miracle [mailto:Tasha.Miracle@ohioattorneygeneral.gov]
Sent: Wednesday, October 28, 2015 3:38 PM
To: abrasher@ago.state.al.us; Lopez, John; Bailey, Michael; jamie.ewing@arkansasag.gov; jennifer.hans@ag.ky.gov; Robyn.Bender@ag.ky.gov; Gregory.Dutton@ag.ky.gov; sean.riley@ag.ky.gov; terrellm@ag.state.la.us; CodyB@ag.state.la.us; AlanJoscelyn@mt.gov; justin.lavene@nebraska.gov; mithun.mansinghani@oag.ok.gov; patrick.wyrick@oag.ok.gov; Clayton.Eubanks@oag.ok.gov; sarah.greenwalt@oag.ok.gov; esmith@scag.gov; Scott.Keller@texasattorneygeneral.gov; Cam.Barker@texasattorneygeneral.gov; matt.miller@texasattorneygeneral.gov; linda.secord@texasattorneygeneral.gov; jon.niermann@texasattorneygeneral.gov; Bernard.McNamee@texasattorneygeneral.gov; keckhaverkz@doj.state.wi.us; lenningtondp@doj.state.wi.us; Breuerdm@doj.state.wi.us; dave.ross@wyo.gov; james.kaste@wyo.gov; elizabeth.lyon@wyo.gov; btalley@ago.state.al.us; cookac@doj.state.wi.us
Cc: Dale T. Vitale; Frederick Nelson; Eric Murphy; Brett A Kravitz; Daniel J. Martin; Erica N. Peterson (Erica.N.Peterson@wvago.gov); elbert.lin@wvago.gov
Subject: Comment Letter to the Proposed Stream Protection Rule

Dear Stream Protection Team,

Attached is the Comment Letter filed by our Office on Monday on behalf of the States of Ohio, West Virginia, Arkansas, Montana, Oklahoma, South Carolina, Wyoming, Louisiana, Arizona, Kentucky, Texas, Wisconsin, Alabama, and Nebraska. It was submitted through the electronic portal and by email. I apologize for not getting this to you sooner!

If you would like the confirmation email from the electronic portal, let me know and I will forward it to you.

Please do not hesitate to contact me if you need anything further.

Thank You,
Tasha

Tasha N. Miracle
Assistant Attorney General
Environmental Enforcement
Office of Ohio Attorney General Mike DeWine
Office number: 614-466-5276
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Tasha.Miracle@OhioAttorneyGeneral.gov

Office of Attorney General
State of Ohio

Mike DeWine
Attorney General

Office of Attorney General
State of West Virginia

Patrick Morrisey
Attorney General

October 26, 2015

The Honorable Joseph G. Pizarchik
Director
Office of Surface Mining Reclamation and Enforcement
1951 Constitution Avenue, N.W.
Washington, D.C. 20240

Submitted electronically via Regulations.gov

Re: Comments Of The Attorneys General Of Ohio, West Virginia, Arkansas, Montana, Oklahoma, South Carolina, Wyoming, Louisiana, Arizona, Kentucky, Texas, Wisconsin, Alabama, and Nebraska On The Proposed Stream Protection Rule (Docket No. OSM-2010-0018)

Dear Director Pizarchik:

As the Chief Legal Officers of our States, we write to express our serious concerns about the Proposed Rule issued by the Office of Surface Mining Reclamation and Enforcement ("OSMRE"). The Proposed Rule impermissibly seeks to broaden federal authority at the expense of the States, in violation of: (1) the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1211 *et seq.*; (2) other federal laws, including the Clean Water Act ("CWA"); and (3) the U.S. Constitution. *See* Stream Protection Rule, 80 Fed. Reg. 44,436 (proposed July 27, 2015) ("Proposed Rule").

In enacting SMCRA, Congress found it "essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry," and also provided that "the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations . . . should rest with the States." 30 U.S.C. § 1201(f). The Proposed Rule, if adopted, would undercut both of these central SMCRA goals. It would make coal mining impossible in vast areas of the country and usurp primary responsibility for surface mining permit requirements from the States to the federal government. Even at the federal level, moreover, the Proposed Rule purports to regulate areas within the exclusive authority of other federal regulators, unnecessarily duplicating federal regulatory efforts and regulatory burdens.

OSMRE should withdraw the current proposal and develop a common-sense alternative that respects the strong federalism policies embodied in SMCRA, comports with SMCRA's statutory requirements, and does not unlawfully infringe on or unnecessarily duplicate other regulatory efforts. To facilitate development of this common-sense alternative, we also urge OSMRE to engage in active consultation with State officials, who can help OSMRE understand the full range of State undertakings consistent with SMCRA that balance protection of the environment with the need for an economically healthy coal industry to provide for this nation's energy needs.

DISCUSSION

I. The Proposed Rule Fails To Respect The State Control Over Mining Regulations Recognized In SMCRA

SMCRA recognizes that States have exclusive authority to develop and enforce federally approved mining programs. The Proposed Rule flips this central SMCRA mandate of state primacy on its head by developing a one-size-fits-all approach that leaves no room for the discretion of state agencies that have regulated coal-mining operations for over 30 years.

A. SMCRA, More Than Any Other Federal Environmental Statute, Gives States "Extraordinary Deference" To Implement And Enforce Their Own Mining Programs With Only Limited Federal Oversight.

SMCRA, passed in 1977, struck "a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy." 30 U.S.C. § 1202(f). To achieve this goal, the statute established "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981); *see* H.R. Rep. No. 95-218, at 167 (1977). The need for this federalism-based approach to surface mining regulation rested on the geographic "diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations." 30 U.S.C. § 1201(f).

SMCRA adopted a two-step approach. It initially instructed the Secretary of the Interior to implement a federal regulatory program setting *minimum* standards for surface coal-mining operations within six months of August 3, 1977. *See* 30 U.S.C. § 1252(e). That initial program would remain in effect nationally until the second step was achieved; that is, until States proposed and received approval for their own individual programs or until permanent federal programs were enacted within the States that did not adopt those state-specific programs. *Id.* The Secretary introduced an initial regulatory program on December 17, 1977. *See* 42 Fed. Reg. 62,639. Since then, 24 States, including Ohio, West Virginia, [and], have received approval to implement their own programs, while the Secretary has implemented federal programs in 12 States. *See Frequently Asked Questions*, Office of Surface Mining Reclamation and Enforcement (last visited Oct. 7, 2015), http://www.osmre.gov/resources/faqs.shtm.

Notably, those States that have gained approval for their own regulatory programs exercise *exclusive* jurisdiction over surface coal-mining operations, while the Secretary exercises

exclusive jurisdiction in States with federal plans. *See* 30 U.S.C. §§ 1253(a), 1254(a). Furthermore, a State that has invested in the right to have exclusive jurisdiction within its borders maintains that exclusive authority except in certain limited situations, such as if the State fails to enforce its program. *See id.* § 1271; *Farrell-Cooper Mining Co. v. U.S. Dept. of the Interior*, 728 F.3d 1229, 1232 (10th Cir. 2013). As the Fourth Circuit has noted, "the Act provides for enforcement of either a federal program or a State program, but not both. Thus, . . . SMCRA exhibits *extraordinary deference* to the States." *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 289 (4th Cir. 2001) (emphasis added). In this way, SMCRA was designed to "provid[e] 'a truly federalist distribution of regulatory authority for the coal mining industry.'" *Pennsylvania Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 316 (3d Cir. 2002) (citation omitted); *see also Nat'l Miners Ass'n v. U.S. Dept. of Interior*, 251 F.3d 1007, 1012 (D.C. Cir. 2001).

This makes SMCRA unique. It differs from other federal environmental statutes, such as the CWA, that incorporate state law into the federal scheme. *See Hess*, 297 F.3d at 328; *cf. Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992). Whereas those statutes *adopt* state law as federal law, SMCRA *defers* to state law entirely so long as it meets the specified minimum requirements. In fact, SMCRA explicitly states that no state law or regulation shall be superseded by "any provision of this chapter or any regulation issued pursuant thereto" unless the state law or regulation "is inconsistent with the provisions of this chapter." 30 U.S.C. § 1255(a). It further specifies that a state law "which provides for the control and regulation of surface mining and reclamation operations for which no provision is contained in this chapter shall not be construed to be inconsistent with this chapter." *Id.* § 1255(b). This "grant of primacy to a state" with an approved program "wholly but 'conditionally divest[s] the federal government of *direct* regulatory authority." *Hess*, 297 F.3d at 317 (quoting *Bragg*, 248 F.3d at 294). OSMRE, in other words, is supposed to "step[] back and let[] an approved program run"—as it has largely done for decades now. *Id.*

Permitting OSMRE to retroactively change the minimum standards to which approved state programs must adhere in order for those States to maintain their exclusive jurisdiction would undermine the structure and purpose of SMCRA. SMCRA states that the federal regulatory program shall remain operative *only* until the agency approves a state program meeting the minimum regulatory requirements. *See* 30 U.S.C. § 1252(e). Thereafter, the State gains "exclusive jurisdiction" over regulating surface coal mining operations. *Id.* § 1253(a). As the Third Circuit noted, "[e]xclusive . . . means just that—'exclusive.' It does not mean 'parallel' or 'concurrent.'" *Hess*, 297 F.3d at 318. Thus, OSMRE has no authority to enact the Proposed Rule against States with approved programs, and thereby to indirectly undertake in those States what OSMRE cannot undertake directly— federal regulation of coal mining in those States (with the state entities as mere agents). Indeed, allowing OSMRE to interfere with state programs in this manner would retroactively eliminate the States' very incentive to create their own programs in the first place. *See* 30 U.S.C. § 1201(f); H.R. Rep. No. 95-218, at 167 (1977). It should be added that OSMRE does not cite § 1271 (the one section permitting it to intervene if a State has failed to enforce its program) as any legal authority for the Proposed Rule. *See* 80 Fed. Reg. at 44,446-47.

SMCRA's promise to States that they will receive exclusive control if they meet certain minimum requirements would prove an empty one if those requirements could be revised by OSMRE at any time. In some respects, then, SMCRA is comparable to federal spending legislation—it is "'much in the nature of a contract.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (citation omitted). The States agreed to follow the minimum requirements; Congress agreed to give them exclusive control. SMCRA thus should be interpreted *not* to allow OSMRE to retroactively impose new conditions on state programs unless SMCRA gives the agency that power *unambiguously*. *See Arlington Cent. Sch. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). It does not, evidenced by OSMRE's reliance on SMCRA's "purpose" provision, 30 U.S.C. § 1202, as the "legal authority" for the Proposed Rule. *See* 80 Fed. Reg. 44,446 (proposed July 27, 2015). Yet even if OSMRE plans to rely on claimed penumbras flowing out of SMCRA as the grounds for the Rule, it should recognize that they point in a decidedly different direction than the Agency's one-size-fits-all regulatory approach.

B. The Proposed Rule Impermissibly And Needlessly Replaces State And Local Regulation With Top-Down, Federal Control

The Proposed Rule conflicts with OSMRE's responsibility under SMCRA to "assist the States in the development of State programs for surface coal mining operations which meet the requirements of [SMCRA], and at the same time, reflect *local* environmental and agricultural conditions." 30 U.S.C. § 1211(c)(9). Contrary to SMCRA and express congressional intent, the Proposed Rule strips away the States' responsibility and authority and hands it over to OSMRE in at least two ways. *First*, the Proposed Rule removes substantial state and local control by re-defining "material damage to the hydrologic balance outside the permit area" in a way that fails to reflect local conditions or maintain the current flexibility that States possess in evaluating impacts or potential impacts from mining on a site-specific basis. *Second*, the Proposed Rule improperly requires States to provide fish and wildlife resource information to the United States Fish and Wildlife Service automatically rather than only when requested by the Service.

1. The Proposed Rule improperly defines "material damage to the hydrologic balance outside the permit area."

The Proposed Rule creates a new federally mandated definition of "material damage to the hydrologic balance outside the permit area." To issue a permit under SMCRA and current regulations, a State must determine that the mining operation "has been designed to prevent material damage to the hydrologic balance outside the permit area." 30 U.S.C. § 1260(b)(3); 30 C.F.R. § 773.15(e). Neither SMCRA nor the current regulations define those terms, but rather defer to the judgment of the State as the primary regulatory authority. In its proposal, OSMRE takes a different approach, defining those terms to mean "any adverse impact from surface coal mining and reclamation operations or from underground mining activities, including any adverse impacts from subsidence that may occur as a result of underground mining activities, on the quality or quantity of surface water or groundwater, or on the biological condition of a perennial or intermittent stream, that would" either: (1) "[p]reclude any designated use under sections 101(a) or 303(c) of the Clean Water Act or any existing or reasonably foreseeable use of surface water or groundwater outside the permit area"; or (2) "impact threatened or endangered species, or have an adverse effect on designated critical habitat, outside the permit area in violation of the

Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*" 80 Fed. Reg. 44,588 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 701.5).

a. Contrary to OSMRE's claims, a federal definition of "material damage to the hydrologic balance outside the permit area" is neither permissible nor necessary.

First, SMCRA makes it the role of the States, not OSMRE, to determine when a permit applicant has demonstrated that the mining operation is designed to prevent material damage to the local hydrologic balance. As noted above, SMCRA assigns the States the responsibility of "developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations" because of "the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations." 30 U.S.C. § 1201(f). Those considerations are particularly relevant to determining whether a mining operation is designed to avoid material damage to the hydrologic balance, as hydrologic conditions differ significantly across the country. For instance, one would expect criteria for determining material damage to the hydrologic balance to be different in arid climates with less than 10 inches of precipitation per year than in areas with more than 50 inches of precipitation. A uniform federal rule would make little sense and is inconsistent with the statute. As the D.C. Circuit has explained, each State is "the entity that applies the general standards of [SMCRA] to the particular geographical and geological circumstances of the state." *In re Permanent Surface Min. Regulation Litig.*, 653 F.2d 514, 519 (D.C. Cir. 1981).

Second, a federally mandated definition of material damage to the hydrologic balance outside the permit area is unnecessary because of the States' work to define that term. OSMRE claims as justification for the definition that "very few states have adopted a definition or established programmatic criteria for material damage to the hydrologic balance outside the permit area." 80 Fed. Reg. 44,473 (proposed July 27, 2015). That is not so. Many States have adopted rules to guide that decisionmaking process. For example, West Virginia by regulation defines "material damage to the hydrologic balance outside the permit areas" as "any long term or permanent change in the hydrologic balance caused by surface mining operation(s), which has a significant adverse impact on the capability of the affected water resource(s) to support existing conditions and uses." W. VA. CODE R. § 38-2-3.22.e. Other States have adopted similar definitions. *See, e.g.*, MONT. CODE ANN. § 82-4-203(31). Additionally, other States make these decisions on a case-by-case basis to better incorporate local conditions at each site. For example, Ohio, through its Ohio Department of Natural Resources, does a material-damage assessment for each permit application. It requires that applications include all necessary information for making this assessment, and its technical staff then review the body of evidence to reach a material-damage conclusion. If the applicant states that material damage will not occur, but the application responses do not support that finding, the Ohio Department of Natural Resources requires application revisions. By reviewing the application and approving the material-damage statement and documentation in the application, the agency conclusively determines that material damage will not occur. *See* OHIO REV. CODE §§ 1513.07(B)(1)(k) (requiring permit applicant to explain probable hydrologic consequences), (E)(2)(c)(i) (requiring chief to affirmatively find that there will not be material damage); OHIO ADMIN. CODE 1501:13-4-14 (underground mining

permit application requirements for reclamation and operations plans); *id.* 1501:13-9-04 (protection of the hydrologic system); *id.* 1501:13-4-13 (underground mining permit application requirements for information on environmental resources); *id.* 1501:13-4-05 (surface mining requirements). Other States have adopted rules similar to those adopted by Ohio. *See, e.g.*, 312 IND. ADMIN. CODE 25-6-12; 405 KY. ADMIN. REGS. 18:060; UTAH ADMIN. CODE r. 645-301-729.

b. Even if it were proper to adopt a federal definition of "material damage to the hydrologic balance outside the permit area," the proposed definition is both too broad in some respects and too narrow in others.

On the one hand, the proposed definition focuses too narrowly on the hydrologic balance in particular streams. It incorporates the CWA's designated use criteria, which are designed to protect individual "waters of the United States" from pollution. But SMCRA focuses on an area's overall hydrologic balance. *See* 30 U.S.C. § 1266(b) ("Each permit issued . . . shall require the operator to . . . minimize the disturbances of the prevailing hydrologic balance at the minesite and in associated offsite areas."); *id.* § 1260(b) ("[T]he proposed operation . . . has been designed to prevent material damage to hydrologic balance outside permit area.").

On the other hand, the definition of cumulative hydrologic impact area is far too broad. SMCRA expressly requires consideration of local conditions. *See id.* § 1201(f). But the Proposed Rule seeks to define the cumulative impact area within which the hydrologic impact must be assessed to include the permit area, the "HUC-12 (U.S. Geological Survey 12-digit Watershed Boundary Dataset) watershed or watersheds in which the actual or proposed permit area is located," and "any other area within which impacts resulting from an actual or proposed surface or underground coal mining operation may interact with the impacts of all existing and anticipated surface and underground coal mining on surface-water and groundwater systems." 80 Fed. Reg. 44,587 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 701.5). The inclusion of one or more HUC-12s substantially expands the cumulative impact area. For example, the average size of an HUC-12 in Ohio is 10,000 to 40,000 acres, with some as small as 3,000 acres. The data collection and analyses accompanying the requirement that the HUC-12 watershed be part of the cumulative impact area would overwhelm the permitting process and provide no valuable information relative to the cumulative hydrologic impact of a defined mining operation. New information or data from nearby mining operations would need to be collected and submitted. Given the size of the cumulative impact area (HUC-12 watershed, minimum), the data gathering requirement would either overwhelm the regulatory agency or the applicant, or it would become so boilerplate as to be meaningless. Impacts between operations at opposite ends of an HUC-12 watershed would be non-existent; therefore the required data gathering is unnecessary. The watershed portion alone establishes a very large cumulative impact area and an even larger area for operations that happen to cross watersheds. Broader still is the inclusion of any area where coal mining "impacts" surface-water or groundwater.

2. <u>The Proposed Rule's requirements regarding fish and wildlife resource information improperly subordinate the States' permitting authority to federal control.</u>

The Proposed Rule unjustifiably subordinates state permitting authority to the federal government with new requirements regarding fish and wildlife resource information. Under the current regulations, a State need only provide resource information contained in a SMCRA permit application to the Fish and Wildlife Service upon the Service's request. 30 C.F.R. § 780.16(c). The proposal, in contrast, *requires* a State to provide such information to the "regional or field office of the U.S. Fish and Wildlife Service whenever that information includes species listed as threatened or endangered under the Endangered Species Act of 1973 . . . , critical habitat designated under that law, or species proposed for listing as threatened or endangered under that law." 80 Fed. Reg. 44,593 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 779.20(d)(1)(i)). The State must also refrain from approving the permit application if the Fish and Wildlife Service disagrees with the State's decision on the permit. *Id.* (to be codified at § 779.20(d)(2)(ii)). But SMCRA vests no such veto power in the Fish and Wildlife Service. At a minimum, these new requirements force States to delay acting on permit applications even where federal authorities have expressed no concern with the application.

3. OSMRE failed to engage with States in its rulemaking process as required.

Finally, the proposal is also disrespectful to the States' role in mining regulation because OSMRE failed to engage in meaningful cooperation with state agencies as required by regulations governing rulemakings subject to the National Environmental Policy Act (NEPA). 40 C.F.R. §§ 1501.6, 1508.5. These regulations require the agency to "request the participation of each cooperating agency in the NEPA process at the earliest possible time" and "meet with a cooperating agency at the latter's request." *Id.* §§ 1501.6(a), 1508.5(a). By agreement state agencies may become cooperating agencies, and agencies from 11 States did so with respect to the Proposed Rule. 40 C.F.R. § 1508.5; OSMRE, Stream Protection Rule Environmental Impact Statement Draft 5-2 (July 2015). In late 2010 and early 2011, OSMRE provided state agencies the opportunity to comment on Chapters 2 through 4 of a working draft of the Draft Environmental Impact Statement. *Id.* at 5-3. There was no more communication between OSMRE and the States until February 23, 2015, when 11 state agencies wrote a letter to OSMRE expressing concern about the lack of cooperation between OSMRE and the States and declaring their intent to terminate their participation. *See id.* Seven of these States subsequently terminated their involvement. *Id.* The Proposed Rule thus fails to account for the efforts States have undertaken to appropriately balance environmental protection with the need for an economically healthy coal industry consistent with SMCRA. Had States that were cooperating agencies in the development of the initial draft of the Environmental Impact Statement been more fully and appropriately involved in the complete process, they would have been in a better position to comment fully on the Proposed Rule. OSMRE should reengage with States in order to write a rule consistent with SMCRA's "extraordinary deference to the States." *Bragg*, 248 F.3d at 289.

II. The Proposed Rule Exceeds OSMRE's Authority Under SMCRA.

A. The Proposed Rule's Restriction On Mining Activities In Or Near Streams Exceeds The Agency's Authority Under SMCRA.

In contrast to the current regulations, the Proposed Rule broadly prohibits nearly all mining-related activity in or within 100 feet of any perennial or intermittent stream. The current regulations prohibit only surface mining activities that the regulatory authority finds will "cause or contribute to a violation of applicable State or Federal water quality standards, and will . . . adversely affect the water quantity and quality or other environmental resources of the stream." 30 C.F.R. § 816.57. The Proposed Rule, however, would preclude any mining-related activity in or within 100 feet of a perennial or intermittent stream unless the activity would not: (1) "[p]reclude any premining use or any designed use under section 101(a) or 303(c)"; (2) "[r]esult in conversion of the stream segment from intermittent to ephemeral, from perennial to intermittent, or from perennial to ephemeral"; (3) "[c]ause or contribute to a violation of applicable water quality standards"; or (4) "cause material damage to the hydrologic balance outside the permit area." 80 Fed. Reg. 44,610 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 780.28(b)(2)). As already noted, the Proposed Rule broadly defines "material damage to the hydrologic balance outside the permit area." It also expansively defines "perennial stream" as "a stream or part of a stream that has flowing water year-round during a typical year." 80 Fed. Reg. 44,588 (proposed July 27, 2015).

For several reasons, and contrary to SMCRA, the result of the Proposed Rule is to prohibit nearly all mining activities with any effect on perennial or intermittent streams. *First*, the Proposed Rule significantly expands regulation from "mining" alone to "all mining-related activities." *Second*, the definition of perennial stream makes a change in the quantity of water in a stream segment, rather than the entire stream, sufficient to prohibit the mining-related activity. *Third*, the Proposed Rule introduces the requirement that the activity not prohibit any "reasonably foreseeable use . . . or impact threatened or endangered, or have an adverse effect on designated critical habitat." *Fourth*, the proposal prohibits any mining-related activity that affects the biological condition of a stream even if it does not affect water quality. *Fifth*, the Proposed Rule expands the definition of perennial stream to include streams with continuous flow during a typical year rather than only streams with continuous flow during all of the calendar year. 80 Fed. Reg. 44,477, 44,586 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 701.5). Taken together these restrictions prohibit nearly all mining-related activities that in any way affect a broadly defined stream or stream segment, making mining impossible in vast areas of the country, contrary to SMCRA's design.

Such a sweeping prohibition on mining-related activities is inconsistent with the text of SMCRA. In SMCRA, Congress recognized the importance of coal mining to the nation's economy and expressly sought to protect it. 30 U.S.C. § 1201(b). In fact, Congress found it "essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry." *Id.* Consistent with this goal, SMCRA adopts the balanced goal of seeking to "*minimize* disturbances and adverse impacts . . . on fish, wildlife, and related environmental values" "to the extent possible using the best technology currently available." 30 U.S.C. § 1265(b)(24) (emphasis added). And SMCRA expressly authorizes placing excess spoil in "springs, natural water course or wet weather seeps" so long as "lateral drains are constructed." 30 U.S.C. § 1265(b)(22)(D); *see also Kentuckians for Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 443 (4th Cir. 2003) ("it is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States.").

OSMRE has also asked for comment on whether to extend these restrictions even further to include ephemeral streams. *See* 80 Fed. Reg. 44,451 (proposed July 27, 2015). For all of the above reasons, OSMRE should decline to do so. The Proposed Rule far exceeds the authority provided by statute.

B. The Proposed Rule Discourages Longwall Mining By Setting Up Requirements For Permit Issuance That Are Unrealistic, Difficult, Or Impossible To Meet, Contrary to SMCRA, And Unfounded In Science.

Congress has recognized that "the overwhelming percentage of the nation's coal reserves can only be extracted by underground mining methods and that it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry . . . ." 30 U.S.C. §1201(b). Nonetheless, the Proposed Rule jeopardizes the existence of an expanding and economically healthy underground coal mining industry. One of SMCRA's core purposes is to "encourage the full utilization of coal resources through the development and application of underground extraction technologies . . . ." *Id.* § 1202(k). The Proposed Rule violates that purpose by, for example, making longwall mining all but impossible. The Proposed Rule impedes longwall mining by, among other things: (1) requiring permit denials when longwall mining may have a chance of adversely impacting the quantity or quality of surface water or groundwater; (2) requiring permit denials when impacts to ephemeral streams may not be avoided; and (3) requiring the inclusion of contiguous reserves of longwall mining operations for cumulative hydrologic impact assessments (CHIAs).

1. In violation of SMCRA, the Proposed Rule may require the denial of longwall-mining permit if there is any chance of an adverse impact on a stream.

Depending on interpretation or application, the Proposed Rule would require denying a longwall-mining permit if it cannot be shown at the permitting stage that the longwall mining would not have any adverse impacts on the quantity or quality of surface water or groundwater. The definition of "material balance to the hydrologic balance outside the permit area" includes "any adverse impacts from subsidence that may occur as a result of underground mining activities on the quality or quantity of surface water of groundwater." 80 Fed. Reg. 44,475 (proposed July 27, 2015). It is well-known that the longwall-mining method may negatively impact the quantity and quality of surface water or groundwater. *Fully* restoring streams to pre-mining water quantity and quality conditions may not be technologically or economically feasible given the subsidence that occurs with longwall mining. SMCRA also recognizes that longwall mining operators should not be required to prevent subsidence damage to the same extent as surface mine operators. SMCRA provides that underground coal mining operators "shall adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible . . . *except in instances where the mining technologically used requires planned subsidence in a predictable and controlled manner.*" 30 USC § 1266(b)(1) (emphasis added). SMCRA clearly recognizes that longwall mining must be regulated differently given the nature of the longwall mining method. The Proposed Rule does not.

The Proposed Rule is also unnecessary because the States themselves have rules minimizing the negative impacts on the quantity and quality of groundwater and surface water from longwall mining. Ohio's regulation provides an instructive example. Its approach to disruption of water sources in wells, developed springs, and streams is to replace wells and springs based on Procedure Directive Regulatory 2013-01, which was developed in cooperation with OSMRE staff, and current state regulations at 1501:13-4-04(F), 1501:13-4-13(F), and 1501:13-9-04(P) of the Ohio Administrative Code that require identification of alternative water sources and water replacement. Following inspector and hydrologist reviews and verification of stream impacts, streams require repair based on protection of the hydrologic balance under 1501:13-4-05(E), 1501:13-4-14(E), and 1501:13-9-04 of the Ohio Administrative Code and the subsidence control plan under 13-4-14 (M) and 1501:13-12-03 of the Ohio Administrative Code. The ODNR also requires avoidance of perennial streams where the cover is less than 200 feet. Further, Ohio requires an evaluation of the potential of mine pool development during review of initial underground mining applications and a plan to re-evaluate mine pool potential at the end of mining followed by implementation of appropriate action (e.g. a detailed mine-pool study; deletion of mining areas that are higher than local drainage; relocation of mine entries) based on the evaluation. Ohio requires action plans to address creation of mine pools, including upgrade water treatment facilities, creation of long-term water treatment systems and trusts, which require regular inspection and enforcement, and/or pumping mines to keep the water level lower than potential surface discharge points.

2. The Proposed Rule's envisioned requirement to avoid impacts to ephemeral streams is contrary to SMCRA and creates an unnecessary and heavy financial burden that effectively curtails longwall mining.

OSMRE has asked for comment on whether to extend the stream buffer requirements to ephemeral streams. 80 Fed. Reg. 44,451. Though states may opt in their own statutes to provide coverage for ephemeral streams, the proposed rule would exceed agency authority under SMCRA because SMCRA does not contain a provision that requires the avoidance of impacts to ephemeral streams. Requiring the movement or stoppage of longwall panels to mine around ephemeral streams would leave many coal reserves stranded and cause the longwall mining operator great expense in having to stop and alter the movement of large longwall panels to account for ephemeral streams.

The Proposed Rule's requirement to conclusively determine whether perennial streams may be converted to ephemeral streams or whether intermittent streams may be converted to ephemeral streams from mining, 80 Fed. Reg. 44,602, 44,602 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 780.19 and 30 C.F.R. § 780.28), impedes surface and underground mining including longwall mining because it is difficult or nearly impossible to make such a determination in advance of mining given that there are factors that cannot be predicted with certainty during the mining operation and backfilling of spoil. As such, the Proposed Rule exceeds OSMRE's authority under the law.

3. The Proposed Rule's requirement to include an applicant/owner's entire contiguous reserves in a CHIA analysis is irrational, has no scientific basis, and imposes a heavy burden on agency review.

The Proposed Rule expands underground mine Cumulative Hydrologic Impact Assessments ("CHIA") to all areas where the company owns or controls coal reserves contiguous to the proposed mining area. 80 Fed. Reg. 44,587 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 701.5). But hydrological impacts are not governed by coal ownership; instead, they are determined by geological and hydrological principles. The amount of coal a company owns has no scientific connection to impacts or potential impacts on a permit area. Water does not change how it behaves based on the extent of a company's coal holdings. Longwall mining operators typically own and/or control large areas of reserves. While in some instances the coal reserves may be mined in the near future, there are many instances in which coal is not projected to be mined for many years, and a coal mining permit application will not be submitted for such area until years or perhaps decades in the future. There is no rational basis to require a CHIA of all contiguous coal reserves and such a requirement dramatically impedes longwall mining operators with substantial reserves. Additionally, it places a heavy and unnecessary burden on state agency review.

The Proposed Rule's requirements are also inconsistent with SMCRA because SMCRA recognizes the need to regulate longwall mining and other forms of underground mining differently and in a way that recognizes the unique nature of underground mining methods. 30 U.S.C. § 1266(a) requires: "That in adopting any rules and regulations the Secretary shall consider the distinct difference between surface coal mining and underground coal mining." SMCRA recognizes the difference between surface mining and underground mining in, for example, its requirements on subsidence, as noted above. SMCRA provides that coal mining operators "shall adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible . . . *except in instances where the mining technology used requires planned subsidence in a predictable and controlled manner*." 30 USC § 1266(b)(1) (emphasis added).

Despite SMCRA's requirements to regulate longwall mining differently, the Proposed Rule disregards the unique differences of the longwall-mining method by imposing heavy burdens impeding its development. This is especially significant in States like Ohio where longwall mining currently accounts for at least 50 percent of the State's coal production annually.

C. OSMRE's Proposal To Require A Material Damage Finding For Permit Renewals Violates SMCRA.

The proposal also violates SMCRA by requiring permit *renewal* applications to assess material damage to the hydrologic balance outside the permit area. The law limits such an assessment to "permit or revision application[s]" only. It provides that "[u]pon the basis of a complete *mining application and reclamation plan or a revision or renewal thereof* . . . the regulatory authority shall grant, require modification of, or deny the application for a permit in a reasonable time." 30 U.S.C. § 1260(a) (emphasis added). Then, it states that "[n]o *permit or revision application* shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing . . . that . . . the operation . . . has been designed to prevent material damage to hydrologic balance outside [sic] permit area." *Id.* § 1260(b)(3) (emphasis added). The statute thus uses "mining application," "revision," and "renewal" to mean different

things. Contrasted with Section 1260(a), it is clear that Section 1260(b)(3) limits the material damage to the hydrologic balance assessment to applications for permits or revisions to permits. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute . . . .") (citation and internal quotation marks omitted).

Moreover, a finding that the operation is designed to prevent material damage to the hydrologic balance would make little sense in the case of a permit *renewal*, which is reserved for situations where the applicant has not made changes to the design of the previously-approved operation. Under SMCRA, a permit may be renewed only if the terms and conditions of the existing permit are being met. Thus, SMCRA requires a regulatory authority to issue a renewal unless "written findings by the regulatory authority are made that—

(A) the terms and conditions of the existing permit are not being satisfactorily met;
(B) the present surface coal mining and reclamation operation is not in compliance with the environmental protection standards of this chapter and the approved State plan or Federal program pursuant to this chapter; or
(C) the renewal requested substantially jeopardizes the operator's continuing responsibility on existing permit areas;
(D) the operator has not provided evidence that the performance bond in effect for said operation will continue . . .
(E) any additional revised or updated information required by the regulatory authority has not been provided."

30 U.S.C. § 1256(d)(1). These standards assume that the initial design has already been approved and remains unchanged. OSMRE has no authority to amend these clear standards through regulation.

D. OSMRE Proposes To Impermissibly Broaden The Definition Of Reclamation.

OSMRE's proposed definition of "reclamation" is considerably broader than its meaning under the current regulations and increases the obligations imposed on mine operators. The current regulations define reclamation as "those actions taken to restore mined land as required by this chapter to a postmining land use approved by the regulatory authority." 30 C.F.R. § 701.5. In contrast, the Proposed Rule expands this definition to include "those actions taken to restore mined land and associated disturbed areas to a condition in which the site is capable of supporting the uses it was capable of supporting prior to any mining or any higher or better uses approved by the regulatory authority." 80 Fed. Reg. 44,588 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 701.5). Also in contrast with the current regulation, this definition is not limited to the mined area. Further, it requires restoration of land to a condition capable of supporting all uses the land was capable of supporting before mining rather than simply the approved post-mining use.

The provision of SMCRA on which OSMRE relies for its new definition does not support the expansive definition that the Agency proposes. OSMRE claims its definition implements SMCRA's purpose to "assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations." 30 U.S.C.

§ 1202(e). But "contemporaneously" means "at or during the same time." 3 THE OXFORD ENGLISH DICTIONARY 813 (2d ed. 1989). What SMCRA requires is reclamation as soon as possible after mining, not restoration of all lands to pre-mining condition.

The Proposed Rule's broad definition also again fails to heed SMCRA's command to balance environmental impacts with the need for an "economically healthy underground coal mining industry." 30 U.S.C. § 1201(b). Requiring mine operators in every case to restore land to all uses it was capable of supporting before mining creates an expensive burden that is not always balanced by sufficient benefits. To properly balance environmental and economic concerns as required under SMCRA, a regulatory authority must be permitted to weigh possible post-mining land uses against other concerns. And it is state and local authorities that are best suited to determine the value of potential post-mining land uses to their communities based on their individual circumstances.

E. The Proposed Rule Includes Revegetation Requirements Outside The Scope Of SMCRA.

Similarly, the Proposed Rule requires the States to set stringent revegetative success standards based on pre-mining land use despite SMCRA's emphasis on preparing land for its approved post-mining use. The proposal states that "standards of success applied to a specific permit must be adequate to demonstrate restoration of pre-mining land use capability." 80 Fed. Reg. 44,669 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 816.116(b)). A site may only be revegetated consistent with the post-mining land use if that use "will be implemented before expiration of the revegetation responsibility period." *Id.* If adopted, this provision would require a mining operator to plant vegetation sufficient to return land to its pre-mining state even if the regulatory authority has approved a different post-mining use that will begin immediately after revegetation. For example, if an area is approved through state permitting for use as pastureland post-mining but had been used as cropland before mining took place, the operators would still be unnecessarily required to restore the land's ability to support cropland.

The Proposed Rule departs significantly from SMCRA. SMCRA requires revegetative standards to focus on the state-approved post-mining land use. Under SMCRA, a native vegetative cover is necessary, but "introduced species may be used in the revegetative process where desirable and necessary to achieve the approved postmining land use plan" regardless of when that plan is completed. 30 U.S.C. § 1265(b)(19). Thus, under SMCRA revegetation with native species is only necessary where there is no approved post-mining land use; conversely, when there is a post-mining use, revegetation should be consistent with that use. OSMRE's current regulations adhere much more closely to SMCRA, providing that "success of revegetation shall be judged on the effectiveness of the vegetation for the approved postmining land use, the extent of cover compared to the cover occurring in natural vegetation of the area, and the general requirements of §816.111." 30 C.F.R. § 816.116. Further, "introduced species [may be used] where desirable and necessary to achieve the approved postmining land use and approved by the regulatory authority." *Id.* § 816.111(a)(2).

Under the Proposed Rule, revegetation plans will have to be reestablished for all areas that do not have an agronomic use. 80 Fed. Reg. 44,491. Areas to be planted in trees will have to be planted to a primarily native planting species with only a minimum amount of introduced species

for soil stabilization. Tree planting plans will require design by a professional forester or ecologist, which will be an added expense. All organics will need to be reapplied and may cause instability, elevated suspended solids and conductivity in surface water in adjacent areas for longer period of time due to a slower process of revegetation, as well as result in a final product that may not be conducive to surface owner priorities and plans for land uses following mining. The proposed changes create ambiguous requirements that alter the current clear standards under which state regulatory authorities are working within known parameters and established guidelines. Substantial work has led to the development of successful guidelines for re-establishing forest and wildlife habitat in the States, but the Proposed Rule ignores the expertise of regional State reclamation professionals.

F. The Proposed Rule Violates SMCRA's Requirement To Balance The Nation's Economic Need For Coal With Protecting The Environment.

Congress designed SMCRA "to assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy." 30 U.S.C. § 1202(f). The Proposed Rule does not strike this balance.

The Proposed Rule would increase required water sampling and monitoring requirements nationwide without considering local requirements and local environmental and agricultural conditions. The required parameters are not based on local geology. In some instances, for example, sampling would be required for a parameter like copper even if copper is not generally found in the geology of a particular State. The Proposed Rule also creates a new requirement that sampling be done for 12 consecutive months. Should there be a drought or excessive wet conditions during the 12 months, the sampling would need to start over again. Sampling for 12 consecutive months is especially unrealistic because of the Proposed Rule's requirement to use the Palmer Drought Index ("PDI"). By the time the PDI publishes a number indicating that a particular month of sampling is invalid, the operator can do little to plan and must restart the sampling process. The delay in documentation will make sampling for an application nearly impossible and reduce certainty for the applicant as to when, if ever, baseline sampling will be completed. Such uncertainty would significantly hamper planning for mining operations.

Moreover, there has been no showing of why sampling that accounts for seasonal variations reflective of local conditions is inadequate to establish baseline quality and quantity. For example, Ohio developed a seasonal variations protocol for three different seasons to account for high, low, and intermediate conditions. Other States, too, should continue to have the flexibility to develop sampling protocols that reflect their local conditions: different States have different (or limited) seasonal variations, and what obtains in Alaska may not always be the case in Florida. The Proposed Rule's one-size-fits-all approach simply does not work.

The Proposed Rule also mandates that the Regulatory Agency or an additional third party verify quality assurance and quality control data. 80 Fed. Reg. 44,603 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 780.19). This extra layer of Quality Assurance and Quality Control (QA/QC) is unnecessary. The existing QA/QC chain of command analysis is a valuable requirement. Regulatory authorities should be able to trust labs authorized and approved by the

EPA to provide credible data associated with sample results, and there is no need to have a third party to evaluate the same data or simultaneously evaluate samples. States have the authority to conduct sampling if they have reason to believe there is an error in the submitted data.

Significantly, too, and as discussed above, the Proposed Rule includes data-collection requirements relating to ephemeral streams. 80 Fed. Reg. 44,601 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 780.19(c)(3)). Locating these ephemeral streams would require mine operators to conduct extensive biological sampling and field observation and surveys over what are often very large and difficult to access sites. And the Proposed Rule would vastly expand the scope of the Cumulative Hydrologic Impact Assessment ("CHIA") requirements of the permit application process. 80 Fed. Reg. 44,587 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 701.5). The analysis is not only costly for the applicants to perform, but it is also taxing on the state agency's staff to perform such an excessively large hydrologic review. There has been no showing that such a vast expansion is necessary or has a valid scientific foundation.

SMCRA contemplates a balance between promoting economic development and protecting the environment, but these and other costly, unnecessary, burdensome, and unfunded mandates ignore that statutory imperative. Contrary to 30 U.S.C. § 1201(d), the Proposed Rule disregards economic and technical feasibility in the context of avoiding adverse impacts. And it imposes economically or technically infeasible requirements for longwall mining subsidence damage that SMCRA does not require. The Proposed Rule thereby threatens the existence of entire industry segments.

III. The Proposed Rule Seeks To Regulate Unnecessarily And Impermissibly In Areas Within The Exclusive Authority Of The EPA, The Army Corps Of Engineers, And The States Under The Clean Water Act Or The Endangered Species Act.

A. The Proposed Rule Seeks To Regulate In Areas Beyond OSMRE's Authority That Are Governed By The CWA as interpreted by other federal agencies.

The Proposed Rule creates requirements for water quality that exceed those in the CWA. Water-quality standards are regulated by Section 303 of the CWA and implemented by Section 402 permits and Section 404 permits issued under those chapters. The CWA gives States authority to set water-quality standards, incorporate those standards into CWA permits, and enforce water-quality standards that are more stringent than those required by federal law. As the law is currently interpreted by federal agency authorities, almost all surface coal mining operations require Clean Water Act permits to operate.

The Supreme Court has consistently affirmed that the CWA is a "comprehensive program for controlling and abating water pollution" within defined federal jurisdiction. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 319 (1981) (citing *Train v. City of New York*, 420 U.S. 35, 37 (1975); *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). And the Court has acknowledged that, by its very terms, the CWA specifies the "policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration,

preservation, and enhancement) of land and water resources...." *Rapanos v. United States*, 547 U.S. 715, 737 (2006), (plurality op.) (quoting 33 U.S.C. § 1251(b)).

SMCRA itself illustrates that the Clean Water Act was intended to be, and is, the controlling federal legislation governing water pollution and water-quality standards of those waters that fall under federal authority. Section 702(a) of SMCRA explicitly provides that "[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing" the Clean Water Act, or any state laws enacted pursuant to the Clean Water Act. 30 U.S.C. § 1292.

Yet the Proposed Rule would effectively and illegally amend the CWA in many ways.

1. The Proposed Rule unlawfully makes the Corps' stream definitions binding for purposes of SMCRA.

The Proposed Rule includes two definitions of streams tied to actions by the Army Corps of Engineers ("the Corps"). First, it seeks to redefine "perennial stream" in a manner substantively identical to the (overreaching) manner in which the Corps defines that terms under CWA Section 404. Second, OSMRE invited comment on whether the final rule should specify that the Corps "has the ultimate authority to determine the point at which an ephemeral stream becomes an intermittent stream or a perennial stream and vice versa." 80 Fed. Reg. 44,476 (proposed July 27, 2015).

OSMRE should reject both of these proposals. The breadth of the proposed definition of "perennial stream" significantly and illegally expands the streams subject to the stream buffer zone rule and makes mining impossible in large areas. That is inconsistent with SMCRA. As for the second proposal, Congress granted the Corps no rulemaking authority under SMCRA. The Corps has no authority to determine when an ephemeral stream becomes an intermittent stream or a perennial stream for purposes of SMCRA, and OSMRE cannot by regulation give the Corps such authority.

2. The Proposed Rule incorporates an illegal definition of "waters of the United States."

OSMRE's proposal to adopt the EPA and Corps' recently promulgated definition of "waters of the United States" is unlawful. To begin with, the term "waters of the United States" comes from the CWA, a statute under which OSMRE has no authority or responsibility. 33 U.S.C. §§ 1344, 1362(7). Moreover, as explained by well over half of the nation's States in several cases currently being litigated around the country, the definition of "waters of the United States" that OSMRE now proposes to adopt violates both the CWA and U.S. Supreme Court precedent. *See, e.g.*, Am. Compl., *Georgia v. McCarthy*, No. 2:15-cv-00079 (S.D. Ga.); Compl., *U.S. Chamber of Commerce v. U.S. E.P.A.*, No. 4:15-cv-00386 (N.D. Okla.); Compl., *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059 (D. N.D.); Compl., *Ohio v. U.S. Army Corps of Eng'rs*, No. 2:15-cv-2467 (S.D. Ohio); Compl., *Texas v. U.S. E.P.A.*, No. 3:15-cv-00162 (S.D. Tex.). In *Rapanos*, a plurality of the Supreme Court concluded that only relatively permanent bodies of water and waters with a continuous surface connection to those waters fall within the

CWA. 547 U.S. at 739-42. Casting the fifth vote, Justice Kennedy wrote a concurring opinion in which he concluded that only navigable waters and those with a "significant nexus" to those waters fall within the CWA. *Id.* at 779. The definition of "waters of the United States" that OSMRE has proposed to adopt flunks both of these tests: it exceeds federal jurisdiction under statute and under the Constitution. That definition unlawfully includes broad swaths of intrastate waters, and sometimes-wet lands, that are connected to navigable interstate waters only after a once in a hundred year rainstorm. It also improperly includes isolated waters within an arbitrary distance of navigable waters and broadly-defined "tributaries" that carry any amount of water to navigable waters.

3. The Proposed Rule creates redundant water-quality requirements.

The Proposed Rule's water-quality requirements are redundant. Any conditions imposed on a coal-mining operation by a Clean Water Act permit would be subject to enforcement authority by both the CWA regulatory authority and the SMCRA regulatory authority. *See* 80 Fed. Reg. 44,515 (proposed July 27, 2015). Such enforcement would place another burden on States already regulating coal-mining operations through the CWA, would burden industry with duplicative regulation, would be a tremendous waste of government resources, and could lead to inconsistent interpretations of applicable laws. The Proposed Rule invites comment on whether permit conditions under the CWA should be directly enforceable under SMCRA, or whether the Proposed Rule should be considered informational in nature in referencing Clean Water Act requirements. *See* 80 Fed. Reg. 44,549 (proposed July 27, 2015). OSMRE is not statutorily empowered to enforce the CWA.

4. The Proposed Rule illegally conditions SMCRA permits on obtaining CWA permits.

The Proposed Rule adds a new permit condition requiring mine operators to obtain all necessary CWA permits, certifications, and authorizations before the SMCRA permit can be approved. 80 Fed. Reg. 44,590 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 773.17(h)). Further, it requires the regulatory authority to "take enforcement action if the permittee does not obtain all necessary Clean Water Act authorizations, certifications, and permits before beginning any activity under the SMCRA permit that also requires approval or authorization under the Clean Water Act." 80 Fed. Reg. 44,515 (proposed July 27, 2015). Current regulations contain no such permit condition. 30 C.F.R. § 773.17. OSMRE initially proposed a similar provision in 2008, but then rejected the proposal in response to comments about its illegality and impracticality. 73 Fed. Reg. 75,842, 75,878 (proposed Dec. 12, 2008). OSMRE concluded at that time that, "we believe that maintaining the distinction between the SMCRA and Clean Water Act regulatory programs is both administratively and legally appropriate." *Id.* at 75,821. The Proposed Rule unjustifiably contravenes that prior proper ruling.

The Proposed Rule goes beyond OSMRE's legal authority in requiring regulatory authorities to enforce CWA permits. SMCRA was not designed to displace or modify the CWA in any way; as noted, "[n]othing in [SMCRA] shall be construed as superseding, amending, modifying, or repealing" the Clean Water Act. 30 U.S.C. § 1292. OSMRE's proposal seeks to

modify the enforcement procedures outlined in the CWA, 33 U.S.C. §§ 1311-1346, by adding an enforcement mechanism and an additional enforcement entity. This was not the purpose of SMCRA. As OSMRE has recognized, "nothing in SMCRA provides the SMCRA regulatory authority with jurisdiction over the Clean Water Act or the authority to determine when a permit or authorization is required under the Clean Water Act. . . . In addition, nothing in the Clean Water Act vests SMCRA regulatory authorities with the authority to enforce compliance with the permitting and certification requirements of that law." 73 Fed. Reg. 75,842 (proposed Dec. 12, 2008). OSMRE does not have the authority under either SMCRA or the CWA to allow, let alone require, the SMCRA regulatory authority to enforce the provisions of the CWA.

5. The Proposed Rule duplicates the Corps' stream-mitigation regulations under CWA Section 404.

OSMRE's stream-mitigation proposal duplicates activities exclusively conducted by the authorized regulatory authority under the CWA as interpreted by federal authorities. When a mine operator proposes to mine in or through a perennial or intermittent stream or stream segment and receives a permit allowing it to do so, the Proposed Rule would require the operator to restore the form and ecological function of the stream segment. 80 Fed. Reg. 44,656 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 816.57). But Section 404 of the CWA already prohibits mine operators from discharging dredge and fill material into "waters of the United States" without a permit from the Corps. 33 U.S.C. § 1344. And in implementation of this provision, the Corps has adopted regulations requiring permit holders to restore disturbed streams. 33 C.F.R. §§ 332.1–.8. The stream mitigation proposal thus exceeds OSMRE's authority by reaching into an area of regulation within CWA authority as claimed by the Corps.

6. The Proposed Rule conflicts with federal agency interpretations of the CWA by prohibiting off-site restoration.

Proposed 30 C.F.R. § 780.28, 80 Fed. Reg. 44,610, does not allow any flexibility for off-site mitigation or other measures to compensate for potential stream impacts that are authorized under the CWA as currently interpreted by federal agency authorities. Ohio and other States allow off-site restoration if the applicant shows on-site restoration is not possible. Under the Proposed Rule, an operator cannot impact a stream unless it is restored on-site. States would no longer have the discretion to issue a mining permit by utilizing off-site restoration. Therefore, the Proposed Rule effectively eliminates an off-site restoration option for coal mines and places an unreasonable burden on the coal-mining industry and the States. In some instances, on-site restoration is a practical impossibility.

B. The Proposed Rule imposes unnecessary dual regulation of endangered species by creating requirements exceeding the Endangered Species Act.

The Proposed Rule significantly expands the current SMCRA performance standards with respect to fish and wildlife protection. It would require coal-mining operations to include in their permit applications and in their fish-and-wildlife protection and enhancement plans those species that are *not listed as threatened or endangered* but merely proposed for listing as threatened or endangered. *See* 80 Fed. Reg. 44,565, 44,620 (proposed July 27, 2015) (to be

codified at 30 C.F.R. § 784.16); *see also id.* at 44,665, 44,690. The current SMCRA performance standards include a prohibition on issuing a surface mine permit that would jeopardize the continued existence of any endangered or threatened species or result in destruction or adverse modification of critical habitat. 30 C.F.R. § 816.97. The Proposed Rule would expand these regulations by requiring that permit applications include information on species identified as "sensitive" by a state or federal agency. 80 Fed. Reg. 44,593 (proposed July 27, 2015) (to be codified at 30 C.F.R. § 779.20). Likewise, permit applications would be required to include information on *state* endangered species. *Id.* at 44,614 (to be codified at 30 C.F.R. § 783.20).

The Proposed Rule's expansion of the endangered and threatened species requirements of the performance standards is contrary to the Endangered Species Act. The purpose of the Endangered Species Act is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species . . . ." 16 U.S.C. § 1531(b). The Endangered Species Act provides that agencies other than the Fish and Wildlife Service must seek to conserve endangered and threatened species, but does not provide authority regarding "sensitive" species that are not threatened or endangered. *Id.* States may opt, pursuant to their own statutes, to provide protections for sensitive species, but this attempt to expand SMCRA's performance standards to cover species not listed as threatened or endangered is unnecessary, costly, and inconsistent with the Endangered Species Act.

IV. The Proposed Rule Raises Grave Constitutional Questions By Exceeding The Powers Authorized To The Federal Government And Intruding On The Powers Reserved To The States And The People.

The Proposed Rule violates fundamental constitutional principles. For this reason, even if the Proposed Rule were not inconsistent with SMCRA, which as demonstrated above it is, it would not be entitled to any judicial deference under *Chevron U.S.A., Inc. v. Natural Res. Def., Council, Inc.*, 467 U.S. 387 (1984). *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*") ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised . . . and therefore reject the request for administrative deference."); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995). The Proposed Rule raises three serious constitutional issues.

First, the Proposed Rule raises serious separation-of-powers concerns. OSMRE acts as though it has the legislative authority to rewrite SMCRA. It does not. OSMRE's duty is to execute the law duly enacted by Congress through SMCRA—not to assume *lawmaking* power. The Proposed Rule's definition of "material damage to the hydrologic balance outside the permit area," for example, and its new requirements for assessing impacts to ephemeral streams are sweeping attempts at statutory amendment. Likewise, the rule targets longwall mining and mountain top mining through new federally imposed requirements that effectively will require the denial of permits and remove state primacy and control over the States' federally approved programs. These provisions, too, go well beyond OSMRE's statutory authority in SMCRA. Accordingly, "[w]ere [courts] to recognize the authority claimed by [OSMRE] in the [Proposed]

Rule, [they] would deal a severe blow to the Constitution's separation of powers." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014).

Second, the Proposed Rule raises serious Commerce Clause concerns. Concurring in the judgment in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), then-Justice Rehnquist rightly suggested that, through SMCRA, "there can be no doubt that Congress in regulating surface mining has stretched its authority to the 'nth degree.'" *Id.* at 311 (Rehnquist, J., concurring in the judgment). The Proposed Rule stretches SMCRA even further beyond the bounds of Congress' Commerce Clause authority.

Third, the Proposed Rule raises serious federalism concerns. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or the people." U.S. Const. amend. X. Among the rights reserved to the States is the authority to regulate land use and water resources. *SWANCC*, 531 U.S. at 174. In SMCRA, Congress expressed its intention to honor this mandated state primacy by granting the States "primary government responsibility" over surface mining and reclamation operations. 30 U.S.C. § 1201(f). The Proposed Rule violates the States' Tenth Amendment rights, as recognized in SMCRA, by displacing the States' authority to regulate intrastate land and water resources. Because of these federalism concerns, the Proposed Rule is an impermissible reading of SMCRA.

In sum, the Proposed Rule lacks any legal basis, violates the Constitution, and should be withdrawn.

Very respectfully yours,

Mike DeWine

MIKE DEWINE
OHIO ATTORNEY GENERAL
30 East Broad Street
Columbus, Ohio 43215

Patrick Morrisey

PATRICK MORRISEY
WEST VIRGINIA ATTORNEY GENERAL
State Capitol
1900 Kanawha Blvd. East
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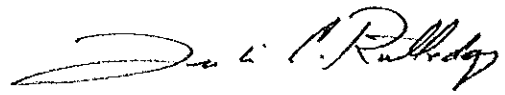

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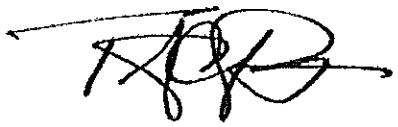

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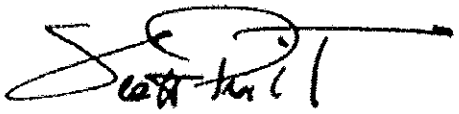

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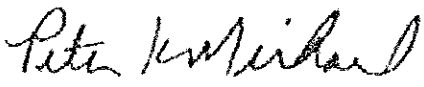

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Cheyenne, WY 82002

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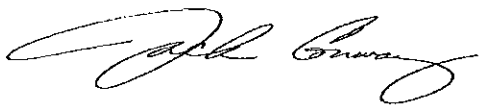
Phoenix, Arizona 85007



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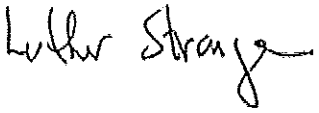
Madison, Wisconsin 53702



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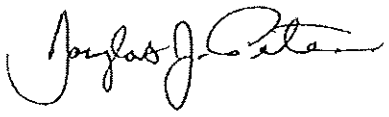

DOUGLAS PETERSON
NEBRASKA ATTORNEY GENERAL
2115 State Capitol Building
Lincoln, Nebraska 68509

Anderson, Ryan

From: Bailey, Michael
Sent: Wednesday, October 28, 2015 12:10 PM
To: Anderson, Ryan
Subject: FW: FYI

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Kim MacEachern [mailto:Kim.MacEachern@apaac.az.gov]
Sent: Wednesday, October 28, 2015 11:59 AM
To: Bailey, Michael
Subject: FYI

Hi Mike. Long time, no see. Hope everything is going well. I guess I missed you at the Como event. Very happy from Greg.
Doug MacEachern will be leaving the Arizona Republic as of Friday, 10/30/15 (he took the buyout under duress). Just thought your office might want to know that he will be looking for other professional opportunities.

Kim MacEachern, Staff Attorney

1951 W. Camelback Road #202
Phoenix, AZ 85015
602-542-7200
602-882-0313 (mobile)
http://www.apaac.az.gov

Empowering Arizona's prosecutors to administer justice and contribute to public safety through training and advocacy.

Anderson, Ryan

From: Bailey, Michael
Sent: Tuesday, October 27, 2015 2:07 PM
To: Anderson, Ryan
Subject: RE: follow up

Start with Terry Harrison

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Anderson, Ryan
Sent: Tuesday, October 27, 2015 12:35 PM
To: Bailey, Michael
Subject: FW: follow up

Who should I direct this inquiry to with Brock now gone.

Would like to get this to Howie.

From: - Capitol Media Services [mailto:capmedia@hotmail.com]
Sent: Tuesday, October 27, 2015 6:59 AM
To: Anderson, Ryan
Subject: follow up

hi. wasn't sure you saw message yesterday.

looking for filings by your office which were due on the state's response to the appeal by the yarnell homeowners.

thanks.

-- howie
capmedia@hotmail.com
602-[redacted]

Anderson, Ryan

From: Bailey, Michael
Sent: Tuesday, October 27, 2015 11:14 AM
To: Anderson, Ryan
Subject: FW: Letter to Obama Requesting NPL Listing
Attachments: 2015.9.7 Ltr fr RBegaye to GMcCarthy & JHickenlooper.pdf; ATT00001.htm; CLAIM FOR DAMAGE FORM-FINAL.docx; ATT00002.htm; 2015-10-22 Letter to President Obama re NPL listing.docx; ATT00003.htm

Michael G. Bailey
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Office of the Arizona Attorney General
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Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Monday, October 26, 2015 10:50 AM
To: Bailey, Michael; Medina, Rick
Subject: Fwd: Letter to Obama Requesting NPL Listing

Attorney General Mark Brnovich
Sent from my iPhone

Begin forwarded message:

> **From:** Ethel Branch <ebranch@nndoj.org>
> **Date:** October 25, 2015 at 10:13:48 PM MST
> **To:** "mark.brnovich@azag.gov" <mark.brnovich@azag.gov>
> **Subject: Letter to Obama Requesting NPL Listing**
>
> Good evening AG Brnovich,
>
> Here is our draft NPL listing request directed to President Obama, along with the request we sent to Administrator McCarthy and the CO Governor. It would be wonderful to have Arizona join this as well. Do you think Governor Ducey would have any interest in joining this letter as a signatory? I've also reached out to my contacts in NM to see if Governor Martinez might also join.
>
> Best regards,

Ethel Branch, Attorney General
Navajo Nation Department of Justice
Office of the Attorney General
PO Box 2010
Window Rock, Arizona 86515
928 871-6345/6205
ebranch@nndoj.org

THE NAVAJO NATION

RUSSELL BEGAYE PRESIDENT
JONATHAN NEZ VICE PRESIDENT

September 7, 2015

Gina McCarthy, Administrator
United States Environmental Protection Agency
Office of the Administrator, Mail Code: 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

John W. Hickenlooper, Governor
State of Colorado
200 E. Colfax Ave., #136
Denver, CO 80203

Re: Request to Place Upper Animas Mining District on National Priorities List

Dear Administrator McCarthy and Governor Hickenlooper:

We request your attention to the important and urgent matter of protecting the Navajo Nation from upstream threats of contamination coming from the 140-square-mile Upper Animas Mining District (District).[1] Specifically, we request that you immediately place the District on the CERCLA National Priorities List (NPL) so that prompt action may be taken to address and contain the long-standing risks to human health and the environment posed by the historic mining and processing activities in the District. As the Gold King Mine (GKM) spill demonstrated, the District and its over 300 abandoned hard rock mines[2] pose a looming threat to us downstream communities, and it is a threat that is far beyond the control of the local community. It is well past time for the United States Environmental Protection Agency (EPA) to step in and remediate the site in a meaningful manner to protect downstream communities. The first step in that process is to list the Upper Animas Mining District on the NPL. This will provide the much needed funding and technical assistance to responsibly address the threats posed by the District.

On August 5, 2015, the EPA and other potentially responsible parties caused millions of gallons of acid mine drainage—containing toxic substances such as aluminum, lead, zinc, arsenic, cadmium, manganese, iron, vanadium, and copper—to spill from the Gold King Mine outside of Silverton, Colorado into Cement Creek, which flows into the Animas River and ultimately reaches the San Juan River. In a flash the GKM spill illuminated the significant risk that District mines

[1] http://www2.epa.gov/region8/upper-animas-mining-district
[2] *Id.*

present to the people, animals, culture, ecosystem and economy of the Four Corners region. Despite the very real and significant risk posed by the District, it is not currently NPL-listed. The current system of management of the hazardous substances in the District does not protect the people or the environment of the rest of the Four Corners region. The health and well-being of the region should be of primary importance to the EPA. The time has come for the Upper Animas Mining District to be given NPL status.

In the 1990s, "EPA and the Colorado Department of Public Health and Environment (CDPHE) conducted a Superfund Site Assessment of the [District]."[3] The assessment concluded "that water quality standards were not achieved" in the District[4]—which includes private, federal, and state lands, and the town of Silverton[5]—and identified the District's "severe impacts to aquatic life in the Upper Animas and its tributaries."[6] Despite the serious harm being caused by the District, EPA postponed listing the District on the NPL because the local community asked for a "community-based collaborative effort" that would allow local cleanup and mitigation efforts to proceed "as long as progress was being made to improve the water quality of the Animas River."[7] In 2005, the "water quality ha[d] declined significantly" in the area despite the combined efforts of the local community and EPA.[8]

In 2008, EPA performed another NPL assessment, this time on the Upper Cement Creek alone, and the study again confirmed "that the area would qualify for inclusion" on the NPL.[9] Despite the carve-out of Silverton from the area of study and the additional confirmation that the GKM area should be listed on the NPL, "EPA [again] postponed efforts to include the area on the National Priorities List," "after receiving additional community input."[10] Yet the City of Durango, the Southern Ute Indian Tribe, the State of New Mexico, the Navajo Nation, the Ute Mountain Ute Tribe, the State of Utah, and the State of Arizona are all downstream interested parties whose input matters with respect to toxic releases and the threat thereof from GKM and the District. Our input and concerns should matter to you as you contemplate listing the District on the NPL.

The chemicals found in the District pose significant human health risk, such as cardiovascular, respiratory, gastrointestinal and reproductive systems. One early post-incident report from the EPA indicated that "arsenic levels in the Durango area of the Animas River were, at their

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[3] http://www2.epa.gov/sites/production/files/2015-08/documents/goldkingminewatershedfactsheetbackground.pdf at 2.
[4] *Id.*
[5] http://www2.epa.gov/region8/upper-animas-mining-district.
[6] http://www2.epa.gov/sites/production/files/2015-08/documents/goldkingminewatershedfactsheetbackground.pdf at 2.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*

peak, 300 times the normal level, and lead was 3,500 times the normal level."[11] Another report of EPA data indicated that "lead was found below Silverton's 14th Street bridge at more than 200 times higher than the acute exposure limit for aquatic life, and 3,580 times higher than federal standards for human drinking water. Levels of arsenic were more than 24 times the exposure limit for fish and 823 times the level for human ingestion. Cadmium was found at more than six times the aquatic limit, 33 times that for humans."[12]

The GKM spill in the Animas and San Juan rivers has imposed an unmitigated crisis upon the Navajo Nation. Coursing through 215 miles of the Navajo Nation, the San Juan River is a critical water source and significant spiritual icon for the Navajo Nation. EPA's determination that they "do not anticipate adverse health effects from exposure to the metals detected in the river"[13] is premature because "[t]he effects of lead may not be seen right away or may not be noticed for many years,"[14] and is indeed contradictory to the EPA's statements to the Navajo Nation made immediately after the spill that we will be dealing with these effects "for decades."[15] The Navajo Nation is gravely concerned with the spill's yet unknown impacts to river sediment and adjacent waterways, and is especially concerned about the ongoing releases from the District that U.S. Geological Survey measures to be at a rate of 610 gallons per minute.[16] Due to the long-term risk that these chemicals present, as well as the continued significant releases coming from the GKM and the District, estimated to now exceed a total release of over 27 million gallons, an NPL listing is well warranted.

The threats posed by the District are felt by the many people connected to the District through the San Juan River watershed, a significant singular surface water supply to the Four Corners region. As one of the impacted jurisdictions, the Navajo Nation's impacts are felt most significantly by our farmers and ranchers, and our traditional people. Many Navajo people rely on the San Juan River to sustain life through irrigating our farmed goods and watering our livestock. Our families then consume these fruits of their labor. The San Juan River also sustains our culture by watering the many unique species of Navajo corn plants that are critical to our prayers and ceremonies. Our traditions and culture are also kept alive by our San Juan River valley farmers' growing of heirloom Navajo fruits and vegetables from seed strains steadily refined by our people since time immemorial. The River is also an important male deity to our people. Its contamination by the GKM has been a significant spiritual blow.

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[11] http://www.usatoday.com/story/news/2015/08/09/navajo-nation-epa-spill/31384515/
[12] http://m.startribune.com/nation/321518301.html
[13] http://www2.epa.gov/goldkingmine/frequent-questions-related-gold-king-mine-response EPA frequently asked questions
[14] http://www.atsdr.cdc.gov/csem/lead/docs/lead_patient-education.pdf at 1.
[15] Telephone Call with Joan Card, Senior Policy Advisor for USEPA Region 8, and Shaun McGrath, Administrator for USEPA Region 8 (Aug. 7, 2015).
[16] http://fox6now.com/2015/08/13/gold-king-mine-owner-i-foresaw-disaster-before-epa-spill-into-animas-river-in-colorado/

Contamination of the River is also a blow to our economy. The Nation faces a daunting unemployment rate of 42 percent.[17] Yet along the San Juan River, many of our people are able to make a life for themselves and support their families through farming and ranching. According to the 2012 Census of Agriculture there are approximately 1,500 farms in the Shiprock Agency alone. The Bureau of Indian Affairs estimates that there are about 1,175 grazing permit holders in the region. Many of our farmers create additional economic value for themselves by carefully growing profitable organic crops. Some of our ranchers produce grass-fed and organic beef product. Their livelihoods have been significantly disrupted by the GKM spill.

The River has always been of the upmost import to our people. Indeed, when our leaders negotiated our release from internment by the federal government at Fort Sumner in the Treaty of 1868, they were certain to include the San Juan River and its adjacent rich farmlands within our Nation's boundary. The reliance of our people on the River and the significance of the River to our people cannot be overstated.

The waste from the mines in the Upper Animas Mining District is also harmful to wildlife found in the Animas River below Cement Creek. In April, EPA released a *Draft Baseline Ecological Risk Assessment Upper Animas Mining District*, which documented the harmful impacts from the combination of mining and naturally occurring hazardous substances.[18] Among the various wildlife that are impacted, the report found that "[m]etals concentrations in the Animas River below Mineral Creek have eliminated virtually all fish down to Elk Creek and all cutthroat and rainbow trout down to Cascade Creek, where only a small community of brook and brown trout exist."[19] Further, the study found "that the benthic invertebrate community is impaired in most sections of the Animas River, Cement Creek and Mineral Creek."[20] The Upper Animas Mining District is causing portions of the Animas River to be uninhabitable for certain wildlife—and the generally negative impacts on wildlife are even broader. The Upper Animas Mining District should be a candidate for listing on the NPL due to its impacts on wildlife alone.

The danger of a spill in the Upper Animas Mining District will continue to exist under the current management scheme, and the spill on August 5 was not an isolated incident. In fact, there were two previous releases of hazardous mine waste from the area in 1975 and 1978. In 1975, "50,000 tons of heavy-metal-loaded tailings" were dumped into the Animas River.[21] And in 1978, "500 million gallons" of water contaminated with "tailings and sludge" spilled into the Animas

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[17] http://navajobusiness.com/fastFacts/Overview.htm
[18] http://www2.epa.gov/sites/production/files/2015-06/documents/upper-animas-bera-fact-sheet-april-2015.pdf at 1
[19] *Id.* at 2.
[20] *Id.*
[21] http://www2.epa.gov/sites/production/files/2015-08/documents/goldkingminewatershedfactsheetbackground.pdf at 1.

River.[22] The damage caused by the Upper Animas Mining District has gone on far too long, and the health and well-being of our people cannot endure a repeat of the GKM spill. Please, do the right thing for us downstream communities. List the Upper Animas Mining District on the NPL. The current approach is inadequate to protect our people and environment. The delay in listing the site can only cause harm to our region. Please contact Jackson Brossy, Executive Director, Navajo Nation Washington Office, 202-682-7390 or jbrossy@nnwo.org.

Respectfully,

THE NAVAJO NATION

Russell Begaye, President

Jonathan Nez, Vice-President

Cc: Mayor Christine M. Tookey, City of Silverton, Colorado
Chairman Ernest Kuhlman, Board of County Commissioners of San Juan County, Colorado
Mayor Sweetie Marbury, City of Durango, Colorado
Chairman Clement Frost, Southern Ute Indian Tribe
Governor Susana Martinez, State of New Mexico
Chairman Manuel Heart, Ute Mountain Ute Indian Tribe
Governor Gary Herbert, State of Utah
Governor Doug Ducey, State of Arizona
U.S. Senator Tom Udall
U.S. Senator Martin Heinrich
U.S. Senator John McCain
U.S. Senator Jeff Flake
U.S. Senator Orrin Hatch
U.S. Senator Mike Lee
U.S. Senator John Barrasso
U.S. Senator John Tester
U.S. Representative Ann Kirkpatrick
U.S. Representative Paul Gosar
U.S. Representative Rob Bishop
U.S. Representative Jason Chaffetz
U.S. Representative Don Young

[22] *Id.*

Anderson, Ryan

From: Bailey, Michael
Sent: Tuesday, October 27, 2015 10:40 AM
To: Brnovich, Mark
Cc: Medina, Rick; Anderson, Ryan
Subject: DOC

I'm not a big fan of the first two tries. Not a big fan of this one either, but I'm trying to push it in this direction.

In all phases of its efforts to import the execution drugs that were seized by the FDA in July, 2015, the Arizona Department of Corrections was represented by outside counsel and not by the Attorney General's Office. Mark Brnovich is a supporter of capital punishment, but understands that this "ultimate" punishment should only be undertaken with steadfast adherence to the law. For this reason, the Attorney General's Office will not support any execution process that involves the drugs at issue in the absence of a court order that unequivocally vindicates the legality of the drugs' use.

Michael G. Bailey
Chief Deputy / Chief of Staff
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Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Monday, October 26, 2015 1:17 PM
To: Draye, Dominic; Watkins, Paul; Anderson, Ryan; Medina, Rick
Subject: RE: Final version review

What do you call the wrongful intrusion into the passive verb. Split infinitive doesn't seem right, in no small part because the verb's not infinitive.

Michael G. Bailey
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Phoenix, AZ 85007
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602-542-4085 Fax

michael.bailey@azag.gov

From: Draye, Dominic
Sent: Monday, October 26, 2015 12:59 PM
To: Watkins, Paul; Bailey, Michael; Anderson, Ryan; Medina, Rick
Subject: RE: Final version review

It pains me to accept a compliment for a passive verb, but we might as well use them correctly.

Dominic E. Draye
Deputy Solicitor General
Office of the Attorney General
1275 W. Washington, Phoenix, AZ 85007
DIRECT 602.542.8255 | FAX 602.542.8308

From: Watkins, Paul
Sent: Monday, October 26, 2015 12:47 PM
To: Bailey, Michael; Anderson, Ryan; Draye, Dominic; Medina, Rick
Subject: RE: Final version review

I think "have" is still part of the verb, but Dom can certainly correct me. My initial (and then rejected) thought was "have been made historically" to emphasize the grandeur of the regulation....

From: Bailey, Michael
Sent: Monday, October 26, 2015 12:43 PM

To: Watkins, Paul; Anderson, Ryan; Draye, Dominic; Medina, Rick
Subject: RE: Final version review

Yes – you each caught the split infinitive, or whatever that error has been historically called.
Ryan, please adopt one of those two solutions on paragraph 1. Then we're good to go.

Michael G. Bailey
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michael.bailey@azag.gov

From: Watkins, Paul
Sent: Monday, October 26, 2015 12:40 PM
To: Anderson, Ryan; Bailey, Michael; Draye, Dominic; Medina, Rick
Subject: RE: Final version review

Two minor edits.

From: Anderson, Ryan
Sent: Monday, October 26, 2015 12:33 PM
To: Bailey, Michael; Watkins, Paul; Draye, Dominic; Medina, Rick
Subject: RE: Final version review

Consistency on "SB1168 / SB 1168" -> I'll make sure the formatted version removes the gap between SB and 1168 in the second reference.

From: Bailey, Michael
Sent: Monday, October 26, 2015 12:31 PM
To: Anderson, Ryan; Watkins, Paul; Draye, Dominic; Medina, Rick
Subject: Final version review

Mark finds the attached version acceptable. However, as there were no fewer than 5 cooks for this broth, he'd like each of us to review for typos, grammar, major problems etc. This letter will be going not just to Flake, but to all AGs. Please review ASAP and send back your clearance or problems.

Michael G. Bailey
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602-542-4085 Fax

michael.bailey@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Monday, October 26, 2015 12:40 PM
To: Draye, Dominic; Anderson, Ryan; Watkins, Paul; Medina, Rick
Subject: RE: Final version review

Thanks – I'm good with all of Dom's suggestions. I thought there was a capital S lurking in there somewhere, but missed it even when looking for it.

Michael G. Bailey
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602-542-4085 Fax

michael.bailey@azag.gov

From: Draye, Dominic
Sent: Monday, October 26, 2015 12:38 PM
To: Bailey, Michael; Anderson, Ryan; Watkins, Paul; Medina, Rick
Subject: RE: Final version review

Looks pretty good. Most of these are stylistic.

Dominic E. Draye
Deputy Solicitor General
Office of the Attorney General
1275 W. Washington, Phoenix, AZ 85007
DIRECT 602.542.8255 | FAX 602.542.8308

From: Bailey, Michael
Sent: Monday, October 26, 2015 12:31 PM
To: Anderson, Ryan; Watkins, Paul; Draye, Dominic; Medina, Rick
Subject: Final version review

Mark finds the attached version acceptable. However, as there were no fewer than 5 cooks for this broth, he'd like each of us to review for typos, grammar, major problems etc. This letter will be going not just to Flake, but to all AGs. Please review ASAP and send back your clearance or problems.

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michael.bailey@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Monday, October 26, 2015 12:34 PM
To: Anderson, Ryan
Subject: RE: Final version review

So just to be clear. It's 1168, not 1668?

Michael G. Bailey
Chief Deputy / Chief of Staff
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Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Anderson, Ryan
Sent: Monday, October 26, 2015 12:33 PM
To: Bailey, Michael; Watkins, Paul; Draye, Dominic; Medina, Rick
Subject: RE: Final version review

Consistency on "SB1168 / SB 1168" -> I'll make sure the formatted version removes the gap between SB and 1168 in the second reference.

From: Bailey, Michael
Sent: Monday, October 26, 2015 12:31 PM
To: Anderson, Ryan; Watkins, Paul; Draye, Dominic; Medina, Rick
Subject: Final version review

Mark finds the attached version acceptable. However, as there were no fewer than 5 cooks for this broth, he'd like each of us to review for typos, grammar, major problems etc. This letter will be going not just to Flake, but to all AGs. Please review ASAP and send back your clearance or problems.

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1275 W. Washington Street
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602-542-4085 Fax

michael.bailey@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Monday, October 26, 2015 12:31 PM
To: Anderson, Ryan; Watkins, Paul; Draye, Dominic; Medina, Rick
Subject: Final version review
Attachments: Federalism and Gambling Flake Letter - Newest Draft.docx

Mark finds the attached version acceptable. However, as there were no fewer than 5 cooks for this broth, he'd like each of us to review for typos, grammar, major problems etc. This letter will be going not just to Flake, but to all AGs. Please review ASAP and send back your clearance or problems.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

Title/Name
Address
Address

October __, 2015

Dear Senator Flake:

I am writing to register my opposition to SB1668. I believe that the best place to determine gambling policy -- prohibition, regulation or something in between -- is at the state level – where such decisions have been historically made.

With the current proliferation of gambling over the Internet, including the rise of Daily Fantasy Sports games (DFS), states must consider both the legality and possible regulation of such activities. Recently, some states have moved to petition the federal government to step in with national laws to address these issues, which I believe is a mistake. As someone who has spent a great deal of my career regulating gambling as the Director of the Arizona Department of Gaming, and prosecuting gambling crimes as an Assistant United States Attorney, I would like to offer the following information for your consideration.

Both the structure of the Constitution and the Tenth Amendment reserve to the states the exercise of their traditional police powers. See, e.g., *Roth v. U.S.*, 354 U.S. 476, 493 (U.S. 1957). Gambling is an area traditionally regulated pursuant to the police power, and has long been recognized as such by the courts. Beginning with *Champion v. Ames*, 188 U.S. 321, 357 (1903), the Supreme Court has acknowledged that "a state

may, for the purpose of guarding the morals of its own people," regulate or even forbid gambling "within its limits." The role of Congress, consistent with principles of federalism, is confined to the regulation of interstate wagering. *Id.* ("Congress . . .may prohibit the carrying of lottery tickets from one state to another."). The insight from *Champion* has not eroded with passing decades. *See, e.g., United States v. Wall*, 92 F.3d 1444, 1451 n. 16 (6th Cir. 1996).

Likewise, the States have traditionally asserted clear ownership of this police power over gambling. *See, e.g., Bird v. State, 908 P.2d 12, 20 (Ariz. Ct. App. 1995)* ("The government has the constitutional power to regulate or prohibit gambling in general."); *Army Navy Bingo, Garrison No. 2196 v. Plowden*, 314 S.E.2d 339, 340 (S.C. 1984) ("[T]he State's power to suppress gambling is practically unrestrained."); *State v. Thompson*, 60 S.W. 1077, 1078 (Mo. 1901) ("[T]he State may, in the exercise of its police powers, prohibit [gambling] altogether.").

To be sure, there are problems with SB 1668 that extend beyond the principle of federalism. For example, the bill might not effectively address DFS, as it contains a sports exception; the bill could hamper the ability of states to offer lottery and other games on the Internet – which many are now safely providing, to generate revenues for public needs like education, property tax reform and advanced consumer protections; and the bill does nothing to help individual states address such challenges as Internet sweepstakes, which have evolved through state sweepstakes laws.

You and I agree that the principle of federalism should be a major factor in any assessment of federal legislation. We know that not every problem warrants a federal solution. Internet gambling is a matter for state regulation.

Respectfully,

Mark Brnovich

Attorney General

Anderson, Ryan

From: Bailey, Michael
Sent: Monday, October 26, 2015 12:22 PM
To: Brnovich, Mark
Cc: Medina, Rick; Anderson, Ryan
Subject: RE: Federalism Paragraph
Attachments: Federalism and Gambling Flake Letter - Newest Draft.docx

revisions

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Monday, October 26, 2015 11:55 AM
To: Bailey, Michael
Cc: Medina, Rick; Anderson, Ryan
Subject: Re: Federalism Paragraph

It seems like we softened federalism angle too much. Shouldn't we have a line in there, such as---not every problem requires a federal solution. Police powers were traditionally exercised by that states and that's what the 10th amendment provides. Especially Should we throw a few more state case references in there---including SC and MO?

Attorney General Mark Brnovich
Sent from my iPhone

On Oct 26, 2015, at 11:48 AM, Bailey, Michael <Michael.Bailey@azag.gov> wrote:

> attached
>
> **Michael G. Bailey**
> Chief Deputy / Chief of Staff
> Office of the Arizona Attorney General
> 1275 W. Washington Street
> Phoenix, AZ 85007
> 602-542-8080 Office
> 602-542-4085 Fax

michael.bailey@azag.gov

NOTICE: This email (and any attachments) may contain PRIVILEGED OR CONFIDENTIAL information and is intended only for the use of the specific individual(s) to whom it is addressed. If you have received this email in error, please immediately notify Valerie Neumann at 602-542-8017 and delete the original email. Thank you.

From: Brnovich, Mark
Sent: Monday, October 26, 2015 11:37 AM
To: Bailey, Michael
Cc: Medina, Rick; Anderson, Ryan
Subject: Re: Federalism Paragraph

Can u send me whatever the "final" version is u are working on. This didn't incorporate changes I mentioned to mike.

Attorney General Mark Brnovich
Sent from my iPhone

On Oct 26, 2015, at 11:35 AM, Bailey, Michael <Michael.Bailey@azag.gov> wrote:

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Draye, Dominic
Sent: Monday, October 26, 2015 11:34 AM
To: Bailey, Michael
Subject: RE: Federalism Paragraph

How about this?

Dominic E. Draye
Deputy Solicitor General
Office of the Attorney General
1275 W. Washington, Phoenix, AZ 85007
DIRECT 602.542.8255 | FAX 602.542.8308

recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

From: Bailey, Michael
Sent: Monday, October 26, 2015 11:06 AM
To: Draye, Dominic
Subject: FW: Federalism Paragraph

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Medina, Rick
Sent: Monday, October 26, 2015 10:32 AM
To: Bailey, Michael; Anderson, Ryan
Cc: Brnovich, Mark; Watkins, Paul
Subject: RE: Federalism Paragraph

Ok, good points. Thanks!

Updated version attached.

From: Bailey, Michael
Sent: Monday, October 26, 2015 10:27 AM
To: Medina, Rick; Anderson, Ryan
Cc: Brnovich, Mark; Watkins, Paul
Subject: RE: Federalism Paragraph

Rick,

First line should say "attorneys general" – not sure whether it should be capitalized.

Only other concern on my end is the penultimate line. Ie whether it's needed.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office

602-542-4085 Fax

michael.bailey@azag.gov

NOTICE: This email (and any attachments) may contain PRIVILEGED OR CONFIDENTIAL information and is intended only for the use of the specific individual(s) to whom it is addressed. If you have received this email in error, please immediately notify Valerie Neumann at 602-542-8017 and delete the original email. Thank you.

From: Medina, Rick
Sent: Monday, October 26, 2015 10:21 AM
To: Bailey, Michael; Anderson, Ryan
Cc: Brnovich, Mark; Watkins, Paul
Subject: RE: Federalism Paragraph

Updated draft ... formatted as letter to Senator Flake. May still need some fine tuning, but getting close.

-R

From: Bailey, Michael
Sent: Monday, October 26, 2015 9:29 AM
To: Medina, Rick; Anderson, Ryan
Subject: FW: Federalism Paragraph

Looks like we're making headway on the wire letter.

Where do we stand on the draft to Draft Kings/Fan Duel?

Ryan, let's go ahead and set that meeting with CCEC for this week, here if possible.

We also have a request to meet with Liburdi and Seiden, over here, to talk about abortion stuff.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Watkins, Paul
Sent: Monday, October 26, 2015 8:51 AM
To: Medina, Rick

Cc: Bailey, Michael
Subject: Federalism Paragraph

Rick,

Gambling is an area traditionally regulated by the States. *See, e.g., United States v. Wall*, 92 F.3d 1444, 1451 n. 16 (6th Cir. 1996). The States' police power in this area is broad and widely recognized. *See, e.g., Bird v. State, 908 P.2d 12, 20 (Ariz. Ct. App. 1995) (*"The government has the constitutional power to regulate or prohibit gambling in general."*); Army Navy Bingo, Garrison No. 2196 v. Plowden*, 314 S.E.2d 339, 340 (S.C. 1984) ("[T]he State's power to suppress gambling is practically unrestrained."); *State v. Thompson*, 60 S.W. 1077, 1078 (Mo. 1901) ("[T]he State may, in the exercise of its police powers, prohibit [gambling] altogether."). In fact, "[s]ince the founding of this nation, states have exercised the police power to regulate gambling." *Hest Technologies, Inc. v. State ex rel. Perdue*, 749 S.E.2d 429, 431 (N.C. 2012); *see Rousso v. State*, 204 P.3d 243, 250 (Wash. Ct. App. 2009) ("Washington has from its inception considered gambling to be an activity with significant negative effects and has always strictly regulated gambling in order to minimize those effects."), *aff'd*, 239 P.3d 1084 (Wash. 2010). This broad, longstanding police power allows States to impose regulations on gambling according to the views of their citizens, pursuant to the Tenth Amendment. *See Thomas v. Bible*, 694 F. Supp. 750, 759-60 (D. Nev. 1988) ("Licensed gaming is a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution.").

As such, the United States Department of Justice correctly interpreted the Wire Act narrowly, given that the Act intrudes on an area traditionally regulated by the States pursuant to their police power under the Tenth Amendment. Congress should not impose a sweeping federal ban on Internet gambling. Such a ban would dramatically curtail the traditional police power of the States in this area and effectively prohibit further State legislation on this issue. *See, e.g., Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551, 571-72 (D.N.J. 2013) (finding that "the fact that gambling might be considered an area subject to the States' traditional police powers" did not alter its conclusion that a state regulation on sports betting was preempted by federal statute).

The second paragraph may not be necessary. Please let me know if you have any questions,

Paul

Paul Watkins
*Licensed in California *Admission Pending in Arizona

Division Chief
Civil Litigation
Office of the Attorney General
Tel: (602) 542-8958
Fax: (602) 542-4377
paul.watkins@azag.gov

<Federalism and Gambling Flake Letter DD.docx>

<Federalism and Gambling Flake Letter - Proposed Final Draft.docx>

Title/Name
Address
Address

October ___, 2015

Dear Senator Flake:

I am writing to register my opposition to SB1668. I believe that the best place to determine gambling policy -- prohibition, regulation or something in between -- is at the state level – where such decisions have been historically made.

With the current proliferation of gambling over the Internet, including the rise of Daily Fantasy Sports games (DFS), states must consider both the legality and possible regulation of such activities. Recently, some states have moved to petition the federal government to step in with national laws to address these issues, which I believe is a mistake. As someone who has spent a great deal of my career regulating gambling as the Director of the Arizona Department of Gaming, and prosecuting gambling crimes as an Assistant United States Attorney, I would like to offer the following information for your consideration.

Both the structure of the Constitution and the Tenth Amendment reserve to the states the exercise of their traditional police powers. See, e.g., *Roth v. U.S.,* 354 U.S. 476, 493 (U.S. 1957). Gambling is an area traditionally regulated pursuant to the police power, and has long been recognized as such by the courts. Beginning with *Champion v. Ames*, 188 U.S. 321, 357 (1903), the Supreme Court has acknowledged that "a state

may, for the purpose of guarding the morals of its own people," regulate or even forbid gambling "within its limits." The role of Congress, consistent with principles of federalism, is confined to the regulation of interstate wagering. *Id.* ("Congress . . .may prohibit the carrying of lottery tickets from one state to another."). The insight from *Champion* has not eroded with passing decades. *See, e.g., United States v. Wall*, 92 F.3d 1444, 1451 n. 16 (6th Cir. 1996).

Likewise, the States have traditionally asserted clear ownership of this police power over gambling. *See, e.g., Bird v. State, 908 P.2d 12, 20 (Ariz. Ct. App. 1995) (*"The government has the constitutional power to regulate or prohibit gambling in general."*); Army Navy Bingo, Garrison No. 2196 v. Plowden*, 314 S.E.2d 339, 340 (S.C. 1984) ("[T]he State's power to suppress gambling is practically unrestrained."); *State v. Thompson*, 60 S.W. 1077, 1078 (Mo. 1901) ("[T]he State may, in the exercise of its police powers, prohibit [gambling] altogether.").

To be sure, there are problems with SB 1668 that extend beyond the principle of federalism. For example, the bill might not effectively address DFS, as it contains a sports exception; the bill could hamper the ability of states to offer lottery and other games on the Internet – which many are now safely providing, to generate revenues for public needs like education, property tax reform and advanced consumer protections, and the bill does nothing to help individual states address such challenges as Internet sweepstakes, which have evolved through state sweepstakes laws.

You and I agree that the principle of federalism should be a major factor in any assessment of federal legislation. We know that not every problem warrants a federal solution. Internet gambling is a matter for State regulation.

Respectfully,

Mark Brnovich

Attorney General

Anderson, Ryan

From: Bailey, Michael
Sent: Thursday, October 22, 2015 8:42 AM
To: Brnovich, Mark
Subject: RE: Supreme Court argument tickets Docket #14-232

They required the request to come directly from you – wouldn't let us make it for some reason. So when they write back, we'll monitor through you or Beth and try to clear up the names issues.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Thursday, October 22, 2015 8:41 AM
To: Bailey, Michael
Subject: RE: Supreme Court argument tickets Docket #14-232

I didn't even send the original. And yes, don't associate names with tix. Rick doesn't like to fly, and we may need mia there for media issues.

From: Bailey, Michael
Sent: Thursday, October 22, 2015 8:40 AM
To: Brnovich, Mark
Subject: RE: Supreme Court argument tickets Docket #14-232

I think we ought to follow up with them and maybe just ask for the tix, but not associate names with the tix unless we have to. Will Susan go?

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

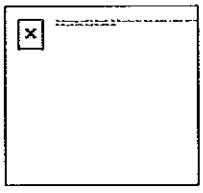
michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Thursday, October 22, 2015 7:10 AM
To: Bailey, Michael
Subject: Fwd: Supreme Court argument tickets Docket #14-232

Attorney General Mark Brnovich
Sent from my iPhone

Begin forwarded message:

> **From:** Marion Zaczkiewicz <mzaczkiewicz@supremecourt.gov>
> **Date:** October 22, 2015 at 6:26:59 AM MST
> **To:** "'Brnovich, Mark'" <Mark.Brnovich@azag.gov>
> **Subject: RE: Supreme Court argument tickets Docket #14-232**
>
> Thanks ... the Marshal will reply in the near future.
>
> ---
>
> **From:** Brnovich, Mark [mailto:Mark.Brnovich@azag.gov]
> **Sent:** Wednesday, October 21, 2015 5:07 PM
> **To:** Marion Zaczkiewicz
> **Subject:** Supreme Court argument tickets Docket #14-232
>
> I am the Attorney General of Arizona and will be arguing on behalf of the state on December 8th, 2015 in Harris v. Arizona Independent Redistricting Commission, docket number 14-232. I am requesting six reserved tickets for members of my staff. Their names are: Mike Bailey, Rick Medina, Ryan Anderson, John Lopez, Dominic Draye and Paul Watkins. Please let me know what additional information you may require.
>
> Thank you for your assistance.
>
> Best regards,
>
> Mark Brnovich



Anderson, Ryan

From: Bailey, Michael
Sent: Wednesday, October 21, 2015 4:39 PM
To: Brnovich, Mark
Cc: Anderson, Ryan
Subject: RE: International Human Trafficking conference

Yes – it was your idea. But he wants to get moving on the implementation.....

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Wednesday, October 21, 2015 4:36 PM
To: Bailey, Michael
Cc: Anderson, Ryan
Subject: Re: International Human Trafficking conference

Great idea.

Attorney General Mark Brnovich
Sent from my iPhone

On Oct 21, 2015, at 4:21 PM, Bailey, Michael <Michael.Bailey@azag.gov> wrote:

> Mark,
>
> Don stopped by with reference to a suggestion that we'd host a human trafficking conference with the Mexican AGs, border alliance, etc. He'd like to get started with scheduling and initial "save the date" type announcements to the various agencies.
>
> First order of business is whether you had a particular invitee list in mind. Was it particular Mexican AGs? Any particular state AGs you do or don't want invited?
>
> He's asking for as many details as we can put together before you are in recuperation.
>
> **Michael G. Bailey**
> Chief Deputy / Chief of Staff

Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Tuesday, October 20, 2015 2:24 PM
To: Brnovich, Mark
Subject: RE: Financial Services and Consumer Protection Enforcement, Education, and Training Fund Committee - Call for Volunteers

Request is for starting next November. Didn't see where any of them were staying on at that point?

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Tuesday, October 20, 2015 1:44 PM
To: Bailey, Michael
Subject: Re: Financial Services and Consumer Protection Enforcement, Education, and Training Fund Committee - Call for Volunteers

But are all of them staying omit so, makes no sense to apply.

Attorney General Mark Brnovich
Sent from my iPhone

On Oct 20, 2015, at 11:14 AM, Bailey, Michael <Michael.Bailey@azag.gov> wrote:

> You want us to volunteer you?
>
> **Michael G. Bailey**
> Chief Deputy / Chief of Staff
> Office of the Arizona Attorney General
> 1275 W. Washington Street
> Phoenix, AZ 85007
> 602-542-8080 Office
> 602-542-4085 Fax
>
> michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Tuesday, October 20, 2015 11:07 AM
To: Anderson, Ryan; Bailey, Michael; Watkins, Paul
Subject: FW: Financial Services and Consumer Protection Enforcement, Education, and Training Fund Committee - Call for Volunteers

---

From: James McPherson [mailto:jmcpherson@NAAG.ORG]
Sent: Tuesday, October 20, 2015 6:10 AM
To: James McPherson
Cc: Chris Toth; Mark Neil; Albert Lama; Jeffrey Hunter
Subject: Financial Services and Consumer Protection Enforcement, Education, and Training Fund Committee - Call for Volunteers

THIS IS BEING SENT TO ALL ATTORNEYS GENERAL, CHIEF DEPUTIES AND CHIEFS OF STAFF, AND EXECUTIVE ASSISTANTS

Good Morning Generals,

On 4 April 2012, the Federal District Court for the District of Columbia entered Consent Judgments against Bank of America, JPMorgan Chase, Wells Fargo, Citi, and Ally/GMAC in a civil suit against those five financial institutions. The Consent Decree included a provision requiring $15 million of the settlement proceeds to be distributed to the National Association of Attorneys General (NAAG) for the purpose of establishing and administering the "Financial Services and Consumer Protection Enforcement, Education, and Training Fund" (The Fund). The Consent Decree further directed that the Fund be administered in accordance with rules and regulations set forth in a Memorandum of Understanding (MOU) entered into by the state members of the "Monitoring Committee". That MOU provides that the Fund will be administered by a committee consisting of five (5) Attorneys General appointed by the NAAG President for a term of one year with unlimited reappointment. All five committee members serve a one year term starting in November of each year. The primary duties of the Committee are to review and decide upon grant requests from the fund made by AG offices.

Attorney General Jackley asked me to solicit the AG Community seeking volunteers to serve on the Committee for a tern of one year commencing in November 2016. The Committee meets by conference call whenever a grant request is made for support from the Fund which occurs about once a month. Current Committee members are:

Attorney General Fox – Chair
Attorney General Caldwell
Attorney General Cooper
Attorney General Miller
Attorney General Zoeller

If you would be interested in being appointed to the Committee, please let me know by Friday, 30 October 2016.

Thank you and V/R,

Jim

James E. McPherson
Executive Director
National Association of Attorneys General
2030 M Street, NW, Washington, DC 20036
202.326.6260
Cell: 202.701.9115

Anderson, Ryan

From: Bailey, Michael
Sent: Tuesday, October 20, 2015 1:39 PM
To: Brnovich, Mark; Anderson, Ryan
Subject: FW: Resume2015.doc
Attachments: Resume2015.doc

The Brno is attracting some more good candidates. Applicant is requesting confidentiality, but it's a partner at Riley Carlock w/ 15 years of employment law experience. He reached out to Dennis when he heard Dennis was leaving. Used to work for Sen. Kyl.

Either of you know the guy?

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Carpenter, Dennis
Sent: Tuesday, October 20, 2015 11:44 AM
To: Northup, Dawn; Bailey, Michael
Subject: Resume2015.doc

Attached is the resume that I spoke to Dawn about yesterday afternoon and then to Mike about this morning. John Fry is an equity partner with Riley, Carlock & Applewhite where he has spent the last 15 years as an employment law attorney. His background is in both litigation and employment law advice to employers; he has represented government employers in the past, and he handled an appeal from a Department of Corrections employee's termination for us last winter at the Court of Appeals.

He contacted me yesterday, as we are acquaintances and he had heard through mutual friends that I was leaving. He is interested in looking to make a change in his career (he has been at Riley, Carlock & Applewhite since he clerked there as a first year law student). While I don't know him very well, I do know him well enough to know that he is a very smart guy.

I told him I would pass on his resume to you guys, and you could contact him if you are interested in talking with him.

Thanks,
Dennis

Dennis D. Carpenter, Jr., Chief Counsel
Employment Law Section
Office of the Attorney General
State of Arizona
(602) 542-7677 (Direct Line)

JOHN M. FRY

[redacted] Lane
[redacted] Arizona 85020
Telephone: (602) [redacted] Email: [redacted]@gmail.com

PROFESSIONAL PROFILE

Employment and business litigation attorney with fifteen years of experience in private practice, including more than seven years in current equity shareholder position. Key member of Labor & Employment practice group consistently recognized by Chambers USA as one of the best in Arizona. Exclusively represents management in civil rights and employment-related litigation involving the defense of federal and state discrimination and retaliation claims, including collective and class action litigation under the Fair Labor Standards Act and state wage and hour laws.

Proven track record of successfully representing employers nationwide, from small start-up businesses to municipalities and some of the largest publicly traded companies in the country, in all phases of litigation — as well as effective collaboration with clients in proactive litigation avoidance. Extensive experience in pre-litigation investigation, administrative proceedings, alternative dispute resolution, evidentiary hearings, dispositive motion practice, jury trials, and appellate proceedings, including two oral arguments before the Ninth Circuit Court of Appeals.

EXPERIENCE

Ryley Carlock & Applewhite, PA Phoenix, Arizona
Shareholder, January 2008 – present
Associate, 2000-2007

Currently serves on the firm's compensation and shareholder selection committees, and as official liaison to firm's associate attorneys

Representative matters include:

Client Collaboration

- Advising clients on classification and compliance issues under the Fair Labor Standards Act and the Arizona Wage Act
- Analyzing classification issues with respect to independent contractor status
- Assisting clients with reasonable accommodation and other compliance matters under the Americans with Disabilities Act
- Implementation of Family & Medical Leave Act policies and procedures
- Proactive development of employment policies regarding equal employment opportunity, compliance with state and federal wage and hour laws, and other workplace matters

- Analysis of pre-employment testing in compliance with federal Uniform Guidelines on Employee Selection Procedures

Employment Litigation and Administrative Proceedings

- Obtained defense jury verdict on behalf of a municipal employer in Age Discrimination in Employment Act lawsuit

- Obtained affirmance by Ninth Circuit Court of Appeals (following oral argument) of summary judgment on behalf of national financial institution on claims of age discrimination and retaliation and FMLA interference

- Successfully defended municipal employer, on the basis of failure to exhaust administrative remedies, against claims by a group of employees alleging they were entitled to additional compensation under the terms of a Memorandum of Understanding. Affirmed by Arizona Court of Appeals.

- Assisted with representation of a municipal employer before Personnel Board resulting in decision upholding termination of an executive employee. Affirmed on special action to the Superior Court.

- Multiple summary judgments on behalf of national clients on claims of disability discrimination and retaliation

- No-cause finding by the Equal Employment Opportunity Commission regarding charge of systemic race discrimination by a national employer

- Defense of FLSA collective actions (involving both misclassification and off-the-clock allegations) in federal courts in Arizona, Florida, West Virginia, and before the Judicial Panel on Multidistrict Litigation

Other Civil Litigation Experience

- Performed lead role in preparing complex briefing before the Interior Board of Land Appeals pursuant to the National Environmental Policy Act, resulting in denial of appeal by environmental organization of a Bureau of Land Management decision approving construction, operation, and maintenance of a 73-mile water conveyance system to provide water in Lincoln County, Nevada.

- Part of team that prepared comprehensive document retention policy for an international publicly traded company

- Drafted *amicus* brief to the Arizona Supreme Court on behalf of the National Conference of State Legislatures in case involving scope of the governor's line-item veto authority. *Forty-Seventh Legislature of State of Arizona v. Napolitano*, 213 Ariz. 482, 143 P.3d 1023 (2006).

United States Senator Jon Kyl (Ret.), January 1995 – October 1997

Worked with Senator Kyl and his State Director on outreach to, and communication with, the Arizona business community. Prepared letters for publication and other substantive communications for Senator Kyl. Acted as liaison between constituents and federal government agencies to facilitate resolution of constituent complaints and to communicate relevant rulings and regulations.

Jon Kyl For U.S. Senate, *Finance Assistant*, January – November 1994

Organized major fund raising events. Worked with host committees comprised of Arizona community and business leaders. Coordinated with nationally renowned speakers and other guests. Ensured compliance with Federal Election Commission regulations.

PUBLICATIONS & RECENT SPEAKING ENGAGEMENTS

"Employer Alert: Recent U.S. Supreme Court Decision Favorable to Employers Has Arizona Origins" (Aug. 13, 2012).

"Squandering the Last Word: The Misuse of Reply Affidavits in Summary Judgment Proceedings," 15 SUFFOLK J. TRIAL & APP. ADVOC. 43 (2010).

"The Citizens' 'Clean' Elections Act: A Cure As Bad As The Disease," 31 ARIZ.ST.L.J. 1373 (1999).

Presentation to the Arizona Better Business Bureau, Legal Series Seminar, on FLSA/Wage & Hour Crackdown (June 25, 2014).

Presentation to Arizona Public Risk Managers Association on Keeping the Workplace Free of Discrimination and Harassment (May 1, 2014)

EDUCATION

ARIZONA STATE UNIVERSITY COLLEGE OF LAW
Doctor of Jurisprudence, magna cum laude, May 2000
Honors: Order of the Coif
Finalist, Berch Appellate Oral Argument Competition
Honors Designee, Legal Method and Writing
Activities: Associate Managing Editor, Arizona State Law Journal

ARIZONA STATE UNIVERSITY
Bachelor of Science, Economics, *summa cum laude,* May 1997
Honors: Member, College of Business Honors Program

ADMISSIONS

State Bar of Arizona, U.S. District Court for the Districts of Arizona and Nevada,
U.S. Court of Appeals for the Ninth Circuit

Anderson, Ryan

From: Bailey, Michael
Sent: Tuesday, October 20, 2015 11:10 AM
To: Medina, Rick; Brnovich, Mark; Anderson, Ryan
Subject: RE: NAAG Solar Energy Panel follow-up

Thanks Rick.

Need to change from Jepsen CT to Hood MS

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Medina, Rick
Sent: Tuesday, October 20, 2015 9:41 AM
To: Bailey, Michael; Brnovich, Mark; Anderson, Ryan
Subject: RE: NAAG Solar Energy Panel follow-up

I made some minor edits, in the interest of brevity and clarity. Attached is an updated draft that I think is good to go.

-R

From: Bailey, Michael
Sent: Friday, October 16, 2015 5:57 PM
To: Brnovich, Mark; Anderson, Ryan; Medina, Rick
Subject: FW: NAAG Solar Energy Panel follow-up

Michael G. Bailey
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602-542-4085 Fax

michael.bailey@azag.gov

From: Medina, Rick
Sent: Tuesday, July 14, 2015 2:29 PM
To: Brnovich, Mark; Bailey, Michael; Anderson, Ryan
Subject: NAAG Solar Energy Panel follow-up

Updated letter draft attached. How does this sound to you?

Rick Medina
Special Assistant to Attorney General
State of Arizona
(602) 542-7904
Rick.Medina@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Monday, October 19, 2015 4:01 PM
To: Brnovich, Mark
Subject: Iongo

She will think about it – but would be taking a pay cut.

Nannetti is not interested for now due to family concerns [redacted]. My guess is that it's possible that could change some time down the road.

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michael.bailey@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Monday, October 19, 2015 1:26 PM
To: Conrad, Donald; Kredit, Beth
Subject: RE: cancelled meeting

Yes – related to surgery.

Michael G. Bailey
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Office of the Arizona Attorney General
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602-542-4085 Fax

michael.bailey@azag.gov

From: Conrad, Donald
Sent: Monday, October 19, 2015 1:22 PM
To: Kredit, Beth
Cc: Bailey, Michael
Subject: cancelled meeting

Is the meeting you notified Lisa about the RICO meeting set Thursday at 1:30: Is there a reason I can give to those invited? Does it have to do with the AG's surgery? I'd like to say that if it's OK.

Donald E. Conrad
Division Chief Counsel
Criminal Division
(602) 542-3881

Anderson, Ryan

From: Bailey, Michael
Sent: Monday, October 19, 2015 1:24 PM
To: Lopez, John; Driscoll-MacEachron, James
Cc: Anderson, Ryan
Subject: a few suggestions
Attachments: Pima County Letter 10-19-15 MGB edits.docx

Not sure whether I'm way off base on with respect to B2e, but let me know your thoughts on these changes.

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michael.bailey@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Monday, October 19, 2015 9:42 AM
To: Brnovich, Mark
Cc: Anderson, Ryan; Garcia, Mia
Subject: FW: Search Warrant Notification for 10/20/2015

Sorry – here's the first FYI, but with the info included.

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602-542-4085 Fax

michael.bailey@azag.gov

From: Conrad, Donald
Sent: Monday, October 19, 2015 9:16 AM
To: Bailey, Michael
Subject: FW: Search Warrant Notification for 10/20/2015

FYI

From: Perkovich, Mark
Sent: Monday, October 19, 2015 9:11 AM
To: Conrad, Donald
Subject: Search Warrant Notification for 10/20/2015

As part of an ongoing Money Laundering / AHCCCS Fraud / Medicare Fraud & Forgery case, SA Ron Davis in partnership with HHS OIG, will be serving two search warrants on 10/20/2015 at the following locations:

1. [redacted] Peoria, AZ 85383 – the residence of Dr. [redacted], DOB: [redacted]
2. [redacted] Surprise, AZ 85374 – the office of Dr. [redacted]

Ops plans are in place for both locations.

Mark

Mark Perkovich
Chief Agent

Office of the Attorney General
Special Investigations Section
1275 W. Washington, Phoenix, AZ 85007
Desk: 602.542.7944 I Cell: 480.[redacted] I Fax: 602.542.4882
Mark.Perkovich@azag.gov
http://www.azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Monday, October 19, 2015 9:41 AM
To: Johnson, John; Lopez, John; Northup, Dawn; Watkins, Paul; Conrad, Donald
Subject: FW: Domestic Violence: What All Lawyers Need to Know - Live AZCLE, Oct 22

The State Bar has agreed to make a limited number of spots available to AZAG cost free, if you think you might have anyone interested in attending. Send me some names and we'll figure out how many we can send.

Michael G. Bailey
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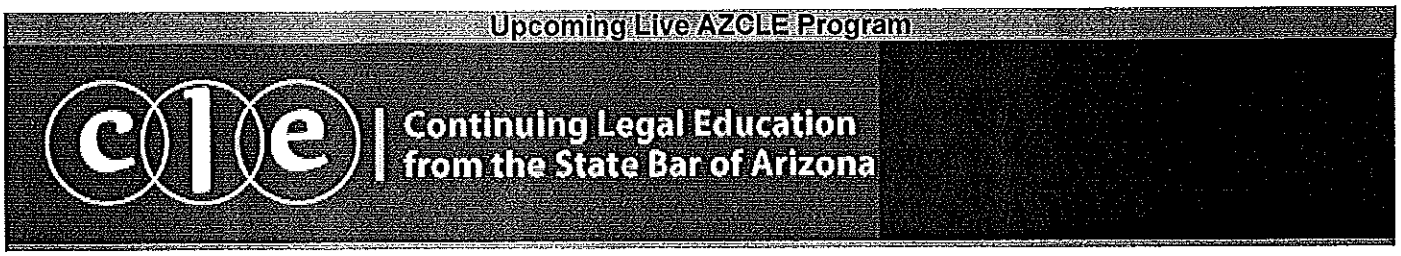
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Gadow, Blaine
Sent: Monday, October 19, 2015 9:19 AM
To: Bailey, Michael
Subject: FW: Domestic Violence: What All Lawyers Need to Know - Live AZCLE, Oct 22

From: SBA CLE [mailto:cle.announcements@azbar.org]
Sent: Monday, October 12, 2015 10:02 AM
To: Gadow, Blaine
Subject: Domestic Violence: What All Lawyers Need to Know - Live AZCLE, Oct 22



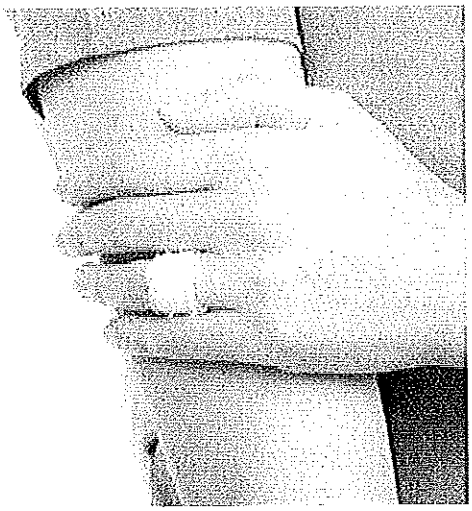
UPCOMING AZCLE - Special Topic

Domestic Violence

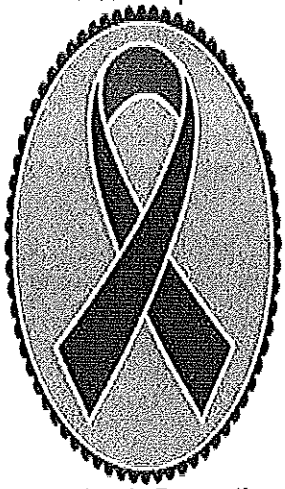
What All Lawyers Need to Know

October 22 @ 9 am

an AZCLE program



Wear Purple



October is Domestic Violence Awareness Month

Domestic Violence:
What All Lawyers Need to Know

October 22 @ 9:00 am - 12:15 pm
May qualify for up to 3.0 hours CLE
McAuliffe CLE Center, 4201 N. 24th Street, Phoenix
To Register: LIVE, Phoenix | Simulcast, Tucson | Webcast

This panel consists of practitioners from various practice areas and the discussion will inform practicing attorneys in any area about the law and practical considerations that arise when dealing with a client who has a Domestic Violence incident in their background or currently pending.

Seminar Chair
Blaine D. Gadow, *Office of the Arizona Attorney General*

Seminar Faculty
Commishioner Erin Otis, *Maricopa County Superior Court*
Timothy J. Agan, *Office of Legal Advocate*
Felicia Schumacher, *Davis Faas and Blase*
Ariel N. Serafin, *Deputy County Attorney - Family Violence Bureau, Maricopa County Attorney's Office*
MonaLou Callery, *National Advocacy & Training Network*

Register Today >>
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Phone: 602.340.7231 (Phoenix)
or 520.623.9944 (Tucson)

Registration details and rates available online.

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More from the Bar - OnDemand

Protected Health Information (HIPAA) - What Every Lawyer Needs to Know - **2.5 CLE / 1.25 Ethics**
Attendees learn about the HIPAA/HITECH final regulations governing all aspects of creating, receiving, maintaining and transmitting protected health information. Seminar reviews best practices for dealing with protected health information and faculty discusses risks and penalties associated with non-compliance. Also addresses how the Rules of Professional Conduct bear on matters involving protected health information.

Recognizing Impairment: A Primer on Addiction, Mental Illness and Co-Occurring Disorders - **2.25 CLE / 2.25 Ethics**
As lawyers we need to know how to recognize impairment, including process addictions, common chemical dependencies, anxiety, depression, and co-occurring disorders in clients, opposing parties, or in ourselves and our colleagues.

CLE Snippet:
Lessons Learned from Peacemaking: Mediation as a Healing Art - **0.75 CLE / 0.75 Ethics**
Retired Judge PENNY L. WILLRICH and JALAE ULICKI are tenured professors at Arizona Summit Law School in downtown

Phoenix. Each has more than 30 years of experience as a mediator. Together, they co-teach a course in mediation at the law school.

State Bar of Arizona - McAuliffe CLE Center
4201 N. 24th Street, Phoenix, AZ 85016
602.340.7231

State Bar of Arizona - Southern Regional Office
270 N. Church Ave., Tucson, AZ 85701
520.623.9944

Click here to view CLE Program Policies

Check your MCLE Tracking Details

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, October 16, 2015 5:57 PM
To: Brnovich, Mark; Anderson, Ryan; Medina, Rick
Subject: FW: NAAG Solar Energy Panel follow-up
Attachments: Solar letter edt.docx

Michael G. Bailey
Chief Deputy / Chief of Staff
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1275 W. Washington Street
Phoenix, AZ 85007
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602-542-4085 Fax

michael.bailey@azag.gov

From: Medina, Rick
Sent: Tuesday, July 14, 2015 2:29 PM
To: Brnovich, Mark; Bailey, Michael; Anderson, Ryan
Subject: NAAG Solar Energy Panel follow-up

Updated letter draft attached. How does this sound to you?

Rick Medina
Special Assistant to Attorney General
State of Arizona
(602) 542-7904
Rick.Medina@azag.gov

Dear Fellow Attorney General:

The NAAG Summer Meeting in San Diego was filled with valuable information. We would like to particularly follow up on the Panel discussion entitled "Solar Energy Systems". The residential solar market is booming with technologies that most people are unfamiliar with, and providers are currently ahead of regulators. Discussion participants warned of some very bad actors in the marketplace and expressed concern that consumers could be victimized in the absence of accurate information.

We want to emphasize that neither of us is opposed to the use of solar energy for residential dwellings. Solar generating units are very trendy, especially with people wishing to pursue renewable "green" power. Unfortunately, as with many popular market entries, there are also opportunities for perpetrators of fraud to ply their trade.

Residential solar systems constitute a considerable investment – from $15,000 to $20,000 or more, depending on size and various factors. Many companies are marketing these systems for sale, lease or as part of Power Purchase Agreements that can last as long as 30 years.

Long-term leasing or financing of residential solar systems can be extremely profitable for providers, but not necessarily for customers. Like sub-prime mortgages, most of these leases are bundled and securitized on Wall Street. Many have automatic escalator provisions, so they start low and can eventually double the cost to the homeowner during the term of the lease. Under this kind of financing, it is the investor and not the homeowner who enjoys the 30% federal tax credit.

Many consumers are unaware of how to determine the actual cost of a solar purchase or lease. The current excitement over 'going green ' can also discourage people from asking tough questions. This creates opportunities to mislead consumers. Given the complexity of these agreements and the unfamiliarity most have with residential solar, a failure to disclose relevant information can be as deceptive as a misstatement.

Many unethical providers mislead potential customers by overstating expected increases in the price of electricity. They also fail to disclose how various subsidies, government programs and rate making practices may affect the cost of energy in the future. This includes the likelihood that some government policies regarding solar energy may change during the course of a long term contract.

Solar providers are rarely regulated by public utility commissions, but their activities are subject to consumer protection and truth in advertising laws enforced by state Attorneys General. That's why we have launched efforts to raise awareness about residential solar power and the questions that consumers should ask in making informed decisions.

In fact, Arizona Corporation Commission now requires those choosing to buy or lease a solar system to sign a disclosure to confirm that they understand the actual costs. Arizona has also taken some of the worst providers to court and entered consent judgments that you may find insightful in understanding how consumers can be hurt. We are attaching that information, along with consumer advice from Iowa and Louisiana, two other states on the forefront of raising awareness. Finally, we are enclosing a set of questions that might come in handy for communications with the public and consumer information web sites.

We hope that you find this information to be helpful and that together, we can reduce the number of well-meaning consumers who fall victim to the dark side of the solar energy scene.

Sincerely,

AG George Jepsen, Attorney General of Connecticut and NAAG President - Elect,
Mark Brnovich, Attorney General of Arizona

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, October 16, 2015 4:42 PM
To: Brnovich, Mark
Subject: FW: Arizona Attorney General's Office
Attachments: Karlson Resume 2015.pdf; Writing Sample.pdf

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michael.bailey@azag.gov

From: Perkins, Jennifer
Sent: Friday, September 25, 2015 9:10 AM
To: Bailey, Michael
Subject: FW: Arizona Attorney General's Office

Mike – the below email is from the woman who was one of two finalists for an attorney spot at IJ-AZ, and was quite well-liked by Tim and Paul over there. She attended our FS event last night (on three hours' notice) in order to meet me, Dom, and John. We didn't have a lot of time with her, and I wouldn't say we were blown away, but she does strike me as potentially more qualified than some of our previous applicants.

Dom and John are both agnostic about interviewing here, I would lean toward doing so if we have the time.

From: Kara Karlson [mailto[redacted]@gmail.com]
Sent: Thursday, September 24, 2015 2:19 PM
To: Perkins, Jennifer
Subject: Re: Arizona Attorney General's Office

Jennifer:

Thank you again. I am so sorry I did not get back to you sooner. I was wondering why I had not heard from you, and went checking my email today and found that I had miss your emails. However, the opportunity has given me some time to mull over the idea of working at the Attorney General's office in a new unit, and it is something that I am very interested in. I am excited about the opportunity to be a part of something new, while building responsible state policy.

I have included my resume and a writing sample. Please note that as a result of our efforts with this case, Plaintiffs have recently agreed to settlement that includes vacating the entire award for attorneys' fees, which I think is directly attributable to my briefing on the matter. Our other argument on appeal was unlikely to succeed due to the finding of fact made by the trial court, but because the attorneys' fee award was half of the entire claim, the appeal was well worth it for the client.

If you need any additional information, I will be happy to provide it. I have also marked any emails coming from you as "important" so they will not get overlooked in my over-loaded personal email account.

I look forward to hearing back from you.

~Kara

On Fri, Aug 28, 2015 at 3:21 PM, Perkins, Jennifer <Jennifer.Perkins@azag.gov> wrote:

Ms. Karlson,

The Arizona Attorney General's Office, Solicitor General's Office, is currently reviewing and interviewing attorney applicants interested in working in our new Federalism Unit. I understand from the folks over at the Institute for Justice that you may be interested in applying for this type of position. If you'd like to apply, please let me know and send me your resume and a writing sample for consideration. If you'd like more information first, let me know when would be a good time and I'd be happy to give you a call.

Thank you very much

Jennifer

Jennifer M. Perkins

Assistant Solicitor General

Office of the Arizona Attorney General Mark Brnovich

Solicitor General's Office

1275 W. Washington Street, Phoenix, AZ 85007

Desk: (602) 542-7826

Jennifer.Perkins@azag.gov

--

Kara Karlson
602[redacted]
[redacted]@gmail.com

Kara Karlson

[redacted] Mesa, AZ 85206 ▪ 602[redacted]@gmail.com

PROFESSIONAL EXPERIENCE

Arboleda Brechner, PLC, Phoenix, AZ
Associate Attorney, June 2012-present
Jury and bench trial experience. Draft pleadings, motions, and other legal documents. Develop discovery, settlement, and litigation strategy with supervising partner. Extensive research on various aspects of civil litigation, including pre and post-judgment remedies and class actions in state, federal, and bankruptcy court.

Arboleda Brechner, PLC, Phoenix, AZ
Summer Associate, June 2011-August 2011
Drafted pleadings, including a brief that was later submitted to the Ninth Circuit Court of Appeals regarding bankruptcy and foreclosure issues. Researched a variety of discreet issues, including developments in anti-deficiency case law in Arizona and student loans in bankruptcy. Worked on various projects from Washington, DC through the fall and spring, including summary judgment motions and drafting a complaint.

Cohen, Milstein, Sellers & Toll, PLLC, Washington, DC
Law Clerk, September 2010-April 2011
Conducted extensive legal research, drafted memorandums, briefs, and motions for various practice areas including antitrust, securities regulation, civil rights, and employee benefits. Determined extra-territorial application for more than twenty-five state antitrust and consumer protection statutes. Drafted memoranda addressing various aspects of class procedure for the *Wal-Mart Stores v. Dukes* class certification case before the Supreme Court.

American University Washington College of Law, Washington, DC
Dean's Fellow, Professor Anna Gelpern, May 2010-December 2010
Researched current financial events including the legislative history of the peer-to-peer lending provision of the new financial reform act. Edited and cite-checked scholarly articles about the rapidly-evolving financial-legal sector for upcoming articles about sovereign wealth funds and financial reform. Wrote memoranda discussing the state of legal scholarship on central banking in the United States, highlighting international central banking regulations that could be applied domestically.

Department of Transportation, Washington, DC
Judicial Intern, Office of Hearings, May 2010-September 2010
Drafted pre-hearing conference memoranda for the Chief Administrative Law Judge. Analyzed the applicability of the Freedom of Information Act and attorney-client privilege as applied to investigative files of a federal agency. Evaluated the reasonableness of an administrative search that did not follow published administrative guidance.

American University Washington College of Law, Washington, DC
Dean's Fellow, Professor Ira Robbins, May 2009-May 2010
Researched and edited for an annual publication focusing on developments in *habeas corpus* law. Assisted with drafting scholarly articles exploring the ethics of assisting *pro se* defendants, restrictive equal protection on capital prisoners, and social media's impact in the court room.

Admitted to Practice: Arizona State and Federal Courts (June 2012)
Ninth Circuit Court of Appeals (Feb. 2014)

PUBLICATIONS

Checks and Balances: Using FOIA to Evaluate the Federal Reserve Banks, 60 AM. U. L. REV. 213 (Oct. 2010).

Cost of Living: Adapting the Comparative Effectiveness Approach to Healthcare Coverage for Terminal Patients, 5 HEALTH L. & POL'Y BRIEF (Spring 2011).

EDUCATION

American University Washington College of Law, Washington, DC
Juris Doctor, May 2011; GPA: 3.86 (Class Rank: 10)
Honors: *American University Law Review*, Note and Comment Editor
Emma Gillett and Ellen Spencer Mussey Fellow
Best Student Publication for *Checks and Balances*

Highest Grade Designation in: Civil Procedure (Fall 2008); Financial Crises (Fall 2009); Financial Institutions (Spring 2010)

American University Kogod School of Business, Washington, DC
Masters of Business Administration, May 2012; GPA: 4.00

University of Arizona, Tucson, AZ
Bachelor of Arts in Journalism *cum laude*, May 2007; GPA: 3.64
Scholarships: James Edward Duncan Scholarship, Provost Scholarship, Spirit of Discovery Scholarship
Activities: *Arizona Cat's Eye* (student-produced news program on PBS), Producer

ORGANIZATIONS

Maricopa County Bar Association, January 2013-present
Author, Maricopa County Bar Association Litigation Guide (expected publication late 2014)

Pancreatic Cancer Action Network—Phoenix Affiliate, June 2012-present
Media Relations Chair

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ATTORNEYS AT LAW
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PHOENIX, ARIZONA 85028
TEL.: 602/953-2400
FAX: 602/482-4068

Carlos M. Arboleda, Ariz. Bar No. 017109
arboledac@abfirm.com
Kara M. Karlson, Ariz. Bar No. 029407
kkarlson@abfirm.com

Attorneys for Debtor

IN THE UNITED STATES BANKRUPTCY COURT

IN AND FOR THE DISTRICT OF ARIZONA

In re: JOHN ALEO Debtor.	In Proceedings Under Chapter 13 Case No.: 2:13-bk-11307-DPC
PENNY FAY, a single woman; R&L LIMITED INVESTMENTS INC., an Arizona corporation, Plaintiffs, v. JOHN ALEO and LORA ALEO, husband and wife; ALEO REALTY GROUP, LLC, an Arizona limited liability company, Defendants.	Adversary Case No. 2:13-ap-00849-DPC **RESPONSE IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR FEES AND COSTS**
AND ALL RELATED COUNTERCLAIMS	

ARBOLEDA BRECHNER
4545 EAST SHEA BLVD., STE. 120
PHOENIX, ARIZONA 85028
TEL.: 602/482-0123

Defendants John and Lora Aleo (the "**Aleos**") and Aleo Realty Group, LLC ("**ARG**") (collectively, "**Defendants**"), by and through counsel undersigned hereby files this Response in Opposition to Plaintiffs' Application for Fees and Costs. Plaintiffs Penny Fay ("**Fay**") and R&L Limited Investments, Inc. ("**R&L**") (collectively, "**Plaintiffs**") sued Defendants for breach of fiduciary duty and other claims. Plaintiffs' claims do not "arise out of" a breach of contract, as required under Arizona law, to support an award of attorneys' fees. Additionally, the fees Plaintiffs seek are not reasonable and would create a severe hardship for the Defendants. In short, Plaintiffs' request for fees should be denied. This Response is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUITHORITIES

I. Plaintiffs are not Entitled to Attorneys' Fees

Plaintiffs are not entitled to attorneys' fees because their claims do not arise out of contract. As discussed in detail below, "suits that arise out of a trust relationship are not suits arising out of a contract for purposes of A.R.S. § 12-341.01(A)." *In re Naarden Trust*, 195 Ariz. 526, 530, 990 P.2d 1085, 1089 (App. 1999). Plaintiffs have the burden of establishing that their claims arise out of contract—a requirement they cannot meet—and thus their application for fees should be denied.

A. Plaintiffs Have the Burden of Demonstrating that their Claims Arise out of Contract and are Reasonable

Arizona courts follow the so-called "American rule" that each side will bear its own fees and costs unless a contractual or statutory provision allows the prevailing party to collect fees. *E.g., Marcus v. Fox*, 150 Ariz. 333, 334 (1986) (*en banc*). The statute authorizing attorneys' fees states that: "In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." A.R.S. § 12-341.01(A). This statute does not alter or restrict terms of contracts that provide for attorneys' fees. *Id.* The legislature enacted this law to mitigate the burden of litigation to establish a just claim or defense. Nevertheless, the award "need not equal or relate to the attorney fees actually paid or contracted..." *Id.* at (B).

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The burden of establishing entitlement to an award and documenting the appropriate hours expended at a reasonable hourly rate is on the fee applicant. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 1938 (1983); *Woerth v. City of Flagstaff*, 167 Ariz. 412, 419, 808 P.2d 297, 304 (App. 1990) ("[The unsuccessful party] correctly maintains that the party requesting an award of attorneys' fees pursuant to A.R.S. § 12-341.01(A) has the burden of proving his entitlement to such an award."); *see also Associated Indemnity Corp. v. Warner*, 143 Ariz. 657, 670, 694 P.2d 1181, 1184 (1985); *Grand Real Estate v. Sirignano*, 139 Ariz. 8, 14, 676 P.2d 642, 648 (App. 1983). Plaintiffs cannot meet their burden because, as discussed more fully in the following sections, their claims arise out of legal duties, not contractual ones.

B. Plaintiffs' Claims Do Not Arise Out of Contract

i. Plaintiffs' breach of fiduciary duty claims do not arise out of contract

Plaintiffs' claims do not arise out of contract as required by A.R.S. § 12-341.01(A) to entitle them to an award of fees. "The mere existence of a contract somewhere in the transaction is not sufficient to support a fee award." *Ramsey Air Meds, LLC v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, 6 P.3d 315, 318 (App. 2000); *A.H. By & Through White v. Arizona Property & Cas. Ins. Guard. Fund*, 190 Ariz. 526, 5299, 950 P.2d 1147, 1150 (1997) (*en banc*); *O'Keefe v. Grenke*, 170 Ariz. 460, 472-73, 825 P.2d 985, 997-98 (App. 1992). At its core, litigation is found to arise out of contract if "the cause of action in tort could not exist *but for* the breach of contract." *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127 (1982).

The leading case on the application of A.R.S. § 12-341.01 to professional relationships is *Barmat v. John and Jane Doe Partners, A-D*, 155 Ariz. 519, 747 P.2d 1218 (1987) (*en banc*). In *Barmat*, the plaintiffs sued their own attorney, claiming that he breached his duties of loyalty the clients, disclosed the clients' confidential information, placed his own interests ahead of the clients, and provided inadequate representation. *Id.* at 520.

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The *Barmat* court held that the breach of an implied covenant in a contract for professional services do not bring the action within A.R.S. § 12-341.01. *Id.* at 521. The *Barmat* court explains that "[a]s a matter of public policy, attorneys, accountants, and other professionals owe special duties to their clients, and breaches of those duties are generally recognized as torts. The essential nature of actions to recover for the breach of such duties is not one 'arising out of contract,' but rather one arising out of tort-breach of legal duties imposed by law." The *Barmat* court compared this to situations where the duty is "created by the contractual relationship, and would not exist 'but for' the contract, then breach of either express covenants or those necessarily implied from them sounds in contract.'" *Id.* at 524. The court concluded that, from a policy perspective, construing the statute to include breaches of duties implied by the law would vitiate the legislature's intent to limit fee awards to contract actions. *Id.* ("The legislature clearly did not intend that every tort case would be eligible for an award of fees whenever the parties had some sort of contractual relationship or ingenious counsel could find authority for an implied-in-law contractual claim."); *Hardiman v. Gosnell Devel. Corp.*, 155 Ariz. 585, 748 P.2d 1209 (App. 1988) ("If we were to recognize such a tort in the situation presented to us here it would not involve a breach of the actual contract; therefore, it would not be an action arising from a contract.").

Similarly, in *Lewin v. Miller Wagner & Co., Ltd.*, the Arizona Court of Appeals denied a fee award to an accountant who had failed to competently provide tax advice to his client. The *Lewin* court analyzed the question as "whether a contract relationship that merely gives rise to a legally imposed standard of care against which subsequent events operate, provides a sufficient nexus between the failure to meet the standard of care and the contract so that it can be said the matter arose out of contract and thus falls within the language of A.R.S. § 12-341.01." *Id.* at 35. The court found that it did not.

> "We therefore conclude that while a contractual relationship may give rise to a duty to perform in accordance with a certain standard of care, this legally imposed duty exists separate and apart from the contract giving rise to the duty. The failure to comply with this standard of care results in a breach of the legal duty imposed and is not an action 'arising out of contract' under A.R.S. § 12-341.01(A)." *Id.* at 36.

The court has applied this limitation uniformly across a number of licensed professions and fiduciary roles, including licensed real estate agents. *Haldiman v. Gosnell Development Corp.*, 155 Ariz. 585, 748 P.2d 1209, (App. 1987) ("It is implicit in [plaintiffs's] argument [for fees] that any duty owed her by [defendant] arose in the context of a real estate seller-buyer contractual relationship . . . Such an action sounds mainly in tort and its existence does not depend upon a *breach* of the contract for sale of real estate."); *Cauble v. Osselaer*, 150 Ariz. 256, 261-62, 722 P.2d 983, 988-98 (App. 1986) (finding that the breach of fiduciary duties by a receiver appointed pursuant to a deed of trust was not a matter arising out of contract and denying fees).

The allegations made by Plaintiffs in this case are strikingly similar to the allegations of the plaintiffs in *Barmat*, in which the Arizona Supreme Court, sitting *en banc*, denied attorneys' fees. Plaintiffs allege that Defendants breached their duty to maintain the standard of care, loyalty, and disclosure. Plfs. 2d Amend. Compl. ¶ 140. Plaintiffs also allege that Defendants had a duty to refrain from self-dealing in their relationship as the Plaintiffs' broker. *Id.* at ¶ 141. Likewise, the plaintiffs in *Barmat* alleged that their agent breached his duty of loyalty and put his own interests above his client. *Barmat*, 155 Ariz. at 520. The court found that the defendants in *Barmat* had breached their duties, but denied the prevailing party attorneys' fees.

The source of the duties Plaintiffs allege Defendants breached arises *entirely* out of state law; therefore Plaintiffs have no claim for fees. *Ramsey Air Meds, LLC v. Cutter Aviation, Inc.*, 198 Ariz. 10, 17, 6 P.3d 315, 322 (App. 2000) ("Thus, when a contractual duty, either express or implied-in-fact, merely repeats the duty already imposed by law, a breach of that duty does not create a claim 'arising out of a contract' under A.R.S. § 12-341.01(A)."). Plaintiffs quote, verbatim, lengthy provisions R4-28-1101 of the Arizona Administrative Code governing licensed real estate professionals. *Id.* at ¶ 143. Plaintiffs do not cite any contractual provision in support of any of their claims. Despite having three different supervising attorneys in four different law firms work on this case, Plaintiffs have never been able to conjure up a claim that would not have arisen *but for* the existence of the

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contract. In other words, Plaintiffs sought and were granted relief for breaches that were legal duties separate and distinct from any contractual duties, and thus A.R.S. § 12-341.01 does not apply. *Barmat*, 155 Ariz. at 523, 747 P.2d at 1222 ("[W]here the implied contract does not more than place the parties in a relationship in which the law then imposes certain duties recognized by public policy, the gravamen of the subsequent action for breach is tort, not contract.").

Indeed, the case cited by Plaintiffs as supporting their claims for attorneys' fees actually undercuts it. In *Ramsey Air Meds*, an aircraft owner sued for negligence in the use and maintenance of plaintiff's airplane, and breaches of contract for that those actions. 198 Ariz. at 12. The *Ramsey Air Meds* court denied plaintiff's attorneys' fees—even though the plaintiff also had a claim for breach of contract— finding that "[t]he fact that the two legal theories are intertwined does not preclude recovery of attorney's fees under § 12-341.01(A) as long as **the cause of action in tort could not exist but for the breach of contract**." *Id.* at 14 (emphasis in original). The mere existence of a contract between two parties to an action is not enough to trigger the award of attorneys' fees. *Id.* Rather, the court found that "*Barmat*'s rationale applies whenever the law imposes a duty of care on a party **regardless** of the existence of a contract." *Id.* (emphasis added).

Plaintiffs' claims, and the harsh equitable remedy that was provided to them, arose entirely from obligations imposed by law. *Naarden Trust*, 195 Ariz. at 530, 990 P.2d at 1089 ("We hold that the duties of a trustee stem from duties implied by law because of the relationships created by the trust, and that such relationships are not contractual."). Plaintiffs cannot point to a single contractual provision that Defendants breached because there simply are none. It is a matter of public record that Defendants were successful in selling Pretty Penny Ranch and brokering the purchase of the 62nd Street Property, and no one has ever claimed that Defendants breached any of the explicit contractual provisions in his agreements with Plaintiffs. Indeed, if the claims regarding the contract arose from a breach of an arm's length contractual relationship—as it must for the award of attorneys' fees—rather than a fiduciary one, then Plaintiffs would have been charged with having

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knowledge of the facts in the contracts and the statute of limitations would have barred Plaintiffs' claims long ago. Plaintiffs cannot have it both ways.

ii. Plaintiffs' declaratory judgment actions also do not arise out of contract

Plaintiffs' claims for attorneys' fees in regards to the declaratory judgment claims fail for the same reason that Plaintiffs cannot receive fees for the breach of fiduciary duty claims. The primary factor in determining whether A.R.S. § 12-341.01 applies is "whether the 'essence' of the claim being asserted was tort or contract." *Ramsey Air Meds*, 198 Ariz. at13, 6 P.3d at 319. The basis of the relief awarded to Plaintiffs in the declaratory judgment action is the tort of breach of fiduciary duty, which, as discussed in Part I.B.i., *supra*, cannot form the basis for a statutory award for fees. Specifically, Plaintiffs claim, in pertinent part, that:

- "166. As set forth above, Defendants procured the 2007 Note, Ms. Fay's personal guaranty of that Note, and the unrecorded 2007 Deed of Trust by breaching the fiduciary duties they owed R&L and Ms. Fay, and by violating R4-28-1101, Arizona Administrative Code."
- "169. Defendants procured the 2009 Note, Ms. Fay's Guaranty, and the 2009 Deed of Trust by breaching the fiduciary duties they owed R&L and Ms. Fay, and by violating R4-28-1101, Arizona Administrative Code." Plfs. 2d Amend. Compl. ¶¶ 166, 169.

Plaintiffs argued that as a result of Defendants' breach of their legal duties, the notes and deeds of trust were void and unenforceable. Although the mere existence of these documents puts the parties within tortious striking distance, it does not satisfy the "but-for" analysis required under Arizona law.

The leading case in Arizona discussing whether a prevailing party to litigation involving both contractual and tort claims is entitled to attorney's fees is *Sparks v. Republic National Life Insurance Co.* 132 Ariz. 529, 647 P.2d 1127 (1982) (*en banc*). In *Sparks*, plaintiff purchased health insurance for himself, his family, and his employees based on promises in the insurance company's brochure. Plaintiffs successfully sued their insurance

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company for breach of contract, breach of covenant of good faith and fair dealing, and misrepresentation for the claims made in the insurance brochure. *Id.* at 534. The *Sparks* court found that attorneys' fees may be awarded pursuant to A.R.S. § 12-341.01 when the case is based upon facts that demonstrate a breach of contract, the breach of which may also constitute a tort. *Id.* at 543. However, the court allowed this claim because "[c]learly, the tort of bad faith cannot be committed absent the existence of an insurance contract and a breach thereof." *Id.* at 544. The court distinguished this claim, however, from plaintiff's claims for misrepresentation. "[Misrepresentation] sounds mainly in tort and its existence does not depend upon a breach of the contract of insurance." *Id.*

Declaratory judgment actions cover a wide range of disputes, and thus, unlike claims for breach of contract or breach of fiduciary duty, there is no clear presumption whether such a claim sounds primarily in contract or tort. This fact is recognized by the flexible statute of limitations for declaratory judgments that looks to the underlying claim for the applicable limitation. In this case, Plaintiffs' declaratory judgment claims sound in tort, as demonstrated by their reliance on legal duties, including the Arizona Administrative Code, and the equitable remedy sought. Therefore, Plaintiffs are not entitled to fees on this claim.

iii. Plaintiffs' other miscellaneous claims fail to provide attorneys' fees

In addition to the requirement that the claims arise out of contract, Arizona law also only provides fees to the successful party. For the same reasons that Plaintiffs' breach of fiduciary duty claims do not arise out of contact, Plaintiffs' fraud claims also do not arise out of contract. However, even if they did, Plaintiffs would not be entitled to fees for litigating this claim because they were not the "successful party" on this claim. A.R.S. § 12-341.01(A). Assuming, *arguendo*, that the other claims arose out of contract (they did not) Plaintiffs were also not the successful party on the usury claims or any of the 11 U.S.C. § 523 claims. In short, Plaintiffs' other miscellaneous claims also fail to support an award of fees.

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iv. Plaintiffs' Bankruptcy Counsel Fees are Not Related to Any Claim Arising Out of Contract and Should be Denied in Their Entirety

Attorneys at Engelman Berger were hired to assist Plaintiffs in collection by converting Defendants' re-organization bankruptcy to a liquidation bankruptcy. Although Engelman Berger's letterhead appears at the top of all pleadings in the adversary proceeding, they played no part in litigating Plaintiffs' successful claims. For example, Mr. Pack was not present at trial. Moreover, bankruptcy counsel's time entries support the fact that Engelman Berger had limited involvement with the case. His supportive role was in relation to the bankruptcy administrative case and the non-dischargeability claims. There is no basis for Plaintiffs' bankruptcy counsel to collect fees in the administrative case, and Plaintiffs failed on their non-dischargeability claims. In short, bankruptcy counsel's inclusion in Plaintiffs' application for attorneys' fees was inappropriate and it should be denied in its entirety.

II. Plaintiffs' Requested Fees are Inappropriate*

A. Mitigating Factors Support Defendants' Position that Attorneys' Fees Should Not be Awarded on Plaintiffs' Successful Claims

An award of attorneys' fees should not provide a windfall to the prevailing party. In light of this purpose, Arizona law allows the court considerable leeway in determining the amount of fees awarded, by stating that the purpose of an award of attorney's fees is to "mitigate the burden of the expense of litigation to establish a just claim or a just defense." A.R.S. § 12-341.01(B). Furthermore, the statute provides that the amount awarded "need not equal or relate to the attorney fees actually paid or contracted." *Id.*

Arizona trial courts must analyze a variety of factors to determine how much, if any, attorneys' fees should be awarded in an action arising out of contract. Courts should consider the merits of the claims or defense of the unsuccessful party, whether the litigation

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* Part II is argued in the alternative. To the extent that Plaintiffs prevail on the issue of whether some or all claims arise out of contract, Plaintiffs still should not receive fees.

could have been settled, whether assessing fees will cause an extreme hardship, if the successful party failed to obtain all relief sought, the novelty of the legal question presented, and whether an award of attorneys' fees would discourage parties from seeking resolution of legitimate contract issues. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 118 (1986) (*en banc*).

The primary factor that supports Defendants' contention that attorneys' fees should not be awarded in this case, assuming *arguendo* that it arose out of a contract, is the fact that Defendants would face extreme hardship if an additional three hundred and fifty thousand dollars and accruing interest was added to the judgment. For example, in *Scottsdale Memorial Health Systems, Inc. v. Clark*, 164 Ariz. 211, 791 P.2d 1094 (App. 1990), a construction company made approximately $180,000 worth of improvements to a piece of property and recorded a lien against it. The construction company was never paid and ultimately attempted to enforce its lien. Due to a transfer of the property the lien was unenforceable as to its new owners. *Id.* at 213. However, the trial court declined to award any fees, and the court of appeals agreed. *Id.*

Although the trial court in *Clark* did not have any information as to the financial position of either of the parties, the court still found that the harsh remedy supported a total denial of attorney's fees. *Id.*at 217. The successful party in *Clark* received the $180,000 worth of improvements to the property as a result of the construction company's work. Thus, "it was not unreasonable to conclude that imposing in excess of $188,000 of attorney's fees against [plaintiff], on top of its inability to enforce its lien, would impose a substantial hardship." *Id.* Because the statute provides wide discretion to the trial court, the facts of the case may support a finding "that it would be inequitable to not only declare a forfeiture of Defendant's lien but also to order Defendants to pay Plaintiff's attorney fees." *Id.* at 215.

Likewise, the case at bar supports a denial of attorneys' fees, even more strongly than the situation in *Clark*. The Court has found that Defendants forfeited two commissions they earned more than seven years ago in the sale and purchase of two different, unrelated

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properties. This disgorgement includes not only funds that Defendants loaned Plaintiffs (which Plaintiffs used to add $400,000 in luxury improvements to their $1.1 million property), but also the funds that Defendants actually received back in 2007. There is no question that Plaintiffs received a benefit from Defendants' services. However, unlike the new property owners in *Clark*, which was enriched by just the labor and materials, Plaintiffs received much, much more than the value of the work that Defendants provided. Specifically, Plaintiffs received the benefit of the $5.75 million sale price on Pretty Penny Ranch, with approximately $4 million in net proceeds. Moreover, this Court, unlike the court in *Clark*, is intimately familiar with Defendants' finances. It would be a severe hardship to Defendants to grant Plaintiffs' request for more than three hundred fifty thousand dollars in attorneys' fees in addition to the judgment on the claims, when Defendants' ability to recover his commissions is lost, and Defendants already took out a reverse mortgage on their home to help Plaintiffs during economic hardship.

The other factors expounded in *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 118 (1986) (*en banc*) also support denying Plaintiffs' application for fees. Given the time that had lapsed before the claims had been brought and the fact that Plaintiffs actually benefitted and did not suffer any quantifiable harm, Defendants presented meritorious defenses to Plaintiffs' claims. Defendants' meritorious defenses were substantiated by the Court's ruling, finding in favor of the Plaintiffs for their breach of fiduciary duty claim, but in favor of Defendants on Plaintiffs' §523(a)(4) claims regarding the dischargeability of a debt incurred as the result of a breach of fiduciary duty. In sum, the claims that Plaintiffs prevailed on were not clear-cut.

Additionally, Plaintiffs did not prevail on Counts Three, Six, Seven, Eight, or Nine of their Complaint. In other words, Plaintiffs prevailed on fewer than half of their claims, and the claims they did prevail on were all inextricably interwoven with the breach of fiduciary duty tort claim to become, in essence, a single claim and the remedies arising from that tort claim. Finally, Plaintiffs claimed relief—the disgorgements of all commissions for separate transactions—was unique and the award of attorneys' fees would discourage parties from

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seeking the resolution of legitimate issues. Plaintiffs should be denied attorneys' fees pursuant to A.R.S. § 12-341(B).

B. Plaintiffs' Requested Fees are not Reasonable

Assuming Plaintiffs are entitled to and awarded some fees, the amounts requested in their attorneys' fees application are clearly excessive. The Court has wide latitude to adjust fees that are unreasonable. The elements to consider when determining whether a fee is reasonable include: the qualities of the attorney, the nature of the work, the work actually performed by the attorney, and the result obtained. *Schwartz v. Schwerin*, 85 Ariz. 242, 336 P.2d 144 (1959). As part of the reasonableness analysis, the court must also undertake a careful analysis of the successful party's bills to determine if "every item of service . . . would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest." *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983). While reviewing each service provided, the court must also determine if "a particular task takes an attorney an inordinate amount of time" because the unsuccessful party should not be required to pay for such over-billing. *Id.* at 189. An attorneys' fee request for time spent on unsuccessful issues or claims also may properly be denied. *Id.*; *Apache East, Inc. v. Weigand*, 119 Ariz. 308, 313, 580 P.2d 769, 774 (App. 1978). Finally, fees should not be awarded for those unsuccessful "separate and distinct claims which are unrelated to the claim upon which the plaintiff prevailed." *China Doll*, 138 Ariz. at 189, 673 P.2d at 933.

Put simply, Plaintiffs' counsel has overbilled this case. For example, Plaintiffs billed 35.25 hours to prepare and provide the Court with forty-five exhibits. Plaintiffs' counsel spent more than fifty hours drafting their response to the second motion for summary judgment, for which they relied primarily on their state court motion for summary judgment and response to Defendants' motion for summary judgment. A more complete digest of the number of hours and amounts billed for different categories of work has been provided for the Court's convenience. Ex. 1, Digest of Pltf's Time Entries. To the extent that Plaintiffs do receive an award of fees, this amount must be limited to a reasonable amount of time for each task.

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Another reason Plaintiffs' request for fees should be reduced is because they did not succeed on all their claims and requested relief. *Schweiger*, 138 Ariz. at 189, 673 P.2d at 933 ("Where a party has achieved only partial or limited success, however, it would be unreasonable to award compensation for all hours expended, including time spent on the unsuccessful issues or claims."). Plaintiffs' claims for fraud, consumer fraud in state court, usury, and all their non-dischargeability claims were unsuccessful. Plaintiffs' fees should be "reduced to reflect the defendant's success." *Id.* This rule further supports Defendants' position that Engelman Berger, as the firm that did not prevail on any claims, should not be awarded any attorneys' fees from Defendants. Should the Court determine Plaintiffs are entitled to some attorneys' fees, Plaintiffs' application should be reduced to reflect "reasonableness."

III. Conclusion

For the reasons set forth above, Plaintiffs' application should be denied in its entirety, pursuant to either A.R.S. §12-341.01(A) or (B). In the alternative, Plaintiffs' application for fees should be reduced to reflect a reasonable amount of time expended on each task.

Dated this October 15, 2014.

ARBOLEDA BRECHNER

/s/ Kara M. Karlson
4545 E. Shea Blvd., Ste. 120
Phoenix, AZ 85028
Attorneys for Defendants/Debtor

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PHOENIX, ARIZONA 85028
TEL.: 602/482-0123

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, October 16, 2015 4:17 PM
To: Brnovich, Mark
Subject: RE: Lawall's Drug treatment program

Do you want to us to reschedule the forfeiture meeting?

It's just LaWall, Bill, Sheila, and the Yuma guy will call in. Not a big group.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Friday, October 16, 2015 3:49 PM
To: Bailey, Michael
Subject: Re: Lawall's Drug treatment program

Crap. I forgot about Rico meeting. I shouldn't have a lot of stress before surgery. But I did want to talk to lawall about the drug treatment program. Would like to work with her on that.

Attorney General Mark Brnovich
Sent from my iPhone

On Oct 16, 2015, at 3:29 PM, Bailey, Michael <Michael.Bailey@azag.gov> wrote:

> Do you want to meet with Barbara LaWall for a half hour right before the forfeiture meeting for the purpose of discussing with her the drug reform initiative?
>
> **Michael G. Bailey**
> Chief Deputy / Chief of Staff
> Office of the Arizona Attorney General
> 1275 W. Washington Street
> Phoenix, AZ 85007
> 602-542-8080 Office
> 602-542-4085 Fax
>
> michael.bailey@azag.gov

From: Conrad, Donald
Sent: Friday, October 16, 2015 2:11 PM
To: Bailey, Michael
Subject: Lawall's Drug treatment program

I talked to her and she proposes to meet with Mark at 1 p.m. on Oct. 22 when she is here for the 1:30 meeting re: RICO. I didn't reserve time with Beth as I wanted you to vet the notion of having her meet with Mark. Her attitude is more the merrier and she is going to bring grant applications that they successfully used to get funding.

Please let me know if I should tell Lawall that the meeting is set. She can't stay after the RICO meeting as she has to get back to Tucson for another event.

Donald E. Conrad
Division Chief Counsel
Criminal Division
(602) 542-3881

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, October 16, 2015 10:51 AM
To: Brnovich, Mark; Anderson, Ryan
Subject: FW: Activity in Case 2:15-cv-01022-SPL Planned Parenthood Arizona Incorporated et al v. Brnovich et al Order on Stipulation

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
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Phoenix, AZ 85007
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michael.bailey@azag.gov

From: Ray, Kevin
Sent: Friday, October 16, 2015 10:49 AM
To: Baer, Aaron; Bailey, Michael; Lopez, John
Cc: Corcoran, Aubrey Joy; Ray, Kevin
Subject: FW: Activity in Case 2:15-cv-01022-SPL Planned Parenthood Arizona Incorporated et al v. Brnovich et al Order on Stipulation

It appears Judge Logan has reversed himself. I'll send over the actual order when I have it!

From: azddb_responses@azd.uscourts.gov [mailto:azddb_responses@azd.uscourts.gov]
Sent: Friday, October 16, 2015 10:42 AM
To: azddb_nefs@azd.uscourts.gov
Subject: Activity in Case 2:15-cv-01022-SPL Planned Parenthood Arizona Incorporated et al v. Brnovich et al Order on Stipulation

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U.S. District Court

DISTRICT OF ARIZONA

Notice of Electronic Filing

The following transaction was entered on 10/16/2015 at 10:42 AM MST and filed on 10/16/2015
Case Name: Planned Parenthood Arizona Incorporated et al v. Brnovich et al
Case Number: 2:15-cv-01022-SPL
Filer:
Document Number: 107

Docket Text:
ORDER granting in part the parties' stipulated request for entry of preliminary injunction [94]. The Temporary Restraining Order is lifted and an Order of Preliminary Injunction is entered. The hearings presently scheduled for October 21, 2015, October 22, 2015,and October 23, 2015 are vacated as moot. Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction [22] is denied as moot. Plaintiffs' Motion to Compel [101] is denied without prejudice and with leave to refile following issuance of a Case Management Order in this matter. Signed by Judge Steven P. Logan on 10/16/15. (CLB)

2:15-cv-01022-SPL Notice has been electronically mailed to:

Lawrence Jay Rosenfeld lawrence.rosenfeld@squirepb.com, lisa.danczewski@squirepb.com, phxdocketmb@squirepb.com

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Skye Perryman skye.perryman@wilmerhale.com

Tiffany Payne tiffany.payne@wilmerhale.com

Mailee R Smith Mailee.Smith@AUL.org, Denise.Burke@AUL.org

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-0] [9e2a684a5b6280cb626768a98221235459105bedabff690c7f0f86583601eb60c
a197c105971158a5c655567b1490ea78a52cc59b95dd52981fa3b776c68a454]]

Anderson, Ryan

From: Bailey, Michael
Sent: Thursday, October 15, 2015 3:07 PM
To: Brnovich, Mark; Anderson, Ryan; Garcia, Mia
Subject: Patent enforcement

We signed on this afternoon.

Michael G. Bailey
Chief Deputy / Chief of Staff
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602-542-4085 Fax

michael.bailey@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Wednesday, October 14, 2015 10:05 AM
To: Brnovich, Mark; Kredit, Beth
Subject: RE: Protected address

Also, if you're refi-ing, you'll need to get the new loan docs included.

Michael G. Bailey
Chief Deputy / Chief of Staff
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Phoenix, AZ 85007
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602-542-4085 Fax

michael.bailey@azag.gov

-----Original Message-----
From: Brnovich, Mark
Sent: Wednesday, October 14, 2015 9:48 AM
To: Kredit, Beth
Cc: Bailey, Michael
Subject: Protected address

I found out via county elections that apparently Susan's home address is "protected" but mine is not. I know at one point, there was an order protecting my address. Does it expire? Even if it did, wouldn't I be covered by Susan's order? Can someone find out.

Attorney General Mark Brnovich
Sent from my iPhone

Anderson, Ryan

From: Bailey, Michael
Sent: Wednesday, October 14, 2015 10:05 AM
To: Brnovich, Mark; Kredit, Beth
Subject: RE: Protected address

You should also be able to get your own order.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

-----Original Message-----
From: Brnovich, Mark
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To: Kredit, Beth
Cc: Bailey, Michael
Subject: Protected address

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Attorney General Mark Brnovich
Sent from my iPhone

Anderson, Ryan

From: Bailey, Michael
Sent: Wednesday, October 14, 2015 10:04 AM
To: Brnovich, Mark; Kredit, Beth
Subject: RE: Protected address

You should be included on the order. But the order has to reference specific documents which are to be sealed. Do you know which docs are showing your address? Could be election related filings. Just need to get those included on the order. I will take this up with Beth when she gets back.

Michael G. Bailey
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Office of the Arizona Attorney General
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602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

-----Original Message-----
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Sent: Wednesday, October 14, 2015 9:48 AM
To: Kredit, Beth
Cc: Bailey, Michael
Subject: Protected address

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Attorney General Mark Brnovich
Sent from my iPhone

Anderson, Ryan

From: Bailey, Michael
Sent: Wednesday, October 14, 2015 8:48 AM
To: Brnovich, Mark
Subject: RE: Revision: Intellectual Property Enforcement Letter

yes

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Wednesday, October 14, 2015 8:48 AM
To: Bailey, Michael
Subject: Re: Revision: Intellectual Property Enforcement Letter

I'm having a hard time opening attachment. Can u run this by Watkins and the federalism unit?

Attorney General Mark Brnovich
Sent from my iPhone

On Oct 14, 2015, at 10:31 AM, Bailey, Michael <Michael.Bailey@azag.gov> wrote:

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

NOTICE: This email (and any attachments) may contain PRIVILEGED OR CONFIDENTIAL information and is intended only for the use of the specific individual(s) to whom it is addressed. If you have received this email in error, please immediately notify Valerie Neumann at 602-542-8017 and delete the original email. Thank you.

From: Alexandra McGuire [mailto:amcguire@NAAG.ORG]
Sent: Tuesday, October 13, 2015 1:37 PM
To: Alexandra McGuire
Cc: Alley, Travis (ATG
Subject: Revision: Intellectual Property Enforcement Letter

This message is being sent to all Attorneys General, Chief Deputies, and Executive Assistants:

Revisions have been made to this letter. Please see the updated packet including the redline revisions on the letter.

If your state has already signed on and you accept the changes, your response will presumptively remain affirmative (no further action is needed). If you wish to change your response, please notify Allie McGuire at amcguire@naag.org using the attached response form no later than **COB Thursday, October 15, 2015.**

The attached **"2016 Joint Strategic Plan on Intellectual Property Enforcement"** sign-on packet contains:

1. "Dear Colleague" letter from Attorneys General Fox and Ferguson,
2. Draft letter to Mr. Daniel Marti, White House Intellectual Property Enforcement Coordinator commenting on the development of the 2016 Joint Strategic Plan on Intellectual Property Enforcement,
3. Response Form: please return to Allie McGuire by email at amcguire@naag.org or by fax at **(202) 521-4052** by **COB Thursday, October 15, 2015.**

If you have any substantive questions about this letter, please contact Travis Alley with the Washington Attorney General's Office at (206) 464-6431 or travisa@atg.wa.gov.

If you have any questions about your state's response, please contact Allie McGuire at 202-326-6008 or amcguire@naag.org. An updated table of signatory states is below.

Please note that if you are interested in which states have signed on to this letter, you may check the real-time status at this website, **please note the new site password below:**
http://[redacted]
password:[redacted]
Please do not share the password with anyone outside of the NAAG Community.

The deadline to sign on is COB Thursday, October 15, 2015.

Intellectual Property Enforcement

of sponsors and signatories: 6

Deadline: COB Thursday, October 15, 2015

Please fax forms to (202) 521-4052 or email to amcguire@naag.org

States	Yes	No	State	Yes	No
Alabama	x		Montana	x	

Alaska			Nebraska	x	
American Samoa			Nevada		
Arizona			New Hampshire	x	
Arkansas			New Jersey		
California			New Mexico		
Colorado			New York		
Connecticut			North Carolina		
Delaware			North Dakota		
Dist of Columbia			N. Mariana Islands		
Florida			Ohio		
Georgia			Oklahoma		
Guam			Oregon		
Hawaii			Pennsylvania		
Idaho			Puerto Rico		
Illinois			Rhode Island	x	
Indiana			South Carolina		
Iowa			South Dakota		
Kansas			Tennessee		
Kentucky			Texas		
Louisiana			Utah		
Maine			Vermont		
Maryland			Virgin Islands		
Massachusetts			Virginia		
Michigan			Washington	x	
Minnesota			West Virginia		
Mississippi			Wisconsin		
Missouri			Wyoming		

Thank you,
Allie

Allie McGuire

NAGTRI Program Specialist
National Association of Attorneys General
2030 M St NW, 8th Floor
Washington, DC 20036
202.326.6008 | amcguire@naag.org

<2016 Joint Strategic Plan on Intellectual Property Enforcement Sign On Packet Revised.pdf>

Anderson, Ryan

From: Bailey, Michael
Sent: Wednesday, October 14, 2015 8:31 AM
To: Brnovich, Mark
Subject: FW: Revision: Intellectual Property Enforcement Letter
Attachments: 2016 Joint Strategic Plan on Intellectual Property Enforcement Sign On Packet Revised.pdf

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Alexandra McGuire [mailto:amcguire@NAAG.ORG]
Sent: Tuesday, October 13, 2015 1:37 PM
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Cc: Alley, Travis (ATG
Subject: Revision: Intellectual Property Enforcement Letter

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Intellectual Property Enforcement

of sponsors and signatories: 6

Deadline: COB Thursday, October 15, 2015

Please fax forms to (202) 521-4052 or email to amcguire@naag.org

States	Yes	No	State	Yes	No
Alabama	x		Montana	x	
Alaska			Nebraska	x	
American Samoa			Nevada		
Arizona			New Hampshire	x	
Arkansas			New Jersey		
California			New Mexico		
Colorado			New York		
Connecticut			North Carolina		
Delaware			North Dakota		
Dist of Columbia			N. Mariana Islands		
Florida			Ohio		
Georgia			Oklahoma		
Guam			Oregon		
Hawaii			Pennsylvania		
Idaho			Puerto Rico		
Illinois			Rhode Island	x	
Indiana			South Carolina		
Iowa			South Dakota		

Kansas			Tennessee		
Kentucky			Texas		
Louisiana			Utah		
Maine			Vermont		
Maryland			Virgin Islands		
Massachusetts			Virginia		
Michigan			Washington	x	
Minnesota			West Virginia		
Mississippi			Wisconsin		
Missouri			Wyoming		

Thank you,
Allie

Allie McGuire
NAGTRI Program Specialist
National Association of Attorneys General
2030 M St NW, 8th Floor
Washington, DC 20036
202.326.6008 | amcguire@naag.org

To: All Attorneys General
Chief Deputies
Executive Assistants

From: Attorney General Bob Ferguson, Washington
Attorney General Tim Fox, Montana

Re: **Sign-on Letter to Mr. Daniel Marti, the White House's Intellectual Property Enforcement Coordinator, Commenting on the Development of the 2016 Joint Strategic Plan on Intellectual Property Enforcement**

Date: October 6, 2015

Deadline for Response: COB Thursday, October 15, 2015

Please find the enclosed draft sign-on letter to Mr. Daniel Marti, the White House's Intellectual Property Enforcement Coordinator, Commenting on the Development of the 2016 Joint Strategic Plan on Intellectual Property Enforcement. The comment letter encourages the following:

- Maintaining funding opportunities for intellectual property theft trainings for state and local law enforcement agencies;
- Expanding public outreach and education efforts by collaborating with states and other partners to improve message permeation in local markets;
- Having federal law confirm state enforcement authority to prohibit bad faith patent assertions;
- Increasing transparency of patentees that send demand letters; and
- Developing proposals for alternative patent dispute resolution systems that reduce costs associated with litigation.

Please return the attached response to Allie McGuire at NAAG either via facsimile to (202) 521-4052 or via email in PDF form to amcguire@naag.org no later than COB Thursday, October 15, 2015. Please contact Travis Alley with the Washington Attorney General's Office at (206) 464-6431 or at travisa@atg.wa.gov with any substantive questions or comments about the letter.

Sincerely,

Bob Ferguson
Washington Attorney General

Tim Fox
Montana Attorney General

Anderson, Ryan

From: Bailey, Michael
Sent: Wednesday, October 14, 2015 8:28 AM
To: Anderson, Ryan
Subject: FW: Revision: Intellectual Property Enforcement Letter
Attachments: 2016 Joint Strategic Plan on Intellectual Property Enforcement Sign On Packet Revised.pdf

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Alexandra McGuire [mailto:amcguire@NAAG.ORG]
Sent: Tuesday, October 13, 2015 1:37 PM
To: Alexandra McGuire
Cc: Alley, Travis (ATG
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Intellectual Property Enforcement

of sponsors and signatories: 6

Deadline: COB Thursday, October 15, 2015

Please fax forms to (202) 521-4052 or email to amcguire@naag.org

States	Yes	No	State	Yes	No
Alabama	x		Montana	x	
Alaska			Nebraska	x	
American Samoa			Nevada		
Arizona			New Hampshire	x	
Arkansas			New Jersey		
California			New Mexico		
Colorado			New York		
Connecticut			North Carolina		
Delaware			North Dakota		
Dist of Columbia			N. Mariana Islands		
Florida			Ohio		
Georgia			Oklahoma		
Guam			Oregon		
Hawaii			Pennsylvania		
Idaho			Puerto Rico		
Illinois			Rhode Island	x	
Indiana			South Carolina		
Iowa			South Dakota		

Kansas			Tennessee		
Kentucky			Texas		
Louisiana			Utah		
Maine			Vermont		
Maryland			Virgin Islands		
Massachusetts			Virginia		
Michigan			Washington	x	
Minnesota			West Virginia		
Mississippi			Wisconsin		
Missouri			Wyoming		

Thank you,
Allie

Allie McGuire
NAGTRI Program Specialist
National Association of Attorneys General
2030 M St NW, 8th Floor
Washington, DC 20036
202.326.6008 | amcguire@naag.org

Anderson, Ryan

From: Bailey, Michael
Sent: Tuesday, October 13, 2015 11:09 AM
To: Brnovich, Mark
Subject: signing agreement

Both Conrad and I have reviewed the Mexico agreement. Neither of us has a problem with it.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Tuesday, October 13, 2015 11:05 AM
To: Conrad, Donald
Subject: RE: RIco meeting on Oct 22

Great – thanks.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Conrad, Donald
Sent: Tuesday, October 13, 2015 10:06 AM
To: Bailey, Michael
Subject: RIco meeting on Oct 22

Lawall, Polk, Montgomery say they will be here. Jon Smith will appear by phone.

Donald E. Conrad
Division Chief Counsel
Criminal Division
(602) 542-3881

Anderson, Ryan

From: Bailey, Michael
Sent: Tuesday, October 13, 2015 10:46 AM
To: Brnovich, Mark
Subject: RE: Where we at

Slow going - he's working it. We've got one case that he's sharing with Kalon Metz. I will light a fire.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

-----Original Message-----
From: Brnovich, Mark
Sent: Tuesday, October 13, 2015 10:18 AM
To: Bailey, Michael
Subject: Where we at

With Blaine filing some human trafficking cases? Let's get moving.

Attorney General Mark Brnovich
Sent from my iPhone

Anderson, Ryan

From: Bailey, Michael
Sent: Tuesday, October 13, 2015 9:06 AM
To: Conrad, Donald
Subject: RE: Meeting to discuss RICO

sure

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Conrad, Donald
Sent: Tuesday, October 13, 2015 9:05 AM
To: Bailey, Michael
Subject: FW: Meeting to discuss RICO

Since it's not my meeting I didn't immediately say yes. Of course I think it's fine. What say you?

From: Jon R. Smith [mailto:Jon.Smith@yumacountyaz.gov]
Sent: Monday, October 12, 2015 9:21 AM
To: Conrad, Donald; 'barbara.lawall@pcao.pima.gov'; 'Sheila.Polk@yavapai.us'; 'montgomw@mcao.maricopa.gov'
Subject: RE: Meeting to discuss RICO

Good morning Don,

I am not able to travel to Phoenix on that day to attend the meeting. Would it be possible to do so by phone?

Best,

Jon

From: Conrad, Donald [mailto:Donald.Conrad@azag.gov]
Sent: Wednesday, October 07, 2015 1:08 PM
To: Jon R. Smith; 'barbara.lawall@pcao.pima.gov'; 'Sheila.Polk@yavapai.us'; 'montgomw@mcao.maricopa.gov'
Cc: Conrad, Donald
Subject: Meeting to discuss RICO

Dear Fellow Prosecutor,

The Attorney General has asked me to invite you to a meeting regarding RICO and the upcoming legislative session. The meeting will be held at 1:30 pm on October 22 in our offices at 1275 W. Washington. Please let me know if you will be able to attend.

Donald E. Conrad
Division Chief Counsel
Criminal Division
(602) 542-3881

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, October 09, 2015 9:12 AM
To: Garcia, Mia
Cc: Anderson, Ryan
Subject: FW: Reporter's Question Regarding the Carcieri Fix

Thought about not bothering with the forward, but just in case you see something.....

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Williams, Dawn
Sent: Friday, October 09, 2015 8:54 AM
To: Bailey, Michael
Cc: Johnson, John
Subject: FW: Reporter's Question Regarding the Carcieri Fix

If anyone in our office is interested in speaking to a reporter about Indian land-into-trust issues, there is info below.

Thanks,
Dawn
Dawn Williams, CWLS
Unit Chief Counsel for CFPD Appeals

Office of the Attorney General Mark Brnovich
Child & Family Protection Division – Appeals Unit
2760 S. 4th Ave., Bldg. C, Tucson AZ 85713
Phone: 520-746-4443
Dawn.Williams@azag.gov
Certified Specialist, Child Welfare Law, NACC

Thank you.

From: Chris Coppin [mailto:ccoppin@cwagweb.org]
Sent: Friday, October 09, 2015 8:52 AM
To: nkelly@riag.ri.gov; frondaw@atg.wa.gov; david.blake@state.co.us; sara.drake@doj.ca.gov; Wayne Howle; kirsten.jasper@state.sd.us; mike mcgrady; anne.nelson@alaska.gov; erik.petersen@wyo.gov; Mquealy@utah.gov; masagsve@nd.gov; Schlichting, Melissa; Daniel.steuer@state.co.us; stephanie.striffler@doj.state.or.us; Clive Strong; Williams, Dawn
Cc: Karen White
Subject: Reporter's Question Regarding the Carcieri Fix

Dear WAGLAC Attendees:

I have been contacted by David Rogers, a reporter for Politico.com, regarding the CWAG reaction to Senator Barrasso's Carcieri legislative fix we discussed at the last WAGLAC meeting. I told him that, absent a formal resolution, CWAG had no position on the legislation but that individual member states may have one. He asked that I contact you to see if anyone would discuss the matter with him. I have copied his email to Karen White below so you can see his interest in the topic.

Thank you,
Chris Coppin
Legal Director - CWAG

Ms. White: I am a long time reporter covering Congress and am writing a piece related to the Carcieri debate over Indian lands. I believe from reading past testimony, the conference has argued in the past that any fix should include changes in the underlying fee-to-trust process. But I wanted to check as to what you may have said recently and are the changes in the Barrasso bill judge adequate to get your support?

What is the best time or number for me to reach you? I work more from home these days because of an illness the VA is treating re Vietnam. That number is 301-[redacted] or my cell is 703-[redacted]. I don't need to take a lot of your time but wanted to be as up to date as possible. Thanks—David Rogers

Anderson, Ryan

From: Bailey, Michael
Sent: Thursday, October 08, 2015 3:40 PM
To: Brnovich, Mark
Subject: RE: Hale letter

Not ringing a bell – but I will check with Conrad.
We had one referred regarding Pearsall's daughter and lobbying without registering. We've got a draft of a letter of reprimand on that, but it hasn't been sent.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Thursday, October 08, 2015 3:36 PM
To: Bailey, Michael
Subject: Re: Hale letter

What ever happened to that investigation of [redacted]

Attorney General Mark Brnovich
Sent from my iPhone

On Oct 8, 2015, at 2:48 PM, Bailey, Michael <Michael.Bailey@azag.gov> wrote:

> Ryan – please touch base with Beth for scheduling this if we haven't already. This is the day before Mark's surgery – and the one other event scheduled that day, in the afternoon, is the county attorneys coming here to talk about forfeiture.
>
> The morning is open – if we schedule, the rest of the day needs to be blocked off.
>
> **Michael G. Bailey**
> Chief Deputy / Chief of Staff
> Office of the Arizona Attorney General
> 1275 W. Washington Street
> Phoenix, AZ 85007
> 602-542-8080 Office
> 602-542-4085 Fax

michael.bailey@azag.gov

From: Medina, Rick
Sent: Thursday, October 08, 2015 2:46 PM
To: Brnovich, Mark; Bailey, Michael; Anderson, Ryan
Subject: Fwd: Hale letter

Fyi...

Sent from my iPhone

Begin forwarded message:

> **From:** "Bielecki, Michael" <MBielecki@lrrlaw.com>
> **Date:** October 8, 2015 at 5:25:33 PM EDT
> **To:** "'Medina, Rick'" <Rick.Medina@azag.gov>
> **Subject:** RE: **Hale letter**
>
> Rick,
>
> Navajo Attorney General Branch will be in Phoenix on October 22 if there is a desire of meeting with her. I have not asked her about it yet, I wanted to ask you first.
>
> Let me know if there is interest.
>
> Take care,
>
> Mike
>
> ---
>
> **From:** Medina, Rick [mailto:Rick.Medina@azag.gov]
> **Sent:** Friday, September 25, 2015 4:11 PM
> **To:** Bielecki, Michael
> **Subject:** RE: Hale letter
>
> Thanks Mike. As always, I appreciate your insight.
>
> -R
>
> ---
>
> **From:** Bielecki, Michael [mailto:MBielecki@lrrlaw.com]
> **Sent:** Friday, September 25, 2015 4:03 PM
> **To:** Medina, Rick
> **Subject:** Hale letter
>
> Rick,
>
> I checked with the lawyer from Navajo Department of Justice. I asked if he knew of the genesis of the hale letter. It appears to be national firm with a presence in Arizona trying to score points in Indian country, it's another version of business

development. They are not a 'tribal firm" but are seeking business in Indian country as a practice area. They may be dealing with other tribal representatives here and across the country. They may be involved with the tribal Supreme Court Project I mentioned. This group is trying to generate a nationwide response to the supreme Court and in individual states. My guy in Navajo DOJ has been a standup person for the 10 years I have worked with him, and says he is the only lawyer there who is following this at this point.

Mike

This message and any attachments are intended only for the use of the individual or entity to which they are addressed. If the reader of this message or an attachment is not the intended recipient or the employee or agent responsible for delivering the message or attachment to the intended recipient you are hereby notified that any dissemination, distribution or copying of this message or any attachment is strictly prohibited. If you have received this communication in error, please notify us immediately by replying to the sender. The information transmitted in this message and any attachments may be privileged, is intended only for the personal and confidential use of the intended recipients, and is covered by the Electronic Communications Privacy Act, 18 U.S.C. §2510-2521.

Anderson, Ryan

From: Bailey, Michael
Sent: Thursday, October 08, 2015 12:54 PM
To: Brnovich, Mark
Subject: RE: Information regarding the Controlled Equipment list pursuant to Executive Order 13688

I don't believe our equipment meets the standard, but am forwarding to Conrad and Perkovich.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Thursday, October 08, 2015 11:33 AM
To: Bailey, Michael
Subject: FW: Information regarding the Controlled Equipment list pursuant to Executive Order 13688

Does someone in our office work on this? Procuring this type of equipment?

From: AFMLS.communications [mailto:AFMLS.communications@usdoj.gov]
Sent: Thursday, October 08, 2015 6:56 AM
Subject: Information regarding the Controlled Equipment list pursuant to Executive Order 13688

The information below was sent in an Equitable Sharing Wire on October 1, 2015. Because of the critical nature of the content, it is also being sent to all agency heads to ensure receipt.

On January 16, 2015, President Barack Obama issued Executive Order 13688, "Federal Support for Local Law Enforcement Equipment Acquisition," that identified and implemented actions to improve federal support for the appropriate use, acquisition, and transfer of equipment by state, local, and tribal law enforcement agencies. This order prohibits Law Enforcement Agencies (LEAs) from using federal funds to purchase military-style equipment outlined in the May 18, 2015 *Equitable Sharing Wire*.

Additionally, the Executive Order requires LEAs to obtain pre-approval from the funding federal agency and follow new guidelines when purchasing equipment found on the Controlled Equipment List. Effective October 1, 2015, the following equipment is subject to these requirements when using federal funds:

- Manned Aircraft, Fixed Wing and Rotary Wing

- Unmanned Aerial Vehicle
- Armored Vehicles, Wheeled
- Command and Control Vehicles
- Breaching Apparatus
- Riot Batons, Helmets, and Shields

If an LEA intends to use Department of Justice or Department of the Treasury equitable sharing funds to purchase any Controlled Equipment, the agency must submit a request to the funding federal agency for approval. Additional guidance and instructions are available on the Department of Justice and Department of the Treasury public websites.

LEAs shall not obligate or spend any federal equitable sharing funds for a Controlled Equipment purchase until approval has been granted by the funding federal agency. The Asset Forfeiture and Money Laundering Section and the Treasury Executive Office for Asset Forfeiture will review requests and notify agencies when the request has been approved or denied. Any questions should be directed to afmls.aca@usdoj.gov or treas.aca@treasury.gov.

Anderson, Ryan

From: Bailey, Michael
Sent: Thursday, October 08, 2015 8:23 AM
To: Brnovich, Mark
Subject: FW: NAAG Fall Meeting - Attorney General Roundtable Discussion

This meeting has no scholarship assistance except for AGs. I assume you won't go because of the post-surgical stuff. Would you like us to send someone, even though we're paying?

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: James McPherson [mailto:jmcpherson@NAAG.ORG]
Sent: Thursday, October 08, 2015 3:53 AM
To: James McPherson
Cc: Chris Toth; Albert Lama; Marjorie Tharp; Noreen Leahy; Jeffrey Hunter
Subject: NAAG Fall Meeting - Attorney General Roundtable Discussion

THIS IS BEING SENT TO ALL ATTORNEYS GENERAL, CHIEF DEPUTIES/CHIEFS OF STAFF, AND EXECUTIVE ASSISTANTS

Good Morning Generals,

One of the most popular substantive sessions of the NAAG Annual Meetings is the Attorney General Roundtable Discussion. Attorney General Miller and Attorney General Wasden have volunteered to moderate this session at the Fall Meeting on Tuesday afternoon, 1 December 2015, in Charleston, SC. Generals Miller and Wasden want to ensure the topics they introduce are ones that you find relevant and useful. They asked me to solicit the AG Community for your ideas on topics to discuss. The topics should lend themselves to a 15 – 20 minute discussion. Just a reminder, the Fall Meeting will be attended by Attorneys General and AG staff only – no public, SAGE, or media will be present.

If you have ideas for a topic, please let me know by Monday, 19 October.

Thank you and V/R,

Jim

James E. McPherson
Executive Director

National Association of Attorneys General
2030 M Street, NW, Washington, DC 20036
202.326.6260
Cell: 202.701.9115