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United States Senate

COMMITTEE ON
 ENERGY AND NATURAL RESOURCES

WASHINGTON, DC 20510-8150

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March 14, 2007

The Honorable Dirk Kempthorne
 Secretary
 U.S. Department of the Interior
 1849 C Street, N.W.
 Washington, D.C. 20240

Dear Secretary Kempthorne:

I reviewed with interest the resolution adopted by the Western Governors' Association, requesting that Congress repeal the provisions of the Energy Policy Act of 2005 (EPAAct) that provide for the use of categorical exclusions with respect to certain oil and gas activities on lands with important wildlife values. I share the concerns of the Western Governors with respect to this provision and its implementation by the Bureau of Land Management (BLM).

Section 390 of EPAAct established a "rebuttable presumption that the use of a categorical exclusion under the National Environmental Policy Act of 1969 (NEPA) would apply" to five types of activities relating to the exploration and development of oil and gas on public lands. The BLM has issued an Instruction Memorandum that provides that these categorical exclusions are not subject to the long-standing requirements in the Council of Environmental Quality (CEQ) regulations and the Department of the Interior's own NEPA rules codified in the Departmental Manual that situations presenting "extraordinary circumstances" not be subject to in-depth environmental analysis.

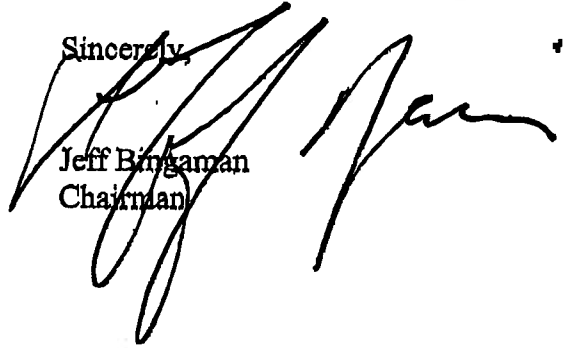
Given that this interpretation of "categorical exclusion" was in effect at the time that section 390 was enacted, I am disturbed that BLM's implementation of section 390 does not provide for further environmental analysis of situations that present extraordinary circumstances. It is, of course, a fundamental rule of statutory construction that where Congress borrows a term of art in which there is an understood legal meaning, it presumably knows and adopts the meaning. Morissette v. United States, 342 U.S. 246, 263 (1952).

The Western Governors' action highlights the adverse impact that section 390 can have on lands with high wildlife values. Please provide me with an explanation of BLM's rationale for its interpretation of section 390, especially with respect to cases that present extraordinary circumstances, together with any legal analysis that has been undertaken by the Department supporting this interpretation. Please also provide information on the number of categorical exclusions provided as a result of this provision by State. Finally, I also request that you review

implementation of the section with respect to all federal lands and provide me with your views as to whether any oil and gas operations are proceeding without adequate environmental analysis as a result of section 390.

Sincerely,

Jeff Bingaman
Chairman

A large, stylized handwritten signature in black ink, appearing to read "Jeff Bingaman", is written over the typed name and title.