

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

Questions from Senator Murkowski

Question 1: Congressional Oversight:

a. What does the law require of the IG of the Department of the Interior with respect to reports to Congress? Do you have an independent reporting obligation?

Answer: An Inspector General has a dual reporting role: to the Secretary and to Congress. I take very seriously our statutory obligation to keep both Congress and the Secretary fully and currently informed about serious deficiencies we identify within the Department. We are required under Section 4(a)(5) of the Inspector General Act “to keep the head of such establishment and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment....”

The other reporting provisions of the IG Act are found in Section 5. It requires each IG to prepare semiannual reports that must include, among other things:

1. a description of and recommendations relating to significant problems, abuses, and deficiencies relating to the administration of programs and operations;
2. a summary of matters referred for prosecution;
3. a listing of each audit, inspection, and evaluation report issued; and
4. a summary of particularly significant reports.

The semiannual report is to be transmitted to the head of the agency by April 30 and October 31 of each year and by the agency head to Congress within 30 days of receipt of the IG’s report. Section 5 of the Act also requires an IG to report “particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations.” This latter category of matters are to be transmitted to Congress by the head of the agency within 7 days.

b. What is the IG’s independent duty to assist Congress when the IG’s Department is unresponsive?

Answer: While I am not aware of any statutory duty for an IG to assist Congress when an agency or department is unresponsive, I seek to work on matters of concern to Congress and take seriously the OIG’s obligation to keep Congress “fully and currently informed” of serious problems and deficiencies in the Department as required by the

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

Inspector General Act. The information sought by the House Committee on Natural Resources that implicated potential claim for executive privilege did not, however, reveal serious problems and deficiencies. Nonetheless, I made every effort to persuade the Department to engage in the accommodation process with the House Committee on Natural Resources. I did this through my direct contacts with the Office of the Secretary as well as frequent efforts by my General Counsel with Department attorneys. As a result of these efforts, the Secretary has committed the Department to engage in greater accommodation of that Committee's requests for information regarding the Stream Protection Rule now that the draft proposed rule has been published.

c. In general, what types of information, if any, must or may an IG properly withhold from a congressional committee? Please include in your answer the legal authorities under which such information must or may be withheld.

I cannot speak for the entire IG community on this subject as some of my colleagues may obtain uniquely sensitive information that they determine cannot be provided to Congress. From my own perspective, other than classified information that has its own processes for sharing with Congress, and grand jury information, I am not aware of any information that must be withheld from a committee. Most or all IGs do not share information about ongoing investigations and prosecutions, based upon guidance from the Department of Justice's Office of Legal Counsel (OLC). See, e.g., *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 32 (1982) (opinion of Attorney General William French Smith): "[I]t has been the policy of the Executive Branch throughout the is nation's history to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances."

The other area where most IGs will withhold information, based upon my conversations with my colleagues, is when the agency or department indicates a potential assertion of executive privilege. Because only the President can formally assert executive privilege, an agency expresses this intent by asserting "The information demanded relates to important Executive Branch confidentiality interests and is deliberative and pre-decisional," or similar words. This is the exact statement provided to us by the Department's Deputy Solicitor in response to the House subpoena in 2014. The Congressional Research Service comprehensively discusses the legal principles and provides the history of the assertion of executive privilege dating back to President Kennedy. See *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, August 21, 2012.

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

Based upon our reading of the IG Act, a claim of executive privilege would not prevent us from turning documents over to Congress in situations where we have uncovered “fraud and other serious problems, abuses, and deficiencies” (quoting IG Act Section 4(a)(5)). As we explained repeatedly to the House Committee, had we made such a finding, our analysis of its request may have been different.

During our dispute with the House Committee, my office did not withhold any documents that were wholly within the realm of control of the OIG. In response to 21 of the Chairman’s request, we turned over extensive internal information including deliberative and pre-decisional drafts, Privacy Act protected information, staff emails, agents’ notes, and attorney-client deliberative material.

Question 2: Concerning your decisions during the “protracted disagreement” with the House Committee described in your testimony:

a. Of which decisions do you remain most confident?

The issue about which I remain steadfastly confident is that of the separation of powers, and the process by which the Legislative Branch and Executive Branch resolve their differences over information that is deemed potentially privileged by the Executive Branch. The accommodation process is well established, and has been employed by both parties holding power in both the Legislative and Executive Branches over many administrations. I believed then, as I do now, that the proper resolution of such differences lies between the two branches of government. The Office of Inspector General had no interest at stake or authority to resolve such differences.

b. Which show your independence from the Department?

My independence from the Department is reflected in the over 500 published reports issued since I became acting IG in 2009, but specifically, I would point to the 2010 Report of Investigation into the Gulf of Mexico Moratorium Recommendation, and the Evaluation, “New Horizon: Looking at the Future of BOEM Inspection and Enforcement”, both of which were borne out of the Deepwater Horizon disaster, each of which were highly criticized by the House Committee on Natural Resources, yet both of which I still consider as some of our most timely, thorough, influential, and independent work. I would also point to our Audit Report on BLM’s Helium Program which was highlighted in a hearing before the House Committee on Natural Resources and upon which new legislation was, in part, based. The OIG investigative report on the improper recognition of the Tejon Indians was highly critical of the Assistant Secretary for Indian

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

Affairs' decision; our report on U.S. Park Police Weapons Accountability was highly embarrassing to the National Park Service, and also the subject of a House hearing; our audits on U.S. Fish and Wildlife's management of the Coastal Impact Assistance Programs in Mississippi and Louisiana led to five convictions of Mississippi officials for fraud and \$27.7 million in questioned costs; our investigation into allegations of misconduct by the Assistant Secretary of Insular Affairs brought about his resignation even prior to our report being issued. Most recently, we issued a report about the National Park Service's (NPS) use of its construction account to pay for Economy Act services provided to other agencies. In that report, we could not resolve our fundamental disagreement with NPS about its use of the construction account, and recently briefed staff for the House Committee on Oversight and Government Reform, as well as bipartisan and bicameral staff for Appropriations. These are but a few examples that highlight our independence from the Department.

c. Which show that you are NOT too closely aligned with the work of Interior to serve in the IG "watchdog" role effectively?

Again, I would point to the "New Horizon: Looking at the Future of BOEM Inspection and Enforcement", about which I was criticized for being too closely aligned with the work of the Department to conduct effective and independent oversight. Yet today, nearly five years since its issuance, the Department continues to implement our recommendations from this report, to change and improve its management, regulatory, and oversight responsibilities over oil and gas production in the Gulf of Mexico. The continuing impact of the New Horizons report reflects both my independence and effectiveness as an Inspector General. More recently, our report about the National Park Service's (NPS) use of its construction account to pay for Economy Act services provided to other agencies was highly critical of this practice. The OIG could not resolve our fundamental disagreement with NPS about its use of the construction account, recommended that NPS either seek congressional approval of this use, or discontinue the practice. We recently briefed staff for the House Committee on Oversight and Government Reform, as well as bipartisan and bicameral staff for Appropriations.

Question 3: A report prepared by the majority staff of the House Committee on Natural Resources, *Holding Interior Watchdog Accountable* (February 21, 2013) (House Committee Report) detailed a number of facts that, from the perspective of the report, show that you and the OIG under your leadership were insufficiently independent from the Department.

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

a. Please tell the Committee the *facts* that should lead us to conclude that the report is mistaken, that you are independent of the Department, and that you are responsive to Congress.

b. What *facts* support the conclusion that you didn't, as the Report asserted, "blur the line between being an independent watchdog and serving as an informal advisor and collaborator on [Interior] policy initiatives"?

Answer: The Report by the Majority Staff, Office of Oversight and Investigations, Committee on Natural Resources, dated February 21, 2013, was written in four parts:

1. Help Wanted: Independence Required for an Inspector General

Acting IG has sought Accommodation and Collaboration

My personal style, to engage in civil discourse even when addressing difficult issues, has been criticized by some as being too accommodating of the Department of the Interior. Civility, in my experience, however, is not an accommodation, but rather, a strong and effective tool in communicating with and holding DOI accountable.

Taking a purely adversarial approach to oversight, as some propose, is inconsistent with the Inspector General's mandate, which is to strengthen as well as criticize the agency. I have led the OIG to provide constructive critique to effect positive change in the Department programs and operations. We seek voluntary cooperation from Department staff to complete our work, which is gained through a practice of engaging in professional relationships while understanding the distinction between one another's mission and responsibilities.

One important result of this approach has been that the Department, through the Secretary, her senior staff, and that of the bureaus, routinely turn to the OIG to address management issues of concern, and concerns about potential wrongdoing. The Department has not always been so forthcoming about asking the OIG to review or investigate such issues.

IG Employee Concerns about Independence

The Majority Staff Report cites data and comments from the OIG Employee Satisfaction Survey that compiled responses, reporting that for 2012, "only 59 percent of IG employees agreed or strongly agreed that 'the OIG conducts its work in a manner that is

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

independent ... from the Department.” The Majority Staff Report did not include the additional 26 percent of respondents that “neither agree nor disagree.”

In our 2015 survey, 73 percent of employees said the OIG conducted its work in a manner that was independent from the Department. Another 12 percent were neutral in their answer and 10 percent did not know.

In 2015, in response to the question, “Over the past year, the OIG conducted its work in a manner that was independent ... from Congress,” 66 percent answered positively, while 15 percent were neutral and 16 percent did not know.

As a point of reference, survey scores above 65 percent positive are considered to be a “strength” in the Federal Employee Viewpoint Survey.

Here are some comments taken from the 2015 survey:

“The Deputy IG's focus is on the thoroughness of reviews and not the outcome.”

“I haven't read every product or report, but I feel that objectivity is a high priority within our organization and is naturally part of our culture.”

“I have been part of discussions that stress the objectivity of projects, so I know that there is an effort being made to be objective.”

“In my personal experience, OIG conducts its [sic] investigations with integrity and objectivity.”

“We are documenting our independence and objectivity more completely and consistently on every job.”

“I have never seen any evidence of our investigations/reports being biased. As far as I know, they are always impartial and unbiased.”

“I have seen the efforts that go into ensuring objectivity, including referencing, multiple reviews, various check-in meetings, etc. All of those are opportunities to raise concerns, as well as a general open-door policy.”

“We are cognizant of independence, are well-trained in recognizing and identifying threats to independence, and are given ample reminders.”

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

Comment from those who answered neutrally are enlightening, as well. In an organization with a culture that emphasizes sufficiency of evidence, it is telling that some employees who responded neutrally or don't know clarified, for example:

“I can only speak for my region, which I believe was independent.”

“The agents are free from improper influence.”

“I don't know the content of discussions at that level, but I believe that our executives seek to achieve our mission in independent manners, whether or not the Department attempts to improperly influence.”

Interest in the Permanent IG Position

I repeat what I said in my testimony:

I have been a career civil servant for over 29 years. I sincerely believe that public service is a public trust, requiring me, and my fellow public servants, to place loyalty to the Constitution, the law, and ethical principles above private gain. I have no other ambition than to continue my public service with dignity and respect for our employees and our stakeholders. I believe in the mission of the Inspectors General, I am committed to the OIG for Interior, and, if confirmed, I will continue to do the very best job I can to lead this respected organization in its ongoing efforts to prevent and detect fraud, waste, abuse, and mismanagement in the Department of the Interior.

2. Moratorium Investigation: IG's Report Dogged by Questions

The Integrity Committee for the Council of Inspectors General for Integrity and Efficiency investigated the allegation that I had an actual or apparent conflict of interest in regard to this OIG investigation, and found the allegation to be unsubstantiated.

Additional facts regarding this matter are found in my response to Chairman Murkowski's Questions 5, 7, and 10, below.

3. Renewable Energy Study Dropped: IG Never Finalized Critical Report

The facts regarding this matter are found in my response to Chairman Murkowski's Question 4, below.

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

4. A Pattern Emerges: Embarrassing Investigations Not Pursued

a. Klamath/Dr. Hauser

The facts regarding this matter are found in my response to Chairman Murkowski's Question 8, below.

b. Steve Black

When the Los Angeles Times reported on the alleged conflict of interest of Steve Black, the OIG had been notified by the Department that Black had issued a recusal in regard to his dealings with NextEra. At the time, we had no information to suggest Black's recusal was anything but proper. When the OIG received additional information from U.S. Fish and Wildlife agents that Black may have acted in violation of his recusal, the OIG promptly opened an investigation. Ultimately, we issued a Report of Investigation that was highly critical of Black, who served as Counselor to the Secretary. Steve Black resigned from DOI in May 2013.

c. JIT Report

The facts regarding this matter are found in my response to Chairman Murkowski's Question 9, below.

Question 4: The House Committee Report also considered work the OIG performed during your tenure to evaluate certain DOI renewable energy programs. It appears that the IG's office compiled a draft report on renewable energy programs in 2010, but that further work was suspended some time later. The Committee Report asserts that the decision was made following meetings with Interior officials outside the IG office, and outlines a number of proposed edits to the draft report that, according to the Committee Report, softened some of the criticism levied at Interior's renewable energy programs.

a. Is it true, as asserted by the House Committee Report that, prior to the decision not to issue the OIG's final report, some of the proposed edits and concerns expressed by Interior officials sought to soften criticism of the renewable energy programs found in the draft report? If not, please identify *the facts* that will set the record straight.

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

Answer: No, the conclusion drawn in the Majority Staff Report is not accurate.

We had endeavored to conduct a comprehensive review of all of the Department's renewable/alternative energy efforts across bureaus. After conducting some follow up work subsequent to our meeting with the Department, we concluded that we could not verify all the information provided to us by the Department on such a comprehensive level without undertaking considerably more field work. Since our data was already dated at the time we met with the Department to discuss the draft, we chose, instead, to focus our attention on more manageable size efforts in which we could be confident of the timeliness and accuracy of our findings, and make more meaningful recommendations. We did this beginning with the Climate Friendly Parks, Program Startup, and BLM Renewable Energy Evaluations. In conducting these more focused individual efforts, we are likely to find cross-cutting programmatic weaknesses, overlap, or opportunities for improving management efficiencies.

The decision to not issue the Alternative Energy report in a final form was because I felt the work performed was not complete and the recommendations put forward were not written in a manner where closure would be possible.

Many of the proposed edits identified weaknesses in the OIG audit work. OIG audits and evaluations follow the reporting standards set by the Comptroller General of the United States which require the views of responsible officials in the Department to be obtained. This standard was put into place by the Comptroller General to assure that the reports are presented in a complete and objective manner. In this instance, all recommendations put forward in the draft report were agreed to by the Department. It would have been easy to issue the report and consider all recommendation closed. This would not have been appropriate, however, as the Departmental response identified Secretarial Orders, initiatives, performance goals, and Departmental projects that we had not identified, as well as factual errors or omissions in our draft report. At a minimum this information needed to be evaluated, according to standards.

The Comptroller General standards require that sufficient and appropriate evidence be obtained in providing support for the findings and conclusions. Once I was presented with information suggesting the evaluation team had not gathered all the appropriate evidence, it would have been a violation of standards to issue the report in its current state. The OIG has a rigorous quality assurance process which requires the information presented in each audit and evaluation report to be cross indexed back to supporting documentation obtained during the review. This report was written more like a

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

discussion paper exploring management challenges rather than an OIG report offering sound, program improvement recommendations.

b. Who decided to not proceed with the final report on Interior renewable energy programs? What role did you play concerning the report or its issuance?

Answer: I made the decision with the input and agreement of the Assistant Inspector General for Audits, Inspections, and Evaluations.

i. If you decided to not release the report, why did you decide not to proceed? And, if not, what was the reasoning that drove the decision? Do you agree with that reasoning?

Answer: I decided not to issue the report because it was incomplete and did not offer recommendations that would help the Department improve its programs. As I explained to the evaluation team, a comprehensive view of a multi-faceted program as large as alternative energy was the wrong approach from the beginning. By attempting an all-encompassing report on renewable energy, we learned important information about the Department's efforts that have better informed our more manageable evaluations and reports on the individual renewable programs. But I still accept full responsibility for initially suggesting that comprehensive approach, and the resulting failure to craft a report that captured such a massive scope and meaningful recommendations.

The draft report contained four recommendations which were written as statements of opinion rather than recommendations for improvement. For example, Recommendation 1 stated, "In this current economic environment, Interior and its bureaus do not have the luxury of operating without concrete goals, measures, and a cohesive/holistic vision. These must include short term and long term goals and measures for each program as well as for the Department as a whole. A cohesive and holistic vision must convey what is hoped to be achieved in five, ten, twenty, fifty years and beyond; how Interior plans on getting there; and what roles the bureaus and individual programs have in those plans." OIG reports should be fact driven and offer concrete solutions for program improvement. I continue to believe that the draft report, as written, should not have been issued in a final form. Subsequently, under my direction I asked my staff to take a focused approach to reviewing the department's efforts in alternative energy and made it focus area in the following fiscal year audit cycles.

In June 2012, we issued a report on BLM's renewable energy program. We were able to discuss specific weaknesses in the management of the projects. For example, we found

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

that BLM lost rental revenues of \$1.2 million on 22 wind projects because it did not implement increased rental rates. We offered nine recommendations which have helped improve the program.

In August 2012, we issued a report on the Guam Power Authority. Guam Public Law requires a renewable energy portfolio which will support 5 percent of electricity sales by 2015 and 25 percent of electricity sales by 2013. We found the progress to achieve these renewable energy goals to be lacking. We recommended Guam Power work with their partners to install renewable energy sources in order to meet their goals. Our report made 5 recommendations to the Governor of Guam for improvement.

In March 2013, we issued a report on BLM's Geothermal Resources Management. We found that BLM's Geothermal Resources Operations Orders were 30 years old. The orders were so outdated that they did not cite correct regulations and failed to account for technological advancements. Additionally, we found that BLM did not have a standardized inspection and enforcement program. We found problems in recruiting, retaining, and training inspectors; and inconsistencies in reporting data into the geothermal database. We made four recommendations for program improvement.

In September 2013, we issued a report on the Department's Offshore Renewable Energy Program. We found problems with policy and standard operating procedures. BOEM's regulations were written when little was known about offshore renewable energy, which led to gaps and inconsistencies in the regulations. ONRR did not have policies in place for the processing of rental payments and operating fees. We offered four recommendations for improvement.

These reports offered sound, implementable recommendations to the Department. Of the 17 recommendations made to the Department 10 have been implemented by the bureaus bringing improvement to the Department's Alternative Energy Program. We forwarded our 5 recommendations made to the Governor of Guam to the Office of Insular Affairs for their use in the awarding of new grants and the monitoring of issued grants.

Question 5: After the Deepwater Horizon accident, you agreed to serve on the newly established OCS Safety Oversight Board, which was tasked with overseeing the Joint Investigation Team and providing recommendations on interim safety measures and policy recommendations.

a. In your testimony before the House Natural Resources Committee on August 2, 2012, you indicated that in your role in working with the OCS

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

Safety Oversight Board, you did not think you needed to recuse yourself from the investigation of the moratorium or editing of the report.

Answer: The OIG did not investigate the moratorium, itself, or the writing or editing of the 30-Day Report. Rather, we investigated only the circumstance by which the three page Executive Summary to the 30-Day Report was edited to suggest that the Secretary's recommendation to institute a moratorium on drilling in the Gulf of Mexico had been peer reviewed. **Therefore, the editing of the three page Executive Summary—not the substance of the 30-Day Report—was the focus of the OIG investigation.**

i. What was the basis for that judgment?

Answer: Given the very narrow scope of the OIG investigation, and the fact that I had no role in the development, writing, or editing of the 30-Day Report, in my judgment, there was no need to recuse myself from the investigation into the editing of the Executive Summary of the 30-Day Report.

ii. What would have been the appropriate role for IG staff to provide assistance to the OCS Safety Oversight Board?

I believe the OIG staff provided the appropriate assistance to the OCS Safety Oversight Board by independently reviewing the major aspects of the Department's management, regulation, and oversight of oil and gas production in the Gulf of Mexico. In hindsight, I would have executed this work differently; I would, going forward, decline the request to become a member of such a Board, but rather offer the assistance of the OIG to conduct its independent review, and report our findings directly to the Secretary.

This said, the OCS Safety Oversight Board was a unique response to an emergency situation. The Board's initial identification of the major issue areas, the scrutiny of the Board, and its programmatic insights positioned the OIG to focus its review of the OCS operations much more quickly and efficiently, something that would typically take the OIG several months to survey and scope. Once the initial scope was determined, however, the Board gave no direction and had no influence on the independent work conducted by the OIG team.

b. Why didn't you focus your efforts and those of OIG on seeking to learn what you could about the Department's performance in the crucial periods before the event?

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

Answer: Our OCS review team conducted its independent review of major aspects of the Department’s management, regulation, and oversight of oil and gas production in the Gulf of Mexico; OIG also committed significant investigative and other support personnel to the Deepwater Horizon criminal and civil investigation teams which have spent over five years determining the roles that BP, Halliburton, Transocean, their employees, and the Department played in the crucial periods before the event. In addition, the Bureau of Ocean Management and Regulatory Enforcement (the successor agency to Minerals Management Service), together with the Coast Guard, had a regulatory mandate to determine the “root cause” of the disaster.

Our work helped lead to the largest civil-settlement with a single entity in the Department of Justice (DOJ) history. David Uhlmann, a law professor at the University of Michigan and former chief of DOJ’s environmental crimes section, said of BP’s total price tag: “No company will ever conduct deep-water drilling in the way that BP did prior to the Gulf oil spill.” We also followed up on recommendations made to the Department in 2010, and upon discovering five that were reported as implemented, but were not in fact implemented, we notified the Department that the recommendations needed to be reopened. To ensure accountability, the affected bureau (BSEE) will report to us on a quarterly basis their progress in implementing the remaining recommendations.

c. Please clarify the extent to which you and other members of the OCS Safety Oversight Board participated in the preparation and review of the 30-Day Safety Report.

Answer: I cannot speak for the other two individual members of the OCS Safety Oversight Board, but we, as a board, and I, individually, did not participate in the preparation or review of the 30-Day Safety Report.

i. Do you think such participation, if any, presents conflicts of interest or the appearance of a conflict of interest?

Answer: I did not participate in the preparation or review of the 30-Day Safety Report.

ii. What steps did you take to address those concerns? Please explain in the context of the subsequent IG investigation into the preparation and editing of that report.

Answer: The context of the investigation into the circumstance by which the Executive Summary to the 30-Day Report was edited to suggest that the Secretary’s

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

recommendation to institute a moratorium on drilling in the Gulf of Mexico had been peer reviewed are as follows:

Background

On April 20, 2010, an explosion on the *Deepwater Horizon* oil drilling rig resulted in the tragic deaths of 11 rig workers and injuries to 17 others. After burning for two days, the *Deepwater Horizon* plunged to the bottom of the Gulf of Mexico, causing the drill pipe to rupture, resulting in the largest marine oil spill in the history of the United States and an immediate environmental disaster in the Gulf, spilling 4.9 million barrels of oil over a nearly three-month period.

In the wake of this disaster, the President directed the Secretary of the Interior, Ken Salazar, to conduct a thorough review of this event and report within 30 days on what short-term “precautions and technologies should be required to improve the safety of oil and gas exploration and production operations on the outer continental shelf.” This was officially titled, *Increased Safety Measures for Energy Development on the Outer Continental Shelf*, but became commonly known as the “30-Day Report.”

Nearly contemporaneously with the President’s directive, Secretary Salazar created, by Secretarial Order, the Outer Continental Shelf (OCS) Safety Oversight Board (OCS Board). The OCS Board consisted of the Assistant Secretary for Lands and Minerals; the Assistant Secretary for Policy, Management and Budget; and the Acting Inspector General. The Deputy Secretary, on behalf of the Secretary, appealed to me personally to participate on the board as an independent and objective member. I agreed to do so, but made clear that I would conduct myself independently and objectively, and that I would not be a part of any policy decisions.

The OCS Board was charged to:

- 1) provide oversight, support, and resources to the then-Minerals Management
- 2) Service regarding its responsibilities in the Joint Investigation into the *Deepwater Horizon* disaster;
- 3) provide the Secretary with periodic progress reports regarding the Joint
- 4) Investigation;
- 3) make recommendations on measures that may enhance OCS safety; and
- 4) make recommendations to improve and strengthen the Department’s overall management, regulation and oversight of OCS operations.

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

Informational Meetings in the Wake of the *Deepwater Horizon* Disaster

When the President directed Secretary Salazar to recommend short-term actions to improve industry practices and standards for deepwater oil drilling, Steve Black, Counselor to Secretary Salazar, was placed in charge of a team responsible for producing the 30-Day Report that contained these short-term recommendations. I was not a member of that team.

In order to fulfill my role on the OCS Board, however, I needed to gain a basic understanding of deepwater drilling. Therefore, I attended a number of information-gathering meetings, organized by Steve Black, with representatives from industry, government, and the engineering and scientific community. I viewed these meetings as both educational, in terms of learning about myriad aspects of deepwater drilling, and helpful, in terms of navigating the role of the OCS Board. In none of these information-gathering meetings that I attended was the substance of the 30-Day Report discussed.

On May 25, 2010, two days before DOI issued the 30-Day Report, I was invited, as a member of the OCS Board, to attend a conference call intended to provide the National Academy of Engineers (NAE) Peer Reviewers an opportunity to comment on the draft 30-Day Report. I was invited to this conference call for informational purposes only. A copy of the already-written draft 30-Day Report was attached to the email invitation. Neither the OCS Board collectively nor I individually commented on the 30-Day Report.

The 30-Day Report, containing 22 recommendations, was issued on May 27, 2010, together with an Executive Summary, the latter of which was still being drafted by Steve Black between 11:38 p.m. on May 26 and 2:13 a.m. on May 27. The Executive Summary also included the Secretary's recommendation for a drilling moratorium in the Gulf of Mexico. This moratorium recommendation was not contained in the 30-Day Report itself. Upon reading the published report and the Executive Summary, the scientists and industry experts who peer reviewed the safety recommendations contained in the 30-Day Report expressed concern that the Executive Summary was worded in a manner that implied that the experts had also peer reviewed and supported this policy decision, when, in fact, they had not and did not.

The allegation that certain emails suggest that I played a significant role in developing what the Majority Staff Report calls "the Drilling Moratorium Report" (but which should be called the 30-Day Report) is not borne out. The subject emails indicated my attendance at informational meetings organized by Steve Black leading up to the 30-Day Report. **I did not, however, participate in the drafting of the 30-Day Report.**

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

Regardless, the OIG did not investigate the 30-Day Report. Rather, the OIG investigated the editing of the Executive Summary to the 30-Day Report, drafted and edited by Steve Black and White House personnel in the late hours of May 26 and early hours of May 27, 2010, in which the moratorium recommendation was made. **Therefore, the OIG investigation into the manner in which the Executive Summary was edited to suggest that the moratorium was peer reviewed, did not present a conflict of interest for me, and my testimony on June 17, 2010 was accurate.**

OIG Investigation

At the request of multiple members of Congress, including the Chair of the House Committee on Natural Resources, the OIG launched an investigation into the allegation that DOI senior officials, in an effort to help justify their decision to impose a six-month moratorium on deepwater drilling, misrepresented that the moratorium was reviewed and supported by the National Academy of Engineering scientists and industry experts. The requests asked that the OIG “identify when and how the modification of the report occurred” (see Attachment 6) and clarified the scope: *“To be clear, we are not asking you to investigate the moratorium. We are asking you to investigate the changes made to the 30-Day Safety Report by political appointees that were presented to the public as peer-reviewed scientific paper.”* **Therefore, edits made to the three page Executive Summary—not the 30-Day Report—were the focus of the OIG investigation.**

When the OIG opened its investigation, I emphasized to investigative staff that the scope of the investigation needed to stay focused on the Executive Summary to the 30-Day Report, where the moratorium recommendation was made—not the moratorium itself, which was, at the time, still the subject of litigation, and not the 30-Day Report. We assigned a senior special agent to this investigation. He was assisted by, and reported to, then-Director of our Program Integrity office, who was a seasoned manager and senior special agent. I did not have significant personal involvement in the direction of the investigation during its course, as I was focused on the efforts of my staff in Denver, Colorado who were conducting a massive evaluation of OCS operations on behalf of the Board. (This evaluation served as the basis for the OCS Safety Oversight Board Report of September 1, 2010. The OIG continued its analysis on several other issues the team had identified, and in December 2010, the OIG issued its own, independent report.)

After conducting interviews of the DOI officials involved in drafting the Executive Summary to the 30-Day Report, the OIG investigating agents reviewed the final email exchange regarding the Executive Summary between DOI and the White House which

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

took place between 11:38 p.m. on May 26, and 2:13 a.m. on May 27, 2010. The email sequencing was such that investigators were confident that nothing was missing or deleted in the exchange. In the version that DOI sent to the White House, the Secretary's recommendation for a six month moratorium was discussed on the first page of the Executive Summary, while the peer review language was on the second page of the Executive Summary, immediately following a summary list of the safety recommendations contained in the body of the 30-Day Report. The version that the White House returned to DOI had revised and re-ordered the language in the Executive Summary, placing the peer review language immediately following the moratorium recommendation. This caused the distinction between the Secretary's moratorium recommendation—which had not been peer reviewed—and the safety recommendations contained in the 30-Day Report—which had been peer reviewed—to become effectively lost, as detailed in our Report of Investigation (ROI). Although the Executive Summary underwent some additional minor editing, it was ultimately published on May 27, 2010, with the peer review language immediately following the moratorium recommendation, resulting in the implication that the moratorium recommendation had been peer reviewed.

All DOI officials interviewed stated that it was never their intention to imply that the moratorium had been peer reviewed by the experts, but rather rushed editing of the Executive Summary by DOI and the White House resulted in this implication. Since the jurisdiction of the OIG does not extend to the White House, we could not compel an interview with the White House personnel involved in the editing of the Executive Summary. The emails exchanged between DOI and the White House did not reveal evidence that the Executive Summary was intentionally edited to lead readers to believe that the moratorium recommendation had been peer reviewed.

Although I was not significantly involved during the course of the investigation, I was personally briefed by the case agent and the Director of Program Integrity on their findings at the end of the investigation. At no time during the briefing did either of the agents express any concern or disagreement about the way in which the investigation had been conducted, or about the conclusion that, while the edits made by the White House to the Executive Summary caused the perception that the moratorium recommendation had been peer reviewed, we did not have evidence that this was done intentionally. At the end of this briefing, I asked the case agent to draft an outline for approval before he embarked on writing the ROI. Instead, he provided both an outline and a draft of the ROI contemporaneously within days of the briefing. Initially, I was quietly annoyed, until I read the draft ROI, and found that it was very well written by the case agent. This is to simply say that I had no hand in the initial drafting of the ROI.

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

I was, however, very much involved in reviewing and editing the ROI, as I am in all significant reports that issue from our office. As is my practice, whenever I make changes to a report (be it an investigation, audit, or evaluation), I always check with the report's author to ensure that I have not made changes that cannot be supported by the evidence or workpapers (which support audits and evaluations). I did the same in this case, as is evidenced in a series of emails between the case agent and me. Again, these emails suggest no disagreement with the way in which the investigation was conducted or the way the report was written or edited. In fact, the case agent, in one email to me, said:

*Mary,
Thank you for your comments on the ROI and investigation.
Your email language [about the exchange between DOI and the White House] was far simpler than my own, yet I believe it still clearly captured our finding that DOI's draft Executive Summary had made the distinction between the safety recommendations that were peer reviewed by the experts, and the 6-month moratorium recommendation, whereas that distinction was lost in the Executive Summary as a result of the edits made by the White House.
Obviously, whether that loss of distinction was intentional on the part of an over-zealous White House staffer/editor, or simply an honest oversight, the jury will always remain out. The reader of the ROI will have to make their own speculations on that topic.*

In another, the case agent wrote to me, "Hope the overall ROI/investigation was up to par," to which I replied, "Other than a few editing tweaks and trying to simplify the discussion about the e-mails, I thought it very well done, thorough, and to the point."

I was, therefore, taken by complete surprise when we discovered emails authored by the case agent criticizing how the investigation was conducted, and expressing his opinion that the edits made by the White House were, indeed, intentionally made to suggest that the moratorium recommendation had been peer reviewed. For example, in an email to an OIG colleague, the case agent said:

Salazar's statement that our ROI concludes it was a mistake and unintentional is a clear attempt to spin our report – I truly believe the editing WAS intentional – by an overzealous staffer at the WH. And if asked, I – as the Case Agent – would be happy to state that opinion to anyone interested. We simply were not allowed to pursue the matter to the WH. But of course that was not mentioned in our report.

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

To the extent that this claim is intended to suggest that I took action to limit the investigation, it is inaccurate. As demonstrated by my emails to the case agent's supervisor, I was awaiting an answer to my inquiry of whether the White House official involved in the editing process would be available for an interview or not. I did not receive a positive response. The jurisdiction of the OIG for DOI to compel an interview does not extend to the White House.

If an OIG investigator (or auditor or evaluator) feels that an OIG report fails to accurately describe the facts uncovered, I expect that employee to bring such concerns to my attention. The case agent in this instance had multiple opportunities to do so, when he briefed me, personally, on his findings at the end of the investigation, as well as during the email exchanges transmitting edits to the ROI. Since I had also engaged this case agent in such discussions about previous reports, in which he had made his position very clear to me, I am simply bewildered by his silence in this case if he had legitimate concerns about the investigation or the ROI.

For example, in an email string between the case agent and me, as the final edits to the report were being made, the case agent expressed no concerns whatsoever:

From me: (to Case Agent and supervisor) *I am attaching language that I propose to replace the narrative on pp. 8-9 of the draft report [discussing the email exchange]. I hope it simplifies the comparison of the draft Executive Summary that was sent by DOI against the drafts that came back from the White House, but if I have somehow changed the meaning of anything, please let me know.*

From me: (to Case Agent) *Did you have any problems with [my edits to] the e-mail language?*

To me: (from Case Agent) *Your email language was far simpler than my own, yet I believe it still clearly captured our finding that DOI's draft Executive Summary had made the distinction between the safety recommendations that were peer reviewed by the experts, and the 6-month moratorium recommendation, whereas that distinction was lost in the Executive Summary as a result of the edits made by the White House.*

Not only do the edits, on their face, made the ROI more objective and easier to read and understand, but I made sure the case agent had ample opportunity to challenge, object to,

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

or change any edit I proposed before it was incorporated into the ROI. The case agent did not challenge, object to, or change any edit.

iii. Are you aware of any inconsistency between your testimony or other statements to the House Committee concerning the 30-day safety Report or any other aspect of your work on the OCS Safety Oversight Board and documentary evidence? If so, what was the inconsistency and how do you explain it?

Answer: I am not aware of any inconsistency between my testimony and other statement to the House Committee on Natural Resources concerning the 30-Day Safety Report or any other aspect of my work on the OCS Safety Oversight Board or other documentary evidence. The emails of the investigating agent were nothing more than his opinion at the time. Neither was the selective accounting of the February 21, 2013 Majority Staff Report of the House Committee on Natural Resources documentary evidence.

Question 6: One of the central purposes of the Inspector General Act was to create effective and independent investigators. These dual characteristics are essential to the IG's conduct of a thorough and unbiased audit or investigation. Recently, however, interactions between some IGs and their agencies have been perceived as potentially threatening both the IG's ability to obtain information from its parent agency, and the IG's ability to remain free from agency influence.

a. With respect to IG authority, what is your view of the recent Office of Legal Counsel opinion that concludes that an agency may withhold information from an IG if that information is protected by certain statutory nondisclosure provisions?

Answer: I believe that the Office of Legal Counsel opinion that concludes that an agency may withhold information from an IG if that information is protected by certain statutory nondisclosure provisions to be both torturous and flawed.

i. Is there information that you believe an agency may withhold from its IG? Please explain your response.

Answer: I believe that an IG should be able to access, independently and without delay, all information and data in an agency's possession that the Inspector General deems necessary to conduct its oversight functions.

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

I do not believe that Departmental officials may withhold information from an Inspector General. Section 6(a) of the Inspector General Act provides clear access to "all records . . . or other material." In response to the recent OLC opinion restricting IG access to certain types of information, I have signed Council of Inspectors General for Integrity and Efficiency (CIGIE) letter to Congress and support CIGIE's efforts to reaffirm or further clarify the Act's meaning.

By placing Inspectors General within the executive branch, Congress avoided both the separation of powers and the waiver of privilege issues when it comes to providing an OIG access to Department records and information.

As the head of my office, I have disclosed to Congress all the information on the serious problems and deficiencies within the Department. The past disputes over claims of potential executive privilege have not reflected any barriers to my access, nor any substantive barrier to my disclosures to Congress. I remain confident that I have fully disclosed all serious problems and deficiencies within the Department and will continue to do so.

ii. With respect to IG independence, how should an IG balance the necessity that the IG's office retains an efficient working relationship with agency officials with the need for IG independence from agency influence during an investigation?

Answer: An OIG operates more effectively and efficiently when it has a professional working relationship with agency officials to conduct an objective and independent investigation (or audit or evaluation). OIG work is often conducted, however, in an adversarial environment, whether overt or oblique.

My overarching goal is that my office have the greatest impact possible on the programs and operations of the Department. To achieve this goal, I have found that we are most effective when we engender respect for our work products. This respect is earned over a period of time, as new Departmental leadership comes and goes, and is the result of a professional working relationship with those Department officials who are committed to improving the organization. As long as Department officials are forthcoming and our recommendations for change and improvement are adopted, the tone of our reports will be constructive. When we are not satisfied with the response of the Department, we have clearly noted the same in our reports, and have followed up with discussions with Congressional staff. But professionalism and civility should not be confused for ceding my responsibility to provide independent and objective oversight.

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

iii. Is it appropriate for agency officials to participate in an IG investigation? Please explain your response.

Answer: We have had agency officials participate in OIG investigations or reviews as subject matter experts (SME) when it involves a complex or highly specialized program area. Although it is done infrequently, it is only done with the clear understanding that the SME becomes responsive and responsible to the OIG, and not Department management, while serving as an SME to the OIG. I believe that this is standard practice in the IG community.

iv. To what degree should an IG comply with agency requests to alter a report at the request of the agency?

Answer: OIG reports should only be altered if what we have said is inaccurate or misleading.

IG reports communicate the results of the work performed. The purpose of an IG report is to communicate the results of the review through findings and recommendations to the appropriate management officials to take corrective or administrative action. Standards issued by the Comptroller General state when an audited entity's comments are inconsistent or in conflict with the findings, conclusions or recommendations in the draft report, or when planned corrective actions do not adequately address the auditors' recommendations, the auditors should evaluate the validity of the audited entity's comments. If the auditors find the comments valid they should modify their report.

OIG Reports of Investigation (ROI) are not provided to the Department in draft for comment. Rather, ROIs are provided in final form, usually with a request that the Department provide a reply about administrative or other action taken in response to the ROI.

Question 7: On May 27, 2010, Interior issued a report entitled “*Increased Safety Measures for Energy Development on the Outer Continental Shelf*” (30-Day Safety Report)¹ which contained a number of recommended preliminary steps to be taken to increase offshore drilling safety. Among these was a recommendation to temporarily halt certain permitting and drilling activities,² including a moratorium

¹ Report available at <http://loe.org/images/content/100528/Increased-Safety-Measures-Report-2.pdf>.

² 2013 Committee Report, at 13, citing 30 Day Safety Report. Report available at <http://naturalresources.house.gov/uploadedfiles/oversightreportdepartmentofinterior.pdf>.

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

on drilling of new wells using floating rigs and a halt to drilling operations on floating rig wells in the Gulf of Mexico.³ The executive summary of the report claimed that this and other recommendations had been “peer-reviewed by seven experts identified by the National Academy of Engineering.”⁴ These recommendations were put into place by the Secretary of the Interior. Subsequently a number of technical experts objected to the implication in the executive summary of the 30-Day Safety Report that they had supported the moratorium proposed in the report.⁵ A November 2010 IG report concluded that the mischaracterization of the positions of the experts on the moratoria was a result of “rushed editing” by the White House.⁶

a. Please state the facts that support the conclusion that misleading language in its executive summary was the result of “rushed editing” by the White House of the Interior draft? Please identify the source of each fact.

Answer: Our November 2010 Report, entitled “Federal Moratorium on Deepwater Drilling” did not draw the conclusion stated above. Rather we *reported* that the DOI officials we interviewed stated it was “rushed editing” that resulted in the implication that the moratorium decision by the Secretary had been peer reviewed. To the extent that there was any *conclusion* in our report, it is captured in the last sentence of the report’s synopsis: “After reviewing different drafts of the Executive Summary that were exchanged between DOI and the White House prior to its final issuance, the OIG determined that the White House edit of the original DOI draft Executive Summary led to the implication that the moratorium recommendation had been peer reviewed by the experts.” In other words, we were unable to corroborate the claim of “rushed editing” nor were we able to negate it. As detailed more fully in our report, we were able to determine from the email traffic we reviewed that the misleading edits were drafted sometime between 11:38 p.m. on May 26 and 2:13 a.m. on May 27, 2010 by White House staff. Additional details are provided in my answer to Question 5 and 10.

b. The 2013 Committee Report states that, in a May 11, 2011 letter to the House Committee on Natural Resources, you said that you had been “unable to independently conclude whether the implications contained in the 30-Day Safety Report were intentional or not.”

³ *Id.*

⁴ *Id.*

⁵ 2013 Committee Report at 14.

⁶ 2013 Committee Report at 16, citing November 2010 IG Report.

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

i. What efforts did you undertake to attempt to resolve this uncertainty?

Answer: In an effort to determine whether the misleading edits were done with the intent to improperly suggest that the Secretary's moratorium decision had been peer reviewed, we interviewed the two Department officials who were involved in discussions with White House staff about the Executive Summary. Both of these individuals were questioned extensively about the editing process and both said that they had an opportunity to review the final White House edits to the Executive Summary before the 30-day Safety Report was issued. Both of these officials also told our investigators that it did not occur to them that based upon the final text of the Executive Summary, an objective reader would conclude that the peer reviewers had supported the 6-month moratorium on certain drilling. Our investigators also obtained the email communications between these Department officials and the White House that confirmed the misleading language originated in the White House. These emails did not disclose the intent behind the edits. After we determined the source of the misleading language, I inquired through the Department's Deputy Secretary whether the White House official involved in the editing process would be available for an interview. I did not receive a positive response and the jurisdiction of the OIG for DOI to compel an interview does not extend to White House personnel. Therefore, we were ultimately unable to come to a conclusion about the intent of the person who made the final edits to the Executive Summary.

Question 8: It is my understanding that in February 2012, Bureau of Reclamation Science Advisor and Scientific Integrity Officer, Dr. Paul R. Houser, was told by his supervisor that Mr. Houser would be terminated if he did not resign from his position. Is this correct?

Answer: Yes, Dr. Houser was informed by his supervisor on February 8, 2011 that his probationary position was going to be terminated and his last day in the office was to be February 10, 2011, at which time he would be placed on 2 weeks administrative leave pending his termination. Dr. Houser was given the opportunity to resign in lieu of termination and told that he had until February 10th to submit his resignation.

a. Mr. Houser apparently felt that this action was in retaliation for his actions related to Interior's proposal to remove four dams in the Klamath River Basin. Mr. Houser filed a complaint with the IG's Office of Whistleblower Protection. In an email, the investigator told a supervisor that "there is a chance he is being terminated because she/they disagree with his scientific opinion on the elimination

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

of the Klamath River Dams, but it's not conclusive. He has been reprimanded for some other apparently minor incidents." After a brief review by IG investigators, IG management became involved in the case, with Chief of Staff Steve Hardgrove ultimately deciding that "Dr. Houser's proposed termination was not a matter for the OIG to investigate." Is this correct?

Answer: Prior to answering the question, I note that the Majority Staff for the House Committee on Natural Resources chose NOT to speak to Chief of Staff Steve Hardgrove to gain any understanding of his decisions in this matter, despite Hardgrove making himself available to Staff.

The answer to the question posed is: this is partially correct. The investigating agent's email was premature and contained assumptions that proved to be inaccurate. Dr. Houser did not claim reprisal because he disagreed with the science behind the elimination of the Klamath River dams. Rather, he claimed reprisal for his comments on a press release about the removal of the dams. Houser had no involvement in the Klamath decision, and was not familiar with the science, other than what he had learned from his own internet searches.

Chief of Staff Hardgrove became involved in the matter prior to any investigative involvement and actually directed the preliminary investigation to occur on February 9th. Hardgrove was notified of a potential whistleblower complaint by Associate Inspector General for Whistleblower Protection, Laurie Larson-Jackson. As Larson-Jackson's supervisor, Hardgrove was routinely involved in providing guidance and input for incoming whistleblower complaints. Once he learned of the complaint, Hargrove directed Larson-Jackson to provide the information to our Office of Investigations, Program Integrity Division for immediate follow-up, since Houser reported he was to be terminated on Friday, February 10.

After several preliminary interviews and document reviews, the assigned Program Integrity investigators briefed Hardgrove, Assistant Inspector General for Investigations (AIGI) John Dupuy, and Deputy Assistant Inspector General for Investigations (DAIGI) Scott Culver, and Laurie Larson-Jackson. Based upon the information relayed by the investigators, to include information that the termination was not to occur as reported on February 10, Hardgrove opined that Houser did not appear to have made a "protected disclosure" under the Whistleblower Protection statute, and that in Hardgrove's judgment, the OIG should not open an investigation, but should instead provide support for Dr. Houser to pursue other administrative remedies or higher level review. Hardgrove believed that Dr. Houser would be best served appealing the proposed termination to the

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

next level official and/or consulting with the Office of Special Counsel which has the authority to take immediate action to stay the termination decision.

b. Did you discuss this matter with Mr. Hardgrove before he made the determination that is attributed to him above? Do you agree with Mr. Hardgrove's conclusion in Mr. Houser's case? Please explain the basis for your agreement in your response.

Answer: No, I had no discussion with Hardgrove, or anyone else involved in this matter, before he made the determination to have Larson-Jackson pursue the matter with Dr. Houser, and not the Office of Investigations.

Based on the facts as I now know them, and the facts as known to Hardgrove at the time of his determination to not open an IG investigation and, rather, provide Dr. Houser support through our Whistleblower Protections official, I believe his decision was appropriate. Hardgrove has extensive law enforcement and investigative experience that he used to make a judgment call not to open a full OIG investigation. In discussions with Hardgrove, well after his decision, I was told the reasons for his decision included:

- Dr. Houser was a probationary employee.
- His supervisor provided examples of poor judgment and performance that Dr. Houser confirmed happened.
- Standards to terminate a probationary employee are such that any reason, other than an unlawful reason, can be used to discontinue probationary employment.
- No protected disclosure was made. Dr. Houser voiced his concern over a press release and made several edits - with all but a few being incorporated into the final release.
- Dr. Houser had due process rights that would result in faster resolution of his situation than an IG investigation.
- Dr. Houser had not made a report of the alleged scientific interference to the Scientific Integrity Office in which he participated in numerous meetings after the incident occurred, to include discussions with the OIG. His concerns were not expressed until he was notified of his termination - even when he received a less than favorable mid-year appraisal.

In addition to making a determination that no investigation should be conducted, Hardgrove directed Larson-Jackson to continue to assist Dr. Houser in resolving his issues. This included Larson-Jackson doing the following:

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

- Advising Dr. Houser on his rights under the law, administrative process and procedures, and possible formal and informal venues for resolution of his complaint.
- Working with Dr. Houser to fully protect his rights at the Office of Special Counsel and MSPB.
- Advising Dr. Houser that she would provide any information or support necessary to the OSC attorney or investigator assigned, which she did.

In addition, Hardgrove contacted the DOI Chief of Staff to the Secretary to alert her to the potential termination of a senior level advisor and suggested that she review the matter to ensure that the proposal was known to senior DOI officials, and that it was based on proper personnel practices.

c. The Committee Report suggests that these sorts of matters are usually handled by an Interior regional special agent in charge rather than by management of the Office of the Inspector General. Is that true? If so, why was that procedure not followed in this case?

Answer: The suggestion in the Majority Staff Report that these sorts of matters are usually handled by an [OIG] regional special agent in charge rather than by management of the Office of Inspector General is not correct. Rather, complaints by, or against, senior level officials are handled by the OIG Program Integrity Division which is based at the OIG headquarters. Program Integrity reports directly to the Assistant Inspector General for Investigations. More importantly, Dr. Houser's complaint came through the Associate Inspector General for Whistleblower Protection who conducts the initial assessment of the complaint and then discusses the complaint with the Office of Investigations and her supervisor (Hardgrove). Hardgrove previously served as the Director of Program Integrity and the Assistant Inspector General for Investigations for the OIG prior to becoming Chief of Staff. He is routinely consulted on senior level and other high profile cases for his expertise and judgment. His initial decision was to conduct a preliminary investigation to determine if the facts warranted a full investigations. To this end, agents were sent to interview Dr. Houser and his supervisor less than 24 hours after receiving the complaint.

In the end, Dr. Houser expressed his satisfaction with the assistance he received from the Associate Inspector General for Whistleblower Protection, and the result obtained through the Office of Special Counsel.

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

Question 9: According to the 2013 Committee Report, a confidential source claimed that then Director of the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), Michael Bromwich, directed members of the team investigating the Deepwater Horizon accident to draft a report on the accident, which was to be published on the one year anniversary of the accident, that focused on failure of equipment (namely, blowout preventers) and downplayed discussions of subsequent inspections not identifying problems with blowout preventers. This was done despite the fact that the agency had retained a firm to conduct an independent outside forensic investigation into the causes of the incident. Ultimately BOEMRE decided against issuing their separate report, leaving the matter to the outside firm contracted to do the forensic investigation. The IG assigned the matter a case number, but according to the Committee Report there was no evidence of further investigative work or follow up on the matter.

a. The Committee Report characterizes the decision not to investigate this matter as “a low key accommodating approach” that “is an example of the IG falling short of its obligations under the IG Act to report to Congress about problems with the Department’s operations and activities.

i. Please explain this decision and explain with supporting facts why the Report’s assessment is not accurate.

Answer: The characterization in the Majority Staff Report that this was a “low key accommodating approach” is not accurate. The Inspector General Act provides that an OIG “prevent and detect fraud and abuse” in programs and operations. In this matter, we were able to alert the Department to a situation in which members of an investigative team were concerned about the involvement by new officials in preparing a report. The officials wanted to ensure that a technical report was written in a manner that a lay person could understand. The investigative team was more concerned with the report being technically precise. By alerting the Department of this concern, it was resolved before it became a serious problem.

The OIG initiated the investigation after a confidential source alleged that Director Michael Bromwich, BOEMRE, and members of BOEMRE’s Investigations and Review Unit (IRU), requested a separate report on the Deep Water Horizon Blowout Preventer (BOP) by the Joint Investigative Team (JIT), which included members from BOEMRE and the Coast Guard. The JIT was primarily charged with producing an overall report on the root causes of Deepwater Horizon incident. The source said that the JIT disagreed with Bromwich and the IRU about producing the separate report because the JIT’s root

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

cause investigation was not complete, all witnesses had not been deposed, and at the time, a forensic report from a third-party investigator was not complete. According to the source, the JIT told the IRU that releasing a report on just the BOP without the forensic examination was premature. Notwithstanding these objections, the JIT was allegedly ordered to complete the draft report. The source said a draft was produced to the IRU, but it was returned with significant edits which the source claimed jeopardized the safety of BOEMRE employees and was factually and scientifically inaccurate. Over the course of several weeks, the source said that members of the JIT attempted to convince Bromwich and the IRU that the edits were incorrect, but all efforts were unsuccessful. Only after a final draft version of the report which contained track changes was obtained by the OIG, and shared with senior members of the Department was a decision made not to issue the report.

Because the report was not issued, the complainant was satisfied, and the OIG closed its investigation.

Question 10: The House Committee Report asserts that during your investigation of the moratorium on oil and gas drilling in the Gulf of Mexico, you and your Chief of Staff, Stephen Hardgrove, directed your staff to collect testimony and documents only from certain witnesses rather than from all relevant witnesses.

a. Is this true? If so, why? If it is false, please state the facts that support your view.

Answer: The Majority Staff Report is not accurate. Neither Chief of Staff Hardgrove nor I directed the investigative staff to collect testimony and documents only from certain witnesses rather than from all relevant witnesses.

Discussions with AIGI John Dupuy, DAIGI Scott Culver, Program Integrity Director Harry Humbert, and the case agent primarily focused on collection of emails and the case agent's request to interview a White House staff member to determine motive behind the edits of the Executive Summary.

Discussions involving collection of emails in this investigation were complicated by the email retention system and the case agent's misunderstanding of the former email retention system known as Zantaz. The case agent and his immediate supervisor believed that all emails for the Office of Secretary could be recovered using Zantaz. Chief of Staff Hardgrove advised them that it was not possible to obtain all emails from the Office of Secretary using Zantaz, and suggested asking the officials for the specific emails in

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

question while in their presence. This suggestion was supported by a comment the case agent made when he advised that at least one official (Black) had already volunteered his emails and documents. The case agent reported, however, that he did not collect these documents at the time.

Ultimately, the OIG obtained copies of the draft Executive Summary to the 30-Day Report, emails between DOI and the White House with attached revisions of the Executive Summary, and did not find any apparent missing Executive Summary drafts or out of sequence emails. There was no reasonable basis to suspect that additional emails related to the sequence of the Executive Summary editing either existed or were being withheld.

The request to interview the White House staffer to determine “motive” behind the edits was discussed. There was disagreement among participants as to the investigative value of such an interview and the likelihood that the staffer would agree to be interviewed. Ultimately, I asked the Deputy Secretary to try to facilitate the interview, but without success.

The House Committee on Natural Resources investigative staff chose NOT to interview Hardgrove regarding his participation in the case discussions, or about the guidance or suggestions he made to the investigators. Hardgrove is the former Director of Program Integrity and the former AIGI. He had led multiple high profile investigations for the OIG and was the person most familiar with previous OIG cases, investigative approaches and tactics used (and why), and his input and judgement have always been valued and respected by OIG investigators.

b. It is my understanding that the lead investigator said that you and Mr. Hardgrove directed OIG staff not to obtain documents from Counselor Steve Black. Is that correct? If not, what are the facts?

Answer: If the lead investigator said this, it is not correct. When the investigating agent met with Steve Black, Black offered his emails and the drafts of the Executive Summary. Inexplicably, the agent chose not to accept these documents at the time. They did not do so, however, at the direction of either Mr. Hardgrove or me. Ultimately, the agent obtained all the documents necessary to conduct a thorough investigation.

Question 11: In testimony before the House Natural Resources Committee on August 2, 2012, you stated that you “have an interest in being nominated and confirmed” as Inspector General.

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

a. You also acknowledged that there is “potential for a conflict of interest” between your role as an investigator of the Administration and your stated desire to be nominated for the position of IG. What concrete steps did you take to avoid that conflict or the appearance of a conflict?

Answer: I have made clear to the Secretary and both political and career leadership at the Department that I am not a part of the DOI management or policy team. Even when I agreed to serve on the OCS Safety Oversight Board, I made clear that I would not participate in any policy decisions. The OIG does not share testimony or press releases with the Department prior to their issuance. We have exercised our authority to disagree with the Department on the adequacy of our budget. I have not shied away from advancing hard-hitting findings and making meaningful recommendations for improvement, even in instances when the Department or its bureaus disagrees with the recommendations. I have not withheld information that might embarrass the Department or its bureaus, but provide it respectfully and professionally, with a view toward solutions. I have earned the respect of both political and career leaders in the Department, who view the OIG as an independent, objective broker that will provide them with straight answers, and offer meaningful recommendations to improve operations. Our review of the Office of Special Trustee’s financial assurance statements, which resulted in the resignation of the Special Trustee; and our investigations into allegations of misconduct by the Assistant Secretary of Insular Affairs, which resulted in his resignation, were both initiated at the request of the Department. The Department has not always been so forthcoming about asking the OIG to investigate such issues.

Question 12: In 2010, the lead OIG investigator called the Solicitor’s Office to obtain the Drilling Moratorium Report and was told that he would have to wait until the report was made public to view it.

a. Did that occur? If so, doesn’t that raise a flag for you? If not, why?

Answer: At a very early stage in the investigation, perhaps at the first meeting we had to discuss the investigation, I suggested that the investigating agents reach out to the Office of Solicitor (SOL) which was tasked with compiling the administrative record in response to the lawsuit brought against the Department in regard to the moratorium decision. Since the SOL was already supposed to be compiling these documents, this seemed an expedient way for the OIG to collect them. I do not recall giving the investigating agents any other suggestions or direction about investigative approach or tactics, until the

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

question about interviewing the White House staffer arose. I agreed to seek access to the White House staffer through the Deputy Secretary, but without success.

Question 13: Has your office filled the open positions in the Sacramento office? Who filled them?

Answer: The vacancies in the Sacramento office have been filled. Committee staff advised that this question relates to a concern that the lead agent for the Moratorium investigation was told by the former AIGI Knox that the agent may be transferred from his domiciled duty station in Boston to Sacramento if staffing levels in the Sacramento office could not otherwise be filled. The former AIGI discussed the possibility that the few domicile offices may be closed and the agents reassigned to regional offices should sequestration greatly impact staffing levels.

The case agent has worked in a single office (at his request and approval of the former Inspector General) in Boston well before the Moratorium investigation was undertaken, and he has continued to operate out of Boston ever since.

Question 14: In August 2014, you declined to sign a letter to Congress signed by 47 of your fellow Inspectors General, regarding the importance of access to records at federal agencies.

a. Please explain why you chose not to sign this letter.

Answer: I chose not to sign that letter for several reasons: I was a part of the Executive Council for the Council of Inspectors General for Integrity and Efficiency (CIGIE). That body sent a formal letter to the Department of Justice, Office of Legal Counsel, with its formal position on the access issue. I felt that, as a signatory by virtue of being on the Executive Council, my position had been conveyed through CIGIE's letter. It did not, in any way, mean that I disagreed with the concerns expressed in the letter signed by the 47 IGs. That letter, however, also left the issue open ended, without any clarity on what the signatories expected Congress to do. I was also concerned that signing the letter might signal that I had a concern about access to information at the Department of the Interior. The OIG does not have an access problem at Interior.

Following the issuance of the OLC legal opinion in July 2015 which curtailed the authority of an IG to access all agency records, however, I joined my CIGIE colleagues in signing a letter to Chairmen Johnson and Chaffetz, and Ranking Members Carper and Cummings, urging legislative action to respond to this OLC opinion.

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

Questions from Senator John Barrasso

Question 1: During your confirmation hearing, I asked you about the delayed release of a report entitled, “Investigative Report of OSM Environmental Review.” A redacted copy of that report shows that it was completed on February 28, 2013. However, the Office of Inspector General (OIG) did not release the report to the public and Congress until December 20, 2013. December 20th was the Friday before Christmas and three days after the Senate Energy and Natural Resources Committee held a confirmation hearing for Janice Schneider. The President nominated Ms. Schneider to the position of Assistant Secretary for Land and Minerals Management which oversees the very office under investigation—the Office of Surface Mining. In response to my question, you stated that you “don’t recall the details of that delay,” that “it sounds wrong,” and that you “would hope that there is a meaningful explanation.”

Is there a meaningful explanation? If so, please provide it.

Answer: On March 7, 2013, my office issued the OSM Environmental Review Report to the Principal Deputy Assistant Secretary for Land and Minerals Management, Tommy Beaudreau. As we customarily do when issuing our investigative reports, by memorandum I requested a written response within 90 days “advising us of the results of your review and any actions taken.” On July 16, 2013, our Deputy Assistant Inspector General for Investigations approved an extension request until September 16, 2013. Our records indicate that we received a memorandum response on September 24, 2013, from Mr. Beaudreau, serving by this time as Acting Assistant Secretary for Lands and Minerals Management, which identified some of the changes he initiated in response to the issues our report identified.

Under our current processes, the Department response to our investigative reports is usually the trigger for us to prepare the report for posting to our website. Mr. Beaudreau’s response, however, was not entered into our tracking system until October 21, 2013, three working days following the October 1 through 16, 2013 government shutdown. On November 8, our administrative staff advised our Freedom of Information Act (FOIA) officer to begin performing the FOIA analysis and prepare the report for posting to our website. This analysis was completed on November 26. When my General Counsel reviewed the version of the report that contained redactions under FOIA and the Privacy Act, he identified the potential privilege issues that required consultation with the

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

Department attorneys in the Office of the Solicitor. As a result, in early December he engaged in these discussions and the report was not made final until on or after December 17, when additional edits were made. It was posted on our website on December 20, 2013.

I was not aware of the confirmation hearing for the Assistant Secretary for Lands and Minerals Management, Janice Schneider, scheduled for December 17, 2013. Ms. Schneider did, however, have a subsequent confirmation hearing before this Committee on February 4, 2014, at which time the OIG report had been publicly available for 47 days.

Question 2: The report entitled, “Investigative Report of OSM Environmental Review,” states that the OIG shared this report with the Principal Deputy Assistant Secretary for Land and Minerals Management.

Did you or any member of your staff share this report (or any information related to this report) with anyone else outside the OIG prior to December 20, 2013? If so, with whom did you share the report (or related information) and when did you do so?

Answer: According to our records, in addition to delivery to Principal Deputy Assistant Secretary for Land and Minerals Management Tommy Beaudreau, a copy was delivered to Deputy Secretary David J. Hayes, Chief of Staff Laura Davis, Director of Office of Surface Mining Reclamation and Enforcement Joseph G Pizarchik, OSMRE OIG Liaison Ruth E. Stokes, Solicitor Hilary C. Tompkins, Deputy Solicitor Edward Keable, DOI Designated Agency Ethics Official Melinda Loftin, and the Office of the Executive Secretariat & Regulatory Affairs on March 7, 2013. We did not distribute the report outside of the Department until it was made publicly available on December 20, 2013.

Questions from Senator Mike Lee

Question 1: It appears, based on a review of the publicly available reports on the OIG website, that the OIG under your leadership has never done a comprehensive review or investigation of the Endangered Species Act program, including the circumstances surrounding the 2011 mega-settlement between the Fish and Wildlife Service and several environmental activist organizations. Why has your office not looked into the listing and delisting process in general or the mega-settlement?

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

Answer: The 2011 settlements resulted from multidistrict litigation (MDL) in the United States District Court for the District of Columbia, MDL No. 2165. The litigation arose out of a number of lawsuits challenging the Fish and Wildlife Service's (FWS') failure to make timely findings, mandated by statutory deadlines, for over 250 species petitioned for listing. The species at issue are those that appeared on the FWS 2010 candidate list, which consists of species for which FWS had found listing was warranted but precluded by other higher priority listing activities. Many of the species had been on the candidate list for over ten years. The settlements require that FWS determine whether or not to list the species based on an agreed upon timetable. The settlements do not mandate any particular result or listing action. The settlements were judicially approved and the court retained jurisdiction to oversee the parties' compliance with the terms of the agreements. The resulting FWS listing work plan currently extends into 2018. Given the Court's oversight, and since we have received no allegations of wrongdoing, the OIG has not looked into the MDL settlements.

Although the OIG has not done a comprehensive review of the Endangered Species Program, we currently have two open investigations and one recently closed matter related to the Endangered Species Act. In the first open case, we are investigating allegations referred to us by a member of Congress of improprieties in the implementation of the Mexican Wolf Recovery Program by the Fish & Wildlife Service (FWS). The second ongoing case relates to alleged mismanagement of the Red Wolf Program by the FWS. We recently closed and referred to the Department of Defense a complaint alleging fraud in obtaining grant funds in a U.S. military-managed program related to study of a certain insect. We will be considering a review of the Endangered Species program in the OIG FY 2016 Audit Plan.

Question 2: Do you have any concerns with the FWS using as peer reviewers the same scientists whose work they rely on to justify their listing decisions? Do you think that practice complies with the policy requiring independent peer reviewers?

Question 3: One listing that I want to bring to your attention involves the Gierisch Mallow, a small flowering plant found in Utah. In its 2013 listing decision, the FWS said the peer reviewers generally concurred with their methods and conclusions. However, the only publicly available comment in the record for this listing that is attributable to a peer reviewer – from a Dr. Lee Hughes – says the listing was prompted by the mega-settlement lawsuit and is not well thought out based on his 20 years as a BLM scientist.

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

- *Dr. Hughes stated in his peer review comments that the “rule has been precipitated by a lawsuit and not a well thought out observation over a lot of years of the plant and man’s operation in its habitat, which this kind of action requires.”*

Do you see any problem with the FWS stating that peer reviewers generally agreed with their listing decision, but comments from the only identified peer reviewer found in the record, contradict the listing decision?

Answer: During my testimony, I told Senator Lee that we would contact his staff to obtain additional information about these questions, and look into the issues. The OIG considers these questions a request by the Senator to review the issues, which we will do. We will respond to the Senator in writing with our findings.

Questions from Senator Steve Daines

Background: Montana is home to twelve federally recognized Indian Tribes, seven Indian reservations and the state-recognized Little Shell Tribe. Many decisions by federal agencies impact these tribes’ sovereignty and their livelihoods—whether it’s the Department of Interior agencies, or others like the Department of Defense (U.S. Air Force and U.S. Army Corps of Engineers) or the EPA. However, too often these federal agencies fail to meaningfully consult with Indian Tribes, even after President Obama has reinforced the importance of the federal government’s tribal trust relationship through his Executive Order 13175. In Montana specifically, the Crow Tribe has been very disappointed in the lack of consultation regarding the Gateway Pacific Terminal project in Washington State by the Corps of Engineers. Additionally, the EPA’s tribal consultation on the Clean Power Plan was also disappointing to the Crow Tribe and other Indian Tribes like the Navajo Nation. The Crow Tribe relies on coal production for most of its nonfederal revenue and good-paying jobs for tribal members. It is the duty of the Department of Interior, especially, to uphold the tribal trust responsibility.

Question 1: What is your view on the duty of Department of Interior to ensure it undergoes meaningful consultation in regards to federal decisions impacting Indian Tribes; and, intervene in other decisions by other federal agencies in consultation if and when necessary?

Answer: As required by Executive Order 13175, federal agencies must develop policies that ensure “meaningful and timely input by tribal officials in the development of

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

regulatory policies that have tribal implications.” In December 2011 the Department issued Secretary’s Order 3317 titled, *Department of the Interior Policy on Consultation with Indian Tribes*, in order to comply with the Executive Order and to update its previous DOI consultation policy. This order has been incorporated into the Department Manual. The policy and Executive Order impose a duty on the Department to engage in meaningful and timely consultation with tribal officials whenever a DOI action with tribal implications arises. These consultations must be respectful of tribal sovereignty and tribal views must be incorporated into the decision making process.

DOI is also required to designate a Tribal Governance Office which is responsible for ensuring that the policy is complied with by Department components. Each bureau or office is required to submit an annual report that demonstrates the results of efforts to engage in and promote consultation with tribes. Included in this annual report is a section on “successes and accomplishments and . . . recommendations for improvements to the consultation process.”

BLM’s annual consultation report for FY 2014 states that it engaged in 45 consultation meetings with Indian Tribes in Montana and the Dakotas. An entry in this annual report reads as follows: “Crow Tribe – An agreement was entered by the DOI, BLM, Montana State Office and the Crow Tribe of Indians for the purpose of facilitating the Intertribal Workshops for Montana and South Dakota. The intent of the partnership is to establish a process to formally facilitate the logistical challenges of holding these regional intertribal workshops. The BLM and Crow Tribe of Indians agree that the scope of the project is for the Crow Tribe of Indians to serve at the “host” for regional intertribal workshop meetings. One series of workshops will be held in South Dakota with up to 13 American Indian Tribes from South Dakota and Eastern Montana. This agreement was used to support many of the intertribal consultation meetings held during the course of the year.”

Neither the Executive Order nor Secretary Order speak to a DOI role regarding decisions made by other (non-DOI) agencies. Rather, agencies must submit to the Office of Management and Budget (OMB) a description of their tribal consultation processes and, for certain types of actions, a copy of tribal communications and a certification that the consultation process has been complied with. Under Executive Order 13647 (June 26, 2013), the Secretary of the Interior serves as the Chair of the White House Council on Native American Affairs, which seeks to coordinate a more effective and efficient process for tribal consultations, but the Council does not oversee the actual consultations performed by other agencies.

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

When we inquired about the Crow Tribe concerns regarding the Corp of Engineers, we were advised by the Office of the Assistant Secretary for Indian Affairs that the Department made efforts to express the Tribe's desire for greater consultation with the Corp. Although the Corp was willing to listen to these concerns, the Corp replied that it had its own consultation process that it was complying with. We were also advised that in this particular issue, there were competing tribal interests that the Corps was required to consider.

Question 2: What will you do differently, if confirmed, to ensure tribes like the Crow Tribe have the opportunity for meaningful consultation with agencies within the Department of Interior and within other Departments' agencies like the U.S. Army Corps of Engineers and the Environmental Protection Agency regarding federal decisions?

Answer: The OIG does not have programmatic function or authority. If allegations are brought to our attention that DOI components are failing to comply with its policy on consultation with tribal governments, I could open an inquiry into the matter and report our findings to bureau and Department officials and to Congress. If a tribe alleged that another agency was failing to comply with its consultation policy, we would refer that allegation to the appropriate Office of Inspector General with jurisdiction.

Questions from Senator Bill Cassidy, M.D.

Question 1: You previously recognized the apparent conflict in serving on the OCS Safety Oversight Board. In testimony before the House Committee you stated, "I recognize the potential for an apparent conflict of interest at the outset of my acceptance as a member of the Safety Oversight Board. But the Department was responding to a crisis. I did not think it appropriate for me to say, 'no, you go ahead and deal with this crisis, and I will just stand by and critique you if things go wrong". It would be an obvious conflict of interest for the DOI OIG to investigate a departmental report it was involved in producing, yes? ... In effect the OIG would be investigating itself?

The OIG did not investigate the writing or editing of the 30-Day Report. Rather, we investigated only the circumstance by which the Executive Summary to the 30-Day Report was edited to suggest that the Secretary's recommendation to institute a moratorium on drilling in the Gulf of Mexico had been peer reviewed. **Therefore, the editing of the three page Executive Summary—not the 30-Day Report—was the focus of the OIG investigation.**

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

Given the very narrow scope of the OIG investigation, and the fact that I had no role in the development, writing, or editing of the 30-Day Report, in my judgment, there was no conflict of interest and no need to recuse myself from the investigation into the editing of the Executive Summary of the 30-Day Report.

In addition, the Integrity Committee for the Council of Inspectors General for Integrity and Efficiency investigated the allegation that I had an actual or apparent conflict of interest in regard to this OIG investigation, and found the allegation to be unsubstantiated.

Question 2: Your testimony before the House describes how the Department was “responding to a crisis” and that the emergency situation superseded any conflict of interest presented by OIG staff participating in the response. Can you please provide me with other precedence within the federal government where oversight officials abandoned their primary mission to investigate acts of waste, fraud, and abuse in order to conduct departmental work?

Answer: The OIG did not have a role in responding to the crisis. Rather, OIG staff conducted a timely, thorough, influential, and independent oversight review of the Department’s management, regulatory, and oversight responsibilities over oil and gas production in the Gulf of Mexico. That work was instrumental in providing the Department with meaningful and actionable recommendations to improve and transform oil and gas production under the Department’s Outer Continental Shelf jurisdiction. Even today, nearly five years since its issuance, the Department continues to implement our recommendations from this report.

The OIG also committed significant staff to the criminal and civil investigations that have resulted in the recovery of billions of dollars that have gone to the Gulf states to address economic and ecological harm caused by the oil spill.

I have never strayed from the primary mission of an Inspector General and am deeply committed to my office’s mission of independent oversight. This includes independent oversight of the Department itself and oversight of the recipients of federal funds and resources.

For example, my office recently completed an investigation into Tom Davis, a Colorado rancher and livestock hauler, after receiving allegations that Davis purchased approximately 1,700 horses from the Bureau of Land Management’s (BLM) Wild Horse

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

and Burro Program and wrongfully sent the horses to slaughter. In cases such as this, my office's activities can overlap with Departmental activities. The BLM Office of Law Enforcement had previously investigated Mr. Davis for similar allegations of horse slaughter. These types of cases can require a degree of honest cooperation between my office and the Departmental employees who are responsible for administering the program that is being defrauded or abused.

The critical difference, however, is that my office also looks at the Department's role, with the statutory independence of an Inspector General. An Inspector General must undertake such investigations on its own accord, without displacing any Departmental responsibilities, and free from Departmental interference. Turning again to the recent investigation of Mr. Davis, my office determined that BLM did not follow current law while managing the Wild Horse and Burro Program.

While the Deepwater Horizon explosion was unprecedented in many respects, including my role on the Safety Oversight Board, our independence remained constant. My office issued a comprehensive report on weaknesses in the Department's activities on the Outer Continental Shelf, including 64 strong and well-supported recommendations that are still being implemented today. My office's recent report on the Bureau of Safety and Environmental Enforcement's (BSEE's) Incident Investigation Program reflects the independent oversight that the OIG continues to exercise over the Department's OCS activities as a result of our involvement in the Deepwater Horizon response. As with the investigation into Mr. Davis, even though my office's OCS-related work can overlap at times with the programs and operations we are overseeing, our independence - and the consequent impact of our reports - remains constant.

Question 3: An IG serves both the Department and Congress. Given the concerns that members of the both the House and Senate have raised over the years about your lack of candor and cooperation with Congress, Do you have the trust necessary to be effective in working with Congress to advance the IG's mission?

Answer: The OIG, under my leadership, has continued to be requested to conduct reviews and investigations by members of Congress, some of whom are the very same members who expressed concerns about me in the past. Since February 2009, when I became the Acting Inspector General, we have received 55 requests from members of Congress to audit, evaluate, or investigate issues of concern to them or their constituents which signals a level of trust in the OIG that I lead. For example, our review of the Department's Helium Program was being conducted during some of the most contentious times between the OIG and the House Committee on Natural Resources. Yet, the

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

Committee called a hearing in 2013, highlighting our report on the Helium Program. In fact, our report was used to support legislation proposed by the Committee. In October 2014, Within a month of the issuance of our audit report on oil and gas trespass and drilling without a permit (“Bureau of Land Management: Federal Onshore Oil & Gas Trespass and Drilling Without Approval”), the House Committee on Natural Resources sent a letter to the BLM Director urging action to implement our recommendations and asking for a copy of the Bureau’s response to our report. In November 2014, former Chairman Hastings, and present Chairman Bishop urged the Secretary of the Interior to turn an inquiry—one into the use of the Brinkerhoff Lodge in the Grand Teton National Park—over to the OIG, saying the Department did not have “the independence, experience, and tools required to conduct a thorough investigation....” Each of these examples again signals a level of trust in the work of my office.

Question 4: There has been considerable Congressional scrutiny about your handling of the moratorium investigation, the review of the Stream Buffer Zone rulemaking, and several other matters, including concerns that you have not fully complied with Congressional document requests. Why should we have confidence that, if you were to be confirmed, your office would be any more forthcoming on this and other matters to come before the IG?

Answer: With the exception of two requests for information that invoked separation of powers issues, I and the OIG have been completely forthcoming with Congress. As for any documents and information fully in our realm of control and authority, we have provided deliberative, pre-decisional, personal privacy, and other information previously unknown to the leadership of the OIG that revealed a case agent’s highly critical opinions about the conduct of an investigation and OIG management, *all of which was provided to Congress without exception*. Of the 30 letters we received from the House Committee on Natural Resources since 2010, 21 included information requests. We committed hundreds of hours of staff time to collect, deliver, and explain the over 5,000 pages of documents that were delivered to the Committee in their entirety.

As for the process by which the Legislative Branch and Executive Branch are to resolve their differences over information that is deemed potentially privileged by the Executive Branch, I remain steadfast. The accommodation process is well established, and has been employed by both parties holding power in both the Legislative and Executive Branches over many administrations. I believed then, as I do now, that the proper resolution of such differences lies between the two branches of government. The Office of Inspector General had no interest at stake or authority to resolve such differences, and was improperly put in the middle of a dispute that was properly between the House

**U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall**

Committee on Natural Resources and the Department of the Interior. Other IG offices have obtained documents that were the subject of disputes between congressional committees and the agency. But I am not aware of any instance in which the committee sought to compel the IG office to release the disputed documents.

Looking forward, I am always pursuing opportunities to improve this organization. In doing so, earlier this year I asked my staff to achieve greater transparency to our customers, including Congress and the public. This past year, we revised our policy and practice on posting our investigative reports. I believe this approach exceeds that of any other IG office and meets Congressional and public interest in the work performed by our office. I am also committed to increasing our engagement with Congressional committees and individual members and have reassigned a senior member of our staff with considerable congressional liaison experience to help the OIG to achieve this commitment.

Question 5: In a June 13, 2010 email to Assistant Secretary Wilma Lewis, you acknowledged the difficulties IG staff were having with the IG’s involvement: “The circumstances certainly call for a coordinated, cooperative effort, and we are fully prepared to work closely with the Department on this matter. While it is still a somewhat foreign concept to our staff, Steve [Hardgrove] and I are committed to making this work as smoothly and effectively as possible.” Your role as Acting IG is to be an impartial investigator of the department’s components regardless of their operational status. Please explain the difference between the discomfort your staff experienced assisting with your membership on the OCS Safety Board, vs. your decision to participate on the board?

Answer: The initial report was directed to the Safety Oversight Board, which adopted the report as its own. The review team was concerned that the Safety Oversight Board might alter the report in ways they could not support. Their concern was put to rest when I assured them that no changes to the report would be made without the team’s support and approval.

I believe the OIG staff provided the appropriate assistance to the OCS Safety Oversight Board by independently reviewing the major aspects of the Department’s management, regulation, and oversight of oil and gas production in the Gulf of Mexico. In hindsight, however, I would have executed this work differently; I would, going forward, decline the request to become a member of such a Board, but rather offer the assistance of the OIG to conduct an independent review, and report our findings directly to the Secretary.

U.S. Senate Committee on Energy and Natural Resources
October 20, 2015 Hearing: Pending Nominations
Answers for the Record Submitted by Mary Kendall

The Safety Oversight Board identified several broad categories regarding the Department's management, regulatory, and oversight responsibilities over oil and gas production in the Outer Continental Shelf (OCS). I asked the OIG staff to conduct a review using these broad categories as a guide. This was something new for the OIG and caused some staff initial discomfort which they overcame in very short order when they realized that the Board gave no direction and had no influence on the independent work conducted by the OIG team.

We also utilized three staff-level Subject Matter Experts (SME) on the OCS review team, as this involved one of the most complex and highly specialized program areas in the Department. Although it is done infrequently, we employed these SMEs with the clear understanding that the SME becomes responsive and responsible to the OIG, and not Department management, while serving as an SME to the OIG. This OCS review was the first time many of the team members had worked with SMEs on the team, however. For them, this, too, was a foreign concept.

The OIG staff came quickly to appreciate the expertise and experience of the SMEs, however, gratefully accepted their help and guidance in focusing the review and avoiding areas that would detract or divert the focus of the review. Ultimately, we could not have gotten the results we did without them. At the conclusion of the review, OIG team members honored the SMEs with an award nomination, which was approved by OIG management and presented to the SME members.