

**American Bar Association  
Section of Environment, Energy, and Resources**

**Multiple-Use Management in a Zero-Sum World**

**Rebecca W. Watson  
Welborn Sullivan Meck & Tooley, P.C.  
Denver, CO**

**24th Fall Conference  
Denver, CO  
October 5-8, 2016**

**ABSTRACT**

*The “Keep It in the Ground” argument to stop leasing federal fossil fuels to slow climate change is the most visible evidence of a significant shift in multiple-use federal energy management. Perhaps less visible, but with a greater, immediate impact has been the volume of new Department of the Interior and Bureau of Land Management policies, land use plans and regulations that have been announced over the last eight years. This paper, first, will lay the foundation by briefly describing the multiple-use premise of the Federal Land Policy Management Act and the statutes governing leasing of federal coal and onshore oil and gas. A summary and analysis of the Obama administration regulatory and policy proposals directed at federal oil and gas is provided followed by an analysis of the “Keep It in the Ground” argument. The paper concludes with some thoughts on the future management of federal fossil fuels in the era of climate change.*

**Introduction**

Many have described the threat of global climate change as the most urgent challenge the world faces – the consequences are so dire that radical action is required.<sup>1</sup> Proponents of immediate action complain that too many think of the needed shift as a zero-sum game rather than as an opportunity for a new, green economy.<sup>2</sup> “We are behaving as if it were a game with winners and losers, in which one actor’s gain is dependent on the losses of other actors.”<sup>3</sup> Not surprisingly, proponents of a “win-win” solution to the challenge of climate change are politicians. Presidential candidate Obama declared his goal was to “transform” U.S. energy policy to address climate change.<sup>4</sup> Once elected, on his first Earth Day, the President announced his Administration’s investments in clean energy are a “win-win: It’s good for the environment,

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<sup>1</sup> See, e.g., United Nations Sustainable Development Goals, Number 13: Take urgent action to combat climate change and its impacts, <http://www.un.org/sustainabledevelopment/climate-change-2/>.

<sup>2</sup> See, e.g., Klaus Hasselmann et al., “Reframing the Problem of Climate Change; From Zero Sum Game to Win-Win Solutions,” (Routledge Publishing 2012).

<sup>3</sup> *Id.* at 2.

<sup>4</sup> Andrew C. Revkin, “The Obama Energy Speech, Annotated,” *The New York Times* (Aug. 8, 2008), [http://dotearth.blogs.nytimes.com/2008/08/05/the-obama-energy-speech-annotated/?\\_r=0](http://dotearth.blogs.nytimes.com/2008/08/05/the-obama-energy-speech-annotated/?_r=0).

it's great for the economy.”<sup>5</sup> As recently as August 31, 2016, President Obama declared, there's “no contradiction between being smart on the environment and having a strong economy.”<sup>6</sup> Candidate Clinton perhaps more realistically recognized that, as we move to a “green” energy supply, “we are going to put a lot of coal miners and coal companies out of business.” But she, too, saw the potential for a “win-win”—discussing her policy “about how to bring economic opportunity using clean renewable energy as the key into coal country.”<sup>7</sup>

A more sober assessment of the challenges of a “transformed” energy supply was recently captured in a *New York Times* article, “The Challenge of Cutting Coal Dependence,”<sup>8</sup> which looked at this transition from a global perspective summarizing: “It won't be easy.” As former Colorado PUC Commissioner, Matt Baker was quoted, “The scale and scope of the transition is enormous. You can't do it in the time frame we are thinking about without the consent of the so-called losers in the transition.”<sup>9</sup> This is the context in which this paper examines a series of Obama Administration energy policy shifts as they impact the oil and gas industry and the public land communities that host those developments.

The Obama administration has used the regulatory tools at hand to push a transition away from fossil fuels towards renewable energy, while recognizing that in the short term fossil fuels are the backbone of U.S. energy supply and economy. Rather than calling for an abrupt halt to fossil fuel development, the policies focus on increased regulation of where, if and how energy development occurs on public land.<sup>10</sup> The Administration is also capturing more fossil fuel “externalities” through higher fees, bonding requirements and royalties. These energy initiatives have made the development of federal oil and gas more costly, uncertain and in a time of low commodity prices, resulted in a move away from federal lands. This shift has a significant economic and social impact on rural counties where this development had occurred.

### **Background of Multiple-Use Management of Federal Oil and Gas**

Approximately 28% of the United States is under the management of the federal government.<sup>11</sup> There are approximately 2.27 billion surface acres in the U.S. and the single largest surface owner is the federal government with 640 million acres.<sup>12</sup> The West is home to all 12 states where the federal government owns the most land, also known as “the public lands states.”<sup>13</sup> A total area of 610 million acres is administered by 4 federal land management agencies in these Western states:

- U.S. Forest Service (“FS”) manages 193 million acres for multiple use (about the size of Turkey)
- National Park Service (“NPS”) preserves 80 million acres (about the size of Norway)

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<sup>5</sup> Transcript: Obama's Earth Day Speech, Igor Rossov, CBS News (April 22, 2009).

<sup>6</sup> Maya Rhondan, President Obama Says Conservation More Important than Ever at Lake Tahoe Summit, Time.com (Aug. 31, 2016), <http://time.com/4475151/president-obama-conservation-lake-tahoe-summit/>.

<sup>7</sup> CNN Town Hall (Mar. 13, 2016), <http://cnnpressroom.blogs.cnn.com/2016/03/13/full-rush-transcript-hillary-clinton-partcnn-tv-one-democratic-presidential-town-hall/>.

<sup>8</sup> Eduardo Porter, “The Challenge of Cutting Coal Dependence,” *The New York Times* (Aug. 30, 2016).

<sup>9</sup> *Id.*

<sup>10</sup> Although the Secretary of Interior has imposed a moratorium, Secretarial Order No. 3338 (Jan. 15, 2016), on federal coal leasing in order to “modernize” the coal program, it is for a three year period.

<sup>11</sup> George Cameron Coggins and Robert L. Glicksman, Public Natural Resources Law § 1:1 (2d ed. 2015).

<sup>12</sup> Congressional Research Service Report R42346, “Federal Land Ownership: Overview and Data,” (December 29, 2014) at 3.

<sup>13</sup> The 12 Western states are Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming.

- Bureau of Land Management (“BLM”) manages 246 million acres for multiple use (about the size of Egypt) and 700 million acres of onshore federal minerals<sup>14</sup>
- U.S. Fish and Wildlife Service (“FWS”) manages 89 million acres largely for bird conservation (a little larger in size than Germany)<sup>15</sup>

The percentage of federal land in the 12 public land states ranges from a low of 29% in Washington and Montana to highs of 69% in Alaska and 85% in Nevada.<sup>16</sup>

In the Federal Land Policy and Management Act of 1976 (“FLPMA”),<sup>17</sup> BLM’s organic act, Congress set out a multiple-use and sustained-yield land management policy providing for commodity development, recreation, rights-of-way, and protection of ecological, environmental, and historical resources.<sup>18</sup> Mineral “exploration and production” is identified as one of FLPMA’s “principal or major uses.”<sup>19</sup> The Mineral Leasing Act of 1920, as amended, provides the mechanics of oil and gas leasing.<sup>20</sup> Federal environmental laws<sup>21</sup> and, particularly, the National Environmental Policy Act (“NEPA”),<sup>22</sup> provide an umbrella of additional regulation and process that apply to federal mineral development.

### **Obama Oil and Gas Leasing Policies**

The President’s transformational efforts at the U.S. Department of the Interior (“Interior” or “Department”) began immediately, first with rhetoric, followed by action. Shortly after inauguration day, Secretary Ken Salazar came to Denver to announce that when it came to federal oil and gas, “[t]he anything goes era is over” because “[t]here’s a new Sheriff in town.”<sup>23</sup> Five days later, Secretary Salazar announced he was taking the unprecedented step of cancelling 77 federal oil and gas leases sold in a December 2008 Utah lease sale pursuant to recently completed BLM Resource Management Plans (“RMPs”), explaining, “I believe, as President Obama does, that we need to responsibly develop our oil and gas supplies . . . but we must do so in a thoughtful

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<sup>14</sup> BLM, Public Land Statistics of the United States 2014 (May 2015) at Table 1-3, *see* maps at 9 and 11, available at [http://www.blm.gov/public\\_land\\_statistics/pls14/pls2014.pdf](http://www.blm.gov/public_land_statistics/pls14/pls2014.pdf).

<sup>15</sup> “Just How Much Land Does the Federal Government Own – And Why?” Big Think at <http://bigthink.com/strange-maps/291-federal-lands-in-the-US>.

<sup>16</sup> Congressional Research Service Report R42346, “Federal Land Ownership: Overview and Data,” (December 29, 2014) at Table 1. Washington, D.C. is 21% federally managed.

<sup>17</sup> 43 U.S.C. § 1701, *et seq.*

<sup>18</sup> 43 U.S.C. § 1701(a)(8). Multiple use: “A deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put.” *Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004).

<sup>19</sup> 43 U.S.C. § 1702(l). Other “major uses” include grazing, fish and wildlife development, rights-of-way, outdoor recreation and timber production. Congress also specifically directed in FLPMA that “the public lands be managed in a manner which recognizes the Nation’s need for domestic sources of minerals . . . from the public lands including the implementation of the Mining and Minerals Policy Act of 1970 [30 U.S.C. § 21(a)].” 43 U.S.C. § 1701(a)(12).

<sup>20</sup> 30 U.S.C. § 226 (oil and gas).

<sup>21</sup> Clean Air Act (“CAA”), Clean Water Act (“CWA”), National Historic Preservation Act (“NHPA”) and Endangered Species Act (“ESA”) among other federal and state environmental laws. *See* Government Accountability Office (“GAO”), GAO-12-874 “Unconventional Oil and Gas Development: Key Environmental and Public Health Requirements” (2012).

<sup>22</sup> 42 U.S.C. § 4321 *et seq.*

<sup>23</sup> Ernest Lunning, “Salazar lays down law on Interior scandals,” *The Colorado Independent* (Jan. 29, 2009).

and balanced way.”<sup>24</sup> This decision was the prelude to a series of policy initiatives that have significantly altered the way in which federal oil and gas leasing is managed.

### **Land Use and Planning Decisions**

BLM RMPs identify, at a broad scale, areas open or closed to mineral development and impose lease stipulations. But some have argued that BLM could do a better job siting development if BLM adopted a “zoning approach”.<sup>25</sup> “As opposed to identifying areas best suited to oil and gas development in advance of development proposals, BLM’s land use plans permit oil and gas drilling to be proposed in most places by the oil and gas industry, leaving the agency to respond on a case-by-case basis as proposals are made.”<sup>26</sup> With the policy initiatives, BLM has altered the oil and gas leasing and development process to enhance BLM’s role in managing where oil and gas is developed.

In 2010, BLM issued a significant guidance document, Instruction Memorandum No. 2010-117 (“IM”) that created a review process for existing RMPs and a new layer of planning to “zone” oil and gas.<sup>27</sup> This significant change to federal leasing was done without public comment. BLM directed a “land use plan review” to consider whether an existing RMP “adequately protects important resource values in light of changing circumstances, updated policies and new information.”<sup>28</sup> The guidance emphasized that an “open for leasing” RMP designation was not the last word – BLM retains the discretion not to lease.<sup>29</sup> In addition, the IM added a new layer of NEPA at the lease issuance phase after an inter-disciplinary team review and a 30-day public comment period.<sup>30</sup> Finally, BLM created a new planning process for oil and gas leasing – the Master Leasing Plan (“MLP”). BLM was directed to “reconsider RMP decisions pertaining to leasing” by analyzing likely development, resource impacts and mitigation at a site-specific level.<sup>31</sup> Although the IM identified mandatory use of an MLP in certain specific circumstances, the door was left open to the use of MLPs in areas that did not meet the mandatory criteria. Environmental groups, in a non-public “nomination” process, identified a number of “optional” MLPs, many of which are now ongoing. The most high-profile MLP, and the subject of a recent *New York Times* editorial as an example of conservation work the administration needs to complete,<sup>32</sup> is the Moab MLP. The Moab MLP Amendment and Final Environmental Impact Statement (“FEIS”) was published on July 26, 2016,<sup>33</sup> and directs development on 785,000 acres of land between Arches and Canyonlands National Parks. The MLP directs that 57% of the area (451,183 acres) be either unavailable for leasing or subject to a “no surface occupancy” (“NSO”) stipulation. The Moab MLP Record of Decision (“ROD”) is expected soon.

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<sup>24</sup> Juliet Eilperin, “Salazar Voids Drilling Leases on Public Lands in Utah,” *The Washington Post* (Feb. 5, 2009).

<sup>25</sup> N. Culver, “Not All Uses in All Places – Zoning to Manage Energy Development on the Public Lands,” ABA 21<sup>st</sup> Fall Conference (October 2013).

<sup>26</sup> *Id.* at 6.

<sup>27</sup> BLM Instruction Memorandum No. 2010-117, “Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews” (May 17, 2010) (“IM-2010-117”).

<sup>28</sup> *Id.* at 2.

<sup>29</sup> *Id.* at 3.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *The New York Times*, “National Monuments from Mr. Obama” (Aug. 26, 2016). “[A] leasing plan that seeks to minimize development near Arches and Canyonlands National Parks in Utah that needs to be made final.”

<sup>33</sup> 81 FR 48,840 (July 26, 2016). *See also* [http://www.blm.gov/ut/st/en/fo/moab/MLP/MoabMLP\\_RMPEIS.html](http://www.blm.gov/ut/st/en/fo/moab/MLP/MoabMLP_RMPEIS.html).

The results of the 2010 “leasing reform” initiative have arguably reduced leasing of federal minerals. The lease process timeline has more than doubled (from 3-6 months to 12-14 months). Lease parcels in any one state only come up once a year due to the geographical rotation imposed by the leasing reform. Lease parcels are more frequently removed or deferred from sale. A report to Congress found that “[o]il production has fluctuated on federal lands over the past 10 fiscal years but has increased dramatically on nonfederal lands. . . . Overall, annual U.S. natural gas production rose by about 10 trillion cubic feet (tcf) since [fiscal year] 2006, while annual production on federal lands (onshore and offshore) fell by about 1.6 tcf (or nearly 26%) over the same time period.”<sup>34</sup> In December 2015, the Majority on the House Committee on Natural Resources wrote to Interior about BLM’s postponement of lease sales complaining that, based on BLM’s own data, “the total number of new leases issued each year has fallen by 57% since 2008.”<sup>35</sup> On August 11, 2016, Western Energy Alliance, a federal lands oil and gas trade association, filed litigation against the Department alleging that as a direct result of BLM’s lease reforms it had failed to comply with the MLA requirement (30 U.S.C. § 226(b)) to hold quarterly lease sales in each state where “eligible lands are available”.<sup>36</sup>

### **“Modernizing” Oil and Gas Regulation**

In March 2015, Interior Secretary Jewell, in a Department-described “major” energy speech, declared, “I am determined to help make energy development safer and more environmentally sound in the next two years. Helping our nation cut carbon pollution should inform our decisions about where we develop, how we develop and what we develop.”<sup>37</sup> After noting that “many of the regulations on the books haven’t kept pace,” the Secretary detailed a series of rulemakings to be finalized including “hydraulic fracturing” regulation, “standards to cut emissions and wasted gas,” a proposal to give BLM “the flexibility to adjust royalty rates and continued use of MLPs to open up access to oil and gas resources in “the right places” and “identify places that are too special to drill.”<sup>38</sup>

*BLM Hydraulic Fracturing Rule.* On March 26, 2015, BLM issued a final hydraulic fracturing (“fracking”) rule.<sup>39</sup> The oil and gas industry, four states and the Colorado Southern Ute tribe immediately challenged the rule. The key issue was federalization of the regulation of fracking, an area historically regulated by the states. The Wyoming Federal District Court first enjoined implementation of the rule and then on June 21, 2016, ruled that BLM “lacked Congressional authority to promulgate the regulations.”<sup>40</sup> The court reasoned BLM’s FLPMA and MLA authority was limited and Congress, in enacting the fracking exemption from the Safe Drinking Water Act in the Energy Policy Act of 2005 (“EPAct 2005”), meant to exclude all federal regulation of fracking.<sup>41</sup> The federal government argues that the court was mistaken in its narrow view of BLM’s regulatory authority over federal oil and gas and has over-read the import

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<sup>34</sup> Congressional Research Service Report 42342, “U.S. Crude Oil and Natural Gas Production in Federal and Nonfederal Areas,” (June 22, 2016) at 1.

<sup>35</sup> Letter, Members of the House Committee on Natural Resources to Assistant Secretary Janice Schneider (December 16, 2015), available at [http://naturalresources.house.gov/uploadedfiles/blm\\_letter\\_12\\_16\\_15.pdf](http://naturalresources.house.gov/uploadedfiles/blm_letter_12_16_15.pdf).

<sup>36</sup> *Western Energy Alliance v. Jewell*, Civil Case No. 1:16-cv-00912 (August 8, 11, 2016).

<sup>37</sup> Press Release, U.S. Department of the Interior, “Secretary Jewell Offers Vision for Balanced, Prosperous Energy Future,” (Mar. 17, 2015).

<sup>38</sup> *Id.*

<sup>39</sup> BLM, Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 *Fed. Reg.* 16,130 (Mar. 26, 2015).

<sup>40</sup> *State of Wyoming v. Jewell*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at \*1 (D. Wyo. June 21, 2016).

<sup>41</sup> *Id.* at \*10-11.

of the EPOA 2005 fracking exemption.<sup>42</sup> The rule remains stayed and the case is on appeal in the Tenth Circuit.<sup>43</sup>

Royalty Reform, etc. In April 2015, BLM began a rulemaking process, “an announcement of proposed rulemaking” (“ANPR”), to ask for comments on updating oil and gas royalty rates, annual rental payments, minimum acceptable bids, bonding requirements and civil penalty assessments.<sup>44</sup> In announcing the rulemaking effort, Secretary Jewell stated, “It’s time to have a candid conversation about whether the American taxpayer is getting the right return for the development of oil and gas resources on public lands.”<sup>45</sup>

- The *royalty* proposal seeks information on where the “sweet spot” is for gaining more revenue, but avoiding loss of interest in federal minerals. Or as BLM puts it, “the interplay between commodities prices and a royalty rate’s impact on the relative attractiveness of Federal oil and gas leases.”<sup>46</sup>
- When a lease is not producing, lessees pay an *annual rental* currently set at \$1.50 per acre in the first five years and \$2.00 per acre thereafter. 30 U.S.C. § 226(d). The fee has not been raised in 28 years. BLM states, “The intent of any potential increase in annual payments would be to provide a greater financial incentive for oil and gas companies to develop their leases promptly or relinquish them . . . .”
- The MLA sets the “*national minimum acceptable bid*” for a federal lease at \$2.00 per acre. 30 U.S.C. § 226(b)(1)(A) and (B). BLM argues experience “suggest[s] the current minimum acceptable bid could be higher.”<sup>47</sup>
- The MLA (30 U.S.C. § 226(g)) requires a *security bond* to ensure reclamation of the lease tract. BLM regulations have set bond amounts in 4 categories, none of which exceed \$100,000 – the amount posted by a company to cover all of its nationwide liabilities.<sup>48</sup> These amounts have been in place since 1960, and BLM correctly notes that “those minimums do not reflect inflation with the reclamation and restoration of any individual oil and gas operations.”<sup>49</sup>
- The Federal Oil and Gas Royalty Management Act of 1982 (30 U.S.C. § 1719) authorized BLM to assess *civil penalties*, but in the 1980s BLM capped the amount of penalty. BLM believes an increase is necessary to adequately deter mineral trespass.

BLM Venting and Flaring and Other Related Rules. In February 2016, BLM issued a rule to address methane emissions from venting and flaring at the well-site.<sup>50</sup> In this proposed rule, BLM is doing its part to meet the President’s goal to curb methane from the oil and gas

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<sup>42</sup> *State of Wyoming v. Jewell*, No. 16-8069, 2016 WL 3509415 (10<sup>th</sup> Cir. June 29, 2016), “Opening Brief for the Federal Appellants” (Aug. 12, 2016) at 1-2.

<sup>43</sup> *State of Wyoming v. Jewell*, No. 16-8069, 2016 WL 3509415 (10<sup>th</sup> Cir. Jun. 29, 2016).

<sup>44</sup> Oil and Gas Leasing; Royalty on Production, Rental Payments, Minimum Acceptable Bids, Binding Requirements, and Civil Penalty Assessment, 80 *Fed. Reg.* 22,148 (April 21, 2015).

<sup>45</sup> DOI Press Release, “Interior Department Seeks Public Dialogue on Reform of Federal Onshore Oil and Gas Regulations” (Apr. 17, 2015).

<sup>46</sup> ANPR, 80 *Fed. Reg.* at 22,152.

<sup>47</sup> ANPR, 80 *Fed. Reg.* at 22,153.

<sup>48</sup> *Id.* at 22,153.

<sup>49</sup> *Id.* at 22,154.

<sup>50</sup> Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 *Fed. Reg.* 6,616 (Feb. 8, 2016).

industry by 40%.<sup>51</sup> BLM is updating an existing rule on what is or is not “waste” of a natural resource and subject to federal royalty to get at methane emissions. The MLA (30 U.S.C. § 225) directs that lessees must “use all reasonable precautions to prevent waste of oil and gas . . .” and court and agency decisions have found that gas is “wasted” only if it could have been economically captured and marketed or put to beneficial use on the lease, but is not. Industry has questioned BLM’s attempt to regulate methane emissions under the guise of “waste.” Industry also urged BLM to defer regulation of existing sources of methane until EPA’s CAA rulemaking on methane emissions from existing sources is complete.<sup>52</sup> Along the same lines, BLM has proposed updates to three regulatory Onshore Orders—Onshore Order Nos. 3 (site security), 4 (oil measurement) and 5 (gas measurement).<sup>53</sup> Each of these rules addresses the integrity of equipment and the measurement of oil and gas subject to federal royalty.

### **Mitigation and Landscape Level Planning**

In addition to specific oil and gas initiatives, Interior and BLM have been developing several related policy tools to better manage the relationship between oil and gas and other public land resources. These include changes to FLPMA land use planning and a new mitigation policy. Each moves BLM’s consideration of oil and gas decisions into a larger landscape.

*Mitigation.* On October 31, 2013, in one of her first official actions, Secretary Jewell issued a Secretarial Order establishing a Department-wide strategy to mitigate the impacts of energy infrastructure development.<sup>54</sup> The Secretary finalized the Department’s mitigation guidance in 2015.<sup>55</sup> What was new is a regional or landscape focus for mitigation, rather than a project-area focus. The Interior Manual also directs a “no net loss” to “resources and their values, services, and functions that are considered by the Department as important, scarce, sensitive, or otherwise suitable to achieve established goals, or have a protective legal mandate,” or if “required or appropriate, a net benefit in outcomes.”<sup>56</sup> Also in 2015, the President issued a Presidential Memorandum<sup>57</sup> addressing mitigation for energy infrastructure projects. The mitigation standard described in the Presidential Memorandum directs agencies to set a “net benefit goal, or at a minimum, a no net loss goal” for natural resources that are “important, scarce or sensitive . . . .” The mitigation standards in the Secretarial Order and Presidential Memorandum provide permitting agencies with greater leverage to deny projects or to require

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<sup>51</sup> The President’s Climate Action Plan, Executive Office of the President (June 25, 2013); The White House, Climate Action Plan – Strategy to Reduce Methane Emissions (Mar. 2014); and The White House, FACT SHEET: Administration Takes Steps Forward on Climate Action Plan by Announcing Actions to Cut Methane Emissions, (Jan. 14, 2015) (calling for 40% reduction in oil and gas sector).

<sup>52</sup> EPA issued a draft Information Collection Request to reduce methane emissions from existing oil and gas sources. 81 *Fed. Reg.* 46670 (July 18, 2016).

<sup>53</sup> Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Measurement of Gas (Onshore Order No. 5), 80 *Fed. Reg.* 61,646 (Oct. 13, 2015); Measurement of Oil (Onshore Order No. 4), 80 *Fed. Reg.* 54,760 (Sept. 11, 2015); and Site Security (Onshore Order No. 3), 80 *Fed. Reg.* 40768 (July 13, 2015).

<sup>54</sup> U.S. Department of the Interior Secretarial Order No. 3330, “Improving Mitigation Policies and Practices of the Department of the Interior (October 31, 2013); *see also* BLM IM No. 2013-142, “Interior Policy, Draft - Regional Mitigation Manual Section - 1794” (June 13, 2013); J.P. Clement, et al., “A strategy for improving the mitigation policies and practices of the Department of the Interior: a report to the Secretary of the Interior from the Energy and Climate Change Task Force,” Washington, D.C. (April 4, 2014).

<sup>55</sup> DOI, Departmental Manual, 600 DM 6, “Public Land Policy, Landscape-Scale Mitigation Policy” (Oct. 23, 2015).

<sup>56</sup> Departmental Manual, 600 DM 6.5.

<sup>57</sup> “Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment,” (Nov. 3, 2015).

greater mitigation as a condition of approval. It is also possible that the policy can create some new flexibility in permitting for permit applicants—at a cost.

*Planning 2.0.* BLM has also proposed revisions to its FLPMA planning rules described as “Planning 2.0.” FLPMA describes a relationship between BLM and local government of “coordination,” “consideration,” “consistency” and “meaningful public involvement of state and local government officials” in “land use programs,” “land use regulations” and “land use decisions.” 43 U.S.C. § 1712(c)(9). BLM asserts that the Planning 2.0 proposal will make “future land use planning more collaborative, transparent, and effective . . . while adopting a broader landscape-scale, science-based approach to managing public lands . . . .”<sup>58</sup> Those laudable BLM statements were undercut by an NGO-dominated rulemaking process. The reaction of state and local governments to the proposal was, not surprisingly, negative. For example, the Western Governors Association (“WGA”) testified that “much of the opposition to this proposal would have been mitigated had BLM engaged in ‘early, meaningful and substantial’ consultations with Governors in the formative stages of the rule’s development.”<sup>59</sup> States and counties are concerned that the rule’s enhancement of the “public’s” role will diminish their unique FLPMA role, that a landscape planning focus will undercut local concerns and that the Governor’s consistency review has been neutered.<sup>60</sup>

*Greater Sage-grouse RMPs.* An example of this new “landscape level” planning is the recently finalized Greater Sage-grouse RMPs (“GRSG RMPs”). The BLM and FS amended and revised 98 RMPs in 15 Environmental Impact Statements (“EISs”) and five RODs in 10 Western states covering 67 million acres on September 24, 2015.<sup>61</sup>

The GRSG RMPs place a strong emphasis on zoning – identification of avoidance areas, disturbance caps of 3%, and uniform lek buffer zones. For example, 10 million acres of land were segregated (withdrawn) from application of the Mining Law of 1872 in 6 states.<sup>62</sup> The RMPs also include measures that prohibit fluid mineral development in GRSG “priority areas” by imposing NSOs. In September, BLM issued 7 GRSG RMP implementation guidance documents.<sup>63</sup> The oil and gas leasing IM prioritizes leasing outside of sage-grouse habitat with leasing in sage-grouse priority areas given the lowest priority.<sup>64</sup> These plan revisions and implementation measures zone oil and gas away from the bird’s habitat. The U.S. Fish and

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<sup>58</sup> Proposed Rules, Resources Management Planning, 81 *Fed. Reg.* 9674 (February 25, 2016).

<sup>59</sup> Testimony to House Committee on Natural Resources, Western Governors Association, “BLM Planning 2.0 Initiative,” (July 7, 2016), <http://docs.house.gov/meetings/II/II15/20160707/105211/HHRG-114-II15-Wstate-OgsburyJ-20160707.pdf>.

<sup>60</sup> *See, e.g.*, Note 58 at §§ 1610.2, 1610.2-1, 1610.4 and 1610.5-1 through 1610.5-3 for changes to public participation.

<sup>61</sup> BLM, Sage-Grouse FAQs, available at [http://www.blm.gov/wo/st/en/prog/more/sagegrouse/frequently\\_asked\\_questions.html](http://www.blm.gov/wo/st/en/prog/more/sagegrouse/frequently_asked_questions.html).

<sup>62</sup> Notice of Proposed Withdrawal, “Sagebrush Focal Areas; Idaho, Montana, Nevada, Oregon, Utah, and Wyoming and Notice of Intent to Prepare an Environmental Impact Statement,” 80 *Fed. Reg.* 57,635 (September 24, 2015).

<sup>63</sup> Press Release, “BLM Issues Guidance for Implementing Greater Sage-Grouse Plans,” (Sept. 1, 2016), [http://www.blm.gov/wo/st/en/info/newsroom/2016/september/nr\\_09\\_01\\_2016.html](http://www.blm.gov/wo/st/en/info/newsroom/2016/september/nr_09_01_2016.html).

<sup>64</sup> BLM, Instruction Memorandum No. 2016-143, “Implementation of Greater Sage-Grouse Resource Management Plan Revisions or Amendments – Oil and Gas Leasing and Development Sequestered Prioritization,” (Sept. 1, 2016).

Wildlife Service (“FWS”) recognized BLM’s restrictions as “an unprecedented change in the management of areas important for sage-grouse with fluid mineral potential.”<sup>65</sup>

### **Keep It in the Ground**

Not satisfied with the incremented results of the Administration’s regulatory and policy initiatives, 350.org, Sierra Club and Wild Earth Guardians, along with 400 other environmental organizations, have urged the President to keep federal fossil fuels unleased and “in the ground.”<sup>66</sup> The groups argue in a letter to the President “you have the clear authority to stop new leases. With the stroke of a pen, you could take the bold action needed to stop new federal leasing of fossil fuels . . . .”<sup>67</sup> Is it really that simple? Although the MLA grants the Secretary considerable discretion on whether and where to lease, it does require quarterly lease sales in “available areas” (30 U.S.C. § 226(b)(1)) and FLPMA emphasizes the development of federal minerals.<sup>68</sup> Even Senator Sanders (I-VT), a supporter of the movement, apparently believes legislation is necessary. On November 5, 2015, he and Senator Jeff Merkley (D-OR) introduced the “Keep It in the Ground Act,” S.2238, to prohibit future fossil fuel leasing on and offshore.<sup>69</sup>

Secretary Jewell has called the movement “naïve.”<sup>70</sup> Yet, over the last year “Keep It in the Ground” activists have protested, resulting in delayed or cancelled oil and gas lease auctions in Denver, Milwaukee, New Orleans, Reno, Salt Lake City and Boise.<sup>71</sup> On August 25, 2016, Wild Earth Guardians and Physicians for Social Responsibility filed litigation in the U.S. District Court for the District of Columbia arguing BLM had failed to weigh the climate impacts for at least 397 leases issued since early 2015 in Colorado, Utah and Wyoming and asking the court to enjoin lease development approvals by BLM until a programmatic review is completed.<sup>72</sup>

What would be the impact of a total ban on federal fossil fuel from federal lands and waters? In August 2016, the U.S. Chamber of Commerce provided one answer to that question in a report that found a ban could trigger the loss of \$70 billion in annual U.S. GDP and nearly a half a million jobs.<sup>73</sup> In summary, the report found that 25% of total national production of coal

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<sup>65</sup> FWS, “Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List Greater Sage-Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species,” Proposed Rule, 80 *Fed. Reg.* 59,858 at 59876 (October 2, 2015).

<sup>66</sup> See Climate Coalition Letter to President Obama (September 15, 2015), [https://www.biologicaldiversity.org/news/press\\_releases/2015/fossil-fuels-advisory-09-14-2015.html](https://www.biologicaldiversity.org/news/press_releases/2015/fossil-fuels-advisory-09-14-2015.html).

<sup>67</sup> Biological Diversity, Grounded: The President’s Power to Fight Climate Change, Protect Public Lands by Keeping Publically Owned Fossil Fuels in the Ground,” see Note 66 link. *But see* Heidi Ruckriegle/Rebecca Watson, “Keep it in the Ground” – Part II, (Dec. 2, 2015), <http://www.wsmtlaw.com/blog/keep-it-in-the-ground-part-ii.html>.

<sup>68</sup> See *supra* at Note 20.

<sup>69</sup> S. 2238, “To prohibit drilling in Outer Continental Shelf, to prohibit coal leases of federal land and for other purposes.” <https://www.congress.gov/bill/114th-congress/senate-bill/2238>.

<sup>70</sup> *The Desert Sun* (May 6, 2016) (“It’s going to take a very long time before we can wean ourselves from fossil fuels, so I think that to keep it in the ground is naïve, to say we could shift to 100% renewables is naïve. We really have to have a blend over time, and a transition over time, that recognizes the real complexity of what we’re dealing with.”).

<sup>71</sup> Justin Worland, “How the Federal Government Could End Some ‘Keep It in the Ground Protests’,” *Time Magazine* (July 26, 2016). In response, BLM is finalizing a regulatory initiative to move to online rather than live auctions.

<sup>72</sup> *Wild Earth Guardians v. Jewell*, Case 1:16-cv-01724 (D. D.C., August 25, 2016),

<sup>73</sup> U.S. Chamber of Commerce, Institute for 21<sup>st</sup> Century Energy, “What If . . . Energy Production Was Banned on Federal Lands & Waters?” (August 25, 2016), <https://www.uschamber.com/above-the-fold/what-if-energy-production-was-banned-federal-lands-waters>.

and oil and gas would be lost along with \$11.3 billion in *annual* royalties and rentals paid to federal and state governments.<sup>74</sup>

### **Conclusion: What Next for Federal Fossil Fuels?**

For some, global climate change presents a moral imperative calling for “zero sum” actions – winners and losers. Others argue that the recreational and renewable energy economy would cushion the loss of federal coal and oil and gas—a “win-win” scenario. Perhaps in some places, but I am skeptical these industries can carry the public land economy in all places.

As we move through this election cycle, it is worth looking at where the candidates stand on the question of the role of federal fossil fuels in a carbon constrained world. President Obama was in support of an “all of the above” energy strategy as he made his way through the Great Recession. Post the Paris Climate Agreement his policy appears to be more “all of the above (except for coal)” on the way to a clean energy future.

Former Secretary Hillary Clinton supports Interior’s moratorium on federal coal leasing and appears to support a ban on future federal fossil fuel extraction.<sup>75</sup> Her spokesperson clarified that the U.S. should be “on a long-term path to a future where there is no extraction of fossil fuels on public lands.”<sup>76</sup> The Democratic Platform commits to phasing down fossil fuel extraction on public lands and instead focus on work “to expand the amount of renewable energy production on federal lands and waters.”<sup>77</sup>

The GOP Platform calls for expanded natural resource development of public lands and “authority to state regulators to manage federal energy resources on federally controlled public lands within their respective borders.”<sup>78</sup> Candidate Donald Trump announced his energy plan in North Dakota in May 2016. Trump stated, if elected, “we will accomplish complete American energy independence” with an “America First” energy plan, lifting regulatory burdens and the “cancellation” of the Paris Climate Agreement.

Federal land oil and gas has met the imperative of climate change and it is more likely than not that these and similar policies will continue to “transform” U.S. energy. What does the future hold for public land states during this transition? From my perspective, FLPMA, if used as envisioned by Congress, could serve as a means to empower local public land communities who must bear the brunt of this energy transition in real time. Unfortunately, in the political “urgency of now” those voices of local communities have been diminished. As the author of the “The Challenge of Cutting Coal Dependence” put it, “[a] successful transition to a low-carbon future depends on their support. And yet they remain pretty much an afterthought in the public debate over climate change.”<sup>79</sup>

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<sup>74</sup> *Id.* Executive Summary at 2-3.

<sup>75</sup> Devin Henry, “Clinton: Banning fossil fuels on public land a ‘done deal’,” (Feb. 5, 2016) (“No future extraction. I agree with that.”).

<sup>76</sup> *Id.*

<sup>77</sup> <https://www.demconvention.com/wp-content/uploads/2016/07/Democratic-Party-Platform-7.21.16-no-lines.pdf>.

<sup>78</sup> [https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT\\_12\\_FINAL\[1\]-ben\\_1468872234.pdf](https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf).

<sup>79</sup> Note 8. *Id.*