

Executive Authority to Keep It in the Ground: An Administrative End to Oil and Gas Leasing on Federal Land

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ABSTRACT

The United States maintains a federal program whereby private actors lease access to the federal mineral estate, including vast stores of fossil fuels. Issuing these leases to extractive industries means a considerable amount of otherwise-benign carbon is released into the atmosphere, which contributes significantly to global climate change. Environmental organizations have called on the executive branch to change this policy under a campaign called “Keep It in the Ground.” This article evaluates the executive branch’s authority to end onshore oil and gas leasing administratively, without action by Congress. I conclude that the Department of the Interior can terminate onshore oil and gas leasing under discretionary authority contained in the Mineral Leasing Act and the Federal Land Policy and Management Act. Based on this authority, the President, acting through the Interior Department, could create a national rule or set of rules, similar to the Forest Service’s 2001 Roadless Rule, ending oil and gas leasing nationwide. Only process, not substantive law, would limit the executive branch’s ability to stop the extraction of federal fossil fuels.

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I.

INTRODUCTION

Atmospheric carbon dioxide holds primary responsibility for our planet's ongoing warming, yet the United States keeps the tap open on an immense source of carbon emissions: fossil fuels extracted from federal land. Federal law permits private industry to lease access to the federal mineral estate and extract carbon-rich fossil fuels, transforming benign underground carbon stores into drivers of global climate change. Between 2003 and 2014, approximately a quarter of the United States' fossil fuel greenhouse gas emissions were attributable to federal fossil fuel production.¹ Vast stores of federally owned fossil fuels remain undeveloped. A recent report found that between 349 and 492 gigatons of potential carbon dioxide emissions are contained within the federal fossil fuel estate, which represents 46 to 50 percent of all remaining fossil fuels in the United States.² This means "about half of all remaining U.S. potential greenhouse gas emissions from fossil fuels—450 billion tons—are federally controlled and publicly owned and have not yet been leased to private industry."³

Recognizing that extracting and burning fossil fuels is incompatible with meaningful carbon emission quotas,⁴ several environmental organizations have rallied behind the "Keep It in the Ground" campaign, which seeks to "keep our publicly owned fossil

1. Memorandum from Richard Heede, Dir., Climate Accountability Inst., to the Ctr. for Biological Diversity and Friends of the Earth – USA (May 7, 2015) https://webiva-downton.s3.amazonaws.com/877/3a/7/5721/Exhibit_1-1_ONRR_ProdEmissions_Heede_7May15.pdf [https://perma.cc/6WBV-339P].

2. DUSTIN MULVANEY ET AL., THE POTENTIAL GREENHOUSE GAS EMISSIONS OF U.S. FEDERAL FOSSIL FUELS 3 (2015), http://www.biologicaldiversity.com/campaigns/keep_it_in_the_ground/pdfs/Potential_Greenhouse_GasEmissions_US_Federal_Fossil_Fuels.pdf [https://perma.cc/K5YC-GAM2].

3. MICHAEL SAUL ET AL., GROUNDED: THE PRESIDENT'S POWER TO FIGHT CLIMATE CHANGE, PROTECT PUBLIC LANDS BY KEEPING PUBLICLY OWNED FOSSIL FUELS IN THE GROUND 3 (2015) (citing *Id.*) https://www.biologicaldiversity.org/campaigns/keep_it_in_the_ground/pdfs/Grounded.pdf [https://perma.cc/S7Z4-DHGX].

4. See MULVANEY ET AL., *supra* note 2, at 4–6 (citing Michael R. Raupach, et al., *Sharing a Quota on Cumulative Carbon Emissions*, 4 Nature Climate Change 873–79 (2014)).

fuels in the ground [and] out of the atmosphere.”⁵ Congress has been remarkably reticent to pass climate change legislation,⁶ so these organizations have understandably focused on the executive branch as the avenue for stopping the flow of carbon into the atmosphere. President Obama responded. In January of 2016, Interior Secretary Sally Jewell, acting under President Obama’s direction, issued Secretarial Order No. 3338, which imposed a temporary moratorium on coal development so that the Department of the Interior (also referred to as the Interior Department) could conduct a discretionary Programmatic Environmental Impact Statement and “[m]odernize” the federal coal program.⁷

Organizations affiliated with the Keep It in the Ground campaign have called for further action. In July of 2016, the Center for Biological Diversity, on behalf of itself and 264 other organizations, submitted a petition to the Interior Department calling for a moratorium on the new leasing of all fossil fuels underlying federal onshore land.⁸ The petition points to international carbon

5. *Keep It in the Ground*, THE CTR. FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/campaigns/keep_it_in_the_ground (last visited Oct. 4, 2016) [<https://perma.cc/JCZ4-SKBR>]. Other organizations involved in the Keep It in the Ground campaign include the Sierra Club and Greenpeace USA. *See generally*, Kate Schimel, *How the Keep It in the Ground Movement Came to Be*, HIGH COUNTRY NEWS, Jul. 19, 2016, <http://www.hcn.org/articles/how-the-keep-it-in-the-ground-movement-gained-momentum> [<https://perma.cc/PX45-4ZEY>] (Other organizations involved in the Keep It in the Ground campaign include the Sierra Club and Greenpeace USA).

6. *See generally*, Amber Philips, *Congress’s Long History of Doing Nothing on Climate Change, in 6 Acts*, THE WASH. POST: THE FIX (Dec. 1, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/01/congresss-long-history-of-inaction-on-climate-change-in-6-parts/> [<https://perma.cc/56HE-RMKR>].

7. U.S. DEPT. OF THE INTERIOR, ORDER NO. 3338, DISCRETIONARY PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT TO MODERNIZE THE FEDERAL COAL PROGRAM, (2016) http://www.blm.gov/style/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.4909.File.dat/FINAL%20SO%203338%20Coal.pdf [<https://perma.cc/DW3S-FRUF>]. The Obama administration has taken other executive measures to combat climate change, including the Clean Power Plan, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015). President Trump’s administration has taken steps to roll back these measures. *See* Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

8. THE CTR. FOR BIOLOGICAL DIVERSITY, PETITION FOR A MORATORIUM ON THE LEASING OF FEDERAL PUBLIC LAND FOSSIL FUELS UNDER THE MINERAL

reduction goals created at the 2015 United Nations Framework Convention on Climate Change Conference of the Parties in Paris, France and requests that the Secretary of the Interior issue an order “imposing an immediate moratorium on the new leasing of *all* federal public land fossil fuels.”⁹ In its petition to the Interior Department, and in an earlier report,¹⁰ the Center argues that the executive branch has authority to “immediately stop new federal fossil fuel leasing in the United States,” which would keep the immense remaining reserve of federal fossil fuels in the ground.¹¹

This article evaluates the Center’s claim: Does the executive branch, acting administratively through the Interior Department, have authority to end oil and gas leasing on federal land, without any action by Congress? I conclude that it does.

The question centers on the Secretary of the Interior’s authority and discretion under the Mineral Leasing Act (MLA),¹² and under the Federal Land Policy and Management Act (FLPMA).¹³ I address three major actions the Department of the Interior could carry out under these statutes. First, the Secretary of the Interior can simply cease issuing leases, even in areas technically open to leasing, without any formalized changes to broader planning policies. Second, the Bureau of Land Management (BLM), which the Interior Department controls, can alter its land management plans to exclude oil and gas activity. Finally, the Secretary can formally withdraw federal land from generally applicable land use laws, including those authorizing oil and gas leasing.

The Interior Department has well-established legal discretion and authority to make use of each of these actions on an

LEASING ACT, 30 U.S.C. §§ 226, 241, (2016), https://www.biologicaldiversity.org/campaigns/keep_it_in_the_ground/pdfs/Petition_for_a_Moratorium_on_the_Leasing_of_Federal_Public_Land_Fossil_Fuels.pdf [<https://perma.cc/PG7H-7RH3>].

9. *Id.* at 2.

10. SAUL ET AL., *supra* note 3, at 8.

11. *Id.* at 3.

12. Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§ 181–287 (2012)).

13. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 102, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701–84 (2012)).

individual basis, but the outer limits of this authority have not been fully tested. This article supports the Secretary's ability to exercise his authority broadly, for all federal onshore land, including some form of administratively created national policy similar to the Forest Service's 2001 Roadless Rule.¹⁴ I find that existing legislation allows, but does not require, mineral development; there are essentially no substantive legal limitations on the Secretary's power to stop leasing land for fossil fuel extraction. Thus, as long as appropriate procedure were followed—including what would be undoubtedly complex National Environmental Policy Act (NEPA) analyses—the Secretary of the Interior could leverage existing law to initiate a national policy keeping federal oil and gas in the ground, as the Center for Biological Diversity and others have formally requested.

Part I of this article provides a background of the laws guiding the current leasing process. In Part II, I examine the Secretary's discretion not to issue oil and gas leases under the MLA and show that a wholesale cessation of issuing leases does not violate the law. Part III discusses the BLM's authority and discretion to make land unavailable for leasing through land use planning, and I show that extensive discretion allows BLM to exclude oil and gas development from its land plans. Part III also considers formal land withdrawals under FLPMA Section 204, and I demonstrate that nothing more than process limits the Secretary's authority to withdraw land, including the Interior Department's mineral estate that lies under Forest Service-managed land, from generally applicable oil and gas laws. Finally, Part IV illustrates how a national administrative land use policy can be executed and defended against legal challenges by comparing a hypothetical formalized executive policy of ending oil and gas leasing to the well-known Roadless Rule.

II.

BACKGROUND

An interconnected set of laws directs federal mineral disposal. These laws can be broken down into two broad categories. First,

14. Special Areas; Roadless Area Conservation, 36 C.F.R. § 294 (2001).

disposal statutes authorize federal minerals to be sold to or appropriated by private parties. Second, land planning statutes dictate what kind of activity is allowed on a given tract of federal land, meaning the disposal statutes operate only where planning decisions allow. This article focuses on the major statutes in each category relevant to onshore oil and gas leasing. First, the Mineral Leasing Act (MLA),¹⁵ as substantially amended by the Federal Onshore Oil and Gas Leasing Reform Act (FOOGLRA),¹⁶ authorizes the Department of the Interior to dispose of federally owned minerals, including oil and gas. The MLA and FOOGLRA enable mineral extraction on federal land by authorizing the Interior Department to lease the right to explore for and extract valuable minerals in exchange for royalties paid to the federal government. The Federal Land Policy Management Act (FLPMA)¹⁷ provides the overarching management regime for the BLM, the agency that administers all onshore oil and gas leasing.¹⁸ Thus, broadly speaking, the Department of the Interior exercises its planning responsibilities under FLPMA to dictate which public lands are “available” for leasing, and it exercises discretionary authority under the MLA to issue oil and gas leases on the land that FLPMA makes available. Importantly, the Interior Department administers the federal mineral estate regardless of surface ownership or management, meaning the Interior Department is responsible for issuing oil and gas leases even on land it does not directly manage. This includes land managed by the Forest Service, an agency within the Department of Agriculture.¹⁹

15. 30 U.S.C. §§ 181–287.

16. Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330-256 (codified at 16 U.S.C. § 3148 and in scattered sections of 30 U.S.C. (2012)).

17. 43 U.S.C. §§ 1701–84.

18. Some federal minerals lie beneath land administered by the Forest Service, an agency within the Department of Agriculture. The National Forest Management Act, National Forest Management Act of 1976, Pub. L. No. 94–588, 90 Stat. 2949, and the Multiple-Use and Sustained-Yield Act, Multiple-Use and Sustained-Yield Act of 1960 Pub. L. No. 86-517, 74 Stat. 215, guide the Forest Service’s land planning, but BLM still administers the mineral estate on these lands. Leasing in these areas must also comport with Forest Service land use plans.

19. Of course, the Department of Agriculture is also part of the executive branch, but the Interior Department’s exclusive control of oil and gas leasing

This Part briefly describes how and why the MLA and FLPMA came into their current forms and lays out the existing land management and leasing processes relevant to oil and gas development on federal onshore land.

A. *The Mineral Leasing Act (MLA)*

Congress enacted the MLA in 1920 to facilitate the development of valuable, federally owned minerals through a leasing process administered by the Interior Department.²⁰ The MLA grants to the Secretary of the Interior general authority to lease public domain land²¹ for mineral development and authorizes the Secretary to promulgate necessary regulations.²² Leases granted under the MLA are issued with a statutorily mandated minimum rent for the land and minimum royalty for the produced minerals.²³ Leases are issued for a set term,²⁴ but they continue indefinitely after the term as long as oil or gas is produced in “paying quantities.”²⁵ The MLA is the exclusive authority governing disposal of the minerals it enumerates.²⁶

Originally, the MLA distinguished between land with a “known geologic structure” (KGS)²⁷ of a producing oil or gas field and land

means that the administrative process of ending leasing on federal land could go purely through the Interior Department, rather than multiple agencies.

20. 30 U.S.C. § 181. The Act reserves helium to the United States but subjects to disposition under the Act: “coal, phosphate, sodium, potassium, oil, oil shale, gilsonite (including all vein-type solid hydrocarbons), or gas.” *Id.* The Act originally applied only to oil and gas, coal, oil shale, phosphate and sodium. 41 Stat. at 437.

21. *See* 30 U.S.C §§ 181–287. Certain land is excluded, including land in national parks, *id.* § 181, and any valid mining claims existing at the time of passage, *id.* § 193. The MLA also applies to land managed by the Department of Agriculture, meaning the Interior Department controls oil and gas leasing on these lands. However, the Forest Service must approve BLM leasing decisions on Forest Service land before leases can be issued. *Id.* § 226(h).

22. *See id.* § 189.

23. *See id.* § 226(b).

24. *See id.* § 226(e) (stating that the current standard term length is 10 years).

25. *Id.* § 226(b)(3)(D). “Paying quantities” typically means a good faith assessment by the lease holder that the lease is profitable. *See Phillips Gas and Oil Co. v. Jedlicka*, 42 A.3d 261 (Pa. 2012).

26. *See* 30 U.S.C. § 193.

27. U.S. BUREAU OF LAND MGMT., INSTRUCTION MEMORANDUM NO. 84-35, PROCEDURES FOR DELINEATING THE AREA TO BE INCLUDED WITHIN KNOWN

without a KGS.²⁸ Most land was leased noncompetitively under a “prospecting permit-preference right” system, meaning a party could obtain a lease simply in hopes of finding and extracting minerals.²⁹ Conversely, land within a KGS of a producing oil or gas field had to be leased competitively.³⁰ Congress amended the MLA several times between 1935 and 1960, but the distinction between competitive and noncompetitive bidding on KGS and non-KGS land, respectively, remained until FOOGLRA’s passage in 1986.³¹ Among many substantive changes,³² FOOGLRA performed “a total restructuring of the bidding process and the abolition of the [KGS] differentiation between leasable lands.”³³ Now, all land must be initially offered through a competitive process, and only leasable lands that did not receive a qualifying bid may be leased noncompetitively.³⁴

FOOGLRA also changed the Forest Service’s role in the leasing regime. As described above, the MLA vests exclusive control over the federal mineral estate, including oil and gas, in the Interior Department, regardless of who owns or manages the surface estate.³⁵ Before FOOGLRA, the Interior Department and the Department of Agriculture often reached informal agreements allowing the Forest Service to disapprove of any leases issued for oil

GEOLOGICAL STRUCTURES OF OIL AND GAS FIELDS (Oct. 14, 1983) (defining a KGS as a “trap whether structural or stratigraphic in which an accumulation of oil or gas has taken place.”).

28. See Thomas L. Sansonetti & William R. Murray, *A Primer on the Federal Onshore Oil and Gas Leasing Reform Act of 1987 and Its Regulations*, 25 LAND & WATER L. REV. 375, 379 (1990).

29. *Id.* at 379.

30. *Id.*

31. *Id.*

32. These changes include “an increase in the minimum annual rental price and minimum royalty per leased acre, the ascension of the Secretary of Agriculture to a position equal to the Secretary of the Interior with regard to leasing National Forest System Lands, the formulation of extensive new regulations to carry out the auction process, and the establishment of tough civil and criminal enforcement authority for the Attorney General.” *Id.* at 381–82.

33. *Id.* at 381.

34. 30 U.S.C. § 226(b)(1)–(c).

35. *Id.* § 226(a); see also *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1226 (9th Cir. 1988) (discussing BLM management of oil and gas leases on Forest Service land).

and gas on Forest Service land.³⁶ FOGLRA essentially codified this informal arrangement, requiring the Interior Department to receive approval from the Department of Agriculture before issuing a lease on land managed by the latter agency.³⁷

Regardless of surface management, land must be available for leasing for the MLA's provisions to manifest. Neither the Act nor its amendments clearly define what land is eligible or available for leasing, simply providing that "[a]ll lands subject to disposition under [the MLA] which are known or believed to contain oil or gas deposits may be leased by the Secretary."³⁸ Agency regulations provide little additional guidance. The BLM's regulations establish that "[o]il and gas in public domain lands . . . are subject to lease under the [MLA],"³⁹ and the Forest Service regulations authorize oil and gas development on land that is "administratively available for leasing."⁴⁰ Consequently, the federal land management statutes—FLPMA for the BLM and the National Forest Management Act (NFMA)⁴¹ for the Forest Service—dictate where leases may be issued.

On land that BLM (or the Forest Service) makes available to oil and gas development,⁴² the BLM must offer leases "at least quarterly" "for each State where eligible lands are available."⁴³ Private parties may also nominate parcels to be leased.⁴⁴ To offer the leases, BLM publishes a Notice of Competitive Lease Sale at least 45 days prior to the sale, which announces when and where the sale will be held and contains bidding and payment

36. See Charles L. Kaiser & Scott W. Hardt, *Fitting Oil and Gas Development into the Multiple-Use Framework: A New Role for the Forest Service*, 62 U. COLO. L. REV. 827, 827 (1991).

37. 30 U.S.C. § 226(h) ("The Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture.").

38. *Id.* § 226(a).

39. BLM Oil and Gas Leasing, 43 C.F.R. § 3100.0-3(a)(1) (2016).

40. FS Area or Forest-Wide Leasing Decisions, 36 C.F.R. § 228.102(d) (2016).

41. National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C (2012)).

42. Leases are offered on "[a]ll lands available for leasing." 43 C.F.R. § 3120.1-1 (2016).

43. 30 U.S.C. § 226(b)(1)(A); 43 C.F.R. § 3120.1-2(a).

44. See 43 C.F.R. § 3120.3-2(a).

requirements.⁴⁵ After the notice period, BLM conducts the sale through an oral bidding process.⁴⁶ If BLM does not receive a qualifying offer—one from someone qualified to hold a lease⁴⁷ and that is at or above the national minimum price⁴⁸—the lease is then offered noncompetitively.⁴⁹ The noncompetitive lease offer remains open for two years,⁵⁰ after which point the land may be leased only through the competitive process once more.

B. *The Federal Land and Policy Management Act (FLPMA)*

Serving as the BLM's organic statute,⁵¹ FLPMA directs the Secretary of the Interior to inventory public land and manage it in a manner that promotes multiple use and sustained yield, while also recognizing the need for domestic sources of minerals, timber, and other resources.⁵² The heart and soul of FLPMA are its planning provisions, which require the Secretary to generate "land use plans which provide by tracts or areas for the use of the public lands."⁵³ The BLM fulfills this mandate through Resource Management Plans (RMPs),⁵⁴ which include a determination of which BLM-managed lands are available for public oil and gas leases. The other management tool relevant to

45. *Id.* § 3120.4-1 to -2.

46. *Id.* § 3120.5-1.

47. Qualified persons are "citizens of the United States, or . . . associations of such citizens, or . . . any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, . . . municipalities." 30 U.S.C. § 181 (2012).

48. The national minimum bid at the competitive auction is \$2 per acre. *Id.* § 226(b)(1)(B); 43 C.F.R. § 3120.1-2(c).

49. 43 C.F.R. § 3120.6.

50. *Id.*; see generally Timothy M. Miller et al., *Leasing Federal Oil and Gas*, in 32 ENERGY & MIN. L. FOUND.: PROCEEDINGS OF THE 32ND INSTITUTE § 14.06 (2011).

51. Although the Bureau of Land Management came into existence in 1946 through presidential action, FLPMA is considered the BLM's organic act by officially recognizing and delegating power to it. See, e.g., CHRISTINE A. KLEIN ET AL., NATURAL RESOURCES LAW 354 (3d. ed. 2013).

52. See generally Roger Flynn, *Daybreak on the Land: The Coming of Age of the Federal Land Policy and Management Act of 1976*, 29 VT. L. REV. 815, 817-19 (2005).

53. 43 U.S.C. § 1712(a); see also 43 C.F.R. § 1610.5-3 (2016).

54. See 43 C.F.R. §§ 1601-1610.

this article is the Interior Department's authority to make "withdrawals" of land from generally applicable land laws.⁵⁵ After providing historical context, I give an overview of the current planning and withdrawal procedures, along with an explanation of "exclusions," a broad term that applies to both RMPs and withdrawals that could come up in an effort to end oil and gas leasing.

1. History

Before Congress enacted FLPMA, the Interior Department did not have clear planning responsibilities or unambiguous withdrawal authority. Instead, its land management policies were shifting, overlapping, and often vague. During the eighteenth and nineteenth centuries, the United States' public land policy focused primarily on disposal, transferring public land to private individuals with the expectation that "all the federal lands would eventually pass to private ownership."⁵⁶ By the late nineteenth century, the federal government began reserving public land for federal ownership and management, including the establishment of Yellowstone National Park in 1872 and passage of the Taylor Grazing Act in 1934. But even in this "reservation era," there was some expectation that reservations were temporary and disposal of public lands would continue.⁵⁷ Other pre-FLPMA land management mandates seemingly removed public lands from general use but delegated nebulous management responsibilities to the Interior Department. For example, as the balance between disposal and management continued to teeter, Congress directed the BLM in 1964 to assign particular uses to different areas and manage public lands in a manner consistent with multiple use and sustained yield by passing the Classification and Multiple Use Act of 1964⁵⁸ and the Public Land Sale Act.⁵⁹ These acts set the stage for multiple use and

55. 43 U.S.C. § 1714.

56. Marion Clawson, *The Federal Land Policy and Management Act of 1976 in a Broad Historical Perspective*, 21 ARIZ. L. REV. 585, 588 (1979).

57. *Id.* at 589.

58. 43 U.S.C. §§ 1411–18 (1970) (expired 1970).

59. *Id.* §§ 1421–27 (expired 1970).

sustained yield management. Both acts expired in 1970, yet the BLM continued to apply them between 1970 and FLMPA's passage in 1976.

The executive branch's power to withdraw land was also unclear before FLPMA's passage. Throughout the early 1900s, the Interior Department made numerous withdrawals and "reservations," which assigned withdrawn land to a specific purpose.⁶⁰ Early withdrawals were made based on implied authority, or "authority delegated to the executive by Congressional acquiescence."⁶¹ The idea was that Congress's silence on commonly-made withdrawals (e.g. for Native American reservations, military bases, and other public purposes) was taken to mean that Congress did not dispute the executive's authority to do so.⁶² In contrast, the Pickett Act of 1910⁶³ expressly authorized the president to withdraw and reserve federal land for certain public purposes, though with limitations.⁶⁴

Perhaps because of the Pickett Act's clear delegation of power, some questioned the validity of the President's implied withdrawal power. The Supreme Court affirmed a withdrawal made

60. The terms "withdrawal" and "reservation" meant something different: "A 'withdrawal' merely removed lands or resources from disposition, while a 'reservation' committed the federal lands to a specific purpose." Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 821 (1993). Although the distinction between these actions was often arbitrary, it mattered for certain issues like reserved water rights, which attach to federal land at the time of reservation; a withdrawal would not confer the same rights. *Id.* at 821–22. A third type of management action, a "classification," "assigned a particular tract of land to a specific function." *Id.* at 822.

61. Laura Lindley & Robert C. Mathes, *Formal and De Facto Federal Land Withdrawals and Their Impacts on Oil and Gas and Mining Developments in the Western States*, in 48 ROCKY MTN. MIN. L. INST. § 25.01 (2002).

62. *See id.* § 25.01–.02.

63. Ch. 421, 36 Stat. 847, *repealed by* FLPMA of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792.

64. The Secretary could "temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for . . . public purposes to be specified in the orders of withdrawals." 43 U.S.C. § 141 (1970) (*repealed by* FLPMA). The Act qualified the withdrawal authority by exempting metalliferous minerals from any withdrawn lands (i.e. keeping these minerals under the general land and mining laws), requiring reporting to Congress, and effectuating earlier restrictions on the creation of forest reserves. Lindley & Mathes, *supra* note 61, § 25.02[3].

under implied authority in *United States v. Midwest Oil Co.*, though it declined to reach the question of whether this authority existed independent of congressional delegation.⁶⁵ Several decades later, in 1941, Attorney General Robert Jackson issued an opinion that the executive branch retained its inherent power to make permanent withdrawals,⁶⁶ and President Truman subsequently delegated his implied withdrawal power to the Department of the Interior by executive order.⁶⁷ Between the Pickett Act, *Midwest Oil*, and the ensuing executive interpretation, the legal landscape before FLPMA “presented a confused, complex, and unresolved conflict between the power of Congress and the Executive to make withdrawals.”⁶⁸

Responding to findings from the Public Land Law Review Commission,⁶⁹ Congress passed FLPMA to clarify the conflicted state of public land policy and in its stead lay out a comprehensive management mandate.⁷⁰ Thus, FLPMA variously formalized, consolidated, specified, and altered the Interior Department’s authority and responsibilities. The Act solidified the larger historical shift in national policy from disposal to reservation and active management of public lands, and its comprehensive inventory and planning provisions provided the cornerstone for the Interior Department’s land management policies going forward. The Act also unequivocally (and repeatedly) declares that it is the only source of executive

65. 236 U.S. 459, 469 (1915).

66. Lindley & Mathes, *supra* note 61, § 25.02[3]; see also *Portland Gen. Elec. Co. v. Kleppe*, 441 F. Supp. 859, 861–62 (D. Wyo. 1977) (agreeing with Attorney General Jackson’s conclusion).

67. Exec. Order No. 10,355, 3 C.F.R. 77 (1952).

68. Lindley & Mathes, *supra* note 61, § 25.02[4].

69. The Public Land Law Review Commission was created to advise Congress on how public lands should be managed, and it issued a seminal report in 1970 entitled “One Third of the Nation’s Land.” The report’s findings and recommendations were the cornerstone of FLPMA’s substance. Flynn, *supra* note 52, at 817.

70. See S. COMM. ON ENERGY & NAT. RES., 95TH CONG., LEGIS. HISTORY OF THE FED. LAND POLICY AND MANAGEMENT ACT OF 1976, at vi (Comm. Print 1978) (FLPMA “represents a landmark achievement . . . For the first time in the long history of the public lands, one law provides comprehensive authority and guidelines for the administration and protection of the Federal lands and their resources under the jurisdiction of the Bureau of Land Management.”).

withdrawal authority, thereby repealing *Midwest Oil* and rejecting Attorney General Jackson's 1941 interpretation of executive power.⁷¹ Furthermore, FLPMA erased the distinction between reservations and classifications⁷² and lays out specific statutory procedures for making withdrawals. I turn now to the planning and withdrawal procedures the Act provides.

2. Resource Management Plans

RMPs “guide future land management actions and subsequent site-specific implementation decisions . . . [and] establish goals and objectives for resource management.”⁷³ RMPs describe for a defined area “allowable uses, goals for future condition of the land, and specific next steps.”⁷⁴ Under FLPMA, “[t]he Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans . . . when they are available.”⁷⁵

There are two types of “land use plan decisions”: “desired outcomes” and “allowable uses and management actions.”⁷⁶ The former identifies goals (“broad statements of desired outcomes”) and objectives (“specific desired outcomes for resources”), while the latter dictates allowable uses (“uses, or allocations, that are allowable, restricted, or prohibited on the public lands and mineral estate”) and management actions (“actions anticipated to achieve desired outcomes”).⁷⁷ RMPS also establish administrative designations, including recommendations for proposed with-

71. 43 U.S.C. § 1701(a)(4) (2012) (It is the policy of the United States that “Congress delineate the extent to which the Executive may withdraw lands without legislative action.”).

72. *See id.* § 1702(j) (defining withdrawal to include land set aside “for the purpose of limiting activities under those laws . . . or reserving the area for a particular public purpose or program;”) (emphasis added).

73. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, H-1601-1, LAND USE PLANNING HANDBOOK 11 (REL. 1-1693, 2005) (BLM Handbook), http://www.blm.gov/style/medialib/blm/ak/aktest/planning/planning_general.Par.65225.File.dat/blm_lup_handbook.pdf [<https://perma.cc/LU6G-LB23>].

74. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 59 (2004) (citing 43 C.F.R. § 1601.0-5(k) (2003)).

75. 43 U.S.C. § 1732(a) (2012).

76. BLM Handbook, *supra* note 73, at 12–13.

77. *Id.*

drawals or suitability for congressional designations.⁷⁸ Thus, RMPs are an avenue by which BLM could declare management goals that disfavor oil and gas development, and the land use plan decisions contained therein could prohibit such activity from occurring.

BLM issues RMPs through a notice and comment process laid out in its regulations.⁷⁹ It must first issue a Notice of Intent to prepare the RMP. It then undertakes a scoping process and initial analysis of the management situation, which includes “records of resource conditions, trends, needs, and problems, and select topics and [determination of] the issues to be addressed during the planning process.”⁸⁰ Next, BLM “prepare[s] criteria to guide development of the [RMP]” to ensure it is properly tailored to the issues identified in the scoping process and that appropriate data collection and analysis takes place.⁸¹ BLM then collects relevant data and information about local resources; the environmental, social, and economic factors in the area; and inventories and analyzes the data collected to help generate alternatives for the NEPA process.⁸² Next are all stages of NEPA analysis, including the development of alternatives and publication of an Environmental Assessment (EA) or Environmental Impact Statement (EIS).⁸³ After the required public comment and revision periods for NEPA are complete, BLM internally reviews and approves the RMP, grants final approval through a record of decision, and implements the plan.⁸⁴ After the plan is implemented, BLM continues to monitor and evaluate the prescribed management plans to “determine whether mitigation measures are satisfactory, whether there has been significant change in the related plans of other [government agencies], or whether there is new data of significance to the plan.”⁸⁵

78. *Id.* at 13.

79. Resource Management Planning, 81 Fed. Reg. 89,661, 89,664 (Dec. 12, 2016) (to be codified at 43 C.F.R. § 1610.2, 1610.2-1).

80. *Id.* (to be codified at 43 C.F.R. § 1610.2-1).

81. *Id.* (to be codified at 43 C.F.R. § 1610.4).

82. *Id.* (to be codified at 43 C.F.R. § 1610.4(d)) and § 1610.5-1).

83. *Id.* (to be codified at 43 C.F.R. § 1610.5-1-5).

84. *Id.* (to be codified at 43 C.F.R. § 1610.6).

85. *Id.* (to be codified at 43 C.F.R. § 1610.6-4).

Once an RMP has been issued, “[a]ll future resource management authorizations and actions . . . and subsequent more detailed or specific planning, shall conform to the approved plan.”⁸⁶ Components requiring compliance include “the land management designations, mitigation measures, and other conditions of approval prescribed in the plan for site-specific development.”⁸⁷ Although management actions encompassing oil and gas activity must comply with the relevant RMP, BLM retains authority to make changes to the plan via either a plan revision or a plan amendment. A revision is a “complete or near-complete rewrite of an existing RMP,” and an amendment is a “modification of one or more parts (e.g., decisions about livestock grazing) of an existing RMP.”⁸⁸ Either change requires NEPA analysis, typically in the form of an EA.⁸⁹ Until a land use plan is amended, any inconsistent actions by BLM can be set aside as contrary to law under the Administrative Procedure Act (APA).⁹⁰

3. Withdrawals

FLPMA Section 204 authorizes the Secretary of the Interior to make withdrawals, which means:

withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program . . .⁹¹

86. *Id.* (to be codified at 43 C.F.R. § 1610.6-3(a)).

87. Ezekiel J. Williams & Carolyn L. McIntosh, *The Growing Phenomenon of Challenges to Federal Land Use in Natural Resources Development Litigation*, 51 ROCKY MTN. MIN. L. FOUND. 11-1, 11-2 (2005).

88. BLM Handbook, *supra* note 73, at 16.

89. Resource Management Planning, 81 Fed. Reg. at 89,669–70 (to be codified at 43 C.F.R. § 1610.6-6–7)).

90. *Southern Utah Wilderness*, 542 U.S. at 69. Note, though, that plans are not binding on BLM in the sense that projected uses commit the agency to a particular action. *See id.* Rather, if an RMP proscribes certain uses or attaches conditions to a particular activity, those requirements have the force of law for purposes of APA review. Similarly, RMPs do not bind the Secretary, including his ability to make withdrawals that do not comport with BLM’s RMPs.

91. 43 U.S.C. § 1702(j). Although the definition of “withdrawal” does not specifically reference mineral leasing, land may be withdrawn from the

The Secretary can “make, modify, extend, or revoke withdrawals” up to twenty years in duration, “but only in accordance with the provisions and limitations of” Section 204.⁹² BLM and third parties can petition the Secretary to make a withdrawal, and Congress can direct the Secretary to do so, but the power to propose and execute a withdrawal resides exclusively with the Secretary.⁹³ Importantly, the fact that the Secretary, and not BLM, holds withdrawal authority, means that withdrawals are not required to comply with BLM’s RMPs.⁹⁴ Although withdrawal authority lies with the Secretary of the Interior, withdrawals of the federal mineral estate can be made even on land managed by other agencies like the Forest Service, meaning that the Secretary’s power to withdraw land from oil and gas leasing extends beyond BLM-managed land.⁹⁵

Three types of withdrawal appear in Section 204, with respective procedural requirements: “[w]ithdrawals aggregating less than five thousand acres,”⁹⁶ “a withdrawal aggregating five thousand acres or more,”⁹⁷ and “[e]mergency withdrawals.”⁹⁸ The second type—large-tract withdrawals of five thousand acres or more—are most relevant to this article, because wholesale termination of oil and gas leasing would involve significantly more than five thousand acres of land. However, I briefly mention small-tract withdrawals as well, because piecemeal small-tract land withdrawals and their associated minimal

generally applicable oil and gas leasing laws. *See, e.g., Pac. Legal Found. v. Watt*, 529 F. Supp. 982, 997–98 (D. Mont. 1981) supplemented, 539 F. Supp. 1194 (D. Mont. 1982) (“The term ‘withdrawal,’ as used in [FLPMA], includes withdrawal of public lands from mineral exploration and leasing.”).

92. 43 U.S.C. § 1714(a) (2012).

93. *Id.* (“The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate.”).

94. *Yount v. Salazar* (Yount II), No. CV11-8171 PCT-DGC, 2014 WL 4904423, at *25–26 (D. Ariz. Sept. 30, 2014).

95. *See, e.g.,* Notice of Proposed Withdrawal, 74 Fed. Reg. 35,887, 35,887 (July 21, 2009) (indicating intent to withdraw approximately 360,002 acres of National Forest System lands from location and entry under the Mining Law of 1872).

96. 43 U.S.C. § 1714(d) (2012).

97. *Id.* § 1714(c).

98. *Id.* § 1714(e).

procedure could be a strategic option for an administration seeking to end oil and gas leasing on federal land.

Both large- and small-tract withdrawals require the Secretary to provide public notice via publication in the Federal Register and opportunity for a public hearing.⁹⁹ Upon issuing the notice, the land proposed for withdrawal “shall be segregated from the operation of the public land laws” until the Secretary issues a final determination on the proposal, or for two years, whichever comes first.¹⁰⁰ The practical effect of this provision is that public notice immediately, albeit it temporarily, withdraws land, “even without utilizing the emergency withdrawal provisions of § 204(e).”¹⁰¹ So, even without invoking the emergency withdrawal provision, the Secretary can withdraw land quickly and with full effect until the determination has been more fully formalized through process.

Small-tract withdrawals require minimal procedure. For these relatively uncontroversial withdrawals, the Secretary, either of his own volition or by directive from Congress, can withdraw land “(1) for a time period deemed desirable for a “resource use,” (2) for not more than 20 years for any other use, or (3) for not more than five years to preserve a tract for a specific use being considered by Congress.”¹⁰² This section provides the Secretary discretion and flexibility in how to withdraw small pieces of federal land.

Large-tract withdrawals require substantially more process, namely in the form of notification to Congress. To withdraw more than five thousand acres, the Secretary must submit an in-depth report to both houses of Congress no later than the effective date of the withdrawal.¹⁰³ The report must contain twelve components enumerated in Section 204(c)(2), requiring detailed evaluations of how the region will be affected by the withdrawal and justifications for proceeding.¹⁰⁴

99. *Id.* § 1714(b).

100. *Id.* § 1714(b)(1).

101. SAUL ET AL., *supra* note 3, at 13.

102. Susan M. Mathiascheck et al., *I'm Still Standing: Future Public Land Withdrawals and Industry's Million-Acre Challenge*, 59 ROCKY MTN. MIN. L. INST. 23-1, 23-9 (2013) (citing 43 U.S.C. § 1714(d)).

103. 43 U.S.C. § 1714(c); *see also* Mathiascheck et al., *supra* note 102, at 23-10.

104. *See* 43 U.S.C. § 1714(c)(2).

Some requirements are rather onerous. For example, the report to Congress must analyze “the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use, together with a statement of the provisions to be made for continuation or termination of existing uses, including an economic analysis of such continuation or termination.”¹⁰⁵ The report need also include “a report prepared by a qualified mining engineer, engineering geologist, or geologist which shall include but not be limited to information on: general geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mineral potential, present and potential market demands.”¹⁰⁶ Moreover, the Secretary must also certify that he has consulted or will consult with federal agencies; state, regional, and local governments; and “other appropriate individuals and groups.”¹⁰⁷ FLPMA Section 204 also purports to grant Congress veto power over any withdrawal made by the Secretary, but this provision is inoperative, as I discuss in Part III.

4. Exclusions

A third provision in FLPMA is relevant to this article. Section 202(e) stipulates that any “management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more” must be reported to Congress.¹⁰⁸ The definition of “principal or major use” includes “mineral exploration and production,”¹⁰⁹ so the provision would apply to oil and gas development.

FLPMA does not provide a definition of “management decision,” but BLM’s land use planning handbook defines the term as “a decision made by the BLM to manage public lands,” including “both land use plan decisions and implementation

105. *Id.* § 1714(c)(2)(4).

106. *Id.* § 1714(c)(2)(12).

107. *Id.* § 1714(c)(2)(7).

108. *Id.* § 1712(e)(2).

109. *Id.* § 1702(l).

decisions.”¹¹⁰ The handbook definition may not directly translate to interpreting FLPMA, but it suggests that Section 202(e) encompasses a broad range of administrative decisions involved in oil and gas leasing: any “decision made by the BLM to manage public lands” that “totally eliminates” mineral exploration or development over at least one hundred thousand acres for two or more years must be reported to Congress.

Seemingly, a Section 202(e) exclusion is broader than a Section 404 withdrawal. For example, the statute provides that withdrawals “may be used in carrying out management decisions,”¹¹¹ meaning at least some management decisions must be broader than a withdrawal. The other primary distinction between the provisions is the amount of land affected. Whereas Section 204 deals with “[w]ithdrawals aggregating less than five thousand acres”¹¹² and “withdrawal[s] aggregating five thousand acres or more,”¹¹³ exclusions refer to “a tract of land of one hundred thousand acres or more,”¹¹⁴ thus, only very large withdrawals would constitute exclusions under Section 202(e). The importance of the distinction is also unclear because withdrawals already require a report to Congress, which is Section 202(e)’s only effect. Unfortunately, FLPMA’s legislative history sheds no light on how these two provisions interrelate,¹¹⁵ and no court has interpreted it beyond facial application.¹¹⁶

110. BLM Handbook, *supra* note 73, at Glossary – 5.

111. 43 U.S.C. § 1712(3).

112. *Id.* § 1714(d).

113. *Id.* § 1714(c).

114. *Id.* § 1712(2).

115. My search yielded very few specific references to Section 202(e). The references I did encounter were typically either mere restatements of the provision or general expressions of approval or disapproval. *See, e.g.*, H.R. Doc No. 94-9 (Comm. Hearing), 94th Cong., 1st Sess. (Apr. 11, 1975) (statement of Jack O. Horton, Assistant Secretary, Land and Water Resources, Department of the Interior) (expressing concern that Congress’s veto power would inhibit the Interior Department’s ability to manage effectively). I note, however, that Section 202(e) strongly reflects Congress’s general sentiment that there existed “a need for closer congressional oversight of the future use and management of the public lands and their vast resources.” 122 Cong. Rec. H7581-7655 (1976) (statement of Senator John Melcher).

116. *E.g.*, *Pub. Lands Council v. U.S. Dep’t of Interior Sec’y*, 929 F. Supp. 1436, 1443–44 (D. Wyo. 1996) (holding that the Department of the Interior

Clearly, “[t]here is some overlap between the provisions in sections 202(e) and 204 . . . [but] the extent of any conflict between these two provisions is unclear.”¹¹⁷ Figuring out their relationship is complicated by the fact that the reporting requirements contained in Section 202(e)(3) “have been ignored since FLPMA’s enactment.”¹¹⁸ Realistically, it seems safe to mostly ignore Section 202(e) exclusions and focus solely on Section 204 withdrawal procedures, which I do for the purposes of this article. But Section 202(e) could come into play if oil and gas development were eliminated from the federal land use portfolio, so I flag it here as a peripheral issue.

Understanding the broad process of land use planning and mineral leasing, I next turn to the different actions the Interior Department could take to end oil and gas leasing on federal onshore land and the various legal challenges it would face at each turn.

III.

NO NEW LEASES: DISCRETIONARY AUTHORITY UNDER THE MLA

The Secretary has significant discretion under the MLA in choosing whether to issue individual oil and gas leases, authority recognized both before and after Congress passed FOOGLRA. The only possible limit to this discretion extant in the caselaw is that leases may need to be issued once a highest qualified bidder has been identified, but even that view is significantly in the minority. More realistic issues that might arise are claims that a no-oil and gas policy violates the MLA’s overarching purpose and claims that such a policy would amount to a de facto withdrawal that must comply with FLPMA Section 204’s specific provisions. In this Part, I (a) discuss the Secretary’s discretion not to issue individual leases, both before and after FOOGLRA’s passage; (b) assess whether a total cessation of lease issuance would violate

needed to amend its land use plans before issuing “Conservation Use Permits” that would excluding livestock grazing from some public land, “and it must also notify appropriate congressional committees if more than 100,000 acres are involved.”).

117. Mathiascheck, et al., *supra* note 102, at 23-14 to -15.

118. *Id.* at 23-15.

the MLA's overarching purpose in a legally challengeable way; and (c) consider whether such a policy would constitute a de facto withdrawal and thereby trigger FLPMA's procedural requirements.

A. *Discretion over individual leases*

BLM has extensive discretion in deciding whether to issue individual leases. A long line of cases before FOOGLRA's passage creates strong precedent that courts are powerless to force the Interior Department to issue leases, and FOOGLRA did not diminish that discretion. The sole court decision finding that BLM is obligated to issue a lease after offering it made that finding in dictum, and other courts have not followed it.

Perhaps most famously, the Supreme Court recognized the Secretary's extensive discretion in *Udall v. Tallman*,¹¹⁹ before FOOGLRA's passage. In *Udall*, prospective oil developers submitted a lease application for a tract of land under the now-nonexistent noncompetitive leasing process, but the application was rejected because a newly issued agency interpretation of land availability meant the tract had already been properly leased to other developers.¹²⁰ The plaintiffs filed a petition for writ of mandamus, which the district court dismissed. The Supreme Court ultimately upheld this dismissal, reasoning in part that the MLA "left the Secretary discretion to refuse to issue any lease at all on a given tract."¹²¹

The *McLennan* case, on which the Supreme Court relied in *Udall*, recognized the Secretary's discretion to an even greater degree. Affirming the appellate court's reversal of an order requiring the Interior Department to process lease applications, the Court noted that "Congress held in mind the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion."¹²² The logic underlying this conclusion offers further support for discretion. The Court

119. *Udall v. Tallman*, 380 U.S. 1, 22–23 (1965).

120. *Id.* at 2.

121. *Id.* at 4 (citing *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414 (1931)).

122. *McLennan*, 283 U.S. at 418.

observed that the MLA was passed in response to “a decline of petroleum product in the United States,” but by the time the case was heard, there was “an enormous increase and a consequent troublesome surplus.”¹²³ These changed circumstances made the Secretary’s decision reasonable, the Court found, and it observed that “there is ground for a plausible, if not conclusive, argument that . . . [the MLA] goes no further than to empower the Secretary to execute leases which, exercising a reasonable discretion, he may think would promote the public welfare.”¹²⁴ This logic suggests that the Secretary’s discretion is not limited to individual leasing decisions, but rather that it empowers the Secretary to take on-the-ground circumstances into account and make policy decisions based on what would best “promote the public welfare.”¹²⁵

Other pre-FOOGLRA cases are consistent with these holdings. For example, the Tenth Circuit held that the Secretary had the discretion to withdraw a lease from the noncompetitive leasing process even after a qualified applicant had been determined, meaning an applicant had no more than a “hope or expectation of a lease” until the Secretary actually issued a lease.¹²⁶ Similarly, the DC Circuit inferred from two amendments’ preservation of the original act’s non-mandatory language that Congress intended “to continue to give the Secretary of the Interior discretionary power, rather than a positive mandate to lease.”¹²⁷ Taken together, this line of pre-FOOGLRA cases lays a strong foundation for significant Secretarial discretion, grounded in

123. *Id.* at 419.

124. *Id.* at 419.

125. *See id.*

126. *McDonald v. Clark*, 771 F.2d 460, 463–64 (10th Cir. 1985). *See also* *Justheim Petroleum Co. v. Dep’t of the Interior*, 769 F.2d 668, 670 (10th Cir. 1985) (finding that “[t]he mere application for a lease thus vests no rights in the applicant . . . except the right to have the application fairly considered under the applicable statutory criteria.”).

127. *Haley v. Seaton*, 281 F.2d 620, 625 (D.C. Cir. 1960). *See also* *Duesing v. Udall*, 350 F.2d 748, 750 (D.C. Cir. 1965) (explaining that even under the competitive leasing process for known geological structures, “it is permissive or discretionary whether or not the Secretary will issue a lease.”); *McTiernan v. Franklin*, 508 F.2d 885, 887 (10th Cir. 1975) (“The [MLA] gives the Secretary discretionary power to accept or reject oil and gas lease offers.”).

statutory language, over whether to issue oil and gas leases under the MLA.

FOOGLRA's passage did not diminish the Secretary's authority to choose not to issue oil and gas leases, though it did impose some additional mandatory actions. Courts consistently follow the historic trend of respecting the Secretary's discretion, and even when limits are recognized, they are minimal and procedural at most. Moreover, FOOGLRA's legislative history does not suggest that the Act was meant to modify the Secretary's existing discretion.¹²⁸

The most unresolved issue regarding discretion is whether the BLM must issue a lease once the bidding process has been completed and a party has been identified as the highest qualified bidder. A district court in Utah interpreted Section 226 of the MLA to impose a mandatory duty on the Secretary to issue a lease at the completion of a successful competitive bid process.¹²⁹ The court pointed to statutory language in FOOGLRA, reasoning that

"FOOGLRA mandates that once the Secretary decides to lease a particular land parcel, '[t]he Secretary *shall* accept the highest bid from a responsible qualified bidder [. . .]' and that 'leases *shall* be issued' by the Secretary within sixty days following payment by the successful high bidder."¹³⁰

Expressly rejecting case law focused on noncompetitive leases, including decisions both before and after FOOGLRA, the court likened competitive sales to real estate auctions, where the auction functionally serves as an offer that, once accepted via bid, cannot be revoked.¹³¹ Also rejected was the agency's interpretation that the MLA and FOOGLRA impose no mandatory obligation, with the court declining to apply *Chevron* deference in light of its interpretation that the statutory

128. Sansonetti and Murray, *supra* note 28, at 388 n. 112. ("[N]owhere in the legislative history of the Reform did Congress suggest that it modified the Secretary's discretion in any way.")

129. *Impact Energy Res., LLC v. Salazar*, No. 2:09-CV-435, 2010 WL 3489544, at *4–8 (D. Utah Sept. 1, 2010), *aff'd*, 693 F.3d 1239 (10th Cir. 2012).

130. *Impact Energy*, 2010 WL 3489544, at *4 (citing 30 U.S.C. § 226(b)(1)(A)) (emphasis provided by the court).

131. *Id.* at *6.

language was clear on its face.¹³² However, despite this extensive analysis, the court ultimately entered judgment in favor of the government defendants, finding the plaintiffs' claim time-barred under the MLA's ninety-day statute of limitations.¹³³ The Tenth Circuit upheld the judgment on appeal without addressing the merits of the discretion issue.¹³⁴

The other case to squarely confront FOOGLRA's impact on the Interior Department's discretion reached the opposite conclusion: "Like its predecessor, the 1987 Reform Act continues to vest the Secretary with considerable discretion to determine which public lands will actually be leased."¹³⁵ In *Western Energy Alliance*, the court first observed that "[b]efore the MLA was amended by [FOOGLRA], it is quite evident that the Secretary had no obligation to issue any lease on public lands."¹³⁶ However, it made note of the same language the court grappled with in *Impact Energy*. Looking at FOOGLRA's addition to Section 226,¹³⁷ the court in *Western Energy Alliance* reasoned that the new "shall"-ridden section "must mean something."¹³⁸ However, it understood the language not to go so far as to require or mandate that a lease be issued; instead, the Secretary was simply required to make a decision whether or not to grant a lease within 60 days of determining the qualified bidder.¹³⁹ "In light of the longstanding recognition of the legal principle of broad Secretarial discretion under the MLA," the court concluded that the Secretary's discretion terminates only with the signing and issuance of a

132. *Id.* at *7.

133. *Id.* at *8.

134. *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1248 (10th Cir. 2012) (per curiam).

135. *W. Energy All. v. Salazar*, No. 10-CV-0226, 2011 WL 3737520, at *4 (D. Wyo. June 29, 2011) (citing 30 U.S.C. § 226(a)).

136. *Id.* at *3 (citing *Udall*, 380 U.S. at 4 and *Justheim*, 769 F.2d at 670).

137. 30 U.S.C. § 226(b)(1)(A) (2012) ("Leases shall be issued within 60 days following payment by the successful bidder." (emphasis added)).

138. *W. Energy All.*, 2011 WL 3737520, at *6. *Accord* *Pac. Legal Found. v. Watt*, 529 F. Supp. 982, 992 (D. Mont. 1981) (finding for standing purposes that "the right to have [oil and gas lease] applications properly considered by the Secretary is within the zone of interests protected by the [MLA]").

139. *W. Energy All.*, 2011 WL 3737520, at *6.

lease, FOOGLRA notwithstanding.¹⁴⁰ This holding was somewhat qualified by the observation that,

“[a]fter declaring a highest responsible qualified bidder, the Secretary may only refuse lease issuance for sufficient reason capable of withstanding review as neither ‘arbitrary [or] capricious . . .’ nor ‘in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.’”¹⁴¹

Still, the decision accords with the long history of judicial non-intervention in the Interior Department’s leasing decisions. The Tenth Circuit dismissed an appeal of the case on jurisdictional grounds.¹⁴²

Other post-FOOGLRA decisions simply confirm that progressive steps of the leasing process do not extinguish discretion before the Secretary has actually issued a lease. Breaking down the leasing process into eight steps, a court found for the purposes of a NEPA analysis that the Interior Department’s action was not final until “step six in the eight-step process,” which was when BLM “actually issued the leases.”¹⁴³ This reasoning recognizes that the Secretary’s discretion endures throughout the leasing process, all the way until a lease has been signed and issued. The Interior Board of Land Appeals (IBLA), the panel that hears administrative challenges to Interior Department policy, has reached a similar conclusion in multiple cases. In *Richard D. Sawyer*, decided after FOOGLRA’s enactment, the IBLA held that even “[t]he filing of a post-sale noncompetitive oil and gas lease offer which has not been accepted does not give the offeror any right to a lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary to issue leases for the lands involved.”¹⁴⁴ These decisions affirm that discretion survives the early stages of the leasing process.

140. *Id.* at *5.

141. *Id.* at *7.

142. *W. Energy All. v. Salazar*, 709 F.3d 1040, 1042 (10th Cir. 2013).

143. *Wyo. Outdoor Council v. Dombeck*, 148 F. Supp. 2d 1, 10 (D.D.C. 2001) (citing *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 50 (D.C. Cir. 1999)).

144. *Richard D. Sawyer*, 162 IBLA 339, 339–40 (2004); see also *Cont’l Land Res.*, 162 IBLA 1, 7 (2004).

Taken together, these cases offer almost no limits on the Secretary's discretion to decide whether to issue oil and gas leases. The court's interpretation in *Impact Energy* offers the only possible limitation on discretion, and even that dicta would merely require lease issuance once every prior step of the leasing process had been completed. Under the court's reasoning in *Western Energy Alliance*, which follows the well-established respect for agency discretion, procedural limits on the timeframes for issuing a decision constitute the only limit on choosing whether to issue or not issue a lease. Otherwise, the MLA does not hamper the Secretary's freedom to end the leasing process at any time before a lease is actually issued. As the Tenth Circuit unambiguously declared, "[t]he federal courts do not have the power to order competitive leasing. By law, that discretion is vested absolutely in the federal government's executive branch and not in its judiciary."¹⁴⁵

B. *Aggregated decisions could constitute challengeable policy*

Choosing not to issue leases as a large-scale national policy could change the equation. After all, administrative actions that are individually permissible can, in the aggregate, constitute an impermissible policy.¹⁴⁶ Two concerns are especially salient. First, despite extensive discretion, it is not clear whether the MLA allows the Secretary to issue no leases at all. While no court has attempted to force issuance of an oil or gas lease before the Secretary has already legally committed to doing so, the Secretary would arguably be violating MLA's core purpose of developing minerals on federal land, as well as national policy

145. Wyoming *ex rel.* Sullivan v. Lujan, 969 F.2d 877, 882 (10th Cir. 1992); *see also* Marathon Oil Co. v. Babbitt, 966 F. Supp. 1024, 1026 (D. Colo. 1997), *aff'd*, 166 F.3d 1221 (10th Cir. 1999) ("Only an order of this court compelling the executive branch to make land available for competitive leasing under the Mineral Leasing Act would likely redress Marathon's claimed injuries. This, I do not have the power to do.")

146. *Cf.* Christine Tsang, *Uncovering Systemic Discrimination: Allowing Individual Challenges to A "Pattern or Practice"*, 32 Yale L. & Pol'y Rev. 319 (2013) (describing how individual employment decisions can constitute illegal discrimination when they are part of a larger "pattern or practice" of systemic disparate treatment).

articulated in other mineral disposal statutes, if he never issued a single lease to develop those minerals. Second, not issuing leases could be viewed as a de facto land withdrawal, which would require compliance with FLPMA's withdrawal procedures. To understand how the Secretary's discretion under the MLA extends to a policy of not issuing leases, I first discuss two cases that challenge administrative decisions as aggregated into de facto policy and then connect leasing decisions to withdrawals under FLPMA.

1. The MLA's Overarching Purpose

The United States' mineral disposal policy took center stage in *Krueger v. Morton*.¹⁴⁷ Much like the Obama administration's recent coal moratorium, Secretary of the Interior Rogers Morton chose to temporarily suspend issuance of coal leases under the MLA "in order to allow the preparation of a program for the more 'orderly' development of coal resources."¹⁴⁸ Consequently, all pending lease applications were rejected.¹⁴⁹ Industry plaintiffs brought suit, alleging that the moratorium violated an affirmative duty contained in the Mining and Minerals Policy Act of 1970 (MMPA)¹⁵⁰ requiring the Secretary "to foster and encourage the exploration and development of coal resources."¹⁵¹ The court framed the question as "whether the Secretary had the right, before receiving or approving applications, to order a pause for refreshment of his judgment."¹⁵² The court found this action was not "committed to agency discretion 'by law'" but was nonetheless subject to review "under the general criteria of [APA section] 706."¹⁵³ The court emphasized that the moratorium was temporary, rather than "a permanent termination of coal prospecting on public land" and held that suspension of lease

147. See *Krueger v. Morton*, 539 F.2d 235, 238–40 (D.C. Cir. 1976).

148. *Id.* at 237.

149. *Id.*

150. 30 U.S.C. § 21a (2012) (declaring that "the continuing policy" of the United States is "to foster and encourage private enterprise in . . . the orderly and economic development of domestic mineral resources").

151. *Krueger*, 539 F.2d at 239.

152. *Id.*

153. *Id.*

issuance and rejection of pending applications “did not constitute an abuse of discretion granted the Secretary by the [MLA] in the light of the Mining and Minerals Policy Act of 1970.”¹⁵⁴

As discussed above, existing case law suggests that leasing decisions rarely constitute an abuse of the Secretary’s expansive discretion; however, universal non-issuance of leases would certainly test the limits of this standard. This is especially true in light of the court’s emphasis in *Krueger* that the leasing moratorium was temporary. That is, the court seemed persuaded largely by the fact that the Secretary paused coal leasing in order to better implement a coal leasing program, rather than ordering a full-blown end to coal exploration and development. A permanent, nationwide moratorium on oil and gas leasing would presumably be more likely to be seen as an abuse of discretion under the MLA, though the precedent for finding so does not yet exist.

With that said, it is perhaps telling that the plaintiffs primarily based their claim, not on the MLA, but on the MMPA. Section 21a of the MMPA declares mineral development to be a national policy and stipulates that “[i]t shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law other than this section.”¹⁵⁵ The definition of “minerals” in the Act includes oil and gas,¹⁵⁶ so the Secretary’s duty to “foster and encourage” mineral development extends beyond the coal issue at stake in *Kreuger*. However, the court found there was no abuse of discretion without reaching

154. *Id.* at 240. This precedent likely contributed to the Obama administration’s willingness to issue another temporary coal moratorium in 2016, though it is not clear what legal position it took on making the moratorium permanent. The order was “issued under statutory authority that includes, but is not limited to, the [MLA], 30 U.S.C. §§ 181 *et seq.*; the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351 *et seq.*; the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*; the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 *et seq.*; and the [FLPMA], 43 U.S.C. §§ 1701 *et seq.*” Department of the Interior, Order No. 3338, Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program (Jan. 15, 2016).

155. 30 U.S.C. § 21a.

156. *Id.*

the question of whether Section 21a is merely “a general statement of policy” that does not diminish the Secretary’s authority under the MLA or “a mandate from Congress” to shift the Interior Department’s policy to one of mineral development.¹⁵⁷

A follow-up case implies that it is the former.¹⁵⁸ In *Natural Resources Defense Council v. Hughes*, a district court required the Interior Department to consider as part of the EIS process an alternative of maintaining the moratorium and implementing no national coal leasing policy.¹⁵⁹ This interpretation would accord with cases decided before the 1970 MMPA, like *McLennan*, which viewed the Secretary as a decision-maker whose job included reacting to on-the-ground circumstances and implementing policy based on what would best “promote the public welfare.”¹⁶⁰ But if the MMPA is in fact a “mandate from Congress,”¹⁶¹ then the wholesale cessation of oil and gas development would likely be an abuse of the Secretary’s discretion.

Still, even if not issuing leases anywhere on federal land were an abuse of some sort of broad, statutory responsibility, it is not clear how a plaintiff would challenge this policy in court, given the APA’s review requirements. Unless a statute independently provides for judicial review, APA Sections 702 through 706 provide the legal avenue to challenge an agency action.¹⁶² These provisions allow judicial review only of “some particular ‘agency action’ that causes [the plaintiff] harm.”¹⁶³ “Agency action’ includes the whole or a part of an agency rule, order, license,

157. *Krueger*, 539 F.2d at 239–40.

158. *See Nat’l Res. Def. Council v. Hughes*, 437 F. Supp. 981, 990–91 (D.D.C. 1977).

159. *Nat’l Res. Def. Council v. Hughes*, 437 F. Supp. 981, 990–91 (D.D.C. 1977). Admittedly, “[a]n alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable.” *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026 (Mar. 23, 1981). Thus, the court may have simply believed this alternative to be “reasonable,” even if maintaining the moratorium was outside the Secretary’s legal discretion.

160. *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 419 (1931).

161. *Krueger*, 539 F.2d at 240.

162. 5 U.S.C. §§ 702–06 (2012).

163. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990).

sanction, relief, or the equivalent or denial thereof, or failure to act.”¹⁶⁴ Aggregated decisions do not satisfy this definition unless the responsible agency initiates the actions programmatically, as a unified rulemaking process that encompasses all of the challenged actions.¹⁶⁵ While something like a coal moratorium fits this definition, a set of decisions not to issue individual leases clearly falls outside this conception of an agency action.

*Lujan v. National Wildlife Federation*¹⁶⁶ illustrates the difficulty of challenging administrative actions in the aggregate. In *Lujan*, environmental plaintiffs challenged a series of BLM actions regarding land withdrawals and reclassifications that would result in opening certain public domain lands to mining.¹⁶⁷ The plaintiffs challenged what their complaint termed the BLM’s “land withdrawal review program,” which referred to several actions included in multiple separate rulemaking proceedings. The Supreme Court reversed the DC Circuit’s denial of the United States’ motion to dismiss (i.e. rejected the plaintiffs’ claim), reasoning that “the term ‘land withdrawal review program’ . . . does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations.”¹⁶⁸ Instead, the program referred to “the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications” and making other land management decisions.¹⁶⁹

Challenging an amalgamation of individual leasing decisions would likely run into the same dead end. While a more programmatic approach to ending oil and gas leasing would likely be necessary or beneficial in the long run, a set of individual leasing decisions would be relatively immune from judicial review because such a challenge would “not refer to a single BLM order or regulation” and likely could not identify “a

164. 5 U.S.C. § 551 (2012).

165. *Lujan*, 497 U.S. at 890–93.

166. *Id.* at 890–91.

167. *Id.* at 879.

168. *Id.* at 890.

169. *Id.*

completed universe of particular BLM orders and regulations.”¹⁷⁰ Consequently, the Department of the Interior would be well positioned to have a complaint alleging such harms dismissed. That said, a more programmatic rulemaking process would not enjoy equivalent protection, an issue I discuss in Part III regarding withdrawals under FLPMA Section 204.

The plaintiffs’ argument in *Krueger* sketches possible outer boundaries of the Secretary’s leasing discretion under the MLA, but the means of challenging that discretion are unclear. If the individual leasing decisions for which the Secretary has substantial discretion aggregate to form a policy that, practically speaking, does not implement the MLA’s core purpose, a court could view the collective policy as an abuse of discretion. However, this has not yet happened, and the cases thus far all point to the opposite result. Moreover, the APA’s review provisions would make it difficult, if not impossible, to challenge a systematic but informal policy of not issuing leases, rather than individual, specific administrative decisions. The MLA, as interpreted thus far, simply contains no clear and meaningful limits on the Secretary’s ability to choose not to issue oil and gas leases.

2. De facto Withdrawals and FLPMA

FLPMA might do what the MMPA and the MLA do not: define the outer limits of discretion under the MLA by making this discretion subject to formal process. A set of cases out of the District of Wyoming¹⁷¹ suggests that leasing decisions can amount to de facto withdrawals that must comply with FLPMA’s procedural requirements. However, their holdings are not definitive, and the Ninth Circuit rejected the reasoning as unpersuasive, suggesting even this minimal limitation might not hold water.

In the first *Mountain States* case, the Forest Service wanted to prevent oil and gas leasing on land that was likely to be

170. *Id.*

171. *Mountain States Legal Found. v. Andrus (Mountain States D)*, 499 F. Supp. 383 (D. Wyo. 1980); *Mountain States Legal Found. v. Hodel (Mountain States ID)*, 668 F. Supp. 1466 (D. Wyo. 1987).

designated as wilderness, and the Interior Department followed the Forest Service's recommendations by not issuing any leases on the land.¹⁷² Oil and gas developers whose leases were not approved on the land brought suit, claiming that the Secretary's failure to act on the oil and gas lease applications for the area constituted "a withdrawal of the lands from the operation of the [MLA]."¹⁷³ The court looked to the statutory definition of "withdrawal" and concluded that "the combined actions of the Department of the Interior and the Department of Agriculture fit squarely within the foregoing definition of withdrawal."¹⁷⁴

The court reasoned that FLPMA's and the MLA's respective policy purposes also warranted this conclusion. FLPMA, it noted, was passed to delineate executive withdrawal authority and to vest that power primarily with Congress, and the Secretary's decision not to issue leases violated this purpose.¹⁷⁵ While it acknowledged that "[t]he Secretary has the discretion to refuse to issue any lease at all on a given tract,"¹⁷⁶ the court reasoned that Congress could not have passed the MLA intending to allow the Secretary "to effectively withdraw large areas of land from mineral exploration and development based solely on the desire for wilderness preservation and without consideration of the mineral potential in the area."¹⁷⁷ Instead, the legislative history suggested that the MLA "was intended to promote wise development of natural resources."¹⁷⁸ As in *Krueger*, the court also noted the pro-development national policy articulated in the MMPA.¹⁷⁹ Based on all of these considerations, the court did not purport to require the Secretary to do anything with the lease applications. Instead, it simply found that the failure to act on outstanding lease applications "falls within the definition of

172. *Mountain States I*, 499 F. Supp. at 388–89; see also 2 GEORGE CAMERON GOGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW, § 14:18 (2nd ed. 2016).

173. *Mountain States I*, 499 F. Supp. at 390.

174. *Id.* at 391.

175. *Id.*

176. *Id.* at 392.

177. *Id.*

178. *Id.*

179. *Id.* at 392–93.

withdrawal,” which in turn required the Secretary “to notify Congress of such withdrawal or institute action on the applications.”¹⁸⁰

Seven years later in *Mountain States II*, the same court reached the same outcome in effectively the same set of circumstances.¹⁸¹ Again, the court required that leases be processed or that the withdrawal be reported to Congress, although it did not purport to order issuance of leases. Perhaps tellingly, the Interior Department did not appeal either of the *Mountain States* cases.

Both of these cases strengthen the Secretary’s authority not to issue leases under the MLA by deferring to his discretion, but weaken it by requiring that the exercise of discretion be reported to Congress. The court’s reasoning in *Mountain States I* regarding the MLA’s overarching purpose—connected to the stated policy in the MMPA—hints at outer limits of Secretarial discretion by suggesting that there is some duty to implement an oil and gas leasing policy. But, it ultimately did not attempt to require any lease issuance. These cases signal judicial discomfort with the notion that the Secretary can wield his leasing discretion indiscriminately, but the only remedy they were willing to apply was compliance with FLPMA’s reporting requirements.

The Ninth Circuit declined to follow the *Mountain States* logic, bluntly stating that it did “not find its reasoning persuasive.”¹⁸² In *Bob Marshall Alliance v. Hodel*, plaintiffs sued the Forest Service under NEPA when the Forest Service approved the Interior Department’s issuance of oil and gas leases on wilderness-quality Forest Service land and did not prepare a full EIS.¹⁸³ Part of the plaintiffs’ argument was that the Forest Service should have, but did not, consider a no-action alternative of not approving the BLM’s issuance of the leases.

180. *Id.* at 397.

181. *Mountain States Legal Found. v. Hodel (Mountain States II)*, 668 F. Supp. 1466, 1474 (D. Wyo. 1987) (The Secretary’s “mineral leasing discretion is not so broad as to allow the Secretary to refuse to act upon lease applications. . . thereby effectively removing the lands from the operation of the [MLA] without following [FLPMA’s procedural requirements].”).

182. *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1229–30 (9th Cir. 1988).

183. *Id.* at 1226.

One of the defendant administrators argued that considering the no-action alternative—precluding lease issuance—would amount to a de facto withdrawal in violation of FLPMA.¹⁸⁴ The Ninth Circuit disagreed.¹⁸⁵ The court observed that the MLA grants the Secretary broad discretion “to determine which lands are to be leased under the statute,” and it recognized the judicial precedent affirming the discretion.¹⁸⁶ “[F]ar from” withdrawing the land from mineral leasing, it reasoned, refusing to issue leases “would constitute a legitimate exercise of the discretion granted to the Interior Secretary under that statute.”¹⁸⁷

The Ninth Circuit’s holding in *Bob Marshall* directly contradicts the *Mountain States* cases and is more in line with the historically deferential position courts have taken regarding the Secretary’s discretion not to issue leases. From a formally precedential perspective, “[a]ll in all, the question must be regarded as still open.”¹⁸⁸ However, the Ninth Circuit’s position seems correct for two reasons. First, it accords with the extensive discretion the Secretary undeniably holds under the MLA in choosing whether to issue leases. Second, the *Mountain States* reasoning offers no judicially administrable standard. When does a set of leasing decisions become a de facto withdrawal that needs to follow FLPMA procedure? True, systematically choosing not to issue leases has the practical effect of making generally applicable mineral laws inoperable, which is more or less the definition of a withdrawal. But a withdrawal is clearly its own administrative action—related to, but separate from, the MLA—and the MLA grants the Interior Department extensive discretion to make leasing decisions however it sees fit, even if it chooses not to exercise the authority to lease land at all. Underscoring this point is the fact that the Secretary himself must approve withdrawals,¹⁸⁹ but BLM typically makes leasing

184. *Id.* at 1229.

185. *Id.*

186. *Id.* at 1230 (citing 30 U.S.C. § 226(a) (1982), *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975)).

187. *Id.* at 1230.

188. GEORGE CAMERON GOGGINS & ROBERT L. GLICKMAN, PUBLIC NATURAL RESOURCES LAW § 14:18 (2d ed. 2016).

189. 43 C.F.R. § 2310.1 (2016).

decisions. How many lease applications must BLM reject before they constitute a withdrawal requiring the Secretary's approval? For all of these reasons, the *Mountain States* reasoning does indeed seem "unpersuasive."¹⁹⁰

While the de facto withdrawal argument falls short, the *Mountain States* cases do illustrate an instance where exclusions under FLPMA Section 202(e) may be relevant.¹⁹¹ As described in Part I, Section 202(e) declares that any "management decision" that "excludes (that is, totally eliminates) one or more of the principal or major uses" on a large (100,000 acres or more) tract of land must be reported to Congress.¹⁹² "[M]ineral exploration and development" is included in the definition of "principal or major uses."¹⁹³ So, while the *Mountain States* and *Bob Marshall* cases did not address FLPMA's exclusion provision, the executive actions they reviewed seemingly would fall under Section 202(e).¹⁹⁴ Thus, even absent a de facto withdrawal, choosing not to issue leases over vast tracts of land could nonetheless require the Interior Department to report the management decision to Congress under Section 202(e).¹⁹⁵ But, like most other courts, the *Mountain States* cases ignored Section 202(e), so even its minimally onerous reporting requirement is questionable.

All told, the *Mountain States* cases do little to change the equation and, if anything, further illustrate how much autonomy the Interior Department enjoys in administering the federal leasing program. Perhaps the Secretary must formally withdraw land if he chooses to systematically stop granting oil and gas leases, but probably not. And even in the unlikely event that this procedural hurdle were required, the Secretary's freedom not to issue leases stands strong.

190. *Bob Marshall*, 852 F.2d at 1229.

191. 43 U.S.C. § 1712(e)(2) (2012).

192. *Id.*

193. 43 U.S.C. § 1702(1) (2012).

194. The tracts in those cases involved areas of 247,090 acres and 758,479 acres (*Mountain States I*, 499 F. Supp. at 387), so they met Section 1712(e)'s size requirement.

195. Section 1712(e) also allows for a legislative veto, but, as discussed in Part III, such vetoes are not constitutional.

IV.

MAKE LAND UNAVAILABLE: PLANNING AND WITHDRAWALS

In addition to its substantial discretion under the MLA, the Interior Department's land use planning responsibilities under FLPMA offer two major mechanisms to make federal lands unavailable for oil and gas development purposes. First, BLM can implement RMPs that preclude oil and gas activity. Second, formal withdrawals allow the Secretary to set land outside the domain of otherwise applicable general land management laws, including the MLA. BLM has significant discretion in issuing and maintaining its RMPs, and the Secretary has broad discretion in determining how and when to withdraw land, making both actions viable options for making land off-limits to oil and gas development.

The distinction between BLM and the Interior Secretary matters for purposes of land planning under FLPMA. BLM can write, revise, and amend RMPs without the Secretary's direct approval.¹⁹⁶ However, BLM cannot withdraw land; that power is vested solely in the Secretary.¹⁹⁷ Furthermore, BLM must comply with existing RMPs in subsequent management actions.¹⁹⁸ However, because the Secretary, not BLM, withdraws land, withdrawals do not have to comply with the relevant RMPs.¹⁹⁹ Nor must RMPs be amended to align with a withdrawal.²⁰⁰ That said, withdrawals may be used as a tool to execute RMPs' planning provisions, but the Secretary can also make withdrawals wholly apart from RMPs, either of his own

196. 43 C.F.R. § 1601.0-4 (providing that BLM's State Directors approve RMPs).

197. See 43 U.S.C. § 1714(a) (2012); see also 43 C.F.R. § 2310.3-3 (2016). BLM can petition the Secretary to make a withdrawal, but such a petition has no effect until the Secretary approves it, which itself constitutes a proposal. BLM Handbook, *supra* note 73, at 29.

198. *Id.* § 1601.0-2 ("Resource management plans are designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses.").

199. See *Yount v. Salazar* (Yount II), 2014 WL 4904423, at *25-26 (D. Ariz. Sept. 30, 2014).

200. See *id.* (finding no language requiring RMP amendments in 43 U.S.C. § 1714 and holding that a withdrawal did not violate FLPMA where the relevant RMP was not amended).

accord, by petition from BLM, or by order from Congress or the President.²⁰¹

Land planning decisions enjoy ample discretion, but legal challenges could still arise. RMPs exclusive of oil and gas could spark challenges based on FLPMA's multiple use mandate or implicate a reporting requirement to Congress. Large withdrawals would also trigger a reporting requirement. The more systematic nature of land use planning and withdrawals—relative to individual leasing decisions—could also open the door to allegations of a violation of some affirmative duty to carry out the pro-extraction policies articulated in the MLA or peripheral statutes like the MMPA. However, no meaningful substantive legal limitations would bar the Interior Department from making land unavailable to oil and gas leasing nationwide through planning mechanisms, withdrawals, or both. Procedural requirements, especially NEPA, would be the biggest hurdle to carry out such a plan. This Part discusses in turn (a) land planning through RMPs and (b) withdrawals under FLPMA Section 204.

A. *Land Planning and RMPs*

As mentioned above, RMPs provide the primary mechanism for BLM to dictate which portions of the land it manages will be available for oil and gas leasing and development. BLM has extensive discretion in determining the content of an RMP, meaning RMPs can be written to simply exclude oil and gas development from these plans. Oil and gas proponents would likely oppose oil and gas-free RMPs by alleging a violation of FLPMA's multiple use mandate, but existing case law suggests such a challenge would be futile. Depending on the scope of the planning, writing RMPs in this manner could also invoke FLPMA Section 202(e) exclusions, but the only implication is a requirement to report to Congress. Thus, as long as the appropriate procedures, including NEPA, are followed, BLM's land planning authority provides an easy opportunity to make land unavailable for oil and gas leasing. The President can direct

201. 43 C.F.R. § 2310.3–3 (2016).

the Forest Service to follow a similar plan, but because it is part of the Department of Agriculture, the Secretary of the Interior cannot set such a plan in motion.²⁰²

BLM has broad discretion to determine the mix of uses in its plans, even taking into account FLPMA's multiple use and sustained yield mandate. FLPMA directs BLM to evaluate land and choose "that use or combination of uses which will best achieve the objectives of multiple use,"²⁰³ but "the BLM need not permit all resource uses on a given parcel of land."²⁰⁴ Recognizing the difficulty of managing land for multiple uses,²⁰⁵ courts readily defer to agencies. As the Supreme Court noted, "[m]ultiple use management' is 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."²⁰⁶ In general, then, as long as BLM decision-makers consider various multiple uses before electing to emphasize one over others, the resulting RMP has complied with FLPMA's multiple use requirements.²⁰⁷

While individual RMPs are mostly immune to multiple use challenges, writing and revising plans nationwide to exclude oil and gas development could push the mandate's limits. One court's thinking illustrates this concern. Finding that BLM could properly prioritize a region's wilderness character over its value for mineral extraction without violating the multiple use mandate, the court in *Utah v. Andrus* reasoned that "[s]ome lands can be preserved, while others, more appropriately, can be mined. . . . BLM is not obliged to, and indeed cannot, reflect all the purposes of FLPMA in each management action."²⁰⁸ Instead, it reasoned, "[i]t is only by looking at the *overall use* of the public

202. The Forest Service's land planning process is provided at 36 C.F.R. § 219 (2016).

203. 43 C.F.R. § 1725.3-1 (1992).

204. *Rocky Mountain Oil and Gas Ass'n v. Watt*, 696 F.2d 734, 738 (10th Cir. 1982).

205. *See generally* Flynn, *supra* note 52, at 819.

206. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2003).

207. *See Rocky Mountain Oil*, 696 F.2d at 738.

208. *Utah v. Andrus*, 486 F. Supp. 995, 1003 (D. Utah 1979); *accord Rocky Mountain Oil*, 696 F.2d at 738 n. 4.

lands that one can accurately assess whether or not BLM is carrying out the broad purposes of [FLPMA].”²⁰⁹ While this logic supports a deferential approach to individual planning and management decisions, the flip side of the coin is that if “the overall use of the public lands” demonstrates a systematic preference for or against a major use, BLM may not be upholding its multiple use responsibilities on the whole. This argument would make a strong case against using land planning to end oil and gas leasing, if the multiple use mandate had a history of rendering agency action illegal. But it does not. Instead, courts defer to BLM’s determination of uses, because the doctrine “breathe[s] discretion at every pore.”²¹⁰

Moreover, after the Supreme Court’s decision in *Ohio Forestry Association v. Sierra Club*,²¹¹ “generic challenges to the sufficiency of [an RMP] are nonjusticiable.”²¹² For example, environmental plaintiffs recently attempted to challenge the adequacy of an RMP laying out management plans for the San Juan Basin in New Mexico, alleging that the RMP would allow for environmental degradation in contravention of FLPMA.²¹³ Citing *Ohio Forestry* and subsequent judicial interpretations of it, the court rejected the claim as not ripe for judicial review.²¹⁴ Because “the RMP does not authorize any specific activity,” and “without knowing specifically what drilling grants will be made in the future and what remedial programs will be imposed to fight degradation,” the court could not determine whether the RMP violated FLPMA.²¹⁵ The caveat is that the *Ohio Forestry* logic might not apply to a plan that definitively excludes a certain use, because no further action would be needed to eliminate that

209. *Utah v. Andrus*, 486 F. Supp. at 1003 (emphasis added); *accord Rocky Mountain Oil*, 696 F.2d at 738 n.4.

210. *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975).

211. *Ohio Forestry Ass’n. v. Sierra Club*, 523 U.S. 726, 739 (1998).

212. *Wilderness Soc’y v. Thomas*, 188 F.3d 1130, 1134 (9th Cir.1999); *accord N. Plains Res. Council v. BLM*, Civ. No. 03-69, 2005 U.S. Dist. LEXIS 4678, at *42 (D. Mont. Feb. 25, 2005).

213. *San Juan Citizens All. v. Norton*, 586 F. Supp. 2d 1270, 1294–95 (D.N.M. 2008).

214. *Id.* at 1295–96.

215. *Id.* at 1295.

use down the road. That is, no later decisions regarding permitting, approval, etc. would come up; the use simply cannot be considered, thereby making the plan arguably ripe for review as it regards excluded uses. Thus, ripeness may or may not be an issue in challenging RMPs that exclude oil and gas development. But, regardless, the deference given to BLM over individual RMP decisions makes land use planning a judiciary-resistant mechanism to preclude oil and gas development on federal land.

The final issue regarding land use planning is FLPMA Section 202(e), which could apply to large individual RMPs and would certainly kick in for a nationwide exclusion of oil and gas extraction. As discussed in Part II, that provision has been mostly ignored and requires only a report to Congress, so its greatest effect would be alerting Congress to a process that it would no doubt learn of anyway. So, FLPMA's multiple use mandate remains the greatest barrier to land use planning as a means of ending fossil fuel development, which is to say that there is not much of a barrier.

B. *Withdrawals*

Withdrawals offer another mechanism for the Interior Department to make land unavailable for oil and gas leasing. The biggest constraint on the Secretary's withdrawal authority is simply the process required to formally withdraw land, which includes reporting to Congress and, more importantly, complying with NEPA. The agency's basis for making a withdrawal in the first place is not readily challengeable because the decision to withdraw land lies solidly in the purview of the Secretary. Pro-extraction plaintiffs could argue that large scale withdrawals violate the Interior Department's duty to promote mineral development—an argument I considered earlier in the context of leasing decisions under the MLA—but the policy statements contained in the MLA, the MMPA, and other related statutes almost certainly would not bar the Secretary from making withdrawals. Thus, if the Secretary complies with all procedural requirements, there are no clear limitations on his authority to formally withdraw land from oil and gas development even on a large scale.

To illustrate this, I discuss (i) the Secretary's withdrawal authority generally, including challenges to it entwined with FLPMA's unconstitutional Congressional veto provision; (ii) procedural requirements, which mostly emphasize NEPA's importance in the withdrawal process; and (iii) the relationship between withdrawals and the Secretary's responsibility to carry out the MLA and other disposal statutes.

1. Authority to Withdraw

The Secretary has broad authority to withdraw land from mineral development, and courts apply a deferential standard of review in analyzing the Secretary's justification for the withdrawal.²¹⁶ Importantly, FLPMA Section 204 is operative even though it contains a Congressional veto provision that is clearly unconstitutional after the Supreme Court's ruling in *Immigration and Naturalization Service v. Chadha*.²¹⁷ That authority may be exercised even when the basis for a withdrawal is nebulous, premised on avoiding uncertain risks.²¹⁸

Section 204's validity, notwithstanding the unconstitutional provision, was affirmed in *Yount v. Salazar (Yount I)*.²¹⁹ Then-Secretary of the Interior, Ken Salazar, withdrew over a million acres of BLM and Forest Service land "from location and entry under the Mining Law of 1872" in order to protect the Grand Canyon watershed from mining's adverse impacts.²²⁰ Mining and energy industry plaintiffs challenged the withdrawal and the Secretary's authority to make it, somewhat ironically premising

216. See, e.g., *Pacific Legal Found. V. Watt*, 529 F. Supp. 982, 997–98 (1981) (holding that withdrawals include "withdrawal of public lands from mineral exploration and leasing" and that the "scope and duration" of a withdrawal "are within the sound discretion of the Secretary of the Interior, to be exercised in accordance with the goals and procedural requirements of the FLPMA, subject to judicial review.").

217. *Immigration and Naturalization Serv. V. Chadha*, 462 U.S. 919 (1983) (holding that the legislative veto provision of the Immigration and Nationality Act violated the Constitution).

218. See *Yount v. Salazar (Yount II)*, 2014 WL 4904423 (D. Ariz. Sept. 30, 2014).

219. *Yount v. Salazar (Yount I)*, 933 F. Supp. 2d 1215 (D. Ariz. 2013).

220. BLM Notice of Proposed Withdrawal, 74 Fed. Reg. 35,887 (July 21, 2009).

their claim on the argument that the Congressional veto provision was unconstitutional in light of *Chadha*, and arguing that the veto was “so interwoven with the withdrawal authority” that Section 204 was unconstitutional as a whole.²²¹ The government defendants did not dispute that the veto provision violated the Constitution, and the court found that it was “clearly unconstitutional under *Chadha*.”²²² The core question became whether the Congressional veto provision was severable from the rest of Section 204, which depended on congressional intent. Based on FLPMA’s severability clause and the lack of “strong evidence”²²³ that Congress would not have passed Section 204 without the veto provision, the court found that the provision was severable and that Congress intended to delegate significant withdrawal authority to the executive.²²⁴ On that basis, it upheld the Secretary’s right to withdraw the land from mineral development.²²⁵

Secretary Salazar’s withdrawal was upheld again in *Yount II*,²²⁶ although an appeal is pending with the Ninth Circuit. Among numerous other claims,²²⁷ the industry plaintiffs chal-

221. *Yount I*, 933 F. Supp. 2d at 1219.

222. *Id.* at 1220.

223. The court identified this as the standard for determining whether Congress intended a clause to be severable. *Id.* (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)).

224. The court relied on FLPMA’s legislative history, including recommendations from the Public Land Law Review Commission. It noted that the Commission did not recommend a legislative veto and that “several House members addressing the FLPMA spoke of the need to support rather than limit the Executive’s ability to withdraw public lands, and the Senate put forth its own bill that neither repealed the Executive’s existing authority nor included a legislative veto.” *Yount I*, 933 F. Supp. 2d at 1234; accord 122 CONG. REC. H7581-655 (1976) (statement of Sen. Melcher) (“I cannot agree to an oversight procedure which would allow either House of Congress to veto relatively minor withdrawal decisions. To do so would open the door to subjecting each and every withdrawal decision to intense lobbying pressure by the mining industry.”).

225. *Yount I*, 933 F. Supp. 2d at 1220.

226. *Yount v. Salazar (Yount II)*, 2014 WL 4904423 (D. Ariz. Sept. 30, 2014).

227. These included the Secretary’s alleged failure to consult with local agencies; the Forest Service’s consent to the withdrawal, which could amount to retroactive amendment of Forest Plans; violation of BLM’s existing RMPs; and violations of Native American rights.

lenged the basis for the withdrawal, which the Secretary identified as the risk of uranium contamination from mining operations. FLPMA does not expressly provide for judicial review of the Secretary's reason for withdrawing land, but the court construed the claim to be based purely on the APA and concluded that it was subject to review. The court pointed to Section 204(c)(2)'s reporting requirements to find that "the statute requires an explanation," and it found that FLPMA "expresses a presumption of judicial review."²²⁸ Based on this right of review, the Secretary's justification for making the withdrawal came under judicial scrutiny, with particular focus on the allegedly incomplete and uncertain information underlying the decision.²²⁹ The court recognized the uncertainty surrounding future uranium contamination, noted that significant information was missing from the analysis, and acknowledged that the Secretary "decided to err on the side of protecting the environment." However, it found that this "decision to proceed cautiously" was legally acceptable.²³⁰ So, while *Yount II* required the Secretary to offer some valid justification for making a withdrawal, uncertain and speculative risk satisfied that requirement.

2. Procedural Hurdles

While substantive limits for making a withdrawal appear limited, FLPMA Section 204(c) imposes meaningful procedural requirements on land withdrawals in the form of reporting requirements to Congress. Withdrawals also trigger NEPA requirements, which pose a practical hurdle for large-scale land withdrawals.

Yount I underscores the importance of Section 204's procedural requirements. The court's decision to sever the veto provision was grounded partly in other checks on the Secretary's discretion, including the reporting requirements to Congress.²³¹ The fact that

228. *Id.* at *19 (citing 43 U.S.C. § 1701(a)(6) (2012)).

229. *Id.* at *19–20.

230. *Id.* at *20.

231. *Yount I*, 933 F. Supp. 2d at 1225–28 (“[T]he reporting requirements provide a meaningful limitation on executive action even if no legislative veto may be exercised.”).

the reporting requirement not only survived the court's review, but also helped justify its decision to sever the veto provision, seemingly magnifies the Secretary's duty to report.²³² However, in *Yount II*, the court noted "[w]here an agency does not demonstrate exacting compliance with the FLPMA, the error may be deemed harmless if the agency action nonetheless satisfies the purposes of the statute." It also noted that FLPMA claims fall under "the discretionary review standard of the APA."²³³ Moreover, the court distinguished *New Mexico v. Watkins*²³⁴ and agreed with the government's contention that "the savings provision of the FLPMA precludes judicial review of the required reports to Congress, including the notices required by § 1714(c)."²³⁵ Admittedly, the conclusion on this issue contradicts the court's basis for permitting its review of the Secretary's justification for withdrawing the land in the first place, which was the explanation required in Section 204(c)(2) and FLPMA's "presumption of judicial review."²³⁶ But, *Yount II* seemingly renders the reports to Congress a mere procedural hoop, with the contents of those reports unreviewable.

Yount II also left an important NEPA-related precedent that is relevant to oil and gas withdrawals. It held that the harm that an industry plaintiff would most likely suffer from a land withdrawal—economic harm from lost or diminished production—would not satisfy prudential standing under NEPA because it falls outside the statute's zone of interest. The major question was whether the industry plaintiffs satisfied both Article III standing and prudential standing requirements by alleging

232. *Accord* State of N.M. v. Watkins, 969 F.2d 1122, 1136 (D.C. Cir. 1992) ("The reporting requirement is not just a formality. It is instead a fundamental part of the scheme by which Congress has reserved the right to disapprove administrative withdrawals.")

233. *Yount II*, 2014 WL 4904423, at *17.

234. 969 F.2d at 1136 (emphasizing the importance of the reporting requirements).

235. *Yount II*, 2014 WL 4904423, at *22. Specifically, the plaintiffs pointed to Section 204(c)(2)'s requirements that the report include "a clear explanation of the proposed use of the land involved which led to the withdrawal' . . . and accurate information regarding 'the economic impact of the change in use on individuals, local communities, and the Nation.'" *Id.* at *19 (citing 43 U.S.C. § 1714(c)(2)(1) (2012)).

236. *Id.* at *19.

economic harms for the former and environmental harms for the latter. The court looked to precedent from the DC and Ninth Circuits and concluded “Article III standing and the NEPA zone of interests test must be satisfied by the same injury.”²³⁷ Seemingly, then, the standing requirements to challenge a withdrawal decision based on NEPA could keep many industry plaintiffs out of court. The coalition of state and local governments satisfied both standing prongs in *Yount II*, so non-industry plaintiffs appear less limited by the case’s holding.

Consultation with local government agencies and information gaps in the Interior Department’s EIS were also key issues in *Yount II* that might arise for oil and gas leasing. The court assessed these claims and ultimately concluded that neither one amounted to a violation of NEPA, but these issues mostly exemplify the multitudinous challenges that flow freely once NEPA standing is established. That is, *Yount II* serves as a reminder that NEPA looms large for any formalized rulemaking proceeding, which includes land withdrawals. The Interior Department cannot formally withdraw land without conducting NEPA’s burdensome analyses and defending them in court, so ultimately, NEPA could serve as one of the biggest practical barriers to ending oil and gas leasing on federal land. This difficulty—defending a large administrative rulemaking that changes public land use management—is the topic of Part IV.

3. Duty to Promote Mineral Development

A final point regarding withdrawals is their relationship to the policy goals of the various mineral disposal statutes. In Part II, I discussed the possibility that choosing not to issue individual oil and gas leases might violate an affirmative duty under the MLA and the MMPA to promote mineral development but concluded that agency discretion under the MLA trumped any potential duty to issue leases. Withdrawals are somewhat more complicated because their broader strokes arguably reflect a more deliberate decision not to fulfill mineral development policy. Furthermore, FLPMA itself requires public lands to be

237. *Id.* at *6 (citing *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1231 (D.C. Cir. 1996)).

managed “in a manner which recognizes the Nation’s need for domestic sources of minerals . . . including implementation of the Mining and Minerals Policy Act of 1970.”²³⁸ So it is worth asking: Could a withdrawal under FLPMA be struck down as a violation of some affirmative duty to promote mineral development on federal land? Probably not, because taken together with the innumerable other statements of policy in federal land use statutes, including many that weigh against oil and gas development, the MLA, the MMPA, and other pro-extraction statutes offer no meaningful, enforceable mandate to extract. Instead, these statements of policy simply wash into the more general multiple-use question of how to manage federal land—an issue on which courts consistently defer.

There is no precedent for the MMPA invalidating a withdrawal, even though withdrawals frequently remove land from mineral disposal statutes’ operation. At most, the MMPA has helped confer standing to industry plaintiffs in challenges to withdrawals of land from mineral development.²³⁹ This fact probably reflects the Interior Department’s discretion in carrying out conflicting policy declarations. For example, in addition to requiring implementation of the MMPA, the FLPMA mandates that “the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values.”²⁴⁰ Each of these values is at least arguably threatened by the warming climate that results from fossil fuel development, illustrating FLPMA’s internal competition and competing goals. Furthermore, even the MMPA’s language is qualified by other policy goals. It encourages “the development of *economically sound and stable*” domestic mineral industries and stores to “help assure satisfaction of *industrial, security and environmental* needs.”²⁴¹ The Interior Department would have to consider and weigh these criteria against its numerous other objectives.

238. 43 U.S.C. § 1701(a)(12) (2012).

239. *See, e.g.*, Pacific Legal Found. V. Watt, 529 F. Supp. 982, 991–93 (D. Mont. 1981).

240. 43 U.S.C. § 1701.

241. 30 U.S.C. § 21a (2012) (emphasis added).

Properly viewed in context, then, mineral development is but one of many oft-conflicting land management goals, the balancing of which Congress delegated to the Interior Department. For that reason, the MMPA and other legislative policy statements are unlikely to inhibit land withdrawals.

V.

ADMINISTRATIVE POLICY-MAKING AND THE ROADLESS RULE

The foregoing discussion has established the Secretary of the Interior's legal authority under the MLA and the FLPMA to use land planning and leasing discretion to stop oil and gas extraction on federal onshore land. Missing is the practical feasibility of doing so through administrative rulemaking, which necessarily entails immense procedure, including providing opportunity for and responding to public comment, complying with NEPA, and dealing with the political challenges of executive policy-making. Here, I compare the concept of ending oil and gas leasing to the Forest Service's famous Roadless Rule,²⁴² an ultimately successful, albeit drawn-out, effort by the executive branch to stop a harmful use from degrading public land. I first provide a brief background of the Roadless Rule and then discuss the legal issues most relevant to oil and gas that arose over the course of the Rule's enactment.

A. *Roadless Rule Background*

Conflicts over the appropriate use of federally managed forests abounded before the Roadless Rule's enactment. Stretching back to the 1920s with efforts like administrative regulation L-20, the Forest Service has "a long history of administratively protecting areas defined as primitive and roadless."²⁴³ Beginning in the 1970s, the Forest Service conducted its Roadless Area Review and Evaluation (RARE) programs, which responded to the Wilderness Act of 1964's mandate that the Forest Service

242. FS Special Areas; Roadless Area Conservation ("Final Rule"), 66 Fed. Reg. 3,244 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294 (2016)).

243. Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 Nat. Resources J. 687, 697 (2004).

inventory its land for possible wilderness designation.²⁴⁴ RARE and its successor, RARE II, classified forest land into three tiered categories: 1) land to be designated as wilderness, 2) areas requiring further study, and 3) areas to be released for general multiple use management.²⁴⁵ Much of the land inventoried as “roadless” and suitable for wilderness designation was never designated as such, leaving the inventoried areas under the Forest Service’s general management. The policy was the source of controversy over appropriate land management throughout the 1980s and 1990s, setting the stage for the Roadless Rule.

In 1999, Forest Service Chief, Michael Dombeck, issued a moratorium prohibiting new road construction in inventoried roadless areas, with exceptions for some forests.²⁴⁶ Intent on making the moratorium permanent, President Clinton directed the Forest Service

“to develop . . . regulations to provide appropriate long-term protection for most or all of these currently inventoried ‘roadless’ areas, and to determine whether such protection is warranted for any smaller ‘roadless’ areas not yet inventoried.”²⁴⁷

The Forest Service conducted a scoping process, which received extensive public interest and comment, and promulgated a draft EIS. After receiving comments on the draft EIS, the Final EIS identified the project’s purpose and considered four alternatives. The Rule’s stated purpose was to “provide, within the context of multiple-use management, lasting protection for inventoried roadless areas within the National Forest System.”²⁴⁸ Alternative One considered taking no action, which would subject future

244. See 16 U.S.C. § 1132(b) (2012).

245. See Nie, *supra* note 243, at 698.

246. FS Administration of the Forest Development Transportation System, Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas, Interim Rule, 64 Fed. Reg. 7290 (Feb. 12, 1999) (codified at 36 C.F.R. § 212 (2016)).

247. The White House, Memorandum from the Office of the Press Secretary to the Secretary of Agriculture on Protection of Forest “Roadless” Areas (Oct. 13, 1999), http://lobby.la.psu.edu/068_Roads_in_National_Forests/Agency_Activities/FS_Roadless/FS_Memorandum_Sec_Ag.htm [https://perma.cc/7JVL-34BT].

248. FS Special Areas: Roadless Area Conservation (“Final Rule”), 66 Fed. Reg. 3,244, 3272 (Jan. 12, 2001).

proposals for road (re)construction to project-level decision-making under NEPA. The Alternative Two proposed prohibiting road (re)construction in inventoried roadless areas, but with no additional restrictions on timber harvesting. Alternative Three prohibited road (re)construction in inventoried areas and limited timber harvesting to stewardship purposes, thereby eliminating commercial harvesting as an acceptable use in those areas. Alternative Four would have prohibited road (re)construction and all timber cutting in inventoried areas, whether commercial or for stewardship, except when necessary to protect threatened or endangered species.²⁴⁹ The Forest Service selected Alternative Three, choosing to prohibit all future road construction in inventoried areas and barring commercial timber harvesting.²⁵⁰

On January 20, 2001, just 16 days after the Final Rule was published, President George W. Bush took office.²⁵¹ As part of his Regulatory Review Plan, President Bush delayed the Rule's implementation twice in his first two months in office.²⁵² Eventually, the Bush Administration allowed the Rule to go into effect with the intent to amend it later. The Administration also refused to defend the Rule in court against legal challenge until August of 2002, after several cases had been initiated.²⁵³

The Roadless Rule was greeted with extensive legal challenges, and the ensuing litigation dragged on for more than 10 years. The Rule was found to violate NEPA²⁵⁴ and temporarily enjoined.²⁵⁵

249. *Id.* at 3,261–63.

250. *Id.* at 3,266. The Final Rule provided two major exceptions to the road construction and timber harvesting bans: (1) roads could still be constructed in areas under mineral lease as of the date the Rule was published; and (2) timber could still be harvested in areas where road construction and subsequent timber harvest, if undertaken between the area's designation as roadless and the Rule's promulgation, "substantially altered the roadless characteristics" of that area. *Id.*

251. *Timeline: The Roadless Rule*, EARTHJUSTICE, <http://earthjustice.org/features/timeline-of-the-roadless-rule> (last visited May 1, 2016) [<https://perma.cc/3TAM-KKNY>].

252. *Id.*

253. *Id.*

254. *Kootenai Tribe of Idaho v. Veneman (Kootenai I)*, 142 F. Supp. 2d 1231, 1247 (D. Idaho 2001).

255. *Kootenai Tribe of Idaho v. Veneman (Kootenai II)*, No. CV01-10-N-EJL, 2001 WL 1141275, at *2 (D. Idaho May 10, 2001).

On appeal, it was upheld, allowing the Rule to move forward.²⁵⁶ It was then permanently enjoined in a separate proceeding.²⁵⁷ The Bush Administration replaced the Clinton-era Rule with a new rule, called the “States Petition Rule,” giving states significantly more power to control management requirements in inventoried areas.²⁵⁸ Several states sought re-implementation of the 2001 Rule. In 2006, a district court enjoined the States Petition Rule and reinstated the original Rule,²⁵⁹ a decision that the Ninth Circuit upheld.²⁶⁰ After a series of various smaller challenges and the promulgation of other versions of the rule,²⁶¹ the Roadless Rule was once again enjoined in 2008.²⁶² The Tenth Circuit ultimately overturned the injunction, making the Rule effective nationwide, and agreeing with the Ninth Circuit that the Roadless Rule had been properly promulgated.²⁶³ The Supreme Court declined to hear an appeal, thus closing the door on the saga of legal challenges to the Rule.²⁶⁴

B. *Legal Issues*

As might be expected after ten years of litigation, the Roadless Rule implicates a profusion of legal issues far beyond

256. *Kootenai Tribe of Idaho v. Veneman (Kootenai III)*, 313 F.3d 1094, 1126 (9th Cir. 2002).

257. *Wyoming v. U.S. Dep’t of Agric. (Wyoming I)*, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003).

258. State Petitions Rule, 70 Fed. Reg. 25,654 (May 13, 2005) (codified at 36 C.F.R. § 294.10–18).

259. *California ex rel. Lockyer v. U.S. Dep’t of Agric. (Lockyer I)*, 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006).

260. *California ex rel. Lockyer v. U.S. Dep’t of Agric. (Lockyer II)*, 575 F.3d 999, 1021 (9th Cir. 2009).

261. *See, e.g., Idaho Roadless Rule*, 73 Fed. Reg. 61,456 (Oct. 16, 2008) (codified at 36 C.F.R. § 294.20–29).

262. *Wyoming v. U.S. Dep’t of Agric. (Wyoming II)*, 570 F. Supp. 2d 1309, 1355 (D. Wyo. 2008).

263. *Wyoming v. U.S. Dep’t of Agric. (Wyoming III)*, 661 F.3d 1209, 1271–72 (10th Cir. 2011).

264. *Wyoming III, cert. denied*, 133 S. Ct. 417 (2012). Challenges to smaller portions of the rule continued through 2016, concluding most recently with the Supreme Court’s denial of an attempt to exempt parts of the Tongass National Forest from the Rule. *See Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1509 (2016).

this article's scope. However, I review several that are relevant to the Executive's authority to stop oil and gas leasing nationwide through administrative action. NEPA claims make up the bulk of the relevant legal issues, including (i) the range of alternatives required, (ii) whether site-specific analysis is required, and (iii) cumulative impacts analysis.²⁶⁵ I also discuss (iv) courts' treatment of whether the Roadless Rule constituted a de facto wilderness designation in contravention of exclusive congressional authority and (v) multiple use management. The legal issues discussed are not perfectly comparable between the Roadless Rule and a potential fossil fuel-less rule, but the Roadless Rule litigation highlights issues that would likely arise.

1. Range of Alternatives Required

The number and character of alternatives considered consistently cropped up as a legal issue in Roadless Rule litigation. The question was twofold: first, whether the Roadless Rule's EIS identified an appropriate management objective, and second, whether reasonable alternatives had been considered in light of that objective. The first decision to enjoin the Rule, *Kootenai I*, found the alternatives analysis to be under inclusive,²⁶⁶ and the court in *Wyoming I* agreed when it later enjoined the Rule.²⁶⁷ The latter court targeted its dissatisfaction at the lack of an alternative that meaningfully considered allowing future road development, noting that "the proposed action alternatives were all identical except the degree of restrictions placed on timber

265. Other NEPA issues that arose in Roadless Rule litigation include the need to prepare an EIS in the first place, scoping, participation of states and other agencies, and the requirement to supplement or revise an EIS. Of these, it is worth noting Judge Brimmer's frustration in *Wyoming I* that the Forest Service did not explain why cooperating agency status was not granted to the ten states that applied for it: "[T]he Roadless Rule affected 53.37 million acres of land, or 92% of the total inventoried roadless areas, in those ten most affected states, and the Forest Service did not find it worth its time to explain why it was denying cooperating agency status to those states." 277 F. Supp. 2d at 1221. The Interior Department would probably have a similar explanation to make.

266. *Kootenai I*, 142 F. Supp. 2d 1231, 1243–44 (D. Idaho 2001).

267. *Id.* at 1224.

harvest.”²⁶⁸ Notably, the court rejected the Rule’s national scale as a reason for not discussing alternatives, stating that it “would not permit the Forest Service to promulgate a rule of national scope and then eliminate alternatives simply because it finds considering a large number of them ‘unmanageable.’”²⁶⁹

Both the Ninth and Tenth Circuits eventually disagreed with this analysis. The court in *Kootenai II* noted that the project’s objectives would generally be thwarted by road construction, meaning that “any inclusion of alternatives that allowed road construction outside of the few exceptions allowed in the Roadless Rule would be inconsistent with the Forest Service’s policy objective in promulgating the Rule.”²⁷⁰ Recognizing that “the Forest Service could not define its objectives in unreasonably narrow terms,” it found no indication that the Forest Service had done so with the Roadless Rule.²⁷¹ When the Tenth Circuit reached a similar conclusion, it noted that “agencies have considerable discretion to define the purposes and objectives of a proposed action, as long as they are reasonable.”²⁷²

While the district courts that enjoined the Rule did not agree, the Circuit precedent suggests the Interior Department could similarly promulgate a rule that, other than a no-action alternative, considers only alternatives that exclude oil and gas leasing. Given the discretion afforded agencies in defining a project’s scope, choosing not to consider oil and gas-inclusive alternatives likely would not violate NEPA, even if the alternatives spanned a national scale.

268. *Id.*

269. *Id.* at 1225.

270. *Kootenai III*, 313 F.3d 1094, 1120–21 (9th Cir. 2002). One circuit judge agreed with the district court, arguing that “[t]hese ‘alternatives’ . . . omit the obvious alternative of not banning road construction and repair. Thus the agency failed . . . to give a ‘hard look’ at all the alternatives.” *Id.* at 1128 (Kleinfeld, J., concurring in part and dissenting in part).

271. *Id.* at 1121–22 (majority opinion).

272. *Wyoming III*, 661 F.3d 1209, 1244–45 (10th Cir. 2011) (citing *Utah Env’tl. Cong. v. Bosworth*, 439 F.3d 1184, 1195 (10th Cir. 2006); and *Friends of Se.’s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998)).

2. Site-specific Analysis

The courts in *Wyoming I*, *Wyoming II*, and *Wyoming III* also grappled with whether the Roadless Rule EIS should have considered site-specific analysis. The answer to this question depends on the circuit. The Ninth Circuit case law requires site-specific analysis, and the Tenth Circuit case law does not. The court in *Wyoming I* considered the question and made note of Ninth Circuit case law requiring that an agency conduct “reasonably thorough” site-specific analyses under NEPA, even for broad, programmatic projects.²⁷³ However, the court chose not to impose this requirement given the absence of similar precedent in the Tenth Circuit. When the Tenth Circuit was confronted with the same question in 2011, it also declined to follow the Ninth Circuit: “Because the Roadless Rule is a ‘broad’ nationwide rule, the Forest Service was permitted . . . to evaluate the common environmental impacts and effects of the rule ‘generically.’”²⁷⁴ Indeed, the Council on Environmental Quality (CEQ) regulations provide that, for “broad Federal actions such as the adoption of new agency programs or regulations,” the agency “may find it useful to evaluate the proposal[] . . . [g]enerically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.”²⁷⁵

The Ninth Circuit rule requiring site-specific analysis, even for large projects, could encumber the Interior Department’s ability to create national policy through rulemaking. Such a requirement adds administrative effort and opens the door to increased litigation. This requirement also suggests that the benefits of a national rulemaking might be limited. If smaller-scale analysis must be made, then breaking the rulemaking into more manageable pieces could be a feasible strategy for the Interior Department to take.

This difference in NEPA interpretation might also foreshadow

273. *Wyoming I*, 277 F. Supp. 2d 1197, 1227 (D. Wyo. 2003) (citing *California v. Block*, 690 F.2d 753, 765 (9th Cir. 1982)).

274. *Wyoming III*, 661 F.3d at 1256 (citing 40 C.F.R. § 1502.4(c)(2) (2011)).

275. 40 C.F.R. § 1502.4(b),(c)(2) (2015).

where the Interior Department would be likely to defend legal challenges. For a plaintiff interested in pursuing claims over site-specific NEPA analysis, a forum in the Ninth Circuit would be more attractive than in the Tenth Circuit.

a. *Cumulative impacts analysis under NEPA*

The Roadless Rule's history indicates that cumulative impacts for large-scale management actions are speculative and tough to nail down, which makes NEPA challenges based on cumulative impacts difficult. Several cases addressed the adequacy of the Forest Service's cumulative impacts analysis for the Roadless Rule. These challenges arose in light of three rulemakings related to, but separate from, the Roadless Rule, where plaintiffs questioned whether the analysis of the four rulemakings taken together was adequate. The court in *Kootenai I* thought they were not, characterizing the analysis as "cursory and general."²⁷⁶ Applying the Tenth Circuit's "independent utility" test,²⁷⁷ the court in *Wyoming I* similarly found that the Forest Service's effort to consider the rulemakings cumulatively was "completely devoid of any substantive discussion" of these impacts.²⁷⁸

As with the other NEPA issues, the Ninth and Tenth Circuits ultimately disagreed with the district courts. The Ninth Circuit required only minimal cumulative impacts analysis, finding that "the potential cumulative effects of the Roadless Rule are too speculative to be amenable to in-depth analysis in the EIS."²⁷⁹ The Tenth Circuit also found the EIS's analysis to be adequate in light of what was foreseeable. Noting that the combination of the rulemakings "would likely result in an overall . . . increase in unroaded areas in IRAs," the court held that the Forest Service

276. *Kootenai I*, 142 F. Supp. 2d 1231, 1236, 1238 n.11, 1247 (D. Idaho 2001).

277. *Wyoming I*, 277 F. Supp. 2d at 1227–28 ("Under the independent utility test, an agency must consider the cumulative impacts of other reasonably foreseeable agency actions if they are so interdependent with the proposed action that it would be unwise or irrational to complete one without the others.") (citing *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1173 (10th Cir. 2002)).

278. *Id.* at 1228.

279. *Kootenai III*, 313 F.3d 1094, 1123 (9th Cir. 2002).

did not need to address the “magnitude or degree” of the cumulative impacts “because the agency could not reasonably predict what specific actions and decisions would be taken under the other three rulemakings in the future.”²⁸⁰

The Ninth and Tenth Circuits’ reasoning is encouraging for an administration eager to utilize rulemaking to stop emissions of oil and gas into the atmosphere. Whether conducted through withdrawals or systematic RMP amendments, a large-scale policy of ending oil and gas leasing would surely intersect with other management decisions over the same tracts of land. Based on the courts’ treatment of the Roadless Rule, the NEPA analysis for a comparable oil and gas rule might dodge some cumulative impacts analysis. Some degree of analysis would surely be required, but the impacts likely would be “too speculative to be amenable to in-depth analysis in the EIS,”²⁸¹ making such a rule more resilient to challenges under NEPA.

b. *De facto wilderness*

One pertinent non-NEPA legal question is whether the Roadless Rule usurped Congress’s exclusive power to designate land as wilderness. The issue is not directly relevant to ending oil and gas leasing under FLPMA and MLA authority, but it illustrates courts’ deference to matters firmly within the Interior Department’s, rather than Congress’s, control.

In the *Wyoming I* and *Wyoming II* challenges, plaintiffs asserted that the Roadless Rule constituted a de facto designation of wilderness by taking land that was inventoried with wilderness designation in mind and ascribing equivalent protection (through regulation). The district court in *Wyoming I* agreed with the claim, articulating several ways that the Rule resembled a wilderness designation and disapprovingly emphasizing that “Congress has the sole power to create and set aside federally designated wilderness areas pursuant to the Wilderness Act.”²⁸² The Tenth Circuit, on the other hand, found that “a comparison of the provisions of the Wilderness Act and

280. *Wyoming III*, 661 F.3d 1209, 1253 (10th Cir. 2011).

281. See *Kootenai III*, 313 F.3d at 1123.

282. 277 F. Supp. 2d at 1233, 1236.

the Roadless Rule demonstrates that IRAs and wilderness areas are not functionally equivalent or ‘essentially the same.’²⁸³ Instead, the court emphasized that the Forest Service “Organic Act gives the Forest Service broad discretion to regulate the national forests, including for conservation purposes.”²⁸⁴ Thus, in light of a direct challenge to administrative authority vis-à-vis Congress, the court found that a rule closely resembling a congressional power did not overreach executive authority.

That finding matters to fossil fuel leasing for two reasons. First, terminating the United States’ oil and gas leasing program does not closely resemble a power held exclusively by Congress. To the contrary, the MLA unequivocally delegates management of the federal mineral estate to the Secretary of the Interior. Second, like the Forest Service Organic Act, FLPMA gives the Interior Department “broad discretion” to regulate public lands—which includes conservation purposes. Thus, from a birds-eye perspective, a no-oil and gas rule would implicate similar policy considerations as the Roadless Rule on this issue, suggesting that such a policy is well within the delegated power of the Interior agencies.

c. *Multiple Use*

Lastly, I consider Roadless Rule of multiple use management. *Wyoming III* was the only case to reach the merits of a multiple use claim, and its analysis confirms the well-known pattern of deference to agency discretion on such claims. However, the reasoning leaves some room to wonder whether a national policy that completely excludes a particular use could be said to comply with the multiple use mandate.

Against claims that the Roadless Rule amounted to a “one size fits all” regulation requiring “identical treatment” of all inventoried roadless areas, the Tenth Circuit found no violation of the multiple use mandate.²⁸⁵ The court’s reasoning was grounded largely in the fact that the Rule included exceptions to road construction and timber harvest proscriptions in some

283. *Wyoming III*, 661 F.3d at 1229–30.

284. *Id.* at 1234 (citing *U.S. v. Grimaud*, 220 U.S. 506 (1911)).

285. *Id.* at 1267–68.

areas. Acknowledging that “the rule does provide broad, uniform prescriptions for IRAs,” the court found that the rule did not require identical treatment across the board because it allowed road construction activity to occur in certain areas.²⁸⁶ The court also pointed to the Forest Service’s “broad discretion to determine the proper mix of uses” and disagreed with the plaintiffs’ contention that the Forest Service failed to give “due consideration . . . to the relative values of the various resources in particular areas.”²⁸⁷

The first part of the court’s analysis is troubling for a plan to eliminate oil and gas leasing and probably offers the strongest argument against such a policy. The court was persuaded by exceptions to the Roadless Rule, seemingly interpreting the multiple use standard to require at least some variation in the permitted uses across management zones. Under this conception of multiple use, oil and gas leasing would need to have a home somewhere in the federal land management regime. The implication is that a single and nationwide rulemaking could be rejected or later rulemakings in a series of them would face increasingly tougher scrutiny to show multiple use management. With that said, the court in *Wyoming III* was also entirely cognizant of the relatively toothless nature of the multiple use mandate; the court highlighted case law that characterized the doctrine as “more permissive and aspirational than mandatory”²⁸⁸ and noted that multiple use “breathe[s] discretion at every pore.”²⁸⁹ In light of this deference and if the Interior Department had to make such a showing at all, it could probably satisfy its multiple use mandate with trivial showings of oil and gas development (e.g. small levels of a highly specific type of natural gas extraction, or development in only a few small regions). Realistically, multiple use management’s “aspirational” nature makes it unlikely to threaten a rule eliminating oil and gas development from onshore land. If the Interior Department’s

286. *Id.* at 1267.

287. *Id.* at 1268 (citing *City of Denver v. Bergland*, 695 F.2d 465, 484 (10th Cir. 1982)). *Id.* (citing 16 U.S.C. § 529 (2006)).

288. *Id.* (citing *Bergland*, 695 F.2d at 484).

289. *Id.* (citing *Perkins v. Bergland*, 608 F.2d 803, 806–07 (9th Cir. 1979)).

major hurdle is satisfying multiple use, then there is minimal cause for concern.

C. Roadless Rule summary

The largest takeaway from the Roadless Rule's history is that administratively creating national policy is logistically harder than it is legally questionable—especially when vastly different administrations run the executive over the course of promulgation. The majority of legal challenges that the Rule faced were based on NEPA and the procedural adequacy of particular components of the rulemaking process. Less prevalent were challenges to the Forest Service's authority on the whole to promulgate the rule. The cases that did make such challenges were grounded on the Wilderness Act, which has little to no applicability to oil and gas leasing, or the multiple use mandate, and is a mostly meaningless standard. Thus, for a president looking to terminate oil and gas leasing through a rulemaking proceeding, the biggest concern would probably be following procedural rules and defending them against a barrage of NEPA challenges.

Applying the Roadless Rule's history to oil and gas also suggests that a single, national rule would be harder to implement than several smaller rules. Because of the possible need for site-specific NEPA analysis—a process most easily broken into smaller parts—and because a single national rule with no exceptions for fossil fuel development grinds against multiple use principles, opting for smaller-scale rules could be a strategic option.

VI.

CONCLUSION

Given what is at stake with the United States' oil and gas leasing regime—enormous fossil fuel reserves that are slowly and surely being converted into greenhouse gases by the extractive industry—the executive would be wise to act. Existing law provides the opportunity to do so, and President Obama took the first step in taking advantage of this power with his administration's coal moratorium. Between the MLA and

FLPMA's planning and withdrawal provisions, the Interior Department also has more than enough discretionary authority to put a permanent end to federal oil and gas leasing.

A major trend within these laws is the interplay between individual and amalgamated actions. For both lease issuance decisions and individual land management decisions, Secretarial discretion is fairly ironclad, with courts very reluctant to impose themselves into administrative decision-making. That discretion may weaken somewhat as more decisions are considered; broad patterns of refusing to issue a lease or intentionally excluding a certain use from land plans arise arguably violate MLA's overarching policy and FLPMA's multiple use mandate. Although, in a sliding scale effect, the ability to challenge patterns of decision-making under the APA decreases as the action challenged becomes less discrete.

The executive branch could use this effect to its advantage. In early stages of terminating oil and gas leasing, BLM could simply stop issuing leases. These individual decisions would be hard to challenge in light of the extensive case law recognizing the Interior Department's nearly absolute discretion on the matter. Smaller land use plan revisions and amendments, going through the normal rule and comment process, would provide more systematic exclusion of oil and gas activity while still basking in the penumbra of discretion. Eventually, a larger rulemaking process similar to the Roadless Rule—which probably entails large withdrawals—could more permanently and more programmatically initiate a national policy that keeps oil and gas in the ground. If a presidential administration directed its Interior Department to thoroughly comply with appropriate procedure (including NEPA), and if the administration were prepared to defend against a firestorm of legal challenges, such a rulemaking would likely succeed.