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Edited Panel Transcript: An Update on Energy/Natural Resource Issues of Interest

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EDITED PANEL TRANSCRIPT
AN UPDATE ON ENERGY/NATURAL
RESOURCE ISSUES OF INTEREST

ENERGY LAW AND POLICY IN THE ROCKIES
OCTOBER 14, 2016

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Peter Forbes, Andrew Emrich, Ryan Lance*

I. INTRODUCTION BY TOM SANSONETTI

The panel entitled “An Update on Energy and Natural Resource Issues of Interest” was designed to educate the conference participants on a wide variety of topics with impacts, not only in Wyoming, but across the Rocky Mountain states. The goal was to provide more of an in-depth review of important policies and litigation than afforded in newspaper stories, online articles, or radio summaries.

The first panelist, Dessa Reimer, an of counsel attorney in the Jackson office of Holland & Hart LLP, reviewed the “Litigation Over the Bureau of Indian Affairs’ (BIA) New Pipeline Right-of-Way Rule,” which became effective in April 2016, as it applies on the Wind River Reservation and elsewhere in Indian Country. The panel discussed the potential for extensive negotiations and lengthy litigation between pipeline owners seeking Right-of-Way (ROW) renewals from tribes as a result of the new rule provisions.

The second panelist, Bret Sumner, a partner in the Denver office of Beatty Wozniak LLP, spoke about “The Sage Grouse Rebellion: Litigation Update.” He sorted out the issues involved in the seven pending cases in a variety of federal courts over the Endangered Species Act’s key provisions protecting the bird and the eleven impacted states. He further addressed the inevitability of other western range-wide issues on behalf of other species once the sage grouse litigation is resolved.

The third panelist, Peter Forbes, a partner in the Denver firm of Carver, Schwarz, McNab, Kamper & Forbes LLP, in “Whose Lease Trumps, Oil or Coal,” addressed a novel case of first impression faced by the Campbell County District Court. He explored the question of when the operations of two valid federal mineral lessees collide, and the Bureau of Land Management (BLM) lessor refuses to choose between the two, how does state law determine which lessee has priority to proceed and at what cost?

The fourth and final panelist, Andrew Emrich, a partner in the Denver office of Holland & Hart LLP, tackled the topic of “BLM’s Programmatic Coal Leasing Review and What it Means for Wyoming.” The presentation included a sobering appraisal of the federal government’s decision-making and its impacts on Wyoming employment figures and state budget.

II. COMMENTARY¹

TOM SANSONETTI: . . . We do have a very diverse panel today. You’re going to be hearing a little bit about Indian law and right-of-ways and coal and oil, and gas, and endangered species. I think it should hopefully provoke a lot of good questions along the way.

So our first topic is going to be all about the current litigation that is going on over the Bureau of Indian Affairs new pipeline right-of-way rules, which a lot of people don’t even know have come into existence because it’s that new.

And our speaker will be Dessa Reimer from the law firm of Holland & Hart. Dessa advocates for clients involving federal and state environmental regulation including environmental impact assessments, endangered species, and permitting aspects of project development on private, public, and tribal lands. . . .

DESSA REIMER: Thank you, Tom, and thank you to the University of Wyoming for having me here. It’s great to be on a panel with such really great speakers and a diverse array of topics. . . .

I’m going to talk today about rights-of-way in Indian country, and you might wonder why is this relevant in Wyoming. We’ve got one reservation, and there’s not a lot of energy, new energy development going on there or new rights-of-way being put in place.

One of the questions earlier sort of reflected why this is important, and that’s because, when we have interstate pipelines that are spanning potentially over a thousand miles and only a small bit may be on a reservation or there may be tribal interests involved, those particular interests can be the lynchpin or the trigger point for federal involvement and also may be the source of controversy that holds up your pipeline.

So when you hear the terms “Indian country” and “pipelines,” maybe today this is what you’re thinking about because this is what is in the news. And this is the Dakota Access Pipeline protest, and I’m going to close my talk discussing this pipeline and its issue in a minute.

¹ This transcript was edited for space and brevity.

But, first, I want to talk to you just a little bit about the BIA right-of-way regulations and those that came into effect this year and what those mean for rights-of-way in Indian country and some of the litigation that has ensued because of some of the more controversial aspects of those new rules.

So, first, let's talk about the BIA's right-of-way regulations. They became effective in April of this year, and in order to kind of understand the context of how these changes are significant, you really need to understand a little bit about the history of Indian law and allotment.

It's not incredibly complicated to get a right-of-way on tribal land. The BIA, Bureau of Indian Affairs, grants the right-of-way subject to the consent of the tribe. What is more complicated is when you're in a situation where there's allotted land at issue.

And allotted land stems back from the 1880s, the 1887 Dawes Act where there was this philosophy, that if we could give the individual Indian landowners their own parcel, they'd have an easier time assimilating, and we could potentially get away from the reservation system.

And between 1887 and when the Dawes Act went out of favor in the 1930s, millions of acres of land that were reservation lands held in trust by the United States government for the tribes went into the hands of the individual landowners, and a lot of it was also lost from the tribes entirely. It went to white landowners so that the reservations became smaller and a lot of the land became segmented.

The Pine Ridge Indian reservation in South Dakota is one example, and you can see the checkerboard that you end up having there, where some of the land remains in tribal hands, some of it is owned by allottees, and a lot of it is owned by private citizens who have no tribal interests.

So if you're going to put a pipeline or transmission line or really locate any project on that type of land, you're going to have some complicated issues to deal with. And in 1948, the United States government recognized this concern, and they enacted the general Right-of-Way Act, which required only a majority of consent by the owners of a parcel.

Now, a lot of land, because the Right-of-Way Act, or the Allottee Act, doesn't actually say how land will be transferred when an Indian owner dies and in many cases the Indian owners didn't designate a particular person to take over their interest, it just went to their heirs.

So this chart is interesting because what it shows is even after only six generations of Indians, assuming those owners only have three heirs, if the land is divided among the heirs, you end up with a fractionated interest problem, where

these allottee lands are held as an undivided whole. So it's not as if your twenty acre parcel is then divided into one acre pieces. Every fractionated interest owns a fraction of the undivided interest in the whole.

And so to do anything on that allotment, you need to have permission of the allottees, and under the 1948 Act, that means the majority of the allottees. So getting a right-of-way in Indian country, particularly when there's allotted land, is complicated.

It's made even more complicated under the new rules, and this is the real controversial part of them is that, not only do you have to obtain the majority consent of the allottees, but now if the allottee owns his or her share as a life estate holder, you must obtain a majority consent of the remaindermen. So these are folks who don't have a present interest but have a future interest in the allotment, and the difficulty there is they may not even be identified. So it becomes a very difficult situation.

The other thing that the rule does is it really puts more emphasis on the tribe's rights under the act and allows the tribes to enact statutes or regulations that might govern rights-of-way and gives them the right to pull back a right-of-way without BIA consent. So there's some uncertainty that's also been interjected into the mix when you've got rights-of-way in Indian country.

So the litigation that's ensued since the BIA changed its right-of-way regulations, the first case is in North Dakota. The Western Energy Alliance did an outright challenge to the statute, a facial challenge, arguing that it violated the 1948 Act because it requires the consent of remaindermen, which, according to that challenge is beyond the definition of owners in the statute.

They also questioned the shift towards more tribal control of the rights-of-way, in particular that the tribal interests could write regulations that superseded the federal regulations and terminate the BIA rights-of-way without approval.

The court denied a preliminary injunction against the rule in that case, and after that, the suit was dismissed without prejudice. So it could be brought again.

The other case that's going on right now is in U.S. District Court in New Mexico. This is the Western Refining pipeline. This is a renewal of a pipeline that's been in the ground for sixty years, and they've been attempting since about 2010 to negotiate with the allottee landowners for renewal of their right-of-way for a twenty year grant. It's a seventy-five mile pipeline, and the allotment covers a half a mile, the allotment in controversy.

Originally in 2013, they had consent. BIA issued the right-of-way, and they went on their merry way and thought that everything was going to be great. And they had a challenge from one of the allottees that had not consented.

And *sua sponte* the Interior Board of Indian Appeals determined that a life estate holder who had consented to that right-of-way could not consent to a twenty-year term because they could potentially die before the twenty year term was up and said you had to go back and get the consent of the remaindermen.

They [Western Refining] went back and attempted over a number of months to get the consent of the remaindermen, but by then, the writing was on the wall and the folks who were opposing the renewal of the right-of-way had gotten into the ears of folks who had originally consented, and consents were withdrawn. And the folks who held the right to consent asked for \$8.6 million if they were going to consent to a twenty-year renewal of this term.

Well, of course, that didn't seem that great to Western Refining. They asked BIA to approve the right-of-way based on some other bases, and the BIA denied it. So they appealed to the Interior Board of Indian Appeals, which doubled down on its requirement that the remaindermen consent.

So now we're in a situation where Western Refining has appealed to the District Court in New Mexico. That case is being briefed, and we'll see where it goes from here.

One other case that I think is worth mentioning here, and this is a little bit of a different issue, but in this case, the Public Service Company of New Mexico (PNM) needs a right-of-way for overhead power, and there's five allotments at issue. And because the allottees have this increased leverage in negotiations, they were requesting exorbitant amounts in some people's minds for these right-of-way renewals.

And so PNM decided that they would condemn the land, which you can do for allottee land—not for tribal land, but land that's held by allottees—you can condemn it.

What happened was one or two of the allottees conveyed a very small fractional interest back to the tribe. And the tribe got involved in the litigation and moved to dismiss the case against the two allotments where they had a fractional interest, arguing that they were an [indispensable] party under Rule 17. But they have gotten immunity so [PNM] couldn't sue them in a condemnation action.

And the U.S. District Court in New Mexico agreed and dismissed those two allotments from the condemnation action. PNM asked that it be certified to the Tenth Circuit. It was, and so currently, the briefing is going on in the Tenth

Circuit. So we'll see what happens in that case whether you can condemn the allotted parcel where, you know, a .05 percent interest is held by a tribe.

And that brings me then to the Dakota Access Pipeline, which I think is of interest to the folks in the room just because it is so current. It really is a case in point for the increased scrutiny on pipelines and energy development where it touches Indian interests, not necessarily just on the reservation.

So this map shows you the length of the pipeline. . . . [T]he *Washington Post* prepared this particular map. But you can see the area where there's a tribal site or there's tribal interest on the crossing of the Missouri River. Other than that one crossing, the entire pipeline length of 1,174 miles is on private land.

And the only federal authorization that was required is from the Corps of Engineers to cross a number of jurisdictional waters, but in particular, the issue here is the Missouri River crossing.

And so even though the pipeline isn't on the reservation, the Standing Rock Sioux tribe, which considers the area around the Missouri River to be sacred and part of the ancestral homeland, is objecting on two bases.

One, that the cultural, impacts to cultural sites and the actual excavation of the pipeline could be significant and there was inadequate consultation with the tribe prior to beginning of construction; and also that there could be potential contamination of their water source, the Oahe Lake, which is adjacent to the Missouri River where the pipeline is going in.

Two courts—well, you all are aware that throughout August there were a number of protests that continue to grow around the pipeline, and folks gathered in North Dakota in an attempt to stop the construction. And you saw a lot of peaceful and unpeaceful protests.

Two courts, both the U.S. District Court in North Dakota and the D.C. District Court declined an injunction against the pipeline construction. In North Dakota, the pipeline developer Energy Transfer Partners had gone in and requested a Temporary Restraining Order (TRO) after they were getting some violent incidents against the contractors.

And in the U.S. District Court in D.C., the Tribe itself has challenged the pipeline and is working towards attempting to get the pipeline stopped for failure to consult under the National Historic Preservation Act.

But in both instances, the district court denied the injunction. The D.C. Circuit has a lengthy opinion with a detail, over twenty pages, the efforts that

were made by the Corps of Engineers to consult with the Standing Rock Sioux tribe, who, for the most part, ignored them.

Towards the very end, they did get involved and objected, but the sites that they identified were outside of the pipeline right-of-way. So whether they actually end up prevailing in that suit, I think is a little bit questionable.

But what [the tribe was] able to do is you've got two courts who declined an injunction, but the Obama Administration and the Corps of Engineers asked for a voluntary halt on all construction of the pipeline under the Missouri River or within twenty miles actually of the Missouri River on either side.

The pipeline was actually forty-eight percent completed and reclaimed, and this is a \$3.7 billion pipeline. So you've got just this one area of controversy.

On Sunday October 11, the D.C. Circuit Court reversed the freeze and held that the construction could continue within twenty miles of the pipeline, and Energy Transfer Partners began construction on Tuesday. So they are back at it, which has led to a whole new round of protests.

There are even senators who have been calling for the pipeline to be stopped, for there to be a full Environmental Impact Statement (EIS) over the entire pipeline length to look at its impact, which, as the National Environmental Policy Act (NEPA) folks in this room know, is small handle question: Does the Corps have jurisdiction to consider the impact of the entirety of the pipeline route?

And the other key that they're concerned about is should that NEPA analysis consider the climate change impact of transferring oil from North Dakota to Illinois? So they're asking for a full environmental review. So we'll see where it all goes.

Energy Transfer Partners has committed to completing the pipeline. The Obama Administration still has not granted the final . . . easement that's needed to cross the Missouri River. So the courts are saying, "Go forward." Energy Transfer Partners wants to move forward, and we'll see where the Obama Administration takes it.

I think the final lesson from all of this is there is just increased scrutiny on projects in Indian country. And even if your project isn't on Indian land there, if there's Indian interests, you need to be aware of them, and you need to be considering addressing those upfront and planning for those.

TOM SANSONETTI: So we'll take some questions from the audience or comments on any of the discussion concerning the BIA. We have a question from the lady right there (indicating).

AUDIENCE MEMBER: I was wondering if the tribes were claiming that any of their—any [treaty] rights given to them were being threatened by the pipeline. Like in Minnesota with the Alberta Clipper litigation, the Fond du Lac Nation was claiming that, if a pipeline spills or something, that their hunting and gathering rights that were guaranteed to them under some treaties could be infringed upon. And that's how they were granted standing.

Were treaty rights an issue in this case?

DESSA REIMER: Treaty rights are not an issue with the Dakota Access Pipeline. At least the case hasn't been framed up that way.

Their main concern is the cultural resources that are actually in the ground, those being disturbed, and also the potential for a leak or spill that could impact their water source in the lake. But it is an issue, the aboriginal hunting rights, and it is a basis for standing.

I have other clients in Nevada who have a pipeline that's going to be going through the ancestral homelands and the aboriginal hunting grounds of the Goshute tribe. So in that case, they've been able to challenge the project under NEPA, but a basis for their standing is that "this is an area where we hunt and fish, and what you're doing is going to impact the wildlife resource, and that in turn is going to impact us." . . .

AUDIENCE MEMBER: Going back over forty years, the Corps of Engineers has done extensive cultural resource surveys along the whole Missouri River. I've not heard anything being referred to those studies and what they showed in terms of cultural resource permits.

DESSA REIMER: It's a good point. I mean, we have to be sensitive to the cultural interests of the tribe. In this particular case, the surveys didn't show any cultural resources that were going to be impacted, and the tribe refused to be involved in some of the invitations to actually come in person to the site and survey it themselves.

Other tribes that were invited to other portions of the pipeline did come, found cultural resources, and the pipeline rerouted around it.

Energy Transfer Partners, if you read the [D.C. District Court] decision, appears has done its best to do the cultural resource surveys. I mean, we've certainly seen in other situations where there's been less done.

The other thing that [Energy Transfer Partners] attempted to do is where this crossing is the Missouri River, it's immediately adjacent to another gas pipeline. . . . In fact, a portion of the area has already been disturbed. So to the

extent there were cultural resources there at one point, they would no longer be there. But that doesn't stop it from being a flash point and a referendum essentially on environmental justice.

I think one of the things that Suedeen Kelly was talking about is that some of these disputes and protests of pipelines don't necessarily have to do with the impact of the pipeline itself, but more about a concern for the development of oil in North Dakota, pipelines in general, where we see leaks occurring.

And so whether it's merited or not, this particular pipeline has become a flash point. There's other pipelines on the horizon where this could be an issue.

AUDIENCE MEMBER: How far out from any given project can Indian interests, as you phrased it, extend?

DESSA REIMER: Well, Indian interests are quite broad because if you're talking about the ancestral homelands of the tribe, that's essentially the United States as a whole. At some point, tribes inhabited the entirety of the United States. Some of them may not have historical ties to areas anymore, but it's very broad.

In particular in the West, you know, almost any area could be considered an ancestral area for a tribe. There is some requirement, though, that they show a use of it and a cultural connection or religious connection to this area.

In the case of the Standing Rock Sioux tribe, where this lake is, which was created by a dam, there's actually a rock formation that was covered by the lake where they did hold tribal rights at one point. And so there's no question that the tribe has a cultural interest in what is going on with this particular area.

But it is quite broad, and the requirement to get involved in have that government-to-government consultation should arise fairly early in the process, and you have to be looking broadly at the number of tribes you request comment from.

TOM SANSONETTI: Okay. I'm going to take the prerogative of the chair and ask you one that brings us to Wyoming and the Wind River reservation.

Historically, rights-of-way being approved over the Wind River Indian reservation were determined by the Joint Business Council and then approved by the Bureau of Indian Affairs. But the Northern Arapaho Tribe has withdrawn from the Joint Business Council.

So what happens to one of the many existing pipelines that go across the Wind River Indian reservation if a renewal is, say, approved by the Eastern Shoshone and not approved by the Northern Arapaho? Is one half of the pipeline in trespass?

DESSA REIMER: That's a really good question, Tom. . . . And the answer, just the simple answer is you're going to need the consent of both tribes, or you could potentially be in trespass.

There's some ambiguity here because the Bureau of Indian Affairs, up to now, has said that they will continue to honor the decisions of the Joint Business Council which is being run by the Eastern Shoshone alone because the Northern Arapaho tribe has pulled out.

But practically speaking, you're going to have to get the consent of both tribes, and that particular reservation is a unique situation, as you all know, where these two tribes were forced to share the same land. And so the difficulty, the politics of getting anything approved on the Wind River reservation is incredibly complex.

TOM SANSONETTI: Thank you, Dessa.

Our next topic is going to be the sage grouse rebellion and a litigation update on what has occurred with that hot topic, which has been part of front-page news not only in Wyoming but in our surrounding states for a decade or more. Our speaker is going to be Bret Sumner. He's with the law firm of Beatty Wozniak in Denver, Colorado. . . .

BRET Sumner: . . . I've been asked to give an overview of the sage grouse litigation. There are currently seven pending cases, and there are so many different components that go into this. I have about fourteen minutes. So I'm going to go a little fast. I'm going to hit the high points, and I'm going to hit the low points.

. . . Just to set the stage and what does this bigger picture look like and how do you place the litigation into that context? Well, as was discussed a little bit this morning, you know, over the past eight years, we've seen an increasing trend for federal regulation reaching into areas traditionally reserved for private lands, private minerals, you know, primarily through the Endangered Species Act, also through the Clean Air Act and the Clean Water Act.

And this affects obviously a very broad array of stakeholders: oil and gas and mining and renewable projects, ranching and farming, and local government. Certainly state and local economies are impacted by this.

And what we're seeing in this litigation is these stakeholders, you know, filing challenges and pushing back, sometimes in coalitions, sometimes on their own. And this really does harken back to the sage brush rebellion from the late 1970s and 1980s where the Federal Land Policy and Management Act (FLPMA) was being implemented and those implemented regulations were being put into place, and that was also touched upon in the panel this morning.

As we fast forward to looking at sage grouse as another trend, it is probably the biggest trend of rangewide species issues under the Endangered Species Act.

Sage grouse habitat covers over 165 million acres in the West, covering over eleven states. But we're seeing this trend elsewhere, as well. The lesser prairie chicken covers five states including, you know, many of the oil and gas basins in West Texas and Oklahoma and Kansas.

The American burying beetle is an example in the mid-continent. You saw that there was a petition to list the Monarch butterfly, which ranges from Texas all the way up to North Dakota.

And these present numerous challenges for the Fish & Wildlife Service, but implicate a lot in terms of areas where they haven't seen a lot of Endangered Species Act types of issues before.

Many of Permian Basin oil and gas companies have had a rude awakening into that over the past several years with the lesser prairie chicken being one example and a very good analogy in some respects with regard to what we have with the sage grouse.

But also think about it from the standpoint of these global settlements that have occurred with Water Guardians and the Center for Biological Diversity and the Department of the Interior. You know, these global settlements cover hundreds of species, and they set a deadline for the Fish & Wildlife Service to render decisions on whether or not to list them.

This creates tremendous pressure on the Fish & Wildlife Service. They don't have the staff or the budget or resources to address this. And part of the solution is to try to engage at the state level, and we're going to talk about this in the context of sage grouse in that they were looking for the states to develop these conservation plans and how can you balance that with not having it all focused in Washington, D.C.?

But as you can see from this litigation that we're going to talk about these cases, it's really led to a lot of states filing legal challenges against the Department of the Interior and also the U.S. Forest Service for these plans that come out.

Just a real quick history, again, just hitting some of the highlights. You know, the first petition to list the greater sage grouse as a threatened or endangered species under the Endangered Species Act was filed in 2002.

The global settlement agreement that I mentioned actually included the greater sage grouse, and that was approved by Judge Sullivan in Washington, D.C., in 2010. And the sage grouse was listed on that schedule that there had to be a decision rendered by September of 2015.

You know, about that time, Fish & Wildlife Service issued a warranted for listing decision, meaning that that started the process for them to decide whether or not to put together rules to actually formally list the species.

At the same time that started the updating of the federal land use plans for the sage grouse. This encompassed over ninety-eight federal land use plans involving BLM and also the Forest Service, again, over the eleven different states.

And that just kind of, again, sets the stage for where we are today and what this litigation has led up to. You know, these federal land use plans really try to focus on the conservation elements for preserving the sage grouse, putting in protections and management prescriptions so that the species does not have to be listed.

On the other side of the equation, you know, this creates a lot of restrictions in terms of areas that are closed to oil and gas leasing and development or mining, putting surface disturbance caps in that could range from two percent to five percent meaning that, for a particular geographic area, you cannot have more than five percent surface disturbance.

There are other things such as lek buffers, no surface occupancy stipulations, and a variety of other measures along the way. And the theme and one of the concepts that has been used is, you know, landscape level conservation and landscape level planning, and what does that mean?

Well, to be determined in a lot of ways because what we're seeing is a lot of disparity across these various plans. One example in Colorado in the White River field office resource area, which is in northwest Colorado, they have a two percent surface disturbance cap in sage grouse habitat.

When you cross the border into Wyoming, the same priority habitat, you know, there's a five percent surface disturbance cap, and there's a lot of other disparities, that just being one of them.

. . . In September of 2015, the land use plan Records of Decision were issued. There were two Records of Decision issued by BLM. One cover was called the Rocky Mountain region which is North Dakota, South Dakota, Wyoming, Colorado, and not even Utah. Utah isn't the other one. The other one is the Great Basin Record of Decision covering parts of Montana, Idaho, Utah, California, and Nevada. And then you have two Records of Decision for the Forest Service as well.

And at the same time in September 2015, when those decisions were issued, Fish & Wildlife Service issued a decision that, based upon these plans and other components, that the sage grouse was not warranted for listing as a threatened species under the Endangered Species Act.

The first case that was filed was filed in the U.S. District Court of the District of Nevada. This was filed by Western Exploration, which is a mining company. It was joined by the State of Nevada through their attorney general, six Nevada counties, a ranching company, and three other mining companies. And on the defendant side, in addition to having the Departments of Interior and Agriculture for the Forest Service, defendant intervenors included The Wilderness Society, National Wildlife Federation and the Earth Works.

And the causes of action varied. Just one slight detour. There are two U.S. Supreme Court cases, one, *Ohio Forestry*; another is *Sioux v. Norton* that talked about, when it comes to these federal land use plans, you cannot do facial challenges to the management prescriptions. You actually need to have an implementation action to have a right to cause of action. But you can file challenges that are procedural based.

For example, if you did not comply with the National Environmental Policy Act, NEPA, you can bring those challenges now because the failure to follow those procedures are ripe because that's part of the promulgation of the land use plan.

And similar things which we'll get into in a little bit regarding the Administrative Procedure Act and whether or not there's a formal rulemaking requirement that had to be complied with because essentially the argument is that some of these management prescriptions, in effect, unilaterally amend BLM's regulations involving oil and gas.

Some of the other causes of action—and again, this is a general overview, and then we're not going to get into specifics for each one—FLPMA and its cousin the National Forest Management Act (NFMA), you know, these causes of action focused on a failure to manage federal lands under the multiple use mandate of FLPMA and failure to recognize and prioritize the nation's need for energy resources.

There's a variety of NEPA challenges. The most common one was failure to conduct a supplemental EIS and have that available for public review and comment. There were substantial changes made between the draft EIS for these plans and the final EIS—new nomenclature, very substantive changes that had not been seen before during scoping or during prior drafts. And there was no opportunity for public review and comment on that. Other NEPA causes of action: Failure to take a hard look at what the economic impact of these plans are. What does this mean in terms of decreased revenue and those types of things and also challenges under the Administrative Procedure Act.

After Nevada, Idaho jumped in. They filed in the District of Columbia, Governor Otter and the State of Idaho.

Next up, we have two cases in Wyoming. The Wyoming Stock Growers Association filed a challenge, and then the Wyoming Coalition of Local Governments. Those cases were consolidated. They were before Judge Johnson here.

Utah Governor Herbert and the State of Utah filed a legal challenge soon thereafter, focusing on the Utah plans.

Western Watersheds Project, this is one of the environmental organizations that are really focusing on sage grouse early on in the process. They had a prior case before Judge Winmill in Idaho that led to some of this settlement, led to some of this land use planning. They were challenging everything, saying that “the plans did not go far enough. You need to have more restrictions on your development so you’re properly protecting the species.”

American Exploration & Mining also filed a challenge, again, broadly challenging the plans as related to mining. This was also filed in the District of Columbia.

For the District of Columbia cases, these were both before Judge Sullivan. Some might know Judge Sullivan from the polar bear cases during the Bush Administration.

Poe Leggette and I had a case twelve years ago before Judge Sullivan, and it definitely left an impression on me. It seems like yesterday. But, you know, very proplaintiff, environmental plaintiff, and it would be very interesting to see how that plays out.

Western Energy Alliance and the North Dakota Petroleum Council filed a challenge in the District of North Dakota. Why North Dakota? Well, it turns out that North Dakota, although it has a small amount of habitat overall, it has the largest amount of habitat, sage grouse habitat that’s been leased for oil and gas, over 80 percent. And, you know, that’s something of great concern for the members of the North Dakota Petroleum Council as well.

And these challenges are focused on the oil and gas provisions specifically in these various plans, not challenging Wyoming—get into that a little bit later if I have time.

You know, in terms of Wyoming, itself, I really am already running out of time. But obviously, Wyoming has been at the forefront for a long time. Governor Freudenthal, you know, was very proactive early on in his administration in tackling sage grouse. Governor Mead has carried that torch and has been at the forefront of a lot of these discussions.

There's a lot of tension between the states and the Department of the Interior regarding these land use plans and regarding what is actually required.

You know, all along, Wyoming's state plan was held out as the benchmark for other states to follow. Other states thought they had different ways to deal with it. Obviously, for Wyoming, with sixty-seven percent of sage grouse habitat in the state itself for the entire range, this is something that is very important.

And there are significant differences in BLM strategy in terms of what was followed there. I don't have time to get into the specifics. I really hope we can ask Ryan some questions because he can probably give us some battle stories there.

But the bottom line is these issues aren't settled. The BLM said they were going to adopt Wyoming's state plan in these federal land use plans. They did not.

At the project level, the Continental Divide-Creston Project EIS and Record of Decision that just came out, people were looking for the state plan to be adopted for mitigation. It was concluded as a menu of potential options, but it was not. And I think these issues are still going to play out in the future.

What does this mean from a bigger picture? Well, this really is—you know, one Interior official Sarah Greenberger from the Department of the Interior was quoted in a *Greenwire* article, saying that this really is a Jenga puzzle because the not warranted decision for sage grouse is really based upon the management prescriptions we have in these land use plans.

If there is a successful legal challenge and those prescriptions go away, then the whole thing can come crashing down, and there's not going to be justification for having that not warranted for listing decision.

That's something that we're going to see play out over time. All these cases are—two of these cases have been briefed on the merits. The rest of the cases are just in their early stages.

The case before Judge Sullivan with Idaho was actually supposed to have oral argument next week. We learned yesterday that's been pushed back until December 15.

So regardless of what happens at the district court level, you know, we're going to see litigation go up through the circuits. We have cases in the D.C. Circuit, Eighth Circuit, Ninth Circuit, and Tenth Circuit. So it's going to be really fun, or not.

Concluding observations, implementation is the next one. Obviously, implementation actions are going to create a new wave of legal challenges. I think

Wyoming, I think the Petroleum Association of Wyoming is taking a wait and see approach—that's just my own personal opinion—you know, to see how this is really going to play out.

Let me just give you two quick examples just to show on the implementation side the challenges we're going to confront.

There is a company that has leases outside of Casper in Wyoming. They want to propose nine wells in core habitat. These nine wells would be drilled from one, possibly two pads. There are already forty-six wells and pads in this existing field.

BLM said, "Well, for those nine wells you're going to have to do an environmental impact statement." Obviously, that's not going to happen. But, I mean, when you think about it, an environmental impact statement takes years, costs extensive amounts of money and further delays further development.

Another example is in Colorado. A company filed for a unit application for its valid, existing leases that it held for quite some time. After they had that unit, they're going to drill one or two wells in order to hold those leases.

And Colorado BLM denied the unit application, saying that, "Because it's now in sage grouse habitat"—sage grouse habitat designation occurred long after the lease, years and years after the leases were issued—"we're going to deny your unit application."

Well, you think about that from a common sense standpoint, if they allowed the unit, you could hold more leases with less disturbance. But that's the type of thing we're seeing.

I think part of this is BLM is still waiting for further implementation guidance. And I think that there's going to be a pause. We're still waiting for regional guidance to come out, and I think that a lot of things that Katie touched upon are going to be at the forefront.

What is compensatory mitigation? What is net conservation gain? What does this all mean? And what does this equate to? In the short term, it equates to a lot of money. It equates to a lot of cost, and for federal lands and minerals in particular, you know, and where the prices are, those are things that just make a lot of this stuff not economically viable in the short term. . . .

AUDIENCE MEMBER: Being a nonlegal person, can you tell me the advantage or the disadvantage of throwing everything into one basket and saying, "I'm against all EISs" versus just one specific action?

BRET SUMNER: Is the question related to the management aspect of it in terms of having broad management for the species? Or is it from a legal standpoint of, you know, challenging specific components of the plans? . . .

Well, it's really oddly structured because, when you have ninety-eight federal land use plans covered by four Records of Decision, you actually have to challenge the Record of Decision. And those Records of Decisions cover, you know, a substantial number of plans. . . .

[T]rying to narrowly focus it . . . one, these states just have interest for their particular plans. So for Idaho, Nevada, Utah, for example, they're just focusing on those narrower areas.

For the oil and gas industry, while we are focusing on the broader prescription contained in those, we're just focusing on the oil and gas. We're not seeking to overturn the entirety of the plans. We're seeking to have certain provisions related to oil and gas management prescriptions remanded so they can be fixed. . . .

AUDIENCE MEMBER: I guess my question was, knowing Judge Winmill has made a lot of bad rulings on sage grouse and perhaps taken ownership of this issue, do you see any evidence of that in how fast the case is going? We notice the environmental groups filed their challenge, global challenge in his court. So what are you hearing about that?

BRET SUMNER: That's a good question. It's actually been moving very slow. At this point the administrative record doesn't need to be lodged until the end of January 2017. Judge Winmill has not ruled on any of the motions to intervene including Western Energy Alliance, but also including the Petroleum Association of Wyoming and others.

So Idaho has a very full docket right now, doesn't have very many judges. I think the Department of Justice is looking at the Winmill effect, so to speak. They have filed a motion to sever and transfer that case out of Idaho entirely and breaking it up into Nevada, Utah, and Washington, D.C.

On the flip side for the case that I'm involved in with Western Energy Alliance and North Dakota Petroleum Council, they have also filed a motion to sever and transfer to transfer it, to split up our case into Nevada, Utah, and D.C.; there's a lot of gamesmanship in terms of jurisdiction and venue.

We have asked for a hearing in our North Dakota case, and that hasn't been scheduled yet. But tying back to Winmill, I think there's definitely concerns about it, and that's why so many people have intervened. I don't think the pace of the case is an indication, but I think that they, the plaintiffs, do have a very friendly judge to go before.

TOM SANSONETTI: . . . What are the next sage grouses? Your map was very telling, the number of states that have been impacted by the sage grouse and the amount of time and effort taken for the state governments and attorneys dealing with the mitigation thereof.

During my era, the 1990s, we were dealing with the spotted owl, and that was Oregon, Washington, Idaho, et cetera. Obviously, you showed us about the sage grouse. What's the next plant or animal on the conveyor belt?

BRET Sumner: . . . When the decision came out that the sage grouse was not warranted for listing, the following was tweeted from the U.S. Fish & Wildlife Service: "What's good for the bird is good for the herd," meaning big game.

So if you look at the sagebrush ecosystem and sage grouse being one of the indicators of that ecosystem, there's another 286 species that rely in some form or fashion on sagebrush habitat. Big game is going to be a big one.

I mean, we've had declines in elk in Colorado and elsewhere. I think that's going to be a very, very big focus, and you'll have even more challenges. You know, there's some migration for sage grouse, but for the migration patterns for these big game, that's going to present a lot of interesting challenges.

The Monarch butterfly is another example, you know, which happens to winter down in Texas and the oil fields down there and end up in North Dakota and the Bakken in the summer. You know, that's another example where I think that—being a little cynical, I think that's one of the reasons those rangewide species were targeted.

So this is just the beginning, and rangewide species and landscape level conservation and land use planning is going to be the theme probably for the next twenty plus years.

TOM SANSONETTI: Very good. Thank you, Bret. Very interesting.

Our next speaker is going to have the interesting topic of "Whose Lease Trumps, Oil Or Coal?" And our speaker is going to be Peter Forbes. He is a partner with the law firm of Carver, Schwarz, McNab, Kamper & Forbes in Denver.

PETER FORBES: Good afternoon. The case I'm going to talk about, the issue I'm going to talk about is actually a case that Tom and I are currently litigating, which is the reason I'm up here. . . .

These first slides will illustrate what I call the operational problem that gave rise to this case. What you're seeing here is a map of about a ten mile by ten mile

section of land south of Gillette. This land is the home of what's called the North Antelope Rochelle Mine. It is the world's largest coal mine. . . .

[I]n the southeast corner, they've been mining down there for decades. They've mined out most of that area. Their plan was then to go kind of to the north and to the west and mine out the rest of that ten-by-ten-mile block.

This problem arose because . . . up in the northern part of the mining area, the mine, you see that green area. That green area is known as the Payne Field. And my client has been operating oil wells in that Payne Field area for something on the order of forty years or more.

The operational problem is this. We have vertical wells. They need to strip off 300 feet of topsoil, and never those twains shall meet. So that's the operational problem. Operationally, we can't both do the same thing at the same time them. That then leads to the business problem. Usually these things are resolved by the bigger operator which is usually the coal operator coming in and making an offer to the oil operator to buy out their wells, and usually that's based on primary production.

The problem here was that my client . . . as the manager of that estate, the personal representative, needs to make sure it was maximizing value. So it couldn't just sell for the primary reserve value without determining whether there was secondary recovery possible. We determined, based on geologic analysis, that there was secondary recovery potential there, and our view was we should be paid for that too. The parties couldn't work out a business solution, and that led to the legal problem.

We both hold federal leases. We hold federal oil leases; they hold federal coal leases. And so the question becomes whose lease prevails? . . .

I pulled out a few excerpts from these leases, and, you know, if you look at it, you'll see the oil lessee has the exclusive right and privilege to drill, to build all structures necessary to the full enjoyment, and you have that right for as long as you produce oil and gas in paying quantities.

There's then a standard of prevention of waste. It says you have to operate with due regard. Then at the bottom it says, "Well, the United States reserves the right to enter into other surface leases only insofar as it won't interfere with our lease operations."

So we're thinking, well, our lease is pretty clear. You know, we have the right to do what we want to do, and they can't take it away.

They then say, "Well, wait a minute. Here is our lease." And, again, this is just an example. "We've got the same right to drill and build structures for the whole

term of our lease.” And then they say, “Look, and now the United States as lessor says it’s going to condition any other uses to prevent unreasonable interference with our rights.”

So both parties say, “Well, our lease controls.” So then we look at what are the controlling legal principles. There’s not a lot of case law on this type of issue. There are maybe only three or four cases in the last hundred years, none of which involve federal leases.

So the first problem we have to encounter is whose law controls? Is it federal law, or is it state law? Now, the obvious answer is, of course, it’s a federal lease, they’re both federal leases; of course, federal law controls. Wrong. The federal law does not control.

The fact is that, because the Mineral Leasing Act is not a comprehensive code addressing all aspects of lease operations, where there’s no federal regulation or law on point, then state law is the background against which these leases are construed, and so state law controls.

So we found out in this case, for purposes of these disputes in Wyoming, Wyoming law is going to control. So then the question is what does Wyoming’s law say? Well, you can well guess Wyoming law doesn’t say anything because these disputes are always resolved out of court.

So we then begin litigating the issue. Initially, we were in federal court, and of course everybody would think, “Well, they’re federal leases. There must be federal jurisdiction.” You’d be wrong again. Because both parties here were Delaware entities, there’s no diversity, and because the lease is controlled by state law, there’s no federal question. So even though we have a dispute involving federal leases, it is not subject to federal court jurisdiction.

So we go back to state court, and we actually litigated this in Gillette before Judge Rumpke and we’re arguing about what legal principles guide here. Now, of course, our position is, well, gosh there’s some great commentary even though there’s no case law, but there’s great commentary saying things like first in time, first in right is an ageless common law maxim. It is probable that a policy of first in time, first in right would be applied by most courts absent statutes or regulations to the contrary.

There’s also BLM’s 1992 Regional Solicitor’s Opinion interpreting for multiple mineral use regulations that are still in place and saying the clear implication of these regulations which provide for the issuance of a second lease only if it includes suitable stipulations for simultaneous operation is that the operating rights of a subsequent lessee are subordinate to those of a prior lessee.

So, of course, we're feeling pretty good because, in most instances, we've got the first, the prior lease. Tom, of course, is feeling pretty good because you recall that due regard language I pointed out there. He convinces the court that what that due regard language really means is that you've got to take into account the impact of the prior operations on the subsequent operations. So it's not first in time, first in right.

We have briefed that. We have summary judgment briefing, and the Court basically kind of agrees with Tom, but not totally.

The Court says, "Well, what I'm going to do is approach this from a fiduciary perspective. The Secretary of the Interior is charged with maximizing the return to the United States. That's his or her job. So I'm going to look at this as what type of solution, what type of operating solution will maximize the return to the United States?"

And by analogy he says, "That type of approach is consistent with Wyoming law because, when you look at the state land board . . . commissioners' regulations, which address multiple use, they've got different criteria saying, well, when you have a subsequent operation come in depending on this, the first operation trumps depending on this, the second operation trumps. Or if you can do both at the same time at a reasonable cost, then you do them both together, and the subsequent operator pays the additional cost."

So Judge Rumpke tells us that that is the standard he's going to use, and then he said, "But first you try to negotiate a solution," which we did, couldn't do it.

Then we go to trial and ask, "judge, we can do that, but we were originally planning to do that onsite with a couple of horizontals. But our analysis now shows we can actually do that, generate the same return if we do it before the horizontal producers, horizontal injectors from off-site paths."

The problem we have is that that's going to cost an additional \$13 million. So our view is we'll do it. We'll move offsite if they'll pay the additional \$13 million.

Their view was, "Well, this project is not a real project. If you let them stay there, we're going to lose . . . 200 million tons of coal valued at \$3 billion, would cost a billion dollars in taxes and revenues lost to the State of Wyoming and the federal government."

The judge, again going to the Wyoming Board of Land Commissioners regulations basically finds, "Well, yes, you can do it at the same time, but you'd have to move off site. So I find it reasonable to allow . . . Tom's client "to mine through. Your client has get out of the way, but they've got to put the \$13 million with the court so that, if you can go get approval from the Wyoming Oil and Gas

Conservation Commission (WOGCC) to do your project, I'll order that money be released to you so you're held whole and you can do your project. The federal government can get its royalties from you. . . . Everybody is happy."

So on the question of whose lease prevails, the answer is basically neither. It's going to be a fact-by-fact determination if the model adopted by the district court is followed.

But the other point is we don't even know if that's going to be followed because his decision just came down on September 30 and there are appeals still to be taken. So it's been a fascinating odyssey so far, and it's not over yet.

TOM SANSONETTI: All right. Questions for Peter?

AUDIENCE MEMBER: So you mentioned at the very end that this is a fact by fact analysis. I guess my disclaimer, yes, I was on the case, but in thinking about the judge's decision, how would it have been different if your client, the oil and gas producer, did not already have set in place the secondary recovery plan in terms of being able to put forth evidence that this was something that was vetted—you know, there were engineering reports, et cetera, et cetera—and had experts talk about that? What if that did not exist? How would that play out?

PETER FORBES: I suspect that the way it would have played out is that the court would still have adopted the same analysis, but would have found under the—and this is in Section 18 of both the oil and gas leasing regulations for the state land board—he would have found that the proposed operation, which would be our new proposed operation, wasn't justified in light of the cost it would impose . . . because we did not have an existing operation and we weren't trying to pursue an existing operation. So I think he probably would have said, "Just pay them for their primary, and then you can go through."

TOM SANSONETTI: Actually a good one to kick around is what do you think the impacts would have been if the BLM had been a party to the lawsuit?

PETER FORBES: Well, that's a good question. I think the problem is, A, obviously we can't join the BLM without their consent; B, the BLM, their policy was that this is a dispute between lessees and not something that they get involved with; and so, C, my suspicion is we would never have found out, and so there would never have been an impact from the BLM being involved.

AUDIENCE MEMBER: I am not a lawyer. I'm a social scientist. But am I correct in thinking that these subjects you're talking about fall under the Mineral Leasing Act of 1920?

PETER FORBES: Well, yes or no. Yes and no. Yes, because the leases are issued pursuant to the Mineral Leasing Act. No, because this particular dispute is not governed by the Mineral Leasing Act. So this type of dispute is governed by state law or what the judge predicts state law would be.

AUDIENCE MEMBER: I guess my question then is it seems like a lot of our national law on these issues is pretty old, the Mining Act of 1872, and this goes back to 1920. Is that part of the reason why this is so complicated?

PETER FORBES: I guess I would say this type of dispute arises so rarely that I don't think it would have been—well, I guess I'd say I can't say because I don't know if this is the kind of dispute that somebody would have said, "Okay. Let's put a comprehensive set of regulations in and address this." So I don't know.

But it's not strictly a function of the fact that the Mineral Leasing Act is from 1920. That's not it. It's because it basically just talks about the terms under which leases will be issued but doesn't talk about disputes between competing lessees.

AUDIENCE MEMBER: Just a quick question here. The first one is were the prior leases recorded? And did the court find that the State of Wyoming's recorded statutes had any application?

PETER FORBES: The leases were BLM leases. So I mean they were federal leases. So they were all in the register. We argued by analogy that the recording statutes should be significant because it would limit what they would take subject to the lease rights that have been granted by us so that the recording statute reflected a public policy of first in time, first in right.

The Court found that it didn't reflect Wyoming public policy, that Wyoming public policy was reflected in the Board of Land Commissioners regulations. . . .

AUDIENCE MEMBER: Under the Mineral Leasing Act as amended or with amendments, are there not conservation provisions that would be touched upon in terms of coal either being left in the ground and disruption of the economics of mining or oil and gas being left in the ground due to geologic aspects of reservoir management and loss of value?

PETER FORBES: There are, and those considerations played into the judge's decision. What the judge found is that the BLM certainly could regulate in the interest of conservation. It could turn off one lease. Particularly, it could turn off the oil leases if it wanted to.

But because the BLM had not acted, he could not make a decision in interest of conservation, but it was relevant in his analysis to say, "Is there a way that we can develop both simultaneously at a reasonable cost?"

AUDIENCE MEMBER: From a policy standpoint, I'm interested in why the BLM hasn't acted. They did act in the past as it related to coalbed methane (CBM)—yeah, no fingers pointed—you know, both because of timing and the cost of, for example, getting an lease by application (LBA)—which currently you do anyway. And with oil and gas, it's so much easier and cheaper to get the lease, and a lot of those leases have been held by production for years to where with a coal lease you don't go out and get it until you need it within a certain period of time. So I'm interested in your policy thoughts on that.

PETER FORBES: Well, first, obviously I can't speak for the BLM. I will say that they . . . listened to both sides. There was a lease suspension request . . . which they carefully considered. They didn't act on it in light of the litigation. I will also say that their coal leasing process tells coal lessees to take into account the fact that there may be existing operations in their path and to take that into account in their bid. . . .

AUDIENCE MEMBER: Well, if you've driven down fifty-nine, there's oil and gas everywhere around the coal mine. And that's an interesting point, and probably there isn't much coal that doesn't have oil and gas, and with the increased cost of the wells, that's also a changing factor, I would guess.

PETER FORBES: It does change. And obviously, what also changes is whether the formation has secondary recovery potential or not.

AUDIENCE MEMBER: Or tertiary.

PETER FORBES: Or tertiary.

TOM SANSONETTI: Very good. Thank you very much, Peter.

For our last presenter, we're going to stay in the coal realm for a while, and the topic is going to be the "Bureau of Land Management's Programmatic Coal Leasing Review and What It Means for Wyoming." And our speaker is going to be Andrew Emrich. Andrew's a partner in the Holland & Hart law firm in Denver, Colorado, and practiced in Cheyenne for a number of years. . . .

ANDREW EMRICH: . . . I wanted to talk today about the coal Programmatic Environmental Impact Statement (PEIS) and BLM's kind of leasing review of the federal coal program. And I wanted to do that in three main areas.

First of all, for setting the stage for the legal context that sort of led up to or was the backdrop for the coal leasing PEIS. Secondly, the highlights of the proposed PEIS itself. And then, finally, what is at stake for the State of Wyoming and more broadly the leasing and development of federal minerals based on what comes out of this environmental review.

First of all, what's the legal backdrop for this particular review? A case was filed just about two years ago, in fact, November of 2014 by the Western Organization of Resource Councils and the Friends of the Earth in Federal District Court, Washington, D.C.

And what the environmental groups, they challenged the Department of Interior and Secretary Jewell, and the legal theory was that the Department of Interior had a mandatory obligation to undertake a wide ranging national programmatic environmental impact statement to consider the impacts of federal leasing nationwide.

The ground of that was that the Department of Interior had not done such a review since 1979. The coal program was basically finalized at that point into sort of the two main pieces of it.

But what the plaintiffs argued was that, under the Council on Environmental Quality's regulations, that there was an obligation due to new developments, new environmental impacts, and new consequences that therefore triggered a mandatory obligation on the department's side to undertake this broad review.

The Bureau of Land Management along with three intervenors—the State of Wyoming, State of North Dakota, and the Wyoming Mining Association—jointly moved to dismiss the case. The case was, in fact, dismissed in August of 2015. And what the federal district court judge said in Washington, D.C., was that there was no longer any action left by the federal government that would require any sort of NEPA review.

NEPA is a leadup, as folks probably know, to federal action. The action in this case, according to the court, took place in 1979. There was no ongoing action that would require ongoing NEPA, and therefore, the plaintiffs could not compel the federal government to undertake such a national review.

Now, why is that significant? Well, it's significant because it was basically the second time in about four years that the federal courts have said that there is no legal obligation for the department to undertake a broad ranging either regional or national environmental impact statement.

A couple years earlier in 2011, Wild Earth Guardians—a group out of Santa Fe, New Mexico, with offices throughout the West—filed a petition with the Bureau of Land Management. And they had asked for something similar. They asked for basically a regional environmental impact statement under the theory that BLM can basically lease coal under two different programs.

They can do what's called lease by application which is the only way that coal is leased today, where an individual mine operator will nominate an adjacent tract and say to the federal government, "We would like to develop this tract."

The other way this can be done in the regulations—although it's no longer operational anywhere in the United States and certainly not in the Powder River Basin—is what they call regional leasing where the BLM will sort of look at a region and nominate an area for potential leasing. They will put that out, and then individual companies would bid on the leasing after they go through a broad environmental impact statement.

Now, BLM, as I said, has not really used that form of leasing since the early '90s. Wild Earth Guardians was not happy about that. They filed a petition for rulemaking with BLM and said, "We want you to go back to the regional leasing."

And the reason is very similar to what we found in the Western Organization of Resource Councils litigation, which is that global climate change and the social cost of coal development, according to Wild Earth Guardians, was not being adequately analyzed by BLM.

So they wanted BLM—they wanted the courts, well, first of all, BLM to voluntarily to undertake a rulemaking. BLM said no. Then they sued in Federal District Court in D.C. to try to get a federal judge to force the agency to do it. And that case was dismissed in 2012.

So you have two federal court decisions in a period of four years, both of which came to very similar conclusions saying that there is no legal obligation for BLM to undertake either a regional or a national impact review and, in fact, the way that the BLM is doing it is satisfactory.

Now, what's interesting about BLM's own decision in 2011 is that they looked at some of the same issues that they're going into in the current review because the Wild Earth Guardians said, "Look, you're not getting a fair return on federal coal." That's one of their arguments.

They also said that the federal government should impose a carbon tax. They should essentially charge coal producers at the point of the lease sale to offset what they thought would be impacts of global climate change. What did Interior say to those two points?

BLM answered that petition and said, "First of all, we are getting fair market value." They gave a very extensive and robust explanation for why they were.

And, secondly, they say, "We do not have the legal authority to impose a carbon tax. A new tax would have to be directed by Congress. As an administrative

agency, we don't have the authority to do that." That's the legal background for sort of what led up to, in some ways, the coal leasing PEIS.

Second point, what are the highlights of this program? January 15 of this year, 2016, Secretary Jewell issued Secretarial Order 3338, in which she basically committed BLM to undertake a national programmatic environmental impact statement to do, in her words, provide "a comprehensive review of the federal coal program and consider whether and how the program may be improved and modernized to foster the orderly development of BLM administered coal."

That's sort of the organizational principle for the review. In the scoping notice, the agency set out basically six main issues that they asked for public comment. These are the issues that BLM and the department are going to focus on in this very comprehensive environmental review.

First of all, how, when, and whether to lease federal coal. Secondly, whether the federal government is receiving a fair economic return from its bonus bids, rental payments, and royalties. Third, how best to address climate impacts of coal production and combustion. Fourth, whether federal leasing program adequately accounts for externalities related to federal coal production, including environmental and social impacts. Fifth, whether leasing decisions should consider whether coal from a given tract would be used for domestic use or export. And, finally, whether coal supports or should support fulfilling the energy needs of the United States.

Now, think about that for a second. There's six questions, and you don't really get to whether—the issue of coal's role in the federal energy mix until the sixth question. All the others are either is the federal government getting a fair return? What are the global climate change impacts? And should some of these other environmental and economic externalities be somehow built into the payments that federal coal lessees pay to the federal government?

As part of this broad review in the Secretarial Order, Secretary Jewell imposed a three year moratorium on all new federal coal leasing. There are some exceptions, but by and large, there will be no new federal leasing on federal lands during the pendency of this environmental review. And it was an estimate that this would take about three years. I won't say any more about that.

Finally, what's at stake for the State of Wyoming and the broader region in the country as a result of this review? Obviously, we don't have the time to get into the details of each one of these issues, but as to the impacts on Wyoming, I want to point people to a very detailed comment letter that the State of Wyoming submitted as part of the scoping process last summer.

Their letter was submitted on July 28 of 2016 and under Governor Mead's signature, but it's a very extensive letter that includes, I think, about a half a dozen appendices from a wide variety of state agencies that get into great detail of the economic impact of changes to the federal coal leasing program on the State of Wyoming.

People in this room probably know this, but of all coal development in the United States, about forty-one percent comes from federal lands. Of that forty-one percent, about eighty percent comes from the Powder River Basin in Wyoming and Montana.

So it goes without saying that the biggest target, if you will, of any sort of reform, revision, change to the federal leasing program would be the State of Wyoming, the taxpayers, and the citizens of Wyoming.

What are some of the broader issues, though, without just looking simply at the coal industry? To me, the two that jump out at me are the third and the fourth questions that the BLM asked: whether the climate change impacts of coal production and combustion should be more broadly considered and whether the leasing program adequately accounts for externalities related to coal production? Why do these have broader impacts?

Take a step back for a minute and think about what BLM is basically being asked to consider. Right now when an agency leases a tract of federal coal, they have, for at least the past six to eight years, considered the impacts of coal leasing on global climate change.

The way that BLM typically does that, though, is by providing a sort of a breakdown of the impacts into two buckets. First are what I would consider the direct impacts, so the actual emissions of the mine site—the drag lines, the equipment, all the emissions that take place to actually pull the coal out of the ground. BLM, I think, has gotten pretty good actually at quantifying those and saying exactly what those global climate change emissions are when they look at CO₂ equivalents.

Now, the trickier parts are what I would consider the indirect impacts. What happens when the coal leaves the mines in Wyoming or Montana or Colorado or Utah or New Mexico and goes to an electric utility in the Midwest, maybe goes to an export to a South Korean or Chinese electric utility user? What is the impact at that stage? That's where it gets very difficult.

And what BLM has basically done at the leasing stage is they try to give an estimate based on what the average estimate of CO₂ equivalence emissions are from a ton of coal. They quantify that; they put it in a chart. And they've been putting that into their leasing EISs now for probably four or five years. And the

Office of Surface Management has now been doing a similar type of analysis when they're approving mine acquisitions.

What the environmental community is really driving at is saying that that's not enough. It's not enough to say what the carbon emissions are from coal use, either directly or indirectly. "We expect the agency to sort of quantify and to describe what the impacts are going to be once the coal, the carbon emissions go up in the atmosphere, climate is changed and the impacts come back down to the land, whether it's in the West, globally, whatever."

I mean, that is an extremely complicated analysis, and even Department of Environmental Quality (DEQ) has admitted that the science is not refined enough to give any degree of specificity on those impacts. But that's being pushed for by a number of commenters in this process.

The second impact that I think has broad implications is whether the leasing program should account for externalities related to coal production. What are they really talking about here? The issue is, if you consider that there are, according to the current administration, certain economic impacts relating to global climate change, how do you quantify those? How do you take a percentage of those based on what the electric utility industry is doing?

And then do you sort of back that into the leasing price and charge coal lessees a higher amount either at the bonus stage or increase the royalty rate to compensate, in the department's view, for the economic impacts of global climate change? Now, if you think this is going to end at the coal industry, I think you're probably kidding yourself.

The final thing I would like to say is that the litigation that sort of led up to this—and by the way, the government won all the cases. So there really wasn't an obligation to do it, but the same kind of cases are now being launched against the oil and gas industry.

Just within the last couple of months, Wild Earth Guardians filed a very broad challenge in federal district court in Washington, D.C. They challenged 397 leases in three states—Colorado, Wyoming, and Utah—very similar legal theories that BLM basically was doing NEPA analyses on a lease-by-lease basis. They certainly were looking at the resource management plan, and they were building in some of that regional component.

But Wild Earth Guardians thinks that BLM has an obligation, before they lease any particular oil and gas lease, to consider a wide range of global climate change impacts for all leasing throughout a three state area. You can just imagine what that's going to do to the timing of getting federal oil and gas leases approved if this turns out to be successful.

And the other issue, I think, is that all these things end up being connected. So even though the Department of Justice satisfactorily and robustly defeated the claims by the environmental nonprofits to force the agency into this kind of review, now that the department has voluntarily undertaken this kind of review, it will be interesting to see what kind of legal defense they mount when these same challenges were brought against the oil and gas industry.

I only say this finally because my sense, in being involved in this litigation over the last seven years or so, is that these challenges seem to be brought against the coal industry first, and then that the oil and gas industry follows but by about two to three years with a lot of these legal theories. And I think Dessa may have touched on this in her piece that these same kinds of issues are now starting to percolate at the midstream sector.

So I can assure you that, once the Corps of Engineers issues its easement to go under the lake on the Missouri River, that someone will come forward and say, “They did not adequately impact—analyze the impacts of global climate change, not just on the direct construction activities of building the pipeline, but the throughput of the crude oil over the life of pipeline and what all the downstream impacts are going to be once that gets to the refinery sector and maybe even into the transportation sector.”

So it's a very interesting and cutting edge area. . . .

AUDIENCE MEMBER: My question is I was interested in that other bullet that seems like it has some legs too, and that is should lease decisions take into account other things if they're versus using the coal locally versus exporting it?

And I'm thinking about what Suedeen [Kelly] was talking about. We have our first liquefied natural gas (LNG) exports, and of course coal exporting is important for the coal industry. So what can you tell us about that component of the PEIS?

ANDREW EMRICH: Well, it's interesting, of course, because the lead time, as people probably know, whether it's coal or oil and gas or whatever, the leasing stage, the time between when the federal government decides to issue a mineral lease and the time that it's actually developed, there can often be four, five, six years.

So essentially, I think the question that's being posed is whether BLM, when it looks at a particular tract in Campbell County, Wyoming, has to consider where all that coal is going to go and whether that impacts the leasing decision in two ways.

Number one, I think there are people that say you can get more money by exporting the coal, that that should somehow impact the bonus payment, and so the coal lessee should have to pay more money for the same tract of coal if they're able to sell it at a higher price internationally. So that's the economic side. I think on the environmental side, what you're going to see more and more is this intent to sort of globalize the NEPA impacts. So is BLM going to be required to consider the emissions in a South Korean utility every time it leases a coal tract in southern Montana or Wyoming?

And are they even going to know necessarily where the coal is going to go? And there's a fair amount of guesswork. Some of the companies have a fairly small group of customers. Many have a broad range.

They can be American utilities. They can be Canadian utilities. They can be Asian utilities. And BLM now is going to be expected to think and say more and more about where that coal is going from an environmental standpoint.

TOM SANSONETTI: Let me have Bret comment here.

BRET Sumner: Yeah, not a question, Andrew, but kind of a comment tying into your commentary on the carbon tax, and the Department of the Interior does [not] have the ability obviously to legislate a carbon tax.

Tying back to Katie Schroder's presentation on compensatory mitigation, I mean, I think what we're going to see for mining and for oil and gas is, well, what are the legal limits of that compensatory mitigation? And when does compensatory mitigation turn into an indirect carbon tax, you know, on these industries?

You know, on the sage grouse front, we're looking—you know, the initial things we're looking at 400-to-1 mitigation ratios. For every acre of disturbance, up to 400 acres of compensation for that, you know, possibly higher.

In the CDC EIS that came out in Wyoming for over 8,000 wells, they had an original example for compensatory mitigation that turned out to be \$1.5 million per pad. When this was brought to me, I said, "Well, \$1.5 million for 8,000 wells, that's not very bad."

"No, no, no. That's per site." That has since been withdrawn, but I think that that's the thing that we're going to be seeing in these resource development industries over time, and I think that's an interesting legal issue for a future discussion in terms of where are the limits of compensatory mitigation? And when does it become an indirect tax on carbon?

TOM SANSONETTI: Okay. I think that's it. . . .