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Edited Panel Transcript: Public Lands in the Twenty-First Century

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EDITED PANEL TRANSCRIPT

PUBLIC LAND STATES IN THE 21ST CENTURY

ENERGY LAW AND POLICY IN THE ROCKIES
OCTOBER 14, 2016

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Phil Hanceford, Ryan Lance*

I. INTRODUCTION BY REBECCA WATSON

For the twelve public land states in the West, public land management policies and regulations are critical.¹ Close to 50% of Wyoming is managed by the federal government and that management is vital to the well-being of Wyoming's citizens, environment, and economy. Federal land management is of particular importance in Wyoming, since its economy is based on coal mining, oil and gas development, and ranching in a wildlife-rich environment.

Over the last eight years, the Obama administration has worked to create a 21st century Bureau of Land Management (BLM) with policies to match. These policies are built on a foundation of addressing climate change and emphasize a strong conservation mission for BLM, a focus on renewable energy on public lands and a goal to "modernize" BLM's oil and gas regulation. The topics covered by this panel address three important Obama-era federal land initiatives:

- ▶ Modernizing and strengthening federal oil and gas regulation
- ▶ Mitigation policies for federal land developments
- ▶ Amendment of BLM's Federal Land Policy and Management Act ("FLPMA") planning rules

Alex Obrecht, an associate at Baker Hostetler in Denver, Colorado, whose firm has handled comments on several of the BLM oil and gas regulations and significant litigation challenging federal policies, kicked off the morning with "New BLM Oil and Gas Regulations, A Drag on Public Land Development?" Alex provided an overview of the numerous significant changes to the regulation of federal oil and gas and an up-to-date account of the Tenth Circuit appeal of BLM's hydraulic fracturing rule. Kathleen Schroder, a partner at Davis Graham & Stubbs in Denver, Colorado, helped the audience sort out the Administration's still-under-development mitigation policies, "Net Benefit? Compensatory

¹ Frank Jacobs, *Just How Much Land Does the Federal Government Own—and Why*, BIG THINK, <http://bigthink.com/strange-maps/291-federal-lands-in-the-us> (last visited Dec. 15, 2016).

Mitigation of Impacts on Public Lands.” Katie took us from the President’s Mitigation Memorandum to mitigation policies at the U.S. Fish and Wildlife Service and BLM and consideration of what is a “net conservation benefit.” Phil Hanceford, Assistant Director of The Wilderness Society, BLM Action Center in Denver, Colorado, concluded the panel with a focus on major changes to the FLPMA’s planning rules, “Expected Changes and Controversies Associated with BLM’s Planning 2.0.” It is with planning that BLM policies become reality and are implemented. Phil highlighted the major proposals in the draft rules as well as pro and con reactions from the public. The discussion that followed the three presentations and the audience questions drilled down on each of these 21st century public land topics.

II. COMMENTARY²

RYAN LANCE: We’ll . . . start with our first session of the day, which is entitled “Public Land States in the 21st Century.”

And I’m very pleased to introduce Rebecca Watson from Wellborn, Sullivan, Meck & Tooley out of Denver to chair the panel. It’s a very esteemed group of folks, and I think you will enjoy the discussion. . . . [S]he’s with Wellborn, Sullivan, Meck & Tooley out of Denver, and I came to know her as Assistant Secretary for Land and Minerals Management which, I believe, gives her a unique perspective on this question of public lands and public land states and the administration of the various policies associated with them. So, Rebecca, I’ll turn it over to you.

REBECCA WATSON: Great. Well, I’m glad to be back here. . . . I think this is a really important topic, and we had a sampling of why public lands in the 21st century are so important for Wyoming. Listening to two governors speak, listening to the [UW] Board of Trustees and the challenges that the university is facing, and the concept of what the state needs to do to look towards the future and to really manage its own future are wrapped up in public lands policy.

I think, in many ways, Wyoming is one of the best examples of these challenges that are facing public land states in the 21st Century. Close to half the state is federal. The economy of the state is focused on the production of commodities—oil and gas, coal, potash, cattle—largely controlled by federal public land and mineral policies. Renewable energy, recreation, and wildlife play a role in the state’s economy, but they’re dwarfed by the role of fossil fuels in the economic base and tax base of the state.

How public land is managed is vital to Wyoming’s economy and to its people. Public land management has changed very significantly over the last eight years,

² This transcript was edited for space and brevity.

and that trajectory of change is not going to stop. It's going to continue probably for at least the next four years, if not longer.

I think the governor, both governors, said it well. These changes are baked in, the market is changing, and policies and laws are changing. And it's hard to turn a ship around once it starts turning in this direction as it has.

I think the overarching driver, as we all know, for these changes is addressing the threat of climate change. These policies are moving U.S. energy supplies to lower carbon and lower methane emitting sources and new non-emitting sources like wind and solar and that is the adaptation to change. So these are some of the things that you're going to hear today and in this panel.

BLM's policies and procedures for public land management are both changing. So both how we do public land policy and the substance of those policies, regulations are changing. And our three speakers this morning are going to address those topics.

The first topic we're going to take a look at is BLM's regulation of federal onshore oil and gas. Secretary Salazar came into office in 2009, saying he wanted to restore balance; and in 2015, his successor, Secretary Jewell, said she wanted to modernize and make sure that the American public had the right return on oil and gas.

So these policy changes are what our first speaker Alex Obrecht is going to talk about. . . .

Katie Schroder, with her expertise is going to talk about mitigation, and mitigation is, I think, one of the chief initiatives of this administration.

The President has issued his own mitigation policy. The Department of Interior has led the way in developing mitigation policies, and this is a policy, I think, President Obama was primarily interested in and how to address some of the permitting delays that happen when you're putting up renewable energy and transmission infrastructure.

They have a strong focus on accelerating the development of those forms of energy, and this mitigation policy was one way to address that challenge but also climate change. So Katie is going to be talking about that. The impacts are largely unknown at this time, but it's going to be a policy that develops over the years.

Phil is going to be talking about Planning 2.0 . . . and this is the process part of the program. The Federal Land Policy and Management Act, the way that public lands are managed starts with land use planning. Planning 2.0 is a major revision of the planning regulations.

There's some very significant changes that Phil will talk about and we'll get into with dialogue, but that was one of the policy initiatives where The Wilderness Society played a very important role in helping the BLM develop these changes to how we engage on the public land.

. . . The public land, land use planning process is where the opportunity is for counties, for states, and for the public at large to weigh in on how half of Wyoming is managed. So process is important; process drives results.

So I think we're going to have an interesting discussion on these three topics, and with that, I'll invite Alex to the podium.

ALEX OBRECHT: Thank you, Rebecca, . . . I've had the pleasure over the last few years to be involved with some litigation related to a number of federal rules and federal oil and gas policies, primarily the challenge on the industry's behalf to BLM's Hydraulic Fracturing Rule but then also a fairly recent lawsuit on behalf of the Western Energy Alliance in the District of New Mexico, essentially alleging that BLM is not standing up to its mineral leasing obligations under the Mineral Leasing Act.

...

What we're going to talk about now is trends in federal oil and gas regulation. First, I'm going to start off and give a little bit of scope about how it applies on federal lands to federal minerals, why that's important, and how that actually affects states like Wyoming. We're going to move into the executive branch policies that have developed through President Obama's candidacy, in his first term, and then finally culminating with what some people will call the legislative onslaught that has been his second term in office.

And then, finally, if we have some time or during the questions, we'll talk a little more in depth about where the challenge actually stands right now by industry and by the state to the BLM's Hydraulic Fracturing Rule.

First, it's no surprise to us here in Wyoming that, in the western states, federal land is key. It's almost a third of the nation's land, and it has something along the lines of—including all of the federal land management agencies and some of the tribal interests that are held in trust—750 million subsurface acres of federal resources. And, currently, there's somewhere between 32 to 36 millions of those acres under lease for oil and gas.

As you can see from the upper left-hand map of Wyoming, this is the federal land responsibility; and just overlapping with one resource, the coal fields here, it's easy to see how important the federal policies are to actually developing Wyoming's energy resources.

And to put it in context of how important to federal oil and gas specifically the regulatory scheme is, the BLM and the Department of the Interior will tout themselves as being the only federal agency essentially to turn a profit. And just for royalties alone, fiscal year 2014, that was \$3.1 billion in royalties.

And, of course, how this trickles down and flows into the state becomes very important. States like Wyoming in fiscal year 2014 received \$550 million in federal oil and gas development. Of course, obviously, with commodity downturn, that has changed, and you can see from the budget policies that are being implemented from the top down, they're affecting every aspect of the state. So everything we can do to encourage proactive federal regulatory policies that encourage development ultimately helps the federal coffers and the state coffers.

Just to put it in context now—obviously, comparing apples and oranges—comparing the BLM's oil and gas regulatory scheme to save the federal rangeland policy, rangeland program, that program costs the BLM \$80 million, and it only generates \$12 million; whereas, royalties in fiscal year 2014 for oil and gas were \$3.1 billion.

Now, turning to President Obama's energy policies, we're going to first talk a little bit about how he sounded when he was a candidate and what happened when President Obama was actually in office both the first and second terms. And then I want to talk about some of the collateral attacks that have been spawned off of some of the presidential and executive policies, essentially, the "Keep it in the Ground" campaign.

Now, this here, this snippet is taken from the speech President Obama gave, I believe, shortly after he secured the Democratic nomination to run for president in 2008. You can see from the underlying content that climate change was one of the top goals of President Obama when he was coming in as a candidate.

And that was reaffirmed in a debate with Senator McCain, where President Obama said, "We have to prioritize. And energy policy is the first thing we're going to prioritize." Of course, at that time, he said healthcare was going to be second. I think, as we all know, the world didn't quite play out that way. . . .

During the first term, President Obama's energy policy really kind of turned into being an energy policy of not doing anything. Now, of course, focusing on the hot button issue at the time was Keystone. It obviously languished in the federal permitting process. There wasn't much action on the federal regulatory front for energy.

Of course, that changed in the second term with many regulatory initiatives specifically affecting oil and gas. *The Wall Street Journal* identified hydraulic fracking, methane emission, transportation. But that was just a small subset

of what was affecting the oil and gas industry. The industry, through trade associations and individual companies, were specifically focused on a number of regulations that were proposed or in various stages of actually being enacted.

They were having specific effects on every aspect of oil and gas production from how much you have to pay to actually secure a federal lease to what you have to do operationally to maintain that lease, how you have to actually conduct your operations on that lease; and then, finally, how you have to actually pay royalties, how you have to account for those royalties for transportation deductions and processing deductions. But as industry trade associations will tell you, the list is much larger. . . .

When we look at the Obama Administration, there has been a marked increase in the amount of major federal regulations passed. And, of course, that's major regulations defined by the federal government. That's a regulation that might have an impact of a hundred million dollars or more.

This isn't just comparing, say, a Republican administration to a Democratic administration. If you look at the last four years of President Clinton's term, many fewer executive actions and major federal rulemaking. And this chart here does not include all the actions that are proposed and could go into effect in 2015/16.

There's also a change in manner to these regulations. Operators, state agencies, they're generally familiar with working with the traditional land management agencies, primarily the BLM. The BLM generally has expertise in oil and gas development. We're seeing a lot of regulations in the second term that are being passed by agencies that don't have specific expertise in oil and gas operations.

This is becoming a problem because you have, as Katie will discuss later, regulations and certain executive policies being implemented under statutes that apply everywhere, not just to the federal lands that we discussed previously; for example, the Endangered Species Act and the Waters of the United States Rule under the Clean Water Act.

So, for example, how this is affecting operators under the Waters of the United States Rule is that a lot of operators are unsure, when they're not even close to federal land, what actually could be a water of the United States. For example, here, this is an example in Utah. Under the old regulatory regime, there was a jurisdictional determination made that this proposed well site was on a water of the United States. And now, under the new rule, it specifically finds certain types of water bodies that will now fall under the Waters of the United States Rule.

And this has operators in North Dakota primarily on private and state land and in Texas primarily on private and state land concerned whether they're next to a playa lake, whether they're next to a prairie pothole. So in effect, some of these

regulatory schemes, they apply everywhere regardless of whether it's on federal lands or federal minerals being developed. I think what we see . . . from President Obama is that the regulatory scheme being implemented is meant to completely overhaul the way oil and gas and fossil fuels in general are actually regulated.

I think one of the primary drivers behind that is the theory about climate change. We're seeing this implemented, of course, through the federal moratorium on coal leasing, but there has now been a petition submitted to the Department of Interior to place a similar moratorium on oil and gas leases, essentially arguing that under the U.S. commitment to the Paris Agreement, there's no way we can meet the emission standards that are required without having a moratorium on federal oil and gas leasing.

It has also spawned other collateral attacks. There's a movement by special interests groups that has been dubbed the "Keep it in the Ground" movement. This is related and a very specific and targeted protest to BLM's lease sales of oil and gas parcels. What this will often result in is BLM cancelling oil and gas lease sales, and this how we've actually ended up challenging the BLM, arguing that it has failed to meet its requirements under the Mineral Leasing Act to offer quarterly lease sales.

. . . As you can see from fiscal year 2010 to 2014, there's been an almost 100 percent increase in the amount of U.S. production of oil. But you see from the top two lines, almost all of that production has come from private and state lands. Federal land production has stayed stagnant to decreasing, and although the increase is not as large in gas, the trend remains the same, about a thirty to forty percent increase in total production of natural gas, almost all of that coming from private and state land.

Now, I think so we don't go too far, I will stop here, and we'll discuss the Hydraulic Fracturing Rule through the question-and-answer session.

KATHLEEN SCHRODER: Thank you very much for having me here today to speak to you. . . . So what I'm here to talk about is the Department of Interior's efforts to formalize mitigation strategies, and what that means is the Department of Interior is looking for ways intended to reduce or offset the impact of development and land use activities on natural resources.

So there's been, as Rebecca mentioned, a real focus in this administration on mitigation and mitigation policy. And I think, initially, the first formal effort that I saw was in 2013, but these ideas and concepts have been in the works before then and through various individual decision-making within the department.

So at a high level, we have a series of directives that are coming from the Department of the Interior and even the White House. As Rebecca mentioned,

there was a Presidential Memorandum in 2015 directing the use of private investment in mitigation efforts. And then, over the years since 2013, there's been a variety of policies coming from the Secretary of the Interior.

Specific to public lands, we have a 2013 BLM draft manual on regional mitigation that's been out in draft form since 2013, and I've heard "any day now" for about maybe six or eight months that it will be final. So I'm not looking at anyone in the audience, but you know who you are because I know there's some BLM folks that have been working on that maybe have a better sense of timing, but it's something that I think a lot of us practicing on public lands or using the public lands are very interested to see go final.

And, finally, we have a series of directives from the U.S. Fish & Wildlife Service on the use of compensatory mitigation. I think from my perspective, as Rebecca mentioned, I do a lot of wildlife work, and it seems that the Fish & Wildlife Service has been most active in moving the ball on mitigation, and you see it has the largest set of policies out there. And what is interesting about the Fish & Wildlife Service policies is that they apply to private lands, not just public lands. So that's just something to keep in mind as we move forward.

So what do we mean by mitigation? What is all this? In its broadest sense, mitigation is the suite of efforts reduced to—designed to reduce or offset impacts from a development action to a resource. And so often when people speak of mitigation, they speak of the mitigation hierarchy, and these concepts are actually found in the CEQ, the Council on Environmental Quality [National Environmental Policy Act] NEPA regulations that were promulgated in 1978. So these ideas have been around for a while.

But what they are is this idea that, first, if you can, you should avoid the impact of an action entirely. And this may mean not taking an action. This may mean, for example, siting an action elsewhere, outside of a wetland, outside of species habitat so that there are no impacts to the affected resources. And if you can't avoid impacts, then you should minimize them, and this usually means, for example, best management practices. In the air quality context, it might mean adding controls, emission controls to equipment to minimize the impacts of the action.

And often a subset of minimization subsets are mentioned as rectifying the impacts of an action or reducing them. So those are terms you may hear as well. And, finally, if there are residual impacts, after impacts have been avoided and minimized to the extent that they can, impacts should be mitigated with compensatory mitigation. And compensatory mitigation generally consists of the restoration of other existing resources usually off site. They might be the enhancement of existing resources, the creation of new resources and sometimes the preservation of resources.

So I know you're thinking, "Okay, Katie. This isn't that hard. Avoid, minimize, mitigate, we're done. Right? That's it." Drop the mic and I'm out. But, no, it's not that simple, and there's a lot of complexities to figuring out, particularly with compensatory mitigation, how that should work. And so what the department—this is mainly my view through my observation, but I think what the department was noticing was that there were efforts to utilize compensatory mitigation in largescale projects, be it oil and gas, be it renewable resources, you know, whatever project is being developed, whatever land use activity.

But often compensatory mitigation was done in sort of an ad hoc way. There was no real centralized look at, for example, if two projects both offer compensatory mitigation, are they offering comparable compensatory mitigation in relation to their own impact? So if project A has a substrate impact and compensatory mitigation, what is the proportion of that compensatory mitigation in relation to project B?

You also have this concern that it was being done in sort of a piecemeal way where, on the landscape level, for example, someone was just going out and looking through the species and finding someone who was willing to enter into an agreement to do the compensatory mitigation.

And maybe this was being done in a way that did not really think strategically about whether the mitigation effort was done in a place where it might deal with the best benefit to the species. And also if you have multiple mitigation efforts going on at the same time, is there a way to centralize them and really create a lift.

And so a lot of these elements are designed to target some of these issues. And I think for purposes of this discussion, two of the main controversial elements of mitigation are, one, consistency and metrics.

So the concept here is, as I mentioned, if you have project A and you have project B, what are the impacts of those two projects in relation to one another? And how can you measure them? How do you measure, for example, with air quality, it's easy. Project A might emit 100 tons of a pollutant, and project B might emit 200 tons of a pollutant.

But, for example, in wildlife impacts, if you're siting two new projects in sage grouse habitat, you know, you might disturb, for example, one might take up three acres, and one might take up five acres; but what if those impacts are lower . . . what if the habitat where those projects are sited in different habitat quality? How do you measure that? What if one is winter range and one is on a brood range habitat, for example, how do you measure those?

So there's this effort to sort of be able to consistently measure impacts of projects through metrics that are supposed to be grounded in science. And

anybody who really digs into natural resources or maybe even doesn't dig into natural resources knows that science is supposed to be objective, but it's not. There's competing studies. So there's a lot of controversy as these metrics are trying to be established.

The other thing that these policies consistently mention is this idea of net benefit or net gain or net conservation benefit or net conservation gain—I mean, these are different variations of the same theme—or else no net loss. And so what this is, is the idea of trying to incorporate some sort of standard to which agencies should require mitigation. So how much mitigation is required?

Well, what these policies direct is that, to the extent you can, to the extent an agency can, it should try and achieve a net benefit, which is, you know, not just offsetting the impacts of a project but actually providing enough mitigation that you're going above just offsetting. And if an agency can't achieve net benefit for one reason or another, then it should aim to at least offset its impact or a no netloss standard.

So all of this opens up a whole can of issues. I mean, so first you have agencies. What is their legal authority to even require mitigation? What is their statutory authority? For example, FLPMA does not really speak to mitigation so far as the BLM's organic act. It does not speak to mitigation. So what is BLM's authority to require it? What is BLM's ability to require net benefit or no net loss? So even if an agency can require mitigation, can it require mitigation that achieves these directives?

And, for example, then you get into these really hairy questions under the mitigation hierarchy where if you can, you know, the directive is to avoid to the extent possible and then mitigate. Or how much avoidance is necessary? And how hard do you have to try? How expensive does avoidance have to be before you can move on to the next step of mitigation?

Then my million dollar question is what the heck a net benefit is? So it means something more than the offset, than the impact. It's something more than offsetting the impact. So if you think of offsetting an impact is providing 100% of the impacted resources, is net benefit 101%? Is it 150%? Is it 200%? Is it 400%? How do we know? We don't. So I think that's a huge question that will have to be answered.

Then, as I mentioned, there's a lot of controversy as to how to quantify the impacts and benefits of action. And some resources may be aired. It's easier. When you get into wildlife, it's hard. If you get into resources like cultural resources, for example, where a lot of the value is somewhat subjective, it's very difficult to try and scientifically quantify the benefits and impacts to resources.

Then another one of the risks is a taking, a regulatory taking under the Fifth Amendment of the Constitution. The U.S. Supreme Court has said there must be a nexus and a rough proportionality between the impacts of an action and the required mitigation. So going back to this idea of a net benefit, is an impact if benefits that are, say, 400% of an impact, is that a rough proportionality? Or have we crossed the line into this is an agency that is asking for too much so that a taking results?

There's also issues of just availability of compensatory mitigation. As I mentioned, you have to have willing, for example, landowners. You have to have places to go out and mitigate. And there's the question of is there enough mitigation, willing participants in mitigation schemes to support a mitigation structure?

And then similarly, what is the preferred mechanism for mitigation? Should you use a third party? Should you use a conservation bank, for example? Should you use an exchange which acts more like a broker than a bank? Should project proponents go out and do their own mitigation? These are big questions.

So there have been a handful of examples from BLM where BLM has made project decisions based on mitigation, and the one that I'll draw your attention to is the Continental Divide Creston Record of Decision that was issued here in Wyoming in the Rawlins field office just a few weeks ago. It has an extensive mitigation attachment that relates to big game and greater sage grouse.

And there's some very specific issues with respect to mitigation on the public land. One, as I mentioned, is BLM's authority to require compensatory mitigation in the first place. And there's a distinction, I think, between future authorization and existing authorization. So if BLM has already made the decision to issue an oil and gas lease, can it then condition the approval of an application for permit to drill on compensatory mitigation if that was never mentioned in the lease in the first place?

A second issue is BLM's authority to require a net conservation gain or a no-net-loss. FLPMA, as you know, has a mandate that BLM cannot take actions that result in unnecessary or undue [degradation] of a public land. And unnecessary or undue [degradation] sounds very different than net conservation gain. And BLM has not issued any rulemakings to try and implement a netconservationgain or nonetlossstandard.

All those policies I pointed to at the beginning of the presentation are just policies. They're not regulations. So what is BLM's ability to condition a land use authorization on a net conservation-gain or no-net-loss standard.

And, finally, there's some hairy issues about use of the public lands for compensatory mitigation. So can I go—if I have a project, can I enter into an agreement with BLM to help it restore areas of public lands as compensatory mitigation? That's also a tricky issue that BLM is grappling with. So now I think I'll turn it over, and we'll have some discussion at the end of the presentation. Thank you very much.

PHIL HANCEFORD: While we're pulling up the presentation, again, Phil Hanceford with The Wilderness Society. . . .

We're going to cover the basics of Planning 2.0 and then hopefully have a good discussion about the more specific kind of controversy that is surrounding the rule now. So just hang in there for the next ten minutes or so.

So, first of all, of course as has been mentioned on this panel, FLPMA, the Federal Land Policy and Management Act, is BLM's organic act of 1976. Actually, next Friday is the 40th anniversary of FLPMA. There's a conference at CU Law, Colorado Law about a lot of the issues we're discussing today if anybody is interested. But a pretty significant act that actually discusses in general detail how BLM should be approaching land use planning.

Shortly thereafter, BLM came up with its interpretation of FLPMA specifically to land use planning and proposed it—passed its first planning rule in 1979. There was a lot of confusion, some case law, that kind of thing working through FLPMA, the planning; and there was significant updates in 1983. That was the last time that BLM has really revisited the planning rule in any significant case, 1983, over three decades ago. . . . There were some minor adjustments in 2005 dealing with cooperation and collaboration and so on.

I want to talk about the Planning 2.0 themes that BLM says it's trying to accomplish. So, one, earlier public participation in the planning process by all of the public and greater transparency overall in the planning process. I'll get into what and how each of these are being proposed to be changed in a minute.

But they want to plan across landscapes, or landscape-level planning and multiple scales, and they want to create a more dynamic planning process, a more efficient planning process in the end—very lofty goals.

So proposed changes, one, under that first public participation piece. BLM in the proposed rule, I should mention the final rule, of course, has not been published. The last I heard, BLM is expecting to publish the final rulemaking by the end of the year, calendar year.

And so here are a few of the proposed changes they want to do pre-scoping-outreach to the public, what they've been calling these envisioning

sessions, where they go out into the local communities and talk about “What is your vision for the planning area?” and have a discussion about what they should be really focusing and honing in on prior to the scoping notice and the beginning of planning. And this is actually a picture from one of the pilot envisioning sessions.

Pre-planning assessment, this is a new analysis tool based on the U.S. Forest Service planning assessment coming out of their relatively new planning rule that’s being implemented as we speak. And the idea here is to do data culls to gather more information and to share more information, again, at the beginning, pre-planning before scoping.

And then you have your scoping period. This is the official start of planning—the notice of intent in the Federal Register and so on. After that, the BLM gathers the key issues it’s scoping, and then they want to release preliminary alternatives to the public.

You know, these are your NEPA range of alternatives—right? That they’ll come out with. So they don’t really release the analysis and the full draft [Environmental Impact Statement] EIS but they point to where they’re saying, “Does this even look like right to people? Are we going down the right path?”

So what would change is we used to start—or we still do for now—started scoping where BLM, like, has an idea of what it wants to address; but it’s like, “Well, what do you guys think?”

You know, you get to scoping comments in, and then about maybe a year, maybe two years, depending, you know, you can have a draft EIS, a draft [Resource Management Plan] RMP that everybody has to respond to and usually everybody hates. So, you know, there’s a lot of conflict, and so they’re trying to combat that with earlier public participation.

So second theme, planning across landscapes and multiple scales. This is, again, lofty, but I think a theme of this whole panel and especially with the mitigation that Katie just addressed, landscape-level planning, what does it mean?

BLM wants to, you know, essentially allow for the flexibility to allow for plans to plan across political boundaries where necessary and to plan . . . the way BLM does it now, they basically focus on a field office—Lander, Pinedale, so on . . . and use that political boundary to plan and don’t look outside.

They want to change who the deciding official and the responsible official is for that plan to allow for more landscape-level planning across states, across field offices, watersheds and so on. And I’m sure we’ll have some discussion about that, what that means exactly. We’re still trying to figure it out as well. And then also,

again, the planning assessment, they want people to submit that on a landscape level analysis, you know, across and connecting landscapes and core habitat.

And then, finally, [the BLM] proposed changes creating a more dynamic and efficient process. One, they now have separated planning into plan components and implementation strategies. And planning components are the really, you know, core things to plans and RMPs, resource management plans, that BLM has to do. They'll require more process to change. They'll require an actual plan of amendment.

And then there's this category of implementation strategies which really are supposed to be streamlined in the end and provide essentially less NEPA and not a plan amendment necessarily, you know, maybe a 30day comment period, that kind of thing but a more streamlined, efficient process.

Second, they want to reduce—or at least in the proposed rule—review time for draft RMPs and EISs. So currently, plan amendments get ninety days for public review, and in the rule as it stands now, plan revisions also get ninety days. They want to reduce the plan amendments to forty-five days and the plan revisions to sixty days.

And then when we're talking about dynamic process, I go to, you know, adaptation or adaptive management. I put a question mark here because they mention adaptive management. I didn't see a real change in the rule, to be honest. And we have—and I know a lot of people in the public meetings on the rule in the webinars and the comment periods raised a lot of good ideas for real and meaningful adaptive management. And so they may be addressing this in the final rule, but we'll see.

So I wanted to get to the controversy, the fun part of the Planning 2.0 Rule. Three Congressional hearings so far, oversight hearings, on the rule itself to the House Natural Resources Subcommittee for oversight; one in the Senate. And here are some common themes.

So there were over 6,000 comments on the rule. There are a lot of comments, both some in support and some in opposition. But here are some common themes that I pulled from the testimony from the hearing witnesses and from the congressional representatives themselves.

So the public participation changes would dilute the cooperating agency status. Of course, the cooperating agencies are the counties, the states, the tribes. Basically anywhere we have a government-to-government relationship, the BLM can sign an [Memorandum of Understanding] MOU and formalize that through the planning process.

And these cooperating agencies get, you know, a special kind of VIP, velvet rope look at the plan before the public does. And throughout the process, they can spin alternatives and be briefed more than the public and that kind of thing. And I'll—well, we'll get to that in a minute.

But anyway, so the argument here is, because of greater public participation in the process, that will dilute that special status that the cooperating agencies get. The landscape-level planning will dilute local voices. In other words, you're going to have large landscapes perhaps spanning states where you have two state directors, two or three field managers. And, you know, the local people know the local resource won't be able to speak as well to such a large boundary.

The reduction in comment periods was a big one that came up, as I mentioned before, from ninety days to forty-five, ninety days to sixty days. These are lengthy, complex plans. They will remain to be lengthy and complex plans, and I think at least ninety days is what is needed to review one of these. Oftentimes, these get extended beyond that to 180 days or beyond.

And I wanted to bring this up. This is a very specific point that came up in almost everybody's testimony at least testifying for the majority in these hearings. BLM proposed to eliminate language that—so when BLM plans per FLPMA, it has to be consistent to the maximum extent practical or possible with local or state land use plans.

And so what [the BLM] had in the current rule is that policy be consistent with policies, programs, and processes as well as land use plans. They wanted to change that to official approved or adopted land use plans. There was some controversy over this language. I think this actually might—could change in the final rule, but we can talk about what that means for people in the discussion.

Finally, a main theme was there wasn't enough outreach on the proposed rule itself. BLM did do a few—several public meetings and hearings. They did several comment periods, and then they did several webinars as well. This is all posted on their website for Planning 2.0 through videos, through their webinar that is actually posted and their notes from that. But, you know, more people wanted to see BLM coming to them, coming to their state, you know, and more participation in this process. So that was honed in on during these hearings.

Lastly, I wanted to mention it isn't all controversy or opposition, I should say. It's also there are some points of agreement as well. There is support for some of the aspects of the proposed rule that, you know, this concept that earlier public participation, more transparency could actually lead to better understanding among the constituents and less conflict in the end, potentially even less litigation.

There is a greater emphasis on landscape level planning, and that could be actually necessary to address the actual dynamics of the planning processes for the long term things like climate change and wildlife connectivity and fragmentation and so on. . . .

And, finally, you know, there is some agreement on that the new planning assessment will allow for a greater share of info and info gathering to allow, again, a greater sharing of viewpoints from the beginning and potentially less conflict in the end. . . .

REBECCA WATSON: Now we're going to have discussion, and the last 15 minutes are going to be for your questions. So at about 11:30, I'm going to be looking out to the audience for some questions, but I want to start first with a question to both Katie and Phil.

And I think Katie did a good job of laying out the complexities of the mitigation, and it's really hard to get your mind around it. Even somebody as experienced as I am is struggling with it. So one of the things I'm interested in is kind of this layering of mitigation.

I noticed in Planning 2.0, there's a provision to do mitigation at the planning level. How will that relate to project level mitigation? And what is that provision about? . . .

PHIL HANCEFORD: . . . Yeah, in the proposed rule—I keep saying the “proposed rule” because I think, you know, some things will change in the final, but there was at least, you know so the rule itself, the actual text was 15, 20 pages, but the preamble was, you know, 200 pages or something, BLM really trying to explain what it's doing; and this is largely where a lot of the mitigation aspects are mentioned.

You know, what I found on the mitigation piece at the planning level and what we commented on was actually it's not required mitigation, but they do mention in the proposed rule that, you know, things like the landscape-level planning things and other tools that they're bringing forth could help in future mitigation efforts.

. . . [A]s far as the project-level aspects of this go—and I think I'll be a broken record on this throughout the panel on mitigation—we're really trying to figure out what this all means.

I think Katie's presentation was excellent in raising all of those questions that still remain out there that we have, that the BLM has and other stakeholders have as well. And so in the end, I think the plan does mention mitigation strategies or something like that, which would be a part of their implementation strategies.

To be honest, I don't know how that will actually play out on the ground. I think we've seen the regional mitigation strategies that Katie mentioned for solar. There's the National Petroleum Reserves in Alaska NPR-A Regional Mitigation Strategy, you know, some of that and the DRECP Desert Renewable Energy Conservation Plan. And BLM is still trying to work out what a strategy is or does.

You know, there's no NEPA associated with it. So is it really an implementation thing? Or is it really, you know, just a strategy? And when you get to the project level, strategies are supposed to inform, you know, what is meant by when you get to permitting of a solar or wind project or transmission, you know, how do you approach that initially?

And I think that's what the Planning 2.0 Rule meant to address was that we need more of this interim strategy level before you get to the project level, but we're still trying to figure out that very middle level for it.

REBECCA WATSON: Yeah, because when you read it, you think and hope perhaps that a plan would describe the level of mitigation that would satisfy the mitigation requirement that "In this area which the plan has identified as critical sage grouse or mule deer or winter habitat that you must mitigate two to one." And the idea is what is the certainty here, and it's going to be whack-amole with different requirements.

So, Katie, maybe from some of the examples you cited, does the solar energy zoning, this Creston Plan, do any of those bring that level of information to the regulated public on what kind of mitigation they can expect to get to this goal?

KATHLEEN SCHRODER: That's a really good question. I don't want to get too far out ahead of either the BLM or the operators that might be under the Creston, the CDC, the Continental Divide Creston plan, but as I read it—so there's two. That plan addresses two resources from the mitigation standpoint—big game and sage grouse, but there's a few things that struck me.

One is that BLM is interpreting the requirements under the old Rawlins RMP, which has been long ago, that BLM has to maintain sage grouse winter range, maintain or improve. And it's reading that "maintain or improve" directive in its land use plan, which is an older plan—it wasn't—it executed last year—as a mandate for no net loss; and therefore, it's requiring mitigation to achieve a no net loss, which I think is interesting because my guess is that there was no mention of mitigation in that plan. I actually haven't gone back and looked at it. So I thought that was interesting that the BLM is reinterpreting its plan in that way.

And then what it does with respect to big game is say, "Okay, we're going to figure out what that mitigation looks like later." And that, to me, doesn't give a whole lot of certainty if the whole point of mitigation is to streamline processes to

simply—in my opinion and my legal expertise, I call that kicking the can down the road. I mean, the BLM really didn't make a decision there.

With respect to sage grouse, it outlines several—excuse me—two different ways of calculating impacts to greater sage grouse habitat, one that the BLM came up with and one that the state came up with. And then the Record of Decision for the Creston plan says, “Well, a project proponent can use either or maybe come up with a third, and we'll figure that out in the implementation phase.”

So it gave the public somewhat of what it would look like. I mean, the mitigation calculations for sage grouse were—I mean, they weren't worlds apart. Let's put it that way. But it certainly did not give a mandate of “This is what we're going to do.” So it's just simply a matter of going into the BLM, filing your [Application for Permit to Drill] APD and saying, “Here, I've got X many credits now. Please approve my program.”

PHIL HANCEFORD: With the question of certainty, I mean, we have those same issues. I mean, you can see I'm struggling with, you know, the strategies and how certain they are and what the process is. I mean, we have commented time and time again that this should have been more a part of the planning process, land use planning to provide that certainty in the end when you get to the project level and not just kind of this purgatory strategy level that people are trying to figure out.

But I think, you know, it's a testament to, yeah, it's not new, you know; but it's newer to the BLM with these types of projects, and everybody is trying to figure it out. I don't think anybody really wants to get out ahead of the other or put their neck out.

REBECCA WATSON: Yeah, and I think it just exacerbates the problem that many project developers find when dealing with BLM is that you go to one field office, you get one answer; you go to one state office, you get a different answer. BLM prides itself on decentralization, but that leaves the regulated public and the public at large uncertain about what is required.

So I think I want to turn to Alex. You teased us a little with a frack[ing] rule, and so I think we should talk about the frack[ing] case because this challenge to BLM's Hydraulic Fracturing Rule came here in the State of Wyoming and now it's up to the Tenth Circuit.

And in reading the briefs of Earthjustice and the government, they critiqued the decision and the industry arguments and the state arguments on two salient issues—I guess I would say—is, one, the question of the Safe Drinking Water Act invention. Did that really apply to BLM's authority under the Mineral Leasing Act?

And then, two, BLM's authority. The district court read BLM's authority over the management of the development of oil and gas in a very narrow fashion, and both briefs attack that as well as some amicus briefs. So I'd be interested in your thoughts on that.

ALEX OBRECHT: Well, I'd like to break it down first and kind of just rip off the decentralization comment for a moment and how that actually played in to, I think, formulation from March 2010, when BLM first began planning its first Hydraulic Fracturing Rule, to actual release of the final rule in 2015.

You can tell that there was a large push in the Washington office to issue this rule, oftentimes with very vociferous dissent from respective field offices and state offices, the folks with the specific expertise.

And, in fact, the administrative record has some very choice comments from certain petroleum engineers related to how they don't believe the BLM Hydraulic Fracturing Rule actually applies to specific geology, hydrology of the region that they are supposed to oversee.

But now moving into the actual Hydraulic Fracturing Rule where the litigation is at currently. So to preface a little bit, it's before the Tenth Circuit right now. We challenged the rule, the industry did, the day it was issued; and the states, numerous states actually joined about four, five, six, days later. And I would like to mention that all of those states already had hydraulic fracking rules in place.

Before the district court, we took a little bit of a divergent road in attacking the rule. The industry primarily focused on Administrative Procedure Act arguments, where the state took the jurisdiction argument. The district court actually found at the preliminary injunction stage, both arguments were likely to proceed on the merits and issued a preliminary injunction on both grounds.

When the court crafted its final opinions, final order essentially setting the rule aside—and this was on a very narrow issue of BLM's jurisdiction. And I think that the court—I mean, depending on who you're talking to—did not go quite as far as some folks, especially at the state level, would have liked to have seen relative to BLM's jurisdiction over oil and gas operations under its organic statutes—I mean, the Mineral Leasing Act and the Federal Land Policy and Management Act.

The court did say that those two statutes were not specific. We said, "What if it was specific?" One, the Safe Drinking Water Act. When the Safe Drinking Water Act was passed in 1974, it specifically prohibited the injection of underground contaminants without a permit, and it gave that regulatory authority to the EPA.

And the recent legislative history—and obviously, there are differing views on how that should be interpreted by different jurists—but there’s a specific provision that said that underground contaminants specifically target strategies by the energy industry to increase production through underground injection.

But to Rebecca’s point, special interest groups and the BLM also raise the point that same legislative history has a footnote that says, “Anything in the Safe Drinking Water Act is not supposed to affect the regulatory power of the United States Geologic Service,” which was essentially in BLM’s shoes at that point over protection of groundwater. So at best, there’s an ambiguous legislative history. But we note the Safe Drinking Water Act passed in 1974. There was no specific action taken by the EPA, but then a decision came through in 1997, a decision called *LEAF*.

And essentially what happened in that decision was the special interest groups challenged EPA’s approval of Alabama’s hydraulic fracturing regulations, and EPA specifically disclaimed any regulatory authority over hydraulic fracturing. And they did so saying that they were only supposed to regulate injection wells because the sole purpose was the injection of wastewater or waste fluids.

And *LEAF* said, “No, there’s no way to read the Safe Drinking Water Act that way. The Safe Drinking Water Act covered the injection of any underground contaminants.” And so, as EPA began to promulgate its rule in response to *LEAF*, we have The Energy Policy Act of 2005.

And in that piece of legislation, which is massive, there’s a specific provision related to the definition of underground injection, specifically exempting hydraulic fracturing operations, not diesel hydraulic fracturing operations, from EPA’s jurisdiction.

So the district court held that that specific provision in EPAct 2005, as it related back to the passage of the Safe Drinking Water Act, was the last time Congress spoke specifically to the power of the federal government to regulate hydraulic fracturing. And essentially by taking that away from the federal sphere, they left it to the states. . . .

REBECCA WATSON: And then I’d like all three to maybe talk a little bit about this tension between state and federal regulation. You can talk about the context of oil and gas and maybe even land use planning—I think that makes sense—and wildlife.

But we see over these last eight years and probably over the last couple of decades an increasing move towards greater federal regulation on a number of fronts. And that tension is really exhibited in the frack rule challenge where states like Wyoming, like Governor Mead mentioned this morning, has taken

the lead—Colorado, the same thing—to regulate fracking and now the federal government comes in and wants to add its voice to that.

I think, looking back on the history of it, the Obama Administration in the midst of the BP oil spill was looking at how it could help the industry by having federal regulation of fracking to demonstrate to the public that this concern about fracking was overblown or not warranted, but in any event the federal government was watching. You can see that in some of the discussion that they had at [Department of Energy] DOE and remarks the President made in different State of the Union addresses.

So what do you guys see as that tension between federal and state governments when it comes to regulating the development on public lands? . . .

KATHLEEN SCHRODER: Well, with mitigation, I think that this is a bit of a new world, and so I think it will be a question as to how it all plays out. There's, I guess, two different examples that come into my mind with respect to the state involvement at the mitigation level.

So the first is here in Wyoming with respect to the greater sage grouse core area strategy, which is essentially an avoidance and minimization strategy. We're going to identify where sage grouse are, and we're going to avoid them. We're going to impose the best management practices.

And, you know, there's provisions in that strategy that allow for exercise and validates states' rights, but primarily it's avoidance and minimization. Really, if you can—under the state plan, it's really where those avoidance and minimization measures cannot be followed for one reason or another, such as the need to recognize and validate state rights that mitigation becomes a component.

But more recently—and so that strategy has been in the works now for seven years, six years, five years; but it's been in the works for a while. And I mentioned that in 2013 there's this effort for mitigation.

So what you're seeing is this tension between BLM saying, "Well, we have a no net loss or a best net gain strategy with respect to mitigation." And how does that strategy relate to avoidance and minimization? And specifically, even if you're following the Wyoming core area strategy, do you have to do something more? Do have you to do additional mitigation to achieve these goals? And so far, that's still playing out, and I won't opine as to sort of how that looks. But that's a tension between the state and the BLM. So I think it does create some uncertainty.

On the other hand, another example in the wildlife context, you see the Fish & Wildlife Service be willing to defer to the state management of certain species as long as listed species—namely, the lesser prairie chicken comes to mind—where

you have a state sponsored mitigation plan that, as long as the state's management of that species operates within the parameters of the Fish & Wildlife Service's own objectives and strategies. So you've got two different examples, but I think there's a lot of evolution on this issue.

REBECCA WATSON: Phil?

PHIL HANCEFORD: Yeah, I think the tension has been longstanding, you know, between the states and the federal government, and it can come in waves. The last time—you know, I don't know, maybe depending on who is counting—but maybe the first sage brush rebellion also was during when BLM was FLPMA and creating its planning rule and, you know, a lot of tension around planning of what's going to happen with that. And so this is nothing new.

There certainly has been an increase in regulation in recent years of development, but I think we're best off where, you know, the states and the feds can come to the table and the states can propose things.

I think the states that did come to the table, although not completely happy but came to the table first on sage grouse, ultimately ended up better off on those plans than some of the ones that were just fighting tooth and nail.

On wildlife, I think it is an important distinction that the state does manage the wildlife, you know, the feds on public lands manage vegetation and habitat and so on. I think there's a lot of opportunity to work together through planning through, you know, the Western Governors' Association initiative for identifying wildlife corridors and critical habitat assessment tools and so on to really provide, again, a large landscape kind of connectivity vision. I think that's a positive aspect where the states and the feds could actually work together because there is that relationship of the states actually managing wildlife.

REBECCA WATSON: I would say that, in looking at oil and gas, obviously the federal government has a role in managing federal oil and gas. I think over the last decade they have acceded a lot of downhole regulation to states, and now it seems to me that the federal government is coming back in and trying to take back some of what it acceded to the states.

And where do you see that going? I mean, you talked about the onslaught of regulations. More of the same? What do you see coming ahead, if you want to talk about that? I know you're a big gamer, but you can put on your policy hat.

ALEX OBRECHT: Well, I mean, that is primarily what's the hydraulic fracturing rule is about; right? I mean, there are some provisions for disclosure through frack focus and storage of flowback or produced water in aboveground tanks. But primarily the hydraulic fracturing rule is concerned with downhole construction

of the well bore to ensure that it can meet the pressure that's going to be injected into the hydraulic fracturing job. These are many of the same provisions that are required by states.

But I think where we run into the tension on the oil and gas front is how far does BLM's jurisdiction actually extend in all these regards? It's pretty clear that the Property Clause of the Constitution that Congress has the power to regulate on federal land and to control federal land, but the executive branch—which these agencies are—they do not have that same power as Congress. They can only act as far as Congress has given them power.

So if we look at the organic statutes, most of the time, they are not specific to anything that this agency or that agency can actually do. So when we have a conflict like we were just discussing with the Safe Drinking Water Act and which, you know, the hydraulic fracturing was removed from that, what can BLM actually regulate downhole relative to hydraulic fracturing?

I think there's an argument to be made that every single provision in this hydraulic fracturing rule is specifically tied to a but for of hydraulic fracturing. So even if this rule were just to be issued as a downhole, wellbore construction rule, no hydraulic fracturing at all, the but for is still hydraulic fracturing.

These organic statutes when read with the Safe Drinking Water Act doesn't actually confer that power on the BLM. I think there's a very strong argument to say that, no, they don't. There actually is a limit to the organic statute and how much authority that gives BLM to downhole.

REBECCA WATSON: . . . You're talking about legal authority and a lot of what the administration, the oil and gas leasing reform, for example, and some of the other policies that Katie was talking about and Phil talked about are done through guidance documents. And what's the vulnerability there for BLM on some of these changes and the authority?

The administration, as I recall, lost four different cases when they tried to take actions without following the Administrative Procedure Act in the forestry realm, offshore oil and gas, surface coal mining, another oil and gas case, they were criticized because they did not follow the Administrative Procedure Act. It strikes me that with mitigation policy, there's a little EPA problem with some of these policies that are coming out. They're going to have an impact on the public. What do you say about that?

KATHLEEN SCHRODER: Well, I agree, and perhaps that's my own bias showing. But the rule, you know, the Administrative Procedure Act requires agencies to formally promulgate regulations when they will impact the public. And I can't imagine a greater impact on the public than if a member of the public is

attempting to exercise a permit or a property right and you have an agency saying, “To do so, we demand compensation. We demand compensatory mitigation.”

To me, there’s no greater—maybe not “no greater.” That’s a bit of an absolute—but that’s a key example of a need for a formal rulemaking. I think that —this is my speculation, but I think the administration has put out all these policies to say, “Well, the EPA requires public comment. We’ve done that. We’ve put all these out to public comment. We got the public’s feedback, and we’ve made modifications. So we sort of complied with the Administrative Procedure Act.”

Well, in addition to the Administrative Procedure Act, when an agency does a formal rule, it has all these other laws it has to follow, the most important of which requires some economic analysis of the impacts of its policies.

And to me, I’m just incredibly curious about how the administration thinks it can essentially say to the public, “If you plan to operate on public land and many private lands, if you’re going to get a Clean Water Act permit, if you’re going to get an incidental take permit, you’re going to be required to provide mitigation to offset your impacts or provide a net conservation gain,” with no analysis of the cost to the regulated public, to the amount of mitigation that is available, how that’s going to work.

I mean, to me, there’s a huge, not only APA issue, you know, clean straight up if it’s a rule or not, but also the analysis of all the other secondary impacts of these rules. That is just my opinion, but to me, it’s a huge issue. I’d be curious to hear Phil’s take on it.

PHIL HANCEFORD: Yeah, I think it’s a threshold issue that the Supreme Court spoke somewhat to it last year as to formal rulemakings and . . . informal rulemakings and how far guidance can go and what you’re trying to do. And so there are, you know, a few companion cases in the 2015 session that did speak to that.

It’s a line that, you know, I think agencies are struggling with; and when BLM, for example, passes or issues an instruction memorandum, an IM, that is agency guidance on usually a specific issue but can be, you know, pretty significant. And then that is supposed to lead to it being incorporated into its policy manuals, which is really BLM’s policy decision making tools.

Now, manuals, you know, are not legally binding; but if the agency does rely on that time after time, they become binding. So I do think for any administration, it’s really important that they don’t cross that threshold.

I agree, and I think that’s what the Supreme Court has said, but I also don’t think that everything needs an official rulemaking, every piece of guidance.

Sometimes these are merely issuances of interpretations from rulemakings before, you know, for a new administration. And I think it's, you know, a struggle to find that threshold.

REBECCA WATSON: I think there's a dynamic. When you're in the administration, it's a lot quicker and faster to get an instruction memorandum out because you don't have to talk to the public about it, you do it internally. And doing a rulemaking is costly and time consuming and somewhat uncertain.

I would just say that on the oil and gas leasing reform, I think changing the way that oil and gas lease sales are held, in such a significant manner that they did, which is now a subject of litigation, it calls out sort of a bit of APA rulemaking because it's a significant departure from how the statute was interpreted in the past. . . .

PHIL HANCEFORD: To an earlier point—if you don't mind if I interrupt—and that's true, the IM is more efficient. It's also easier to overturn without a rulemaking.

REBECCA WATSON: Yeah, that's the danger of it. But you can bet that administrations weigh that in making their decision on what to do. I want to talk a little bit about the other oil and gas reforms that Secretary Jewell, in particular, raised. . . .

So [in April 2016] there were a series of rules where the Secretary talked about modernizing BLM's practice, and these were taking a look at the annual rental that's set at \$1.50 currently, the national minimum acceptable bid that starts at \$2.00, security bonding and civil penalties.

And her point was that, "Hey, these laws are from the 1980s. And in the case of bonding, that was written when President Eisenhower was in office." . . . And if you look at the bonding regulations, it's kind of hard to defend it. You can get a nationwide bond to ensure against reclamation. If you're BP and you have onshore and offshore, you can post a hundred-thousand-dollar bond and that covers all the impact.

Here in the state of Wyoming, they're struggling with some impacts from reclamation of oil and gas, coalbed methane operators that went bankrupt and disappeared and leaving the reclamation responsibilities with the state and the federal governments. I know that you guys did comment on the rule. I just wanted to have you share with the audience some of the comments that the industry provided on these particular modernization rules.

ALEX OBRECHT: We, meaning Baker Hostetler, wrote the comments on behalf of the joint consortium of [Independent Petroleum Association of America] IPAA

and Western Energy Alliance. And I think in those comments, you're not going to find a whole lot of pushback against the bonding provisions.

Some of them are outdated, considering the modern scale of development. And I think the example in Wyoming is the old coalbed methane wells. I mean, it's a great example of why things need to be updated. There's not going to be too much pushback from the industry on that front.

I mean, the largest pushback you're going to get from industry is specifically relative to the royalty rate. It's often common on private lands that the royalty rate in hot areas can creep up into the 18s, even 27% range. Whereas, on federal lands, it's probably mandated at 12[.5] although there's discretion to move it.

I think the problem that you see from the industry perspective's there is where is the analysis? Of course, this is just an advance notice of proposed rulemaking at the time, so just requesting comments and feedback.

Where is the analysis going to be for how much we want to increase the revenue to the federal government? And how much are we going to weigh that against the minerals, the reduction in minerals that are actually produced? Because I think, as we demonstrate on our slide, a [100]% increase in production on nonfederal land.

If you continue to make federal lands harder to produce from, essentially taking your due share, you might actually be decreasing the amount of revenue you're receiving. I mean, it's kind of an old outdated economic principal that a go-back occurs.

REBECCA WATSON: For taxation.

ALEX OBRECHT: But there is a point where you increase the amount of money you're trying to extract, and you actually end up decreasing the amount of revenue you take in.

REBECCA WATSON: And I think Secretary Jewell, when she made the announcement—because Secretary Salazar was leaning to increasing 12.5 to the 18[%]—what?—75 offshore? I can't remember. But, oh, okay. He's giving me the thumbs up. So offshore was increased 18.75, and Secretary Salazar wanted to do the same onshore.

Secretary Jewell came in and said, well, she addressed that very problem as kind of where is the sweet spot for where you can make sure the public is paid adequately for its federal resources but you don't "disincent" development. And that's been the problem they've been struggling with. So that would be interesting to see.

I want to get back to this question of mitigation because it's such a conundrum. Okay. So, Katie, you mentioned that some mitigation could occur on federal land, but obviously most mitigation is going out and mitigating on private land. So I have two kind of related questions. And, Phil, you're going to be called upon to opine as well.

So you have Fish & Wildlife Service. You have U.S. Army Corps of Engineers with wetlands. You have BLM. Impacts to their resources, maybe they're different resources—are they all going to get a mitigation bite? And is there a cap on it?

And then what happens when you're in an area—say you were in Teton County, where 99% of the land is managed by the federal government and you have 1% in private lands, what happens? I mean, can you go outside of the area? And how does that work out? I think you mentioned it a little bit, Katie, that there is a—there could be a constraint on where you find mitigation property.

KATHLEEN SCHRODER: Well, I guess going back to your first—I think I'll start with the first question, but I wanted to just elaborate on the mitigation plight. So when you say that, do you mean that under . . . all these different agencies . . . mitigation, will they be—under the existing laws, will they be required to provide mitigation essentially?

REBECCA WATSON: Will they be asking that from an operator? Will they face multiple requests for mitigation? And even state mitigation, there's plenty of projects that impact resources managed by different entities from the federal government and on state land. And how, as an operator, would you manage those mitigation requests?

KATHLEEN SCHRODER: Well, it's interesting. So BLM has its own mitigation policy that's drafted. U.S. Army Corps of Engineers has been requiring compensatory mitigation through its wetlands program since—for a long time, but the rule was finalized in 2008 and may have even informally been done before that.

But since 2008, the U.S. Army Corps of Engineers has been operating under the “no net loss of wetlands” mandate. So there is a compensatory mitigation process for wetlands. And then Fish & Wildlife Service is the other agency that's come out with a formal policy.

So ultimately, I think we'll see more agencies even than those three requiring compensatory mitigation, potentially the Department of Defense. The Department of Defense has been doing its own mitigation thing for a while but does not quite impact the public as much. And the Forest Service has promised some sort of mitigation rule that we have not seen yet.

But when I look at the three mitigation—the three agencies where we have some mitigation policies that apply, BLM obviously will apply on public lands, but Fish & Wildlife Service has the biggest bite. So this is a roundabout way to get to your question. Fish & Wildlife Service takes the position that, if it is, you know, under the National Environmental Policy Act, if there's a federal action that applies to any federal agency, it can request compensatory mitigation through its role as a consulting agency.

And so, if you are, say, looking for some sort of right-of-way from some land management agency, perhaps you're looking for a cell phone tower from the [Federal Communications Commission] FCC, Fish & Wildlife Service views it as within its authority to request compensatory mitigation.

REBECCA WATSON: Is that only for listed species?

KATHLEEN SCHRODER: No, both, for both types.

REBECCA WATSON: Threatened and listed.

KATHLEEN SCHRODER: Threatened and listed or just maybe species that the Fish & Wildlife Service cares about, I mean, just unlisted species that are managed by the state. The one other interesting thing that is the reason I harped on the U.S. Army Corps of Engineers is there's this question in my mind that the Fish & Wildlife Service also says, "Well, we can request mitigation from the Army Corps of Engineers to address additional . . . affected species."

Well, the U.S. Army Corps of Engineers is already doing its own compensatory mitigation under a no net loss standard. So now how do you integrate the Fish & Wildlife Service's request (indicating quotation marks)—sorry, perhaps too sarcastic—request for a net conservation gain to these listed and non-listed species? And how does that affect the U.S. Army Corps of Engineers obligations?

And the reason I say "request" with a bit of sarcasm is because, in theory, the agencies are free to say no; right? But under NEPA they do have an obligation to at least analyze mitigation. And then to show that they're not arbitrary and capricious, the agencies have to explain why they don't want to do the Fish & Wildlife Service's requested mitigation, and they have to give a reasonable, rational explanation for that.

So to me, it seems that, even if an agency declines to adopt that mitigation, the recommended mitigation, that there's vulnerability in their decision making where then a third party can pick it apart and say, "Did you reasonably—did you not act arbitrarily and capriciously in declining the requested mitigation?" . . .

REBECCA WATSON: The Teton County example, or it can be Nevada County where [ninety], [ninety-nine]% of the land is in federal management, where do you go to mitigate in that circumstance?

PHIL HANCEFORD: Yeah. Well, you know, if it is a federal—actually, I guess the question is assuming it's a private land project and then, you know, you've basically taken up a lot of private land and you're looking towards.

REBECCA WATSON: I guess I was thinking about you're doing a federal land project that requires you to mitigate the impact and typically you mitigate on private land, you get private land impacts from somewhere, what if there isn't any private land?

PHIL HANCEFORD: Well, actually not necessarily. So I think at least with BLM, you know, I think probably typically they're going to look towards public land or other public land resources for mitigation.

But I will say, you know, there is a real question of where do you go? I mean, they're looking for geographically or ecologically or contextually similar landscapes. So what if those don't exist in the project area or on the border or something, checkerboard? Or I don't know.

But absolutely you should be able to go outside. That should be within the policy. In other words, you're not just, you know, done with the project. I think mitigation can occur elsewhere and through the policy that's been laid out.

KATHLEEN SCHRODER: I think that's right. I think there's a preference for, within the agency, if it's on public land, you mitigate on public land; if it's on private land, you mitigate on private land.

The problem with public lands and the reason that I think we'll see people gravitating where, if there is an impact on public land, see them gravitate towards private land is that BLM has identified there's issues with its ability to enable durable mitigation which is the idea that the mitigation has to last as long as the impact.

So under its regulatory authority, can it, for example, grant a conservation easement? Does it have that authority to do a long term encumbrance? So I think BLM is exploring in its regulations how to do that.

The other issue BLM has identified is, you know, its ability to actually perform the mitigation is subject to—it's always subject to yearly appropriations within its budget. So there are these practical constraints that limit the ability to do mitigation on public land, and I think that's why you may see people turning

to private. If there's a private land alternative, see if that regulated party is looking to private lands to be able to get the mitigation done more efficiently.

REBECCA WATSON: I think I want to turn our last few minutes before we take questions from the group to sort of looking at the future. And when I think about oil and gas and federal regulations, this onslaught that you talked about and some of the changes that are coming through other policies, it seems to me that oil and gas is moving away from the Rockies, moving away from federal land and towards private land.

We see the governors talking about that. The Governor today was talking about Ohio and its newfound importance and, of course, the Appalachians and Texas and Oklahoma are always important.

So what do you see looking at, you know, you're a young practitioner and focusing in the oil and gas arena, what's your sense that you'd like to share with the students out there on the future of federal oil and gas?

ALEX OBRECHT: Well, unfortunately for you guys the [Uniform Bar Exam] UBE applies I think to fifteen states and District of Columbia being out in the east and the rest of them are primarily in the Rockies, so think about North Dakota; think about Texas.

Now, I don't take that pessimistic of an outlook. I think there are some problems with how the federal regulatory scheme has evolved, I think it's fair to say, to incentivize other types of energy, energy development without adequately adjusting the impact to the oil and gas industry and particularly fossil fuels.

But I don't think that energy is going away from the Rockies. I don't think it will not—no longer have a prominent place in the Rockies, but I think this current downturn we're seeing—Houston companies, Houston-based companies and foreign-based companies are pulling out of Denver, and that can be a problem.

So what you're left with in the Rockies oftentimes are smaller operations, maybe even mom and pop operations, but if you make developing on federal lands so difficult that those companies cannot afford it, cannot be on federal land, you might see the exodus from federal lands in the Rockies that we all hope to prevent.

That's actually kind of going back to your previous question to me about the bonding issue. You know, it's easy to think of—when you think of an oil and gas company, you think of Exxon, you think of Conoco, you think of BP; right? Posting a national bond for them in that sense, that's hardly anything; right?

But if you're going to a company that owns five, ten, maybe even fifty wells, they might not be able to afford the national bonding, and they might not even have that type of environmental exposure.

In the Administrative Procedure Act, you're talking about a number of requirements and attendant statutory provisions that the agencies have to fulfill. I think you see in a lot of these federal regulatory measures that are aiming to push development either to bigger companies or to companies that have the ability to make the technological development, they don't adequately address and analyze the effect on small businesses. I think you see it specifically here in Wyoming, here in Casper, here in Gillette. I think that is a serious problem.

REBECCA WATSON: I agree, but you have to ask yourself, I mean, is the federal government without reason to do that? Looking at it from their perspective as the land manager, do they want exhibit A coalbed methane operators that left the state holding the bag with reclamation?

I mean, there are issues there, but you're exactly right. Small companies are the bread and butter of Wyoming and the bread and butter of legal practice here. So where do you find that balance?

And I think that gets back to the planning rule. I have represented Garfield County in finding comments on the planning rule, and it's a county that's oil and gas dependent on the western slope of Colorado, and the concern there is how do you take into account county and state needs in the planning process?

When you look at FLPMA and read the legislative history and the language, the repeated language in there about consulting and working with the state and local governments, it seemed to be an acknowledgement [by the federal government] that "Hey, yeah, we're here for the long term. We're going to own 30 to 80% of your state, but we are going to work with you and your economy."

And some of the changes in the planning rule I think, you know, you laid them out for the opposition, the concern of going to a larger landscape area where you move beyond the county or a couple of counties and you move across state lines, you know, where do you get that kind of ability of counties with few people in their staff to provide input on what is their future for their communities and, you know, address the issue that Alex raised? So how do you see that working in this planning—proposed planning rule?

PHIL HANCEFORD: Proposed, yeah. So I mentioned, you know, before and you just mentioned, FLPMA does call out specifically the counties and the states and the tribes as being kind of special status entities, and I actually agree with that. I think, you know, there's a saying "All planning is local."

You know, I also agree that these issues are oftentimes local. I believe that the provisions that were in the original rule to allow for cooperating agencies to be very involved and sign an MOU with the agencies and, you know, have this kind of behind the scenes look at documents, create alternatives, be as involved as they can or want to be are appropriate and should remain. Under the proposed planning rule, they will remain, and nothing changes about that.

The argument has been that public, more public participation will dilute that or the landscape level approach will dilute that. I disagree.

I think that public participation and more public participation from, you know, the citizens themselves especially since population growth in the West has boomed over the last few decades, people are living closer to BLM lands and more involved in issues of recreation and energy development and so on—I think it's important to have, you know, their voice up front and then also have that opportunity for counties to remain that way for the landscape scale issues. I think the counties can still participate.

It also doesn't have to be a large landscape. BLM has said—this was in our comments actually—the landscape was not defined, and I think that was problematic for the rule. And I think it should have been and it should be going forward.

But there are a couple of way you can do it. You can rely on the field office boundaries and say, "But we're going to analyze the broader landscape."

Or you can take a smaller landscape. Maybe it's, you know, say, a master leasing plan in which you define the context and the issues you're going to address such as "How are we going to lease oil and gas in this area and also provide for natural resource mitigation or enhancement?"

And that's the whole purpose of a master lease. To me, that's a landscape level plan even though some of these aren't that big or large or even outside of, you know, states or field offices.

So I think you can have—you know—we're not talking about the whole Colorado Plateau or the whole maybe California desert in one case, but I think we can do that on a smaller scale as long as you're setting the context, you know, and the issues for discussion appropriately.

REBECCA WATSON: Well, I want to turn to the audience now, and you've heard a lot from us. So what are your questions or comments?

AUDIENCE MEMBER: I have a request for a perspective from Phil. . . . the legitimacy of any agency's action especially rulemaking but could be

resource management plans, decision to offer leases, decision to accept leases, decision to issue permits—legitimacy is heavily dependent on quality of the agency's explanation.

Historically, BLM has never been a great explainer, but in the last couple of years, some of their explanations have shrunk to the vanishing point on a lot of different decisions. You will read long preambles, but issue by issue basically they say—at least I see this from an energy development perspective. That's why I'm asking you for yours—they say, "Public commented X. Response, we disagree. We're going to do this other thing."

But missing from that is any explanation of what facts have been presented to the agency or collected by the agency, what inferences they drew from those facts, and how those conclusions led them to do something that ties in with what Congress has directed them to do. From the vantage point of The Wilderness Society or allied agencies, how do you see that?

PHIL HANCEFORD: Agree completely. And I'm not here to—certainly not here—to defend the BLM. On that point especially, we have run into the same problem. And, you know, it's what we call the "comment noted" problem.

And you take the time and the public takes the time to write, you know, lengthy discussion and provide analysis, you know, that BLM should be considering and "Comment noted, you know, moving on" essentially; or they summarize your comment in a sentence or two and then, you know, address what they wish they were asked. That's a problem, and I agree.

. . . Planning 2.0 isn't going to solve all of this or the BLM's problems that you're raising. But possibly through, you know, the planning assessment stage where they're actually, you know, asking for or supposed to be asking for information, specific information and comments and that kind of thing earlier through the public, you know, at least there's more of an administrative record. At least they're more on the hook throughout the process for people like us to say, "Remember, you know, you didn't pay attention to our comment. Remember that. Remember that," instead of just, you know, the scoping comment, kind of draft problem that I laid out earlier. But I agree.

REBECCA WATSON: Anyone else have any questions?

AUDIENCE MEMBER: My question is sort of along the lines of the compensatory mitigation that you discussed. And this question kind of pertains to wetlands issues. You talked about, Katie, the use of a conservation easement for mitigation purposes. A lot of times they use this, the impact, for example, wetlands are temporary, and the solution, the mitigation that the agencies are seeking are more

permanent. How do you see that? And how do you see it as a potential taking? Or what do you think a better solution might be?

KATHLEEN SCHRODER: That's a good question. Mitigation guidance calls for durable mitigation, and the definition of "durable" is the last duration of impact. And from an oil and gas perspective, we make the same point a lot of the time that oil and gas is a temporary impact and therefore permanent conservation is an overreach.

The tension I think in this request, in trying to really break that down is, one, a part of the issue is the idea of advance mitigation. And so, for example, the idea of advance mitigation is it needs to be secured prior to your impact. So, for example, you have to go out and enter into an agreement ahead of your impact.

So from a practical standpoint, there's, you know, if you're able to go and secure, say—if you know your impact is going to be thirty years, perhaps you can go and get a thirty year like easement, for example.

From an oil and gas perspective, to be honest, it's difficult to predict how long your impact is going to be at the outset because you don't know what the—you might be able to forecast what the life of the well may be, but you really don't know that until you actually go out and drill the well.

So from the oil and gas perspective, the demand for permanent conservation easements is a concern, but it's also a hairy issue to address. And but I agree that, if you have a known five year impact or let's say you're going to go out and do some other kind of development and it's only going to be there for five years, a permanent conservation easement would be difficult—would be an overreach, excuse me.

So I think that the short answer to the question is the durability concept is a bit of a—there's a pro and a con to it because, on one hand, you do have to have durable mitigation. On the other hand, it does allow an operator or a developer to say, "Well, my impact only needs to be—my mitigation only needs to be as long as my impact."

REBECCA WATSON: Anyone else have any questions?

AUDIENCE MEMBER: Hi. So you talked about the exodus of oil and gas from federal lands in the West and the Rockies here. With that exodus, is there now the potential for more renewable energy industries coming to this area and the federal lands here like wind or solar, considering that this is a very windy place?

ALEX OBRECHT: I think you would see the current administration like to see and incentivize more renewable development on federal land. Part of the problem

with the renewable resources is, you know, they have to be, like you mentioned, where the wind blows, where the sun shines, or where there's a geothermal resource or where there's some water to generate the hydroelectric.

So I don't know that oil and gas leaving brings up more opportunities for renewables, but I do think you see a push towards incentivizing using federal land for renewables. But to the extent they're not in the same place, I don't think they really have a conflict. I mean, you have to put turbines where the wind blows, but I think there definitely is a policy to favor renewable energy resources and the construction of them on federal land.

REBECCA WATSON: Before I turn to maybe Phil on this one because, as I said, The Wilderness Society played a really important role in standing opposite the administration's renewable energy policy, but here in Wyoming you have a conundrum. You have the world largest wind farm permitted, but yet you have very unfavorable state law that taxes wind, which no other state does.

So unfortunately, Wyoming does have a big resource. You have Phil Anschutz investing a heck of a lot of money and time in trying to stand up his 10,000 turbine wind farm, but at the same time, the legislature is talking about increasing the tax on this wind farm. So that's a problem. But, Phil, why don't you talk a little bit about the renewable energy.

PHIL HANCEFORD: Yeah, it's just a little bit more of a policy background. You know, this administration came in with a priority to make . . . renewable energy a priority explicitly on public lands, and that was actually one of Ken Salazar's main pushes and then it continued with Sally Jewell. And they have done a stellar job at that, you know, from where we were before the administration in permitting renewable energy and where we've come in the last eight years.

It's not without conflicts either, and so we recognized early on that these had to be permitted and sited in the right places, both, you know, of course, where the resource is, as Alex said, but also away from other conflict resources, and there's the problem or potential problem or conflict with large transmission. Where is this resource going as well?

Oftentimes, the resource is out away from the cities that we're trying to feed, and so that has been a big conflict that we've actually tried to work through is find the least conflict places or the best places for this resource. And that's really what I praise this administration on doing, not just saying, "We're going to permit so many megawatts of renewable energy on public lands, but we're going to look for the least conflict areas or mitigate those conflicts as the case may be."

And so I hope that policy continues, is built into a program where the solar PEIS that is a programmatic environmental impact statement done by a few

agencies to look for those least conflict lands for siting solar energy zones. And what that gets you is incentives, you know, essentially more efficiency, maybe less NEPA, less process essentially so you can target those areas.

And I think it's smart. It's a smart way to do business on our public lands that are often overused. Like Alex said, I don't know that there's, you know, a direct relationship between the oil and gas downturn and that kind of thing leaving and renewable energy kind of filling a void. I think it's more that the incentives have created, you know, those programs and places to site.

REBECCA WATSON: Do we have one more question? . . .

AUDIENCE MEMBER: I apologize in advance for the nature of the question. But it seems to me like we've got these long range planning processes mandated by FLPMA. You've got long range planning processes that are required under NEPA and those types of things.

Those outlast administrations, and so what you have is this tug and pull between political ideologies. You have 11th hour maneuvers in terms of rulemaking. You have executive actions designating Escalante and so forth. This seems like the least efficient possible way to manage the resource.

So my question is, is there a better way? If so, what is it? And I think it's especially important where, you know, you have—on one side, you have entities that want to deploy capital, huge investments, long term projects.

On the other side, delay is generally a victory for conservationists. I mean, it's effectively the same as an injunction when we're waiting on regulations or we're waiting on continuity. There's no predictability. There's no certainty. So it seems like a heck of a way to run a railroad where every four years the tug and pull goes back and forth one direction and then another. . . .

PHIL HANCEFORD: So one of the criticisms that drove us to Planning 2.0 is that planning takes way too long. It's so inefficient; it's so complex. And I think everybody actually agreed on that, on that point, and we agree, The Wilderness Society.

And we have looked over the past several years at ways to make not just planning more efficient, but, you know, we want to drive development to the right places, energy development. We want to drive—you know, we want to incentivize that development. That's why we're involved.

Yeah, master leasing plans aren't perfect and aren't embraced by everybody, but we see it as a way to where, you know, these areas have substantial interest from the industry. And we know that we could either—and others could

pick a fight project by project and case by case and, you know, stall things and do things the way we've traditionally done it, you know, the "BLM inaction center," whatever.

And we've turned, you know, I think a leaf. I think, you know, we've turned a corner. You know, we're looking—with solar energy zones and mitigation plans, with master leasing plans and development plans, we're looking to find those places for, you know, to provide that certainty.

Now, I realize, you know, that sounds even a little bit *Pollyannaish*, and so I'll go one step further and say, you know, we're also looking for the adaptive management plan and flexibility that the BLM was searching for but I don't think they found it in Planning 2.0 to where they can say, "Well, certain areas may not be appropriate now or may not have the interest now, but let's revisit that in the future based on future resource needs."

That happened in the Pinedale, Wyoming, BLM plan where there were intensely developed fields, traditional leasing areas and unavailable areas. And what BLM said was, "Well, a traditional leasing area can become this more streamlined, intensely developed field if certain factors were shown," that BLM—or that the developers showed interest, and all of a sudden there was a boom and so on and mitigation occurred and so on. So we're okay with that. That's adaptive management.

I think building that kind of, you know, response into our plans and having a smarter planning approach will get us there, but I don't think BLM is there. There's been a lot of pushback on some of these ideas in Planning 2.0. I think it's people are scared of change largely and especially, you know, under this administration and the regulatory scheme and "Aren't we regulated enough? What is this? Another planning rule?"

I actually think, you know, BLM is looking for those solutions. We're looking for those solutions, . . . we know that energy development, recreation, it's going to be a part of our future, period. But so is climate change; so is, you know, pressures on the land. So let's fix what everybody hates about planning and project level, and let's get it in the right places.