COMMENT

Interior's Authority to Curb Fossil Fuel Leasing

by John D. Leshy

John D. Leshy is Emeritus Professor at the University of California, Hastings College of the Law, and was Solicitor of the U.S. Department of the Interior from 1993 to 2001.

In his recent statements and testimony before the U.S. Congress, Secretary of the Interior David Bernhardt has expressed doubt he has the legal authority to limit his unrelenting campaign to lease fossil fuels on America's public lands. He has supplemented this by offering a rather bizarre argument that he has no such obligation because carbon emissions are being curbed more in the United States than in many other countries.[1] The U.S. Department of the Interior (DOI) reported not long ago that these emissions account for about one-quarter of total U.S. carbon emissions.[2]

As I discuss in this Comment, Bernhardt's position seriously misreads the applicable law.[3]

I. Coal Leasing

The Mineral Leasing Act[4] of 1920 (as refined by the Coal Leasing Amendments of 1978) is crystal clear on this matter. It authorizes, but does not require, the Secretary to offer coal deposits on public lands for leasing "in his discretion."[5]

In 2016, the Barack Obama Administration instituted a near-total moratorium on new coal leasing while it studied the program's impact on climate change, among other things. This was not challenged in court. The Donald Trump Administration lifted the moratorium, and a court recently ruled that the Administration could not resume leasing without first studying the effects under the National Environmental Policy Act (NEPA).[6]

II. Oil and Gas Leasing

The law applicable to oil and gas is almost as clear but takes a little more explaining. The same Mineral Leasing Act provides that public lands "may" be leased by the Secretary.[7] With some limitations, it goes on to provide that "[l]ease sales shall be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary."[8] This language was added by the Federal Onshore Oil and Gas Leasing Reform Act of 1987.[9] The statement that lease sales "shall" be held applies only where there are lands "eligible" for leasing.

Existing law has long given the Secretary of the Interior three distinct ways to declare public lands "ineligible" for leasing. Nothing in the legislative history of the 1987 Act indicates that Congress intended to change the prior practice.

A. *Exercise Executive Discretion Not to Lease*

The first method is to do what the Obama Administration did with respect to coal, and simply to announce that it will not entertain further oil and gas leasing pending further study of its effects on climate change. This is sup-

1. *See, e.g.*, Chris D'Angelo, *Interior Chief Blames Congress for His Inaction on Climate Change*, HuffPost, May 7, 2019, *at* https://www.huffpost.com/entry/david-bernhardt-interior-secretary-climate-change-extinction_n_5cd1f3c9e4b0a7dffcce0468; Juliet Eilperin, *Facing Democratic Resistance, Interior Secretary Promotes Oil and Gas Drilling*, Wash. Post, May 10, 2019, *at* https://www.washingtonpost.com/national/health-science/facing-democratic-resistance-interior-secretary-promotes-oil-and-gas-drilling/2019/05/09/a9198b0e-7296-11e9-8be0-ca575670e91c_story.html?utm_term=.af1baa32444e; Cecelia Smith-Schoenwalder, *Interior Secretary Unconcerned Over Rising Carbon Dioxide Levels*, U.S. News & World Report, May 15, 2019, *at* https://www.usnews.com/news/national-news/articles/2019-05-15/interior-head-david-bernhardt-hasnt-lost-any-sleep-over-rising-carbon-dioxide-levels.
2. Adam Aton, *Fossil Fuel Extraction on Public Lands Produces One Quarter of U.S. Emissions*, Sci. Am., Nov. 27, 2018, *at* https://www.scientificamerican.com/article/fossil-fuel-extraction-on-public-lands-produces-one-quarter-of-u-s-emissions/?redirect=1.
3. *See also* John D. Leshy, *Secretary Bernhardt Says He Doesn't Have a Duty to Fight Climate Change. He's Wrong.*, Vibrant Env't (June 19, 2019), https://www.eli.org/vibrant-environment-blog/secretary-bernhardt-says-he-doesnt-have-duty-fight-climate-change-hes-wrong.
4. 30 U.S.C. §§181 et seq.
5. *Id.* §201(a).
6. Citizens for Clean Energy v. Department of the Interior, No. CV-17-30-GF-BMM, 49 ELR 20066 (D. Mont., Apr. 18, 2019); 42 U.S.C. §§4321-4370(h), ELR Stat. NEPA §§2-209.
7. 30 U.S.C. §226(a).
8. 30 U.S.C. §226(b)(1).
9. H.R. 2851, 100th Cong.

ported by the U.S. Supreme Court's unanimous 1931 decision in *Wilbur*, explained further below.

B. Formally Withdraw the Lands From Leasing

The second way to make public land ineligible for leasing is by a formal "withdrawal." The most concise statement of this power is found in the Pickett Act of 1910,[10] as fine-tuned by the Federal Land Policy and Management Act (FLPMA) of 1976.[11] The Pickett Act gave the Secretary of the Interior broad power to withdraw areas of public land from "settlement, location, sale, or entry" and reserve them for "public purposes," which Congress left to the Secretary to define. The Pickett Act did not mention "leasing" because the Mineral Leasing Act would not be enacted until 1920, 10 years later.

In 1929, President Herbert Hoover instituted a general moratorium on oil and gas leasing on public lands. The industry challenged his authority to do this. In 1931, in *United States ex rel. McLennan v. Wilbur*, the Supreme Court curtly rejected the industry's argument in a brief, unanimous decision.[12] The Mineral Leasing Act gives the Secretary discretion not to lease, the Court said, and it also pointed to the Secretary's "general powers over the public lands as guardian of the people," and to the Pickett Act and its own decisions as leaving no doubt the president could "withdraw public lands from private appropriation."[13]

In FLPMA, Congress fine-tuned this withdrawal authority (substituting it for the Pickett Act) without narrowing it. Its definition of withdrawal parrots the language of the Pickett Act ("withholding an area of Federal lands from settlement, sale, location, or entry, under some or all of the general land laws,"[14]) and so effectively incorporates the Supreme Court's interpretation in the *Wilbur* decision to embrace mineral leasing. Put another way, the "general land laws" referenced in FLPMA include the Mineral Leasing Act. See, for example, the case of *Pacific Legal Foundation v. Watt*[15] and the cases cited there, where the Court concluded that "the relevant sources indicate that there is no traditional definition of 'withdrawal' which would prevent . . . the Secretary from withholding disposition of these lands from mineral leasing."[16] DOI has routinely used FLPMA to withdraw lands from mineral leasing.[17] This administrative practice deserves "great deference."[18] Congress (through its relevant committees) has also recognized that public lands can be withdrawn from mineral leasing, in the process of exercising its FLPMA authority to order emergency withdrawals.[19]

C. Prohibit Leasing Through FLPMA's Management Planning Process

FLPMA requires the Secretary to "manage the public land . . . in accordance with land use plans developed by him."[20] FLPMA's specific instructions on the preparation of such plans allow the Secretary to exclude or totally eliminate "one or more of the principal or major uses" of tracts of public land (and require that large-scale total exclusions be reported to Congress).[21] The Bureau of Land Management (BLM) has long used its planning process to designate lands "closed to leasing" upon making certain determinations.[22]

III. "Multiple Use" and "Sustained Yield" Do Not Require That Public Lands Be Leased for Fossil Fuel Development

Secretary Bernhardt has spoken of a duty to manage public lands to provide for "multiple use" and "maximum" yield, implying this also forbids him from calling a moratorium on fossil fuel leasing.[23] This too is a serious misreading of applicable law.

FLPMA's definition of "multiple use" does not require that public lands or any tract thereof be made available for fossil fuel leasing. The Act refers to the "various resource values" of the public lands and calls for public lands to provide for "some or all" of those resources, but recognizes that some land may be used "for less than all of the resources." Most important, it calls for DOI to decide upon a "combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources," and that aims at "harmonious and coordinated manage-

10. Pub. L. No. 61-303, 36 Stat. 847.
11. 43 U.S.C. §§1701-1785, ELR Stat. FLPMA §§102-603. The executive has withdrawn public lands from the operation of various laws almost since the nation's founding, sometimes with, and sometimes without, explicit authority from Congress. The Supreme Court recounted this history in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), where it upheld the traditional exercise of that power. By the time that case was decided, Congress had confirmed that long-exercised power in the Pickett Act.
12. 283 U.S. 414 (1931).
13. *Id.* at 419.
14. 43 U.S.C. §1702(j)),
15. 529 F. Supp. 982, 995-99, 12 ELR 20197 (D. Mont. 1981),
16. FLPMA also elaborated on the "public purposes" reference in the Pickett Act without limiting its scope. Specifically, it described various purposes for withdrawals, including "limiting activities" under the general land laws "in order to maintain other public values in the area" or "reserving the area for a particular public purpose or program." 43 U.S.C. §1702(j).
17. *See, e.g.*, 65 Fed. Reg. 2423 (2000) (withdrawing public lands in New Mexico from "settlement, sale, location, or entry under the general land laws, including . . . from leasing under the mineral leasing laws").
18. *See* Udall v. Tallman, 380 U.S. 1, 16 (1965).
19. *See, e.g.*, Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383, 11 ELR 20044 (D. Wyo. 1980). The court there noted that the FLPMA section on withdrawals, 43 U.S.C. §1714(c), requires a report from experts on, among other things, "mineral leases," "past and present mineral production," "evaluation of future mineral potential," and "present and potential market demands." This, the court said, is evidence that Congress wanted to "be made aware of and have the opportunity to oversee the withdrawal of public lands from mineral use, and that it should be informed as to the natural resource potential," of withdrawn lands, including its potential for oil and gas. 499 F. Supp. at 391.
20. 43 U.S.C. §1732(a).
21. *Id.* §1712(e); *see also* 43 C.F.R. §1610.5(n)(1)-(2) (defining resource management plans as establishing "[l]and areas for limited, restricted or exclusive use" and "[a]llowable resource uses").
22. *See* BLM, Land Use Planning Handbook (H-1601-1), App. C at 23-24 (2005).
23. *See supra* note 1.

ment," "without permanent impairment of" the "quality of the environment."[24]

FLPMA's definition of "sustained yield" applies only to renewable resources of the public lands, and not to nonrenewable resources like fossil fuels. Moreover, it makes no reference to "maximum" yield, but rather to the "achievement and maintenance in perpetuity of a high-level annual or regular periodic output" of renewable resources "consistent with multiple use."[25]

IV. Conclusion

Existing law gives the Secretary of the Interior ample legal authority to limit or call a halt to fossil fuel leasing on America's public lands. Secretary Bernhardt should not be permitted to hide behind fallacious legal arguments that Congress has forbidden such a result.

Instead, he should forthrightly address whether—given the mounting evidence of a coming catastrophe if greenhouse gas emissions are not curtailed—the substantial contribution that America's public lands make to the nation's overall emissions of greenhouse gases should be curtailed.

Indeed, there is a serious legal question whether Secretary Bernhardt's relentless push to expand fossil fuel leasing on public lands is consistent with his duty under FLPMA to take "into account the long-term needs of future generations," and to avoid "permanent impairment of" the "quality of the environment" in managing the nation's public lands.[26]

24. 43 U.S.C. §1702(c).
25. *Id.* §1702(h).
26. *Id.* §1702(c).