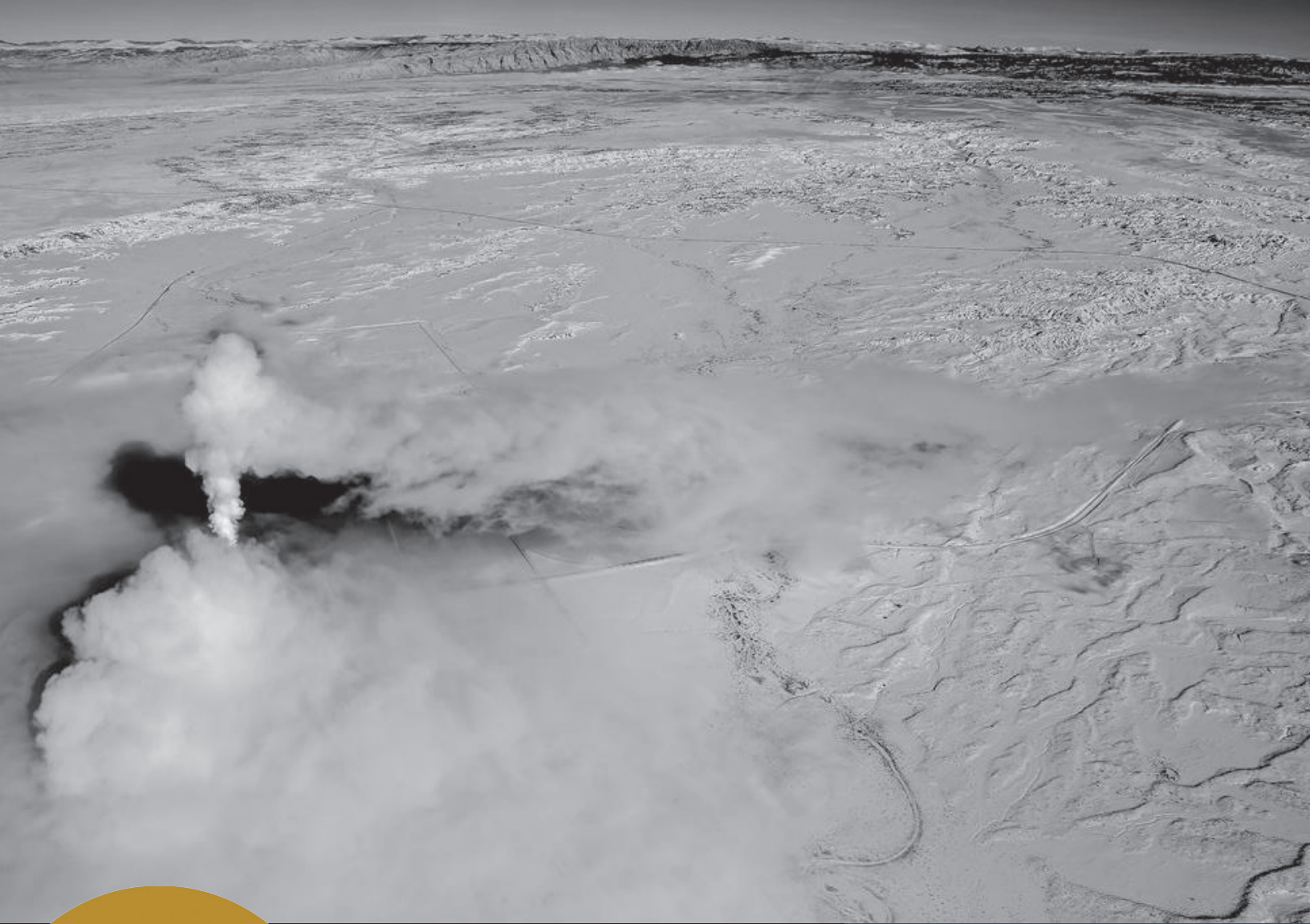


GROUND

The President's Power to Fight Climate Change,
Protect Public Lands by Keeping Publicly Owned
Fossil Fuels in the Ground



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Grounded: The President's Power to Fight Climate Change, Protect Public Lands by Keeping Publicly Owned Fossil Fuels in the Ground

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At the Center for Biological Diversity, we believe that the welfare of human beings is deeply linked to nature — to the existence in our world of a vast diversity of wild animals and plants. Because diversity has intrinsic value, and because its loss impoverishes society, we work to secure a future for all species, great and small, hovering on the brink of extinction. We do so through science, law and creative media, with a focus on protecting the lands, waters and climate that species need to survive.

We want those who come after us to inherit a world where the wild is still alive.

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Executive Summary

“And the fact is that climate is changing faster than our efforts to address it. That, ladies and gentlemen, must change. We’re not acting fast enough.”

President Barack Obama, GLACIER Conference, AK Sept. 1, 2015

A recent report by EcoShift Consulting found that about half of all remaining U.S. potential greenhouse gas emissions from fossil fuels — 450 billion tons — are federally controlled and publicly owned and have not yet been leased to private industry. Given the magnitude of those potential emissions, it is vital that they be kept safely in the ground and out of the atmosphere.

This report details the legal authority by which the president can immediately stop new federal fossil fuel leasing in the United States, thereby keeping up to 450 billion tons from the global pool of potential greenhouse gas pollution. This is the equivalent to 13 times the global carbon emissions in 2013 or annual emissions from 118,000 coal-fired power plants. The president can do this now, without Congress, either independently or in the context of a binding international agreement. This report details the existing executive authority under the three major statutes that govern extraction of federal fossil fuels: the Mineral Leasing Act, the Outer Continental Shelf Lands Act and the Federal Land Policy and Management Act.

Federal fossil fuels include coal, oil, gas, oil shale and tar sands. Like the public lands and oceans they underlie, federal fossil fuels are owned by the U.S. public and are administered by federal agencies. Rather than acting to prevent greenhouse gas pollution at the source, the Obama administration continues to lease new areas to the fossil fuel industry. Federal fossil fuel leasing contributes significantly to domestic and global greenhouse gas pollution while industrializing and degrading America’s public lands and oceans.

- From 2003 - 2014 approximately 25 percent of all U.S. and 3-4 percent of global fossil fuel greenhouse gas emissions are attributable to federal fossil fuel production;¹
- Since 2008 the Obama administration has leased more than 35 million acres of federal public lands and oceans to the fossil fuel industry;
- More than 67 million acres of public land and oceans — an area 55 times larger than Grand Canyon National Park — are already leased to the fossil fuel industry. Those leases contain up to 43 billion tons of potential carbon dioxide pollution;²

¹ Climate Accountability Institute. Memorandum to Dunkiel Saunders, Friends of The Earth and Center for Biological Diversity. 2015. Available at: http://webiva-downton.s3.amazonaws.com/877/3a/7/5721/Exhibit_1-1_ONRR_ProdEmissions_Heede_7May15.pdf

² EcoShift Consulting. The Potential Greenhouse Gas Emissions of U.S. Federal Fossil Fuels. Prepared for Center for Biological Diversity & Friends of the Earth. 2015. Available at: <http://www.ecoshiftconsulting.com/wp-content/uploads/Potential-Greenhouse-Gas-Emissions-U-S-Federal-Fossil-Fuels.pdf>

- About 91 percent of total federal fossils have not yet been leased to industry. They contain up to 450 billion tons of potential greenhouse gas pollution — nearly half of the total remaining federal and non-federal fossil fuels;³
- The potential emissions from unleased federal fossil fuels are incompatible with any U.S. share of global carbon limits that would keep emissions below scientifically advised levels.⁴

Ending new federal fossil fuel leasing would be the most significant climate action undertaken by any U.S. president. By stopping new fossil fuel leasing and ensuing industrialization, the president can also conserve the irreplaceable values of America's public lands and oceans. Congress has vested the president with authority to control new federal fossil fuel leasing under the following acts:

- The Mineral Leasing Act of 1920 governs leasing of federal onshore oil, gas, coal, oil shale and tar sands and affords the president's interior secretary discretion to determine if and when to offer federal fossil fuel leases. 30 U.S.C. §201, 206;
- The Outer Continental Shelf Lands Act of 1953 governs the leasing of the submerged lands of the Outer Continental Shelf beyond the United States' three-mile zone of control. The act grants the president broad unilateral authority to withdraw from availability for federal fossil fuel leasing any of the unleased lands of the Outer Continental Shelf. 43 U.S.C. § 1341(a);
- For federal onshore lands (primarily lands administered by the U.S. Department of the Interior's Bureau of Land Management and the U.S. Department of Agriculture's Forest Service), the Federal Lands Policy and Management Act of 1976 establishes conditions for withdrawing areas of land from particular uses, including fossil fuel leasing. Once certain reporting and analysis requirements are met, the act allows the president, acting through the secretary of the interior, to withdraw specified areas of federal land from leasing for a 20-year period. 43 USC § 1714(a).

³ Id.

⁴ Id.

Introduction

The climate crisis is the most urgent challenge facing human civilization. It is widely accepted that, in order to avoid catastrophic harm to societal and natural systems, warming must be limited to no more than 1.5 or 2° C above preindustrial levels. To do this, pollution from fossil fuel combustion must end by about mid-century, and the vast majority of remaining fossil fuel reserves and resources must remain in the ground.

Yet under the Obama administration's "all of the above" energy policy, federal agencies continue to enact an aggressive program of leasing federal public lands and oceans to private industry for fossil fuel extraction. The resulting pollution contributes significantly to domestic and global greenhouse gas emissions while destroying vast swaths of America's national forests, sagebrush steppe, grasslands, deserts, ocean and habitat for wildlife.

The opportunity to end that policy — and to prevent new federal fossil fuel leasing and development — is tremendous. About 91 percent of federal fossil fuels, representing up to 450 billion tons of potential greenhouse gas pollution, have not yet been leased to private industry. This is nearly half of the potential greenhouse gas emissions of all remaining federal and non-federal fossil fuels in the United States. If those fuels were burned, their emissions would exceed any reasonable U.S. share of global carbon limits.

The president has broad authority under the Mineral Leasing Act, the Outer Continental Shelf Act, and the Federal Land Policy and Management Act to defer and ultimately prohibit new leasing of federal fossil fuels onshore and offshore. Ending new federal fossil fuel leasing is a chance to demonstrate real international leadership on climate by recognizing that burning our unleased fossil fuels is incompatible with any sane climate future.

Under both international and domestic law, the president also has the power to bind the United States to a formal, meaningful agreement to reduce emissions using the legal authorities discussed in this report. As the world's largest cumulative emitter⁵ and one of its largest economies, the imperative for tangible, credible U.S. climate action is paramount. Such credibility cannot be maintained alongside the continuation of the federal fossil fuel leasing program.

⁵ World Resources Institute. 6 Graphs Explain the World's Top 10 Emitters. 2014. Available at: <http://www.wri.org/blog/2014/11/6-graphs-explain-world%E2%80%99s-top-10-emitters> and http://www.wri.org/sites/default/files/uploads/historical_emissions.png

Federal Fossil Fuels: Our Public Carbon Estate

Federal fossil fuels in the United States, which include coal, oil, gas, oil shale and tar sands, are publicly owned and held in the public's trust by federal agencies. Federal fossil fuels underlie federal public land, non-federal land and submerged federal public land beneath the Outer Continental Shelf. Federal public lands span 650 million acres and the Outer Continental Shelf includes 1.7 billion acres.

A 2015 report written by EcoShift Consulting on behalf of the Center for Biological Diversity and Friends of the Earth titled *The Potential Greenhouse Gas Emissions of U.S. Federal Fossil Fuels* provided a first-ever estimate of the volume and potential life-cycle greenhouse (GHG) emissions of nonfederal and leased and unleased federal fossil fuels.

Its major findings, expressed in gigatons (Gt) (one gigaton equals one billion tons) of carbon dioxide equivalent (CO₂e), are that:

- The potential GHG emissions of federal fossil fuels (leased and unleased) are 349 to 492 Gt CO₂e, representing 46 percent to 50 percent of potential emissions from all remaining U.S. fossil fuels. Federal fossil fuels that have not yet been leased to the fossil fuel industry contain up to 450 Gt CO₂e;
- Unleased federal fossil fuels make up 91 percent of the potential GHG emissions of all federal fossil fuels. The potential GHG emissions of unleased federal fossil fuel resources range from 319-450 Gt CO₂e. Leased federal fossil fuels represent from 30-43 Gt CO₂e;
- The potential emissions from unleased federal fossil fuels are incompatible with any U.S. share of global carbon limits that would keep emissions below scientifically advised levels.

Preventing leasing and development of remaining unleased federal fossil fuels would keep up to 450 billion tons from the global pool of potential future GHG emissions. Because the potential emissions from unleased federal fossil fuels are incompatible with any U.S. share of global carbon limits that would keep emissions below scientifically advised levels, they should be considered “unburnable” in the context of global carbon limits.

Yet, under the Obama administration’s “all of the above” energy policy, new federal fossil fuel deposits continue to be opened for leasing and development each year. Under this policy private companies, acting through federal leases, extract and sell federal fossil fuels in domestic and international markets. The “all of the above” policy contributes significantly to domestic and global greenhouse gas emissions, and to the industrialization and degradation of federal public lands and oceans. For example:

- Since 2005 nearly 25 percent of all U.S., and 3 percent of global, fossil fuel greenhouse gas emissions have been attributable to federal fossil fuel production;
- Since 2008 the Obama administration has leased more than 35 million acres of federal fossil fuels to the fossil fuel industry;

- More than 67 million acres of public land and ocean — an area 55 times larger than Grand Canyon National Park — are now leased to the fossil fuel industry. Those leases contain up to 42 billion tons of potential carbon dioxide pollution;
- More than 179 million acres, or 90 percent, of the public land administered by the Bureau of Land Management in the 11 western states are available for oil and gas leasing.⁶

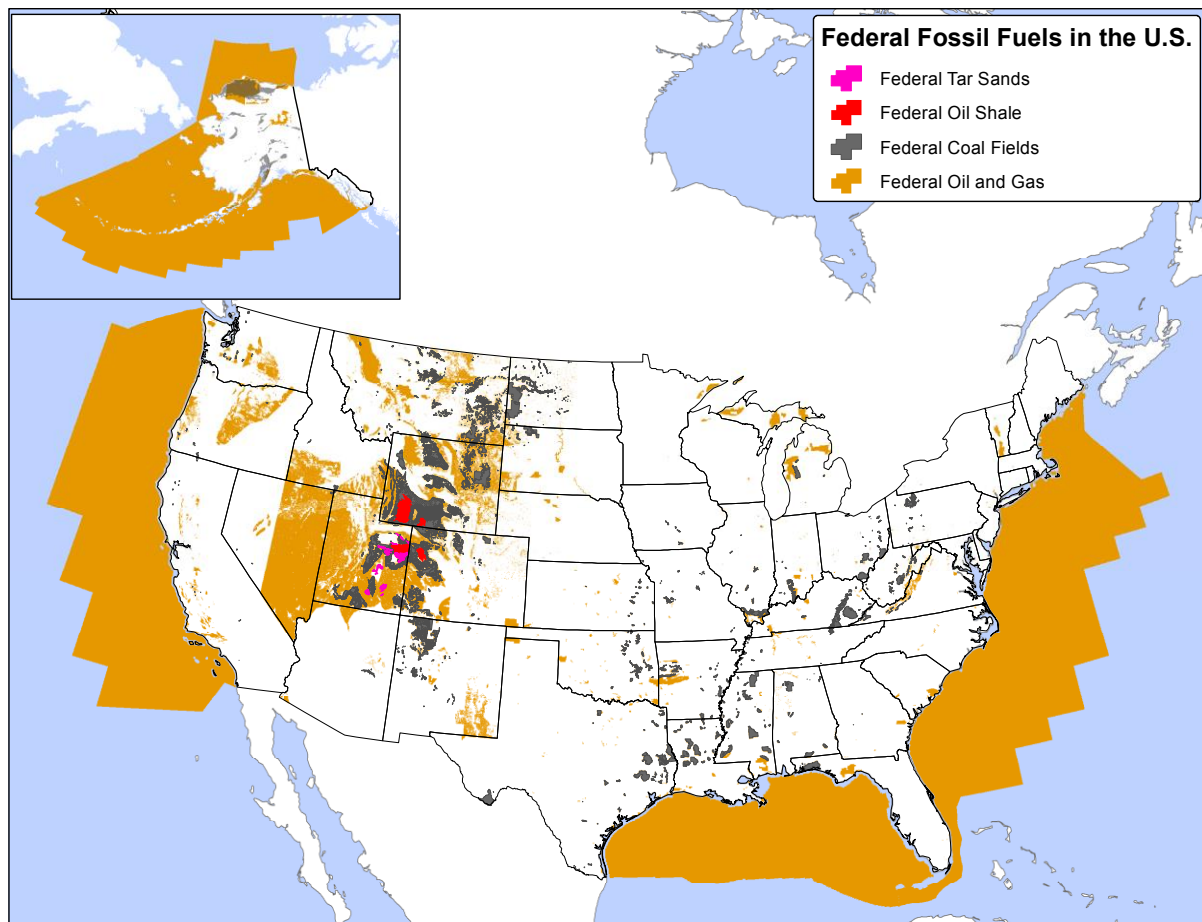


Figure 1. Federal fossil fuels in the United States. (Map by Curt Bradley, Center for Biological Diversity.)

The impacts of federal fossil fuel development on public lands and oceans reach beyond dangerous greenhouse gas pollution. Coal mining, drilling and fracking operations turn functioning forests, grasslands, deserts and sagebrush ecosystems into industrial zones. Fossil fuel extraction fragments vital habitat for wildlife, causes air and water pollution, drives ocean industrialization and acidification; degrades and destroys natural ecosystems and wildlife habitat, and further imperils species.

⁶ The Wilderness Society, "Open For Business: How public lands management favors the oil and gas industry," (2014) available at http://wilderness.org/sites/default/files/TWS%20--%20BLM%20report_0.pdf

Because federal fossil fuel leasing contributes significantly to domestic and global greenhouse gas pollution, it also contributes significantly to resultant warming. That warming, in turn, is exacting widespread harm to public lands and coastal waters. These include inundation of coasts from sea-level rise, more variable precipitation patterns resulting in devastating droughts in some areas and increased hurricanes and floods in others, declining snowpack, declining runoff and river flows, longer and more severe wildfire seasons. In many cases these changes exacerbate problems already imperiling species and ecological systems. With more emissions and warming, those impacts are projected to escalate.⁷

The President’s Authority to Prohibit New Fossil Fuel Leasing

Federal fossil fuel resources are subject to broad executive discretion over leasing. Fundamentally Congress chose, in the Mineral Leasing Act and Outer Continental Shelf Lands Act, to vest authority in the executive branch to elect when, where and how to make oil, gas and coal available for leasing to private developers. Courts have long and consistently recognized that discretion.

Onshore Leasing

The modern legislative treatment of federal oil, gas, coal and shale oil begins with the Mineral Leasing Act (“MLA”) of 1920, as subsequently amended.⁸ The MLA provides for the private extraction of fossil fuels through a lease system. Importantly, federal leases do not confer a unilateral right to acquisition by discovery, prospecting, or the like. The Mineral Leasing Act governs oil, gas, shale, tar sands and coal, although the system governing coal leases is distinct from that governing other fossil fuels, and is subject to additional requirements under both the Federal Coal Leasing Amendments of 1976⁹ and the Surface Mining Control and Reclamation Act (SMCRA) of 1977.

From the enactment of the MLA until the mid-1980s, most federal oil, gas and coal leasing was conducted on a noncompetitive basis, save within certain areas designated as “known geological structures,” a process uniformly regarded as an invitation to speculation and outright fraud. The Federal Onshore Oil and Gas Leasing Reform Act (“FOOGLRA,” or sometimes the 1987 Reform Act) left the basic language and structure of the MLA in place, but included an initial competitive bidding requirement on all offered leases, as well as giving the Forest Service veto power over leasing on National Forest System lands.¹⁰ The Energy Policy Act of 2005 similarly left the basic leasing structure in place.¹¹

The MLA’s core statutory provision governing discretion over federal oil and gas leasing is codified at 30 U.S.C. § 226(a), which provides that “[a]ll lands subject to disposition under this Act which are known or believed to contain oil or gas deposits *may* be leased by the

⁷ Final Endangerment Finding, 74 Fed. Reg. at 66,497.

⁸ 30 U.S.C. §§ 181-287.

⁹ 30 U.S.C. §§ 201 *et seq.*

¹⁰ See 30 U.S.C. §§ 188, 195, 226.

¹¹ See 43 U.S.C. §§ 15927, 15942.

Secretary.”¹² The BLM is the agency responsible for leasing all lands subject to disposition under the Act, including Forest Service lands, although FOOGLRA and its implementing regulations require Forest Service consent prior to BLM leasing of National Forest System Lands.¹³ The MLA does require 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.”¹⁴

There is a long line of cases interpreting 30 U.S.C. § 226 as conferring on the secretary considerable discretion whether or not to offer any particular lands for lease.¹⁵ 30 U.S.C. § 226(h) vests the Forest Service with similar discretion with regard to whether or not to authorize leasing on National Forest System lands.¹⁶ Industry has argued that the FOOGLRA, or 1987 Reform Act, limited this discretion, but the one court to address the issue has rejected that argument, finding that the 1987 switch to a competitive bidding system did not alter the secretary’s fundamental discretion as to which leases will be offered up for bid.¹⁷

The MLA scheme governing coal differs somewhat. Prior to the 1976 Coal Leasing Amendments and the 1977 passage of SMCRA, the statute and case law distinguished between the issuance of prospecting permits, which were discretionary,¹⁸ and “preference right” leases, which were not.¹⁹ Current 30 U.S.C. § 201(a)(1) provides, however, that

The secretary of the interior is authorized to divide any lands subject to this Act which have been classified for coal leasing into leasing tracts of such size as the secretary finds appropriate and in the public interests and which will permit the mining of all coal that can be economically extracted in such tract and thereafter the secretary shall, in his or her discretion, upon the request of any qualified applicant or on his or her own motion, from time to time, offer such lands for leasing and shall award leases thereon by competitive bidding.

Under this provision the secretary is “permitted,” but not required, to lease particular tracts for coal mining, and is delegated “sweeping authority” to implement that statutory authority.²⁰

Precedent for banning new fossil fuel leasing can be found in the case of the coal-leasing moratoria of the 1970s. The District of Columbia Circuit upheld the validity of a 1970-76

¹² For the coal equivalent, see 30 U.S.C. § 201(b).

¹³ 30 U.S.C. §226(h);43 C.F.R. §3101.7(c).

¹⁴ 30 U.S.C. § 226(b)(1). Presumably, a Secretarial determination to impose a state, regional or national moratorium on new leases could amount to a determination that no eligible lands are available in a particular state

¹⁵ See, e.g., *Udall v. Tallman*, 380 U.S. 1, 4 (1965); *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 417 (1931); *McDonald v. Clark*, 771 F.2d 460, 463 (10th Cir. 1985); *McTiernan v. Franklin*, 508 F.2d 885, 887 (10th Cir. 1975); *Duesing v. Udall*, 350 F.2d 748, 750 (D.C. Cir. 1965); *Cont’l Land Res.*, 162 I.B.L.A. 1, 7 (2004).

¹⁶ *Rocky Mt. Oil & Gas Ass’n v. United States Forest Serv.*, 12 Fed. Appx. 498 (9th Cir. 2001).

¹⁷ *Western Energy Alliance v. Salazar*, 709 F.3d 1040, 1044 (“Before the MLA was amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987 . . . it was well established that the Secretary had extremely broad discretion and was not obligated to issue any lease on public lands . . . “[t]he MLA, as amended by the Reform Act of 1987, continues to vest the Secretary with considerable discretion to determine which lands are ‘to be leased’ under § 226(b)(1)(A).”)

¹⁸ See *Arnold v. Morton*, 529 F.2d 1101 (9th Cir. 1976).

¹⁹ See *Natural Resources Defense Council v. Berkland*, 458 F. Supp. 925 (D.D.C. 1978).

²⁰ *WildEarth Guardians v. Salazar*, 783 F. Supp. 2d 61, 63 (D.D.C. 2011) (quoting *Indep. Petroleum Ass’n of Am. v. DeWitt*, 279 F.3d 1036, 1040 (D.C. Cir. 2002)).

moratorium on new coal leases, part of a series of various moratoria from 1970 to 1981.²¹ Under the pre-1976 “preference right” coal leasing scheme, speculation on coal leases was widespread. Even prior to the enactment of the 1976 Coal Leasing Amendments and SMCRA, the Department of the Interior recognized widespread problems, and in 1973, the then-secretary issued Order No. 2952, which provided:

In the exercise of my discretionary authority under Section 2(b) of the Mineral Leasing Act, as amended (30 U.S.C. § 201(b)), I have decided not to issue prospecting permits for coal under that section until further notice and to reject pending applications for such permits in order to allow the preparation of a program for the more “orderly” development of coal resources upon the public lands of the United States under the Mineral Leasing Act, with proper regard for the protection of the environment. Accordingly, no prospecting permits for coal under Section 2(b) of the Mineral Leasing Act, *supra*, shall be issued until further notice. All pending applications for such permits shall be rejected. . . .²²

During the moratorium the Interior Department undertook a series of national and local environmental impact statements for coal leasing. Industry challenged the moratorium on two principal grounds — first, that the moratorium failed to implement the policy of the Mining and Minerals Policy Act of 1970²³ to “foster and encourage the development of coal resources, and second, that the secretary’s determination that the moratorium did not require preparation of an EIS under National Environmental Policy Act was arbitrary and capricious. The court in *Krueger* rejected both claims, finding that “the Secretary had the right, before receiving or approving applications, to order a pause for refreshment of his judgment by further investigation, public input, comprehensive consideration, and rulemaking directed toward the hopefully better implementation of the Mineral Leasing Act in light of NEPA and other significant factors.”²⁴

Although the moratorium eventually ended and coal leasing resumed, the courts did require the EIS process to consider the alternative of no new national coal leasing program whatsoever.²⁵ Fundamentally Congress chose, in the Mineral Leasing Act and all its subsequent amendments, to vest authority in the executive branch to elect when, where and how to make oil, gas and coal available for leasing to private developers, and the courts have long and consistently recognized that discretion.

Given the scope of the climate crisis, the vast amounts of federal fossil fuels already under lease, and the necessity to keep carbon in the ground to avert catastrophic climate disruption, as well as industrializing and polluting forests, deserts, sagebrush steppe, grasslands and oceans, the president can and should exercise his executive authority to defer issuance of any new leases for oil, gas or coal on federal public lands and withdraw all federal offshore waters from such leasing. This action would not only yield significant emissions reductions, it would

²¹ See *Krueger v. Morton*, 539 F.2d 235, 238-40 (D.C. Cir. 1976); see also *NRDC v. Hughes*, 437 F. Supp. 981, 983-85 (D.D.C. 1977) (discussing history and reform of coal leasing).

²² United States Department of the Interior, Secretarial Order 2952 (Feb. 1973); see *Krueger*, 539 F.2d at 237.

²³ 30 U.S.C. § 21a.

²⁴ 539 F. Supp.2d at 239.

²⁵ *NRDC v. Hughes*, 437 F.Supp. at 990-91 (requiring DOI to address “the threshold question as to *whether* the proposed [coal leasing] policy is even *necessary*”)

also start the U.S. down the path toward decarbonization by 2050 and demonstrate critical international leadership by the world's largest cumulative emitter and most dynamic economy.

Offshore Leasing

The U.S. regulates the Outer Continental Shelf (OCS) under authority of the Outer Continental Shelf Act (OSCLA).²⁶ The OCS includes 1.76 billion acres of submerged federal land, subsoil and seabed that, off the coast of most coastal states, begins three nautical miles out and extends, under international law, at least 200 nautical miles to the Exclusive Economic Zone, or farther to the edge of the continental shelf. The continental shelf is a gently sloping undersea plain between the coast and deep ocean; it is rarely more than 500 feet deep. The OCS is divided into four regions: Atlantic Region, Gulf of Mexico Region, Pacific Region and Alaska Region.

The Bureau of Ocean Energy Management (BOEM) administers federal oil and gas leasing in these OCS regions. About 33 million acres of OCS are currently under lease; they account for about 5 percent of U.S. gas production and 21 percent of its oil production. The Energy Information Authority (EIA) estimates that the OCS contains about 5.2 billion barrels of proved oil, and about 29 trillion cubic feet of proved gas. The BOEM estimates that the remaining undiscovered, technically recoverable federal fossil fuels in the OCS include about 89 billion barrels of oil and 405 trillion cubic feet of gas whose 100-year global warming potentials are about 48 and 33 GtCO_{2e}, respectively.

The president has broad authority under OSCLA to withdraw “submerged lands” of the OCS from the offshore fossil fuel leasing pool, including undiscovered oil and gas resources that represent about 81 GtCO_{2e} of potential emissions. The Outer Continental Shelf Lands Act (OCSLA) explicitly authorizes the president to “from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.”²⁷ This provision was put to use by President George H. W. Bush in 1990 when he withdrew the West Coast and portions of the North Atlantic and the Gulf of Mexico from the potential leasing pool.²⁸ In 1998 President Bill Clinton extended the presidential moratorium through 2012, only to see it largely rescinded by President George W. Bush in 2008.²⁹ For purposes of safeguarding the climate and a livable world, a willing president could withdraw all submerged lands from the leasing pool, preventing any new leases from being available for drilling with one sweeping action.

Presidents have also exercised their authority under OCSLA in a more limited fashion to withdraw indefinitely from leasing certain areas designated as marine sanctuaries. In 1998 President Clinton withdrew from leasing the eight then-existing national marine sanctuaries: Washington-Oregon (Olympic Coast); Central California (Cordell Bank, Gulf of Farallones and

²⁶ 43 U.S.C. § 1331 *et seq.*

²⁷ 43 U.S.C. § 1341(a) (“The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.”)

²⁸ See Statement on Outer Continental Shelf Oil and Gas Development, 26 Weekly Comp. Pres. Doc. 1006 (June 26, 1990);

²⁹ See Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 34 Weekly Comp. Pres. Doc. 1111 (June 12, 1998); Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition, 44 Weekly Comp. Pres. Doc. 986 (July 14, 2008)).

Monterey Bay); Southern California (Channel Islands); Western Gulf of Mexico (Flower Garden Banks); Straits of Florida (Florida Keys); South Atlantic (Gray's Reef); Mid-Atlantic (Monitor); and North Atlantic (Stellwagen Bank).³⁰

Withdrawal of Federal Lands From Availability for Fossil Fuel Leasing

In addition to discretionary authority under the MLA and OSCLA to defer or deny the leasing of any or all federal minerals, the executive branch has considerable delegated authority over onshore lands and minerals under the Federal Lands Policy and Management Act of 1976 (FLPMA). Management of federal lands is governed in the most part by the Property Clause, Article IV, of the U.S. Constitution § 3, cl. 2, and, therefore, executive authority is largely limited to what is conferred by statute. The courts have a long history of recognizing broad statutory authority, implicit or explicit, to withdraw public lands from particular uses. Prior to the enactment of FLPMA, presidents (perhaps most notably Theodore Roosevelt) made extensive and largely unfettered use of broad statutory grants of authority (including the Forest Reserve provisions of the 1891 General Reserve Act and the 1906 Antiquities Act).³¹ In 1915 — prior to the MLA, when oil and gas claims were leading to patents of federal land under the general mining law — President William H. Taft withdrew some 3.6 million acres of oil and gas lands, a decision the Supreme Court upheld as “impliedly delegated” authority in 1915.³²

FLPMA, which finally in 1976, imposed an organic act on the federal public lands not already withdrawn, both codified and attempted to constrain the authority of the executive branch to withdraw lands from the general operation of the public land laws.³³ FLPMA both imposed on BLM lands a structured planning-based management system³⁴ and attempted to codify the executive's withdrawal authority while maintaining tight congressional control. FLPMA § 204(a) provides that “the Secretary is authorized to make, modify, extend, or revoke withdrawals” of up to 20 years in duration, “but only in accordance with the provisions and limitations of this section.”³⁵

For purposes of FLPMA, “withdrawal” means “withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program.”³⁶ This definition includes withholding an area from mineral leasing.³⁷

³⁰ See Curry L. Hagerty, Cong. Research Serv., RL 41132, Outer Continental Shelf Moratoria on Oil and Gas Development 9 n.37 (2011).

³¹ See generally David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 Nat. Res. J. 279 (1982).

³² See *United States v. Midwest Oil Co.*, 236 U.S. 456 (1915).

³³ *Id.* at 313-329.

³⁴ See 43 U.S.C. § 1712.

³⁵ 43 U.S.C. § 1714(a).

³⁶ 43 U.S.C. § 1702(j).

³⁷ In *Pacific Legal Foundation v. Watt*, 529 F. Supp. 982, 995 (D. Mont 1981) the Watt Interior Department argued without success that it in fact lacked any authority to withdraw lands from mineral leasing, because “withdrawal” under FLPMA was “defined to preserve its traditional meanings,” which, Watt contended, did not include withdrawal from the mineral leasing laws. See also *Clayton Williams*, 103 IBLA at 205-208.

FLPMA § 204 enumerates an extensive list of factors for consideration and documentation in a withdrawal action — factors including, but not limited to, “an inventory and evaluation of the current natural resource uses and values of the site and adjacent public and nonpublic land and how it appears they will be affected by the proposed use, including particularly aspects of use that might cause degradation of the environment, and also the economic impact of the change in use on individuals, local communities, and the Nation,” and “an analysis of the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use.”³⁸ Given the well-documented threat of climate change to biodiversity and human health and welfare, a climate-based withdrawal could address both the global and national effects of fossil fuel combustion, as well as the immediate environmental impacts of potential mineral extraction on the affected public lands.

Although FLPMA’s withdrawal authority was sought to be limited by requiring congressional approval, ever since the Supreme Court’s 1983 holding in *INS v. Chadha* that a similar “legislative veto” violated the Constitution’s separation of powers and bicamerality requirements, the constitutionality of FLPMA § 204’s legislative veto provisions has been doubtful at best. A series of district court decisions arising out of Interior Secretary Ken Salazar’s 2009 Grand Canyon uranium mining withdrawal confirm that § 204’s legislative veto is both unconstitutional and also severable from the rest of the section.³⁹ The court rejected the *Yount v. Salazar* plaintiffs’ argument that the unconstitutionality of the legislative veto invalidated the entirety of § 204 and, therefore, stripped the secretary of withdrawal authority altogether.⁴⁰ Noting the presence of a severability clause in FLPMA, the historical context behind the statute, and the structure and context, the court in *Yount* ultimately concluded that § 204, including its reporting requirements, remained meaningful, and within the intent of Congress, even without the legislative veto.⁴¹ The unconstitutionality of the § 204 legislative veto is clear-cut and the *Yount* holding offers a careful and detailed conclusion that it is fully severable from the remainder of § 204.

Although the withdrawal process is involved and requires detailed findings, FLPMA provides a clear mechanism for immediate action during the process. 43 U.S.C. § 1714(b) provides that “[w]ithin thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted and the extent to which the land is to be segregated while the application is being considered by the Secretary.” § 1714(b) goes on to provide that: “Upon publication of such notice, the land shall be segregated from the operation of the public land laws to the extent specified in the notice,” for a period of up to two years from the date of the notice. This provision allows the Secretary (at the direction of the President) to stay new leasing pending development of a final withdrawal proposal. FLPMA § 204(b) states that the land “*shall* be segregated” “to the extent specified in the notice” — this conveys considerable discretion on the secretary to impose two-year temporary protections pending a final withdrawal decision, even without utilizing the emergency withdrawal provisions of § 204(e).

³⁸ 43 U.S.C. § 1712(c)(2)(2), (4).

³⁹ See *Yount v. Salazar*, 2014 U.S. Dist. LEXIS 138505 (D. Ariz. Sept. 30, 2014) (“*Yount II*”); *Yount v. Salazar*, 933 F. Supp.2d 1215, 1219 (D. Ariz. 2013) (“*Yount I*”).

⁴⁰ *Id.* at 1220-25.

⁴¹ *Id.*

In addition to general authority under the MLA and OCSLA, and withdrawal authority under FLPMA, the president also may protect federal onshore and offshore lands from leasing by declaring them national monuments or marine sanctuaries.⁴² This authority was used in 2009 by President Bush to establish, among others, the Marianas Trench Marine National Monument near the Northern Mariana Islands of the United States Territory of Guam, as well as the Rose Atoll Marine National Monument and the Pacific Remote Islands Marine National Monument.⁴³ President Clinton also used this power twice.⁴⁴ President Obama has used this power twice to expand the area covered by certain marine national monuments.⁴⁵ In total, seven marine national monuments have been created in this manner since 2000.⁴⁶

Conclusion

The potential emissions from unleased federal fossil fuels are incompatible with any U.S. share of global carbon limits that would keep emissions below scientifically advised levels.

The president has the authority to immediately cease new leasing of federally managed, publicly owned fossil fuels from extraction, and to begin the process of withdrawing those lands and oceans from availability. Such an action would show that the United States is committed not simply to bending the curve of emissions increases under Obama's current climate change policies, but to actually taking the necessary concrete steps to ensure that significant carbon reserves remain where they must to avert catastrophic climate change: safely in the ground.

⁴² See 16 U.S.C. § 431-433.

⁴³ See Establishment of the Marianas Trench Marine National Monument, 74 Fed. Reg. 1557, 1561 (Jan. 12, 2009) (withdrawing all Federal lands and interests in lands within the boundaries of the monument from leasing); Establishment of the Rose Atoll Marine National Monument, 74 Fed. Reg. 1577 (Jan. 12, 2009); Establishment of the Pacific Remote Islands Marine National Monument, 74 Fed. Reg. 1565 (Jan. 12, 2009).

⁴⁴ See Establishment of the Virgin Islands Coral Reef National Monument, 66 Fed. Reg. 7364 (Jan. 22, 2001).

⁴⁵ See Boundary Enlargement of the California Coastal National Monument, 79 Fed. Reg. 14,601 (March 14, 2014); Pacific Remote Islands Marine National Monument Expansion, 79 Fed. Reg. 58,645, 58,647 (Sept. 25, 2014).

⁴⁶ See *generally* Establishment of the California Coastal National Monument, 65 Fed. Reg. 2821 (Jan. 18, 2000); Establishment of the Virgin Islands Coral Reef National Monument, 66 Fed. Reg. 7364 (Jan. 22, 2001); Establishment of the Northwestern Hawaiian Islands Marine National Monument, 71 Fed. Reg. 36,443 (June 26, 2006); Establishment of the Marianas Trench Marine National Monument, 74 Fed. Reg. 1557 (Jan. 12, 2009); Establishment of the Pacific Remote Islands National Monument, 74 Fed. Reg. 1565 (Jan. 12, 2009); Establishment of the Rose Atoll Marine National Monument, 74 Fed. Reg. 1577 (Jan. 12, 2009); Establishment of the San Juan Islands National Monument, 78 Fed. Reg. 18,789 (March 28, 2013);