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Exploring the Bounds of Possibility
A roundtable discussing the legal extent and economic impacts of stalling new energy production on federal lands
February 2, 2021
University of Wyoming
School of Energy Resources

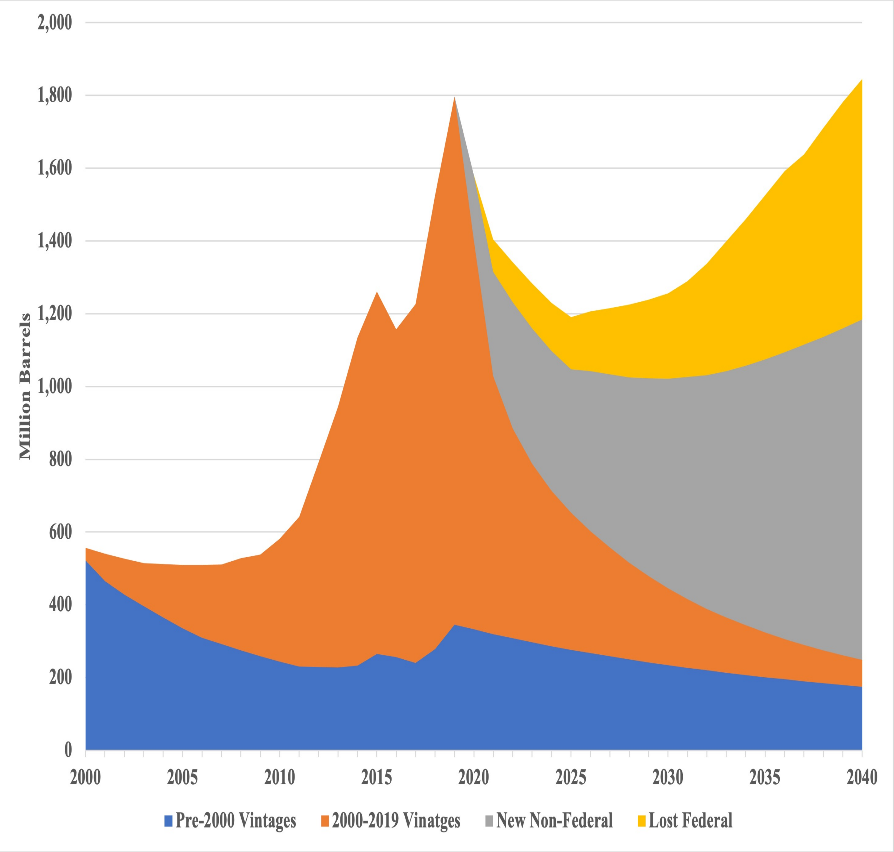
Fiscal & Economic Impacts of a Federal Oil and Gas Lease Moratorium

- Federal lands are important for western states
- 48% of the land area in Wyoming is federal and
  - 53.6% of oil production and
  - 78.6% of gas production come from these federal lands
- A leasing moratorium reduces
  - Investment in new oil and gas wells, and
  - Results in lower future oil and gas production
- Lower investment & production reduces economic activity, employment, and tax revenues
- Restricting federal oil and gas development forgoes significant economic opportunities for income and wealth creation
- My study estimates these opportunity costs

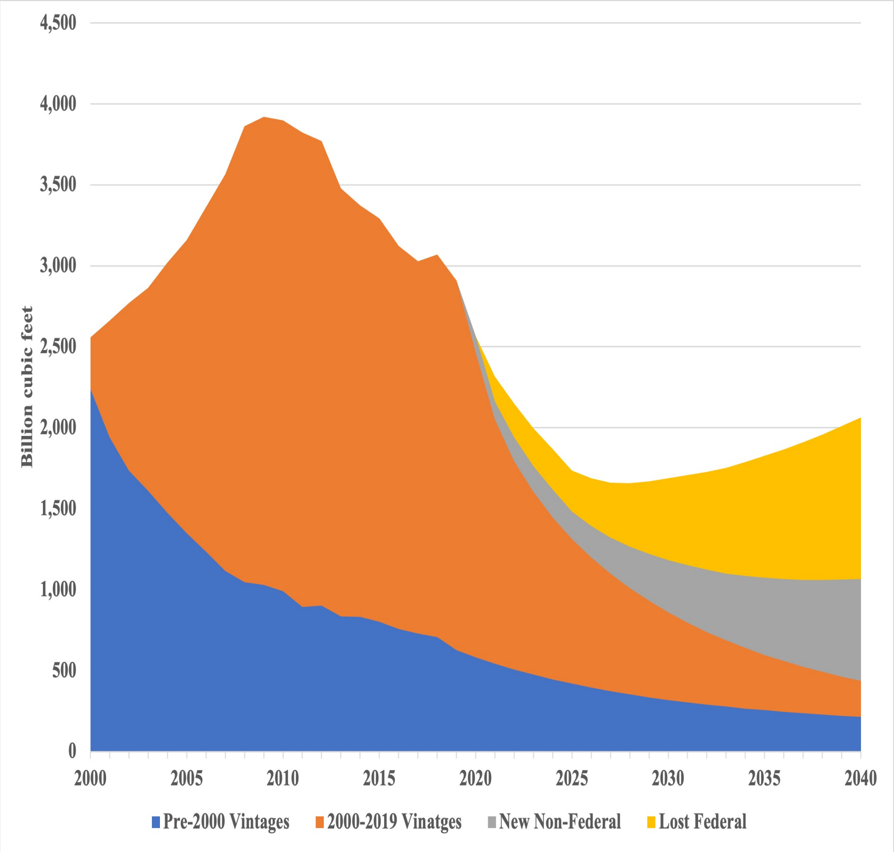
FEDERAL OIL & GAS LEASE MORATORIUM

Lost Production from a Lease Moratorium in the Study Region

Onshore Federal Oil Production



Onshore Federal Gas Production



FEDERAL OIL & GAS
LEASE MORATORIUM

Fiscal & Economic Impacts of Lease Moratorium

- Fiscal impacts – tax revenues fall
  - Wyoming - down $300 - $1,700 million per year
  - New Mexico – down $900 - $3,700 million per year
  - Entire Region – down $1,600 - $11,093 million per year
- Negative economic Impacts
  - Lower employment by 10s of thousands / year
  - Losses in gross domestic product: $9 - $62 billion per year
- Lease moratorium is a costly way to reduce GHG emissions
  - Even assuming no offsets $64 - $196 per ton of avoided emissions
  - With offsetting production & emission gains overseas these pollution abatement costs at least double

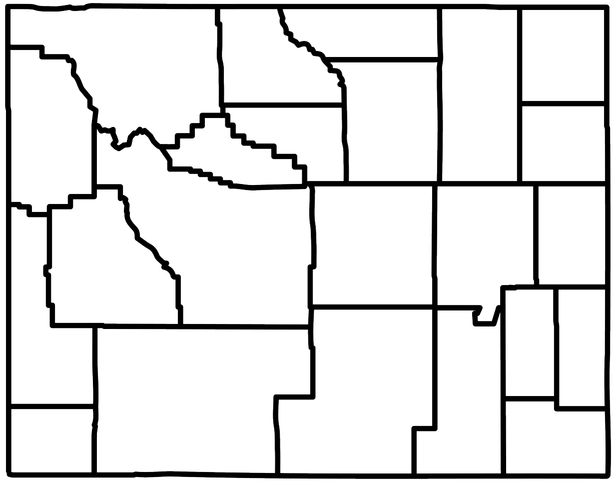
Is A Lease Moratorium Smart Policy?

- Smart energy policy ensures cheap, clean, & secure energy
- A lease moratorium appears to fail all three tests:
  - It is expensive, imposing significant fiscal & economic losses
  - It doesn't significantly reduce emissions if at all, and
  - It leaves us more dependent upon foreign sources of energy
- Let's remember the benefits of American oil and gas
  - Operates under high environmental standards,
  - Is the world's third largest exporter of low-carbon natural gas,
  - Supports high paying jobs in rural communities, and
  - Generates billions in tax revenues that support local governments and special districts (conservation, libraries, health care, etc.)
- We may wish to consider a strategy of
  - Leveraging the wealth that oil and gas industries create by
  - Investing in R&D to improve the environment

IMPACTS

Wyoming Impacted Disproportionately

- Gas fields in the Western part of the State are largely made up of federal lands and minerals.
- Powder River Basin (PRB) has patchwork of fee, surface and federal mineral ownership.
- Majority of Laramie County is largely the only county unaffected by federal oil and gas leasing.
- Executive Orders could impact the feasibility of any CO2-EOR or storage project in Wyoming.



Mineral Leasing Act

- 30 U.S.C. 181 – oil and gas “shall be subject to disposition in the form and manner provided by this chapter to citizens of the United States”

- 30 USC 226 – (Leases of Oil and Gas Lands)

  - “All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.”

  - “Lease 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.”

FLPMA

Federal Land Policy and Management Act of 1976

- Through FLPMA, Congress designated the policy of the United States in managing the public lands.
- 43 USC 1701 – Congressional Declaration of Policy
  - "(8)the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values;"
  - "(9)the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;"
  - "(12)the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970…"

SOLUTIONS

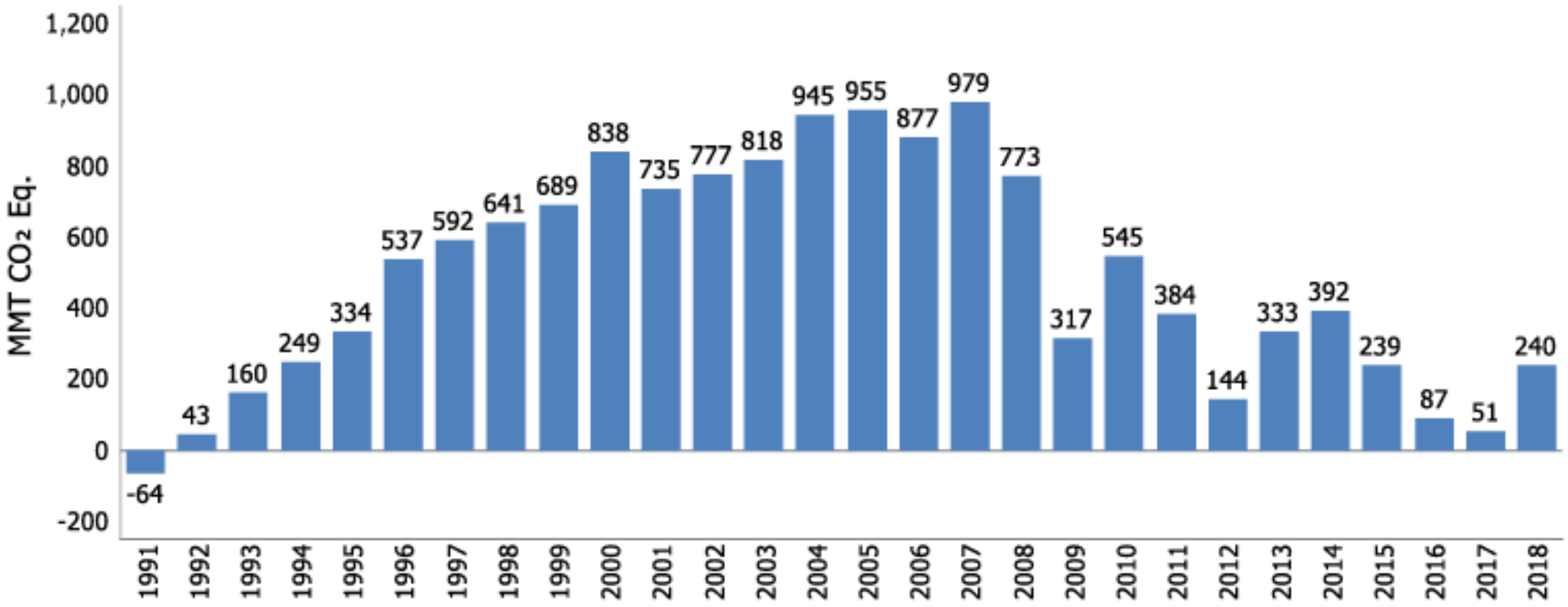
What Can Wyoming Do?

- Advocacy (Secretary of Interior)
- Litigation (Federal Court)
- Congressional Action (U.S. Congress)
- State Legislation/Regulatory Response?
  - Not Ideal – Might investigate changes to drilling rules allowing non-federal minerals to more easily be developed.

IMPORTANT CONTEXT

- From 2005 to 2018, CO_2 emissions fell by 12%, while global energy-related emissions increased 24%
- EPA data show a distinct and significant overall downward trend in CO_2 emissions since 2007

Figure ES-3: Change in Annual Gross U.S. Greenhouse Gas Emissions Relative to 1990 (1990=0, MMT CO_2 Eq.)

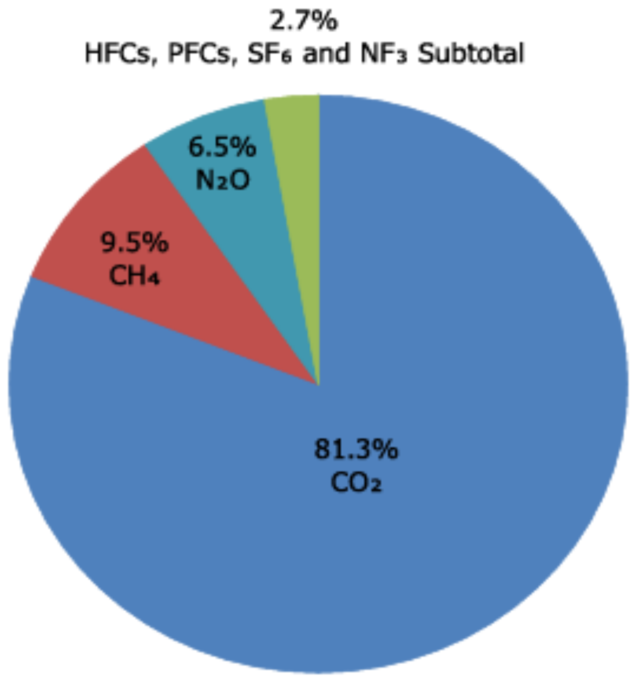


Source: EPA GHG Inventory 1990-2018

IMPORTANT CONTEXT

- CO_2 is by far the largest U.S. GHG, with methane less than 10%

Figure ES-4: 2018 U.S. Greenhouse Gas Emissions by Gas (Percentages based on MMT CO_2 Eq.)



Source: EPA GHG Inventory 1990-2018

IMPORTANT CONTEXT

- Methane emissions from natural gas systems are down 23.7% since 1990, despite significant production increases

  The decrease in methane emissions [from natural gas systems] is largely due to decreases in emissions from distribution, transmission, and storage. The decrease in distribution emissions is due to decreased emissions from pipelines and distribution station leaks, and the decrease in transmission and storage emissions is largely due to reduced compressor station emissions (including emissions from compressors and equipment leaks).

  Source: EPA GHG Inventory 1990-2018

- Methane emissions from natural gas and petroleum systems (combined) are also down 23% from 1990-2018

  The decrease in [petroleum systems]is due primarily to decreases in emissions from offshore platforms, tanks, and pneumatic controllers.

  Source: EPA GHG Inventory 2020 Report

THOUGHTS ON LITIGATION

Leasing

- Challenging Executive Orders

  This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

- Challenging Secretarial Orders
  - There will almost certainly be a Secretarial Order implementing the directive in the Executive Order to pause leasing
  - Generally, secretarial orders establishing department policy are not reviewable under the APA for lack of *final* agency action. These can often create issues of standing. *<u>But</u>*

  Lessons from Coal Leasing Moratorium

  "A programmatic analysis that may predetermine future decision making represents a concrete injury that plaintiffs must, at some point, have standing to challenge. Plaintiffs do not need to wait until after coal has been leased and mining has been approved in order to challenge an alleged procedural injury." *Citizens for Clean Energy et al. v. U.S. Department of the Interior et al.*, 2019 WL 1756296 (D. Mont. April 19, 2019) (Coal leasing moratorium) (citation omitted)

Standing in the Oil and Gas Leasing Context

- Failure to act may constitute final agency action. 5 U.S.C. § 706(1)

    See Western Energy v. Jewell, 1:16-cv-00912 (Opinion on Motion to Dismiss) (Contrary to timber sales "BLM is under no such discretion and 'shall' hold lease sales for each state where eligible parcels are available at least quarterly. . . . [W]hen WEA's members expect regular lease sales, and they lose the opportunity to exercise their right to bid at those sales, it is highly conceivable the members are injured.")

    See Western Energy v. Jewell, 1:16-cv-00912 (Opinion on Motion to Dismiss) ("" [W]hen BLM fails to adhere to its statutory obligation to offer available parcels, the injury is not limited to specific companies that submitted EOIs but extends to all the association's members.")

- Central question: Does BLM have authority to pause leasing while it conducts a programmatic review through a land use planning amendment to review all leases authorized or eligible in an RMP?

Leasing cont.

- This Administration thus far has taken a thoughtful approach ("pause" & "to the extent consistent with applicable law" & "programmatic review" = nominally, not a ban)

- A good example of the Environmental/NGO playbook from 2016 (https://www.biologicaldiversity.org/campaigns/keep_it_in_the_ground/pdfs/Petition_for_a_Moratorium_on_the_Leasing_of_Federal_Public_Land_Fossil_Fuels.pdf)

    - "The Secretary has broad discretion under the MLA as to when, how, and <u>if</u> federal . . . oil and gas. . . may be offered for lease. This discretion has been consistently upheld by the courts."

    - "[Q]uarterly leasing is not required if no lands or 'eligible' and 'available' due to factors including withdrawal from the operation of the MLA under FLPMA, allocation decisions under an applicable land management plan, need for additional environmental review, or exercise of Secretarial discretion." *See also* Wyoming BLM ("Oil and Gas Leasing is a discretionary action.") (https://www.blm.gov/sites/blm.gov/files/oilandgasleasing_wy_oilandgasleasing101.pdf)

- Similar petition from Wild Earth Guardians in 2016 (http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2016/20160120_docket-none_petition.pdf)

PROGRAMMATIC REVIEW

What might the programmatic review look like ?

- Scope of Coal PEIS:
    - How, when, and where to lease
    - Fair return
    - Climate impacts
    - Socioeconomic impacts
    - Exports
    - Energy needs
- Focus on flaring, leaks, other emission sources
- CBD remedy - “no federal public lands shall be considered eligible or available for fossil fuel mineral leasing [if] leasing is [not] consistent with the United States’ goal of limiting climate change to 1.5^{o} Celcius above pre-industrial levels”
- Multi-year process possible (took one year just to “scope” the Coal PEIS)

What can operators do? – Secretarial Order 3395

- Downhole sundries that do not trigger NEPA appear to be getting approved.

- Numerous operators had routine APD's issued *after* S.O. 3395, which were subsequently rescinded for a lack of sufficient authority.

- Agency cannot unreasonably delay or withhold required action (5 U.S.C. § 706(1))

  - Onshore Order 1 – completeness review within 10 days; approval/denial within 30 days of complete application.

- Under S.O. 3395, operations "necessary to avoid adverse impacts to public land or mineral resources" are excluded

  - Look for places where implementation of the orders strand or "waste" mineral resource, perhaps by forcing operators to pursue non-optimal drilling plans

  - If APD withheld, will it force operator to move locations and increase environmental impact (flaring? surface disturbance? etc.)

- This is not a "no"; it is a removal of delegated authority. Seek approval at the necessary level (letters to Secretary or Acting Secretary; copy Secretary on submittals; work it up the chain)

OPTIONS FOR OPERATORS

What can operators do? – Pause on Leasing (PEIS)

- Review drilling plans to identify any with heightened “environmental” issues (i.e., tied in or flaring? closed loop drilling and completions?; tier 4 engines?; unusual water use or disposal requirements?)

- Identify RMP’s that are undergoing or ripe for review from a climate change perspective – good vehicle for DOI to make lands “not available” for leasing

- Expect additional COAs and lease stipulations around emissions

- Coordinate industry response, create a record particularly as to harm

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