

2-17-2017

Federal Lands Under the Trump Administration

Thomas Gerwick

Follow this and additional works at: <https://digitalcommons.du.edu/dlrforum>

Recommended Citation

Thomas Gerwick, Federal Lands Under the Trump Administration, 94 Denv. L. Rev. F. (2017), available at <https://www.denverlawreview.org/dlr-online-article/2017/2/17/federal-lands-under-the-trump-administration.html>

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review Forum by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

FEDERAL LANDS UNDER THE TRUMP ADMINISTRATION

I. RECENT NEWS AND POTENTIAL IMPACT ON WESTERN STATES

While newly inaugurated President Donald Trump has yet to put forth his plan for energy development on federally owned lands, he has expressed his desire to “open up federal lands to more energy development.”¹ President Trump also indicated that he plans on lifting the coal moratorium and “remove regulations that the energy industry says can delay projects.”² On January 30, 2017, President Trump issued an executive order indirectly impacting energy regulations, promulgating a rule that for every new regulation imposed, two must be eliminated.³ President Trump’s nominee for Secretary of the Interior, Ryan Zinke, offers insight into the future of energy development on public lands.⁴ While Zinke appears to believe in protecting national parks and monuments, his commitment to deregulation may incentivize the energy industry to take advantage of the considerable resources underlying public lands.⁵

If more energy production is permitted on public lands, many western states would be virtually certain to feel the effects, both good and bad. Public lands are central to “land use, economic development, and social structure and culture” in eleven western states—“New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, Arizona, Nevada, California, Oregon, and Washington.”⁶ Within the aforementioned western states, there are “404,500,000 acres of federal mineral estate, and over 39,000,000 acres of that estate were subject to federal oil and gas leases in [2008].”⁷ Colorado specifically could see a tremendous increase in energy production, as large swaths of land are federally owned.⁸ In Colorado, the Bureau of Land Management (BLM) administers 8.3 million acres of public land as well as 27 million acres of mineral estate.⁹ The National Park Service (NPS) administers Colorado’s four national parks—Black Canyon of the Gunnison National Park, Great Sand Dunes

1. Annie Knox and Kim Palmer, *Trump taps well of protest with calls for more drilling in national parks*, REUTERS.COM (Jan. 11, 2017, 1:14 PM), <http://www.reuters.com/article/us-usa-trump-energy-nationalparks-idUSKBN14V1EP>.

2. James Osborne, *Out West, Trump eyes federal lands for oil and gas boom*, HOUS. CHRON., (Jan. 21, 2017, 1:39 AM), <http://www.houstonchronicle.com/business/article/Out-West-Trump-eyes-federal-lands-for-oil-and-10869823.php>.

3. See The White House, *Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs*, 2017 WL 394070, (Jan. 30, 2017).

4. See discussion *infra* Section (II)(A).

5. See *infra* text accompanying notes 18–24.

6. Bruce M. Pendery, *BLM’s Retained Rights: How Requiring Environmental Protection Fulfills Oil and Gas Lease Obligations*, 40 ENVTL. L. 599, 602 (2010).

7. *Id.*

8. See *infra* text accompanying notes 9–12.

9. *Colorado Field Offices*, BUREAU LAND MGMT., (Nov. 11, 2016), <https://www.blm.gov/co/st/en.html>.

National Park, Mesa Verde National Park, and Rocky Mountain National Park.¹⁰ Colorado has eight national monuments¹¹; national monuments are administered by the NPS, but can be delegated to the BLM.¹² Moreover, the U.S. Geological Survey estimated that the Mancos Basin, located under public land in western Colorado, “hold[s] 66 trillion cubic feet of natural gas, a deposit close in size to the Marcellus Shale in Pennsylvania.”¹³

While increased energy development on federal lands would further wean the United States off of foreign oil and gas, the economic impact may not be worth the public outcry. Although protectionism has been President Trump’s central philosophy, it bears considering whether the legal institutions will even permit drastic action. This article seeks to determine which legal mechanisms and institutions allow for energy production on public lands.

II. GOVERNMENTAL BODIES THAT OVERSEE PUBLIC LANDS

A. Department of the Interior

The Department of the Interior has “plenary authority over the administration of public lands.”¹⁴ Black’s Law Dictionary defines plenary authority as “power that is broadly construed.”¹⁵ The Department of the Interior is the parent agency of both the NPS and the BLM.¹⁶ The NPS oversees the administration of public lands, such as national parks, while the BLM administers most other public lands; both are involved in the administration of national monuments.¹⁷ The secretary of the interior’s broad powers allow him or her to affect great change on the public lands system. Consequently, the environmental disposition of President Trump’s secretary could have considerable implications on the future of public lands.

The Trump administration’s newly confirmed secretary of the interior is Representative Ryan Zinke of Montana.¹⁸ During Zinke’s confirmation hearing, Zinke referred to himself as “an unapologetic admirer of Teddy Roosevelt,” which presumably tempered some

10. Colorado, NAT’L PARK SERV., (last accessed Jan. 31, 2017), <https://www.nps.gov/state/co/index.htm>.

11. *Quick Guide to Colorado’s National Monuments*, COLORADO.COM, (last accessed Jan. 31, 2017), <http://www.colorado.com/articles/quick-guide-colorados-national-monuments>.

12. Robert Iraolo, *Proclamations, National Monuments, and the Scope of Judicial Review Under the Antiquities Act of 1906*, 29 WM. & MARY ENVTL. L. & POL’Y REV. 159, 167–68 (2004).

13. Osborne, *supra* note 2.

14. ROMUALDO P. ECLAVEA, *National park system*, 59 AM. JUR. 2D *Parks, Squares, and Playgrounds* § 3 (2016) (citing *Hoefler v. Babbitt*, 139 F.3d 726, 732 (9th Cir. 1998)).

15. *Power*, BLACK’S LAW DICTIONARY (10th ed. 2014).

16. Pendery, *supra* note 6, at 602–03; Denise E. Antolini, *National Park Laws in the U.S.: Conservation, Conflict and Centennial Values*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 851, 853 (Spring, 2009).

17. See *supra* text accompanying notes 9–12.

18. Osborne, *supra* note 2.

conservationists' concerns.¹⁹ While Zinke will “consider an expansion of energy drilling and mining on federal lands,” he stated that he “would ensure sensitive areas remain protected.”²⁰ Zinke further appealed to conservationists by vowing to keep “federal lands under federal control to ensure they are preserved for future generations.”²¹ This statement is important because recently the House GOP proposed a law to facilitate the sale of federal lands.²² Additionally, Zinke used the stagnant domestic economy to justify increased energy production, contending that increases in domestic production would help boost the economy.²³ Zinke also supported his position by asserting “it is better to produce energy domestically under reasonable regulation than overseas with no regulation.”²⁴ This contention can be framed as humanist, as little oversight and even less accountability in foreign drilling presumably wreaks havoc on not only the environment but also the individuals who are employed in such operations. Conversely, it could also be framed as protectionist, as domestic production would undercut the lynchpin of many developing countries' economies. In either case, Zinke appears committed to increasing domestic energy production while being mindful of conservation.

In a departure from President Trump's stance on climate change, Zinke “told committee members that he believes humans contribute to global climate change.”²⁵ However, Zinke expressed doubt as to the extent humans influence climate change and stated “he would support efforts by the U.S. Congress to cancel recent regulation imposed by the Interior Department's Bureau of Land Management aimed at preventing leaks of methane—another gas scientists blame for climate change—from oil and gas installations.”²⁶

Considering the broad authority vested in Zinke, his moderate attitude will likely not result in the molestation of public lands for two reasons. First, in the national parks context, Zinke's moderate stance will better straddle the competing interests contained within the Organic Act's dual mandate than both a true conservative, who would likely dismantle regulations to emphasize “enjoyment” of national parks, and a true liberal, who would likely impose further regulations to emphasize “conservation.” Second, Zinke's moderate stance may serve as an

19. *Id.* (“[Theodore Roosevelt] created the National Park system and designated 18 sites, including the Grand Canyon, as national monuments to protect them.”).

20. Valerie Volcovivi & Timothy Gardner, *Trump Interior nominee would consider more drilling on federal land*, REUTERS.COM, (Jan. 17, 2017, 11:45 PM), <http://www.reuters.com/article/us-usa-congress-zinke-idUSKBN1511DQ>.

21. *Id.*

22. *See supra* text accompany note 50.

23. Volcovivi & Gardner, *supra* note 20.

24. *Id.*

25. *Id.*

26. *Id.*

impediment to any decisions, as “enjoyment” and “conservation” inherently diametrically oppose one another. Thus, satisfying both, as Zinke presumably intends to do, may simply be too onerous. However, Zinke’s commitment to deregulation places the majority of public lands in a tenuous position, as any deregulation will presumably lead to more development.

B. National Park System

The first national parks in the United States were Yosemite National Park and Yellowstone National Park, established in 1864 and 1872, respectively.²⁷ Until 1916, “different agencies managed the national parks as separate entities.”²⁸ During that time, the Department of the Interior oversaw some national parks and monuments while the War Department and the Forest Service of the Department of Agriculture administered other similar federal lands.²⁹ In 1916, “Congress enacted the Organic Act, which created the National Park Service to oversee and manage the national parks system.”³⁰ The Organic Act has been “correctly interpreted by the courts” to afford the NPS “substantial discretion to manage national parks as it deems best,” so long as such discretion is moored to the Organic Act’s fundamental purpose.³¹ The “fundamental purpose” is to “pursue the dual goals of conservation and enjoyment of all national parks.”³²

The secretary’s plenary authority “to make rules for the use and management of national parks and monuments as he or she may deem necessary or proper is very broad.”³³ This broad discretion applies to “determining what actions are best calculated to protect park . . . resources.”³⁴ Congress vested such broad authority in the secretary because the onus falls on him or her to “facilitate the administration of the National Park System” while being mindful of his or her duty to maintain “national parks” while “providing facilities and services for . . . public enjoyment.”³⁵ The Organic Act authorizes the Secretary to utilize certain mechanisms to achieve its “fundamental goal”; for example, the

27. Antolini, *supra* note 16, at 853.

28. John Copeland Nagle, *How National Park Law Really Works*, 86 U. COLO. L. REV. 861, 862 (2015).

29. *History*, NAT’L PARKS SERV., (last accessed Jan. 29, 2017, 2:32 PM), <https://www.nps.gov/aboutus/history.htm>.

30. Nagle, *supra* note 28, at 862 (citing Organic Act, 54 U.S.C. § 100101(a)).

31. Nagle, *supra* note 28, at 888 (citing *Nat’l Parks Conservation Ass’n v. Jewell*, 965 F. Supp. 2d 67, 84 (D.D.C. 2013)).

32. Nagle, *supra* note 28, at 863 (citing 54 U.S.C. § 100101).

33. ECLAVEA, *supra* note 14.

34. *Id.* (“including but not limited to asserting reserved water rights, acquiring water rights and rights-of-way, denying land exchanges and rights-of-way that may constitute or aid a threat to resources, and bringing trespass or nuisance actions if appropriate”).

35. *Id.*

secretary “is authorized to regulate and implement rules regarding . . . resources or water contracts.”³⁶

Energy development in national parks and national monuments administered by the NPS are confined to “split-estates,” where a private right preexisted a national park’s or monument’s creation.³⁷ Any private party interested in excavating those minerals must apply for a permit subject to stringent regulations.³⁸ In such circumstances, the NPS, through the secretary, issues regulations to ensure the dual mandate’s balance is affected as little as possible.

Clearly, the secretary of the interior stands as the arbiter in deciding whether regulations governing energy production on national parks are “necessary or proper”; thus, the future of the National Park System will be contingent upon Secretary Zinke’s disposition towards development in national parks and national monuments.

C. Bureau of Land Management

The BLM could prove most central to the ongoing debate between conservation and development on public lands because the agency manages the coal and oil and gas leases on public lands.³⁹ In issuing leases, the BLM must take “reasonable measures” to “minimize adverse impacts to the environment and other resources.”⁴⁰ Such reasonable measures can include “modification to siting and design of facilities, timing of operations, and specification of reclamation measures.”⁴¹

The BLM can issue mineral leases on public lands, which “are subject to mineral lease” under the Mineral Leasing Act of 1920.⁴² Both national parks and monuments are listed exclusions under the Mineral Leasing Act of 1920.⁴³ National parks and national monuments that are under the BLM are afforded more protection than typical public lands—for example, the BLM that cannot issue coal leases in any national park or monument, which should offer a reprieve for conservationists because President Trump has indicated he will lift former-President Obama’s coal moratorium.⁴⁴ Additionally, the BLM cannot issue oil and gas leases in

36. *Id.* (citing *Sierra Club v. Andrus*, 487 F. Supp. 442 (D.D.C. 1980), *aff’d*, 659 F.2d 203 (D.C. Cir. 1981)).

37. *Energy and Mineral Development in Parks*, NAT’L PARK SERV., (last accessed Jan. 30, 2017), <https://www.nps.gov/subjects/energyminerals/development-in-parks.htm>.

38. See 36 C.F.R. §§ 9.30–9.52 (2014).

39. 43 C.F.R. §§ 3100, 3160 (2008).

40. Pendery, *supra* note 6, at 622 (citing 43 C.F.R. § 3101.1-2).

41. *Id.*

42. 43 C.F.R. § 3100.0-3(a)(1); Mineral Leasing Act of 1920, 18 U.S.C. § 181 (1920).

43. 30 U.S.C. § 181.

44. 43 C.F.R. § 3400.2(a)(1); Osborne, *supra* note 2.

national parks or monuments unless the mineral rights were privately owned prior to the park's establishment.⁴⁵

While the aforementioned regulations afford some protections for national parks and monuments, they do not preclude the BLM, acting under Secretary Zinke, to open up other, less protected, public lands to expansive development.

III. OTHER CONSIDERATIONS TO ENERGY DEVELOPMENT ON PUBLIC LAND

A. Statutes

The agencies may attempt to carry out increased energy development on public lands; however, conservationists will likely file suit to enjoin such programs. Litigation is likely considering the legal community's reaction to the executive order pertaining to immigration was to file suit almost immediately.⁴⁶ While the the agencies may be sued under their enabling statutes, there are four statutes in particular most often used to form the basis for litigation: the National Environmental Policy Act (NEPA),⁴⁷ the Wilderness Act, the Endangered Species Act (ESA), and the Wild & Scenic Rivers Act (WSRA).⁴⁸

Lawsuits filed under those statutes are typically more successful because actions that the aforementioned agencies can carry out may still violate the numerous statutes governing environmental conservation.⁴⁹ These statutes are decidedly more stringent as to what is permitted because each respectively governs the environment at-large without vague rules such as "reasonable measures" (BLM) and the dual mandate (NPS). It is important to note the virtual impossibility of energy development destroying the national parks, monuments, and public land in general because of these statutes. No action can be egregious because public interest groups will almost certainly file suit. Some express doubt over that contention, considering that the Republican-controlled House recently proposed legislation that would facilitate the process of selling

45. 43 C.F.R. § 3100.0-3(a)(2)(i).

46. Nick Wingfield & Daisuke Wakabayashi, *Tech Companies Fight Trump Immigration Order in Court*, N.Y. TIMES, (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/technology/technology-companies-fight-trump-immigration-order-in-court.html>.

47. Courts have held that "any recommendations by the Secretary of the Interior on the exercise of the President's powers under the Antiquities Act, which recommendations have been requested by the President, do not come under the NEPA impact statement process." *State of Alaska v. Carter*, 462 F. Supp. 1155, 1160 (D. Alaska).

48. Nagle, *supra* note 28, at 862; *see also* 42 U.S.C. § 4321 (1970) (NEPA); 16 U.S.C. § 1131 (1964) (the Wilderness Act); 16 U.S.C. § 1531 (1973) (ESA); 16 U.S.C. § 1271 (1968) (WRSA).

49. Nagle, *supra* note 28, at 890–91.

federal land.⁵⁰ The legislation would transfer the federal lands to state and local authorities that, as the House argues, are more responsive to local needs than the federal government.⁵¹ Once federal land is transferred to a state, the state can decide whether to sell the land to private entities or continue to preserve it.⁵² However, neither the President nor Zinke support the transfer of federal land.⁵³ In fact, Zinke “quit his post as GOP convention delegate this past summer over the issue.”⁵⁴

B. Cost

The cost associated with drilling on national parks and monuments serves as another impediment to invasive energy development. Many resource-rich sites simply lack the necessary infrastructure to facilitate energy development, as these areas do not “have the pipelines, roadways and ready supply of workers available in more established fields, such as the Permian Basin in West Texas.”⁵⁵

On public land generally, the price of natural gas serves as an obstacle to increased energy development.⁵⁶ Over the past several years, “the BLM offered 12.1 million acres for lease, but received bids on only 31 percent of the acreage.” Additionally, there are nearly 700 inactive drill wells just in Colorado.⁵⁷ Therefore, the costs of development may be too burdensome to capitalize on the de-regulation of public lands.

C. Public perception

Understandably, conservationists are concerned that such development will irreparably harm what many consider to be the United States’ national treasure—the National Park System.⁵⁸ Those who share that sentiment will be repulsed at the idea of development in national parks, perhaps envisaging the dramatic visuals associated with timber-clearing efforts in the Amazon rainforest. However, such a plan does have its proponents. Of course, the chief proponent of such action is the

50. See Julie Eilperin, *House GOP rules change will make it easier to sell off federal land*, WASH. POST (Jan. 3, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/01/03/house-gop-rules-change-would-make-it-easier-to-sell-off-federal-land/?utm_term=.58e56300bfc0.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Osborne, *supra* note 2.

56. Mark Jaffe, *What does a Trump administration mean for Western public lands?*, DENVER POST, (Jan. 23, 2017), <http://www.denverpost.com/2016/11/26/the-really-real-world-could-temper-a-trump-interior/> (“When the Bush administration was issuing permits, the price of natural gas was in the range of \$5 to \$6 per million BTUs. It is now less than \$3.”).

57. *Id.*

58. Antolini, *supra* note 16, at 855 (describing the National Parks Systems’ “classic image” as “unpopulated jewels of American Wilderness”).

energy industry.⁵⁹ However, people living near national parks have expressed their approval as well. For instance, Bob Turri, a former BLM officer, lives in southern Utah, which is “surrounded by millions of acres of pristine federally managed forest.”⁶⁰ Turri explained that the only hope people like him have is “what Trump may be able to do for us,” in reference to opening up national parks to further development.⁶¹

As I suggested above,⁶² conservationists will likely file suit to counter any harmful development. However, it bears considering the positive effect such development would have on locals. This is the heart of the development debate and is one that is not easily answerable.

IV. CONCLUSION

While the government has authority to increase energy development on public land through deregulation, within the parameters explained throughout this piece, the extent of the de-regulation is still unknown. Secretary Zinke’s comments during his confirmation hearing suggest that complete deregulation is an impossibility and therefore national parks and monuments will be safe. However, his commitment to decrease regulations to promote development on federal lands signals that deregulation and the subsequent increase in development is virtually certain. Conservationists may rest easy, but need be ready to utilize the numerous environmental conservation statutes to defeat any development that encroaches the rules prescribed therein.

*Thomas Gerwick**

59. Knox and Palmer, *supra* note 1.

60. *Id.*

61. *Id.*

62. *See supra* discussion Section (IV)(E).

* Thomas Gerwick is a staff editor on the *Denver Law Review* and J.D. Candidate 2018 at the University of Denver Sturm College of Law. Mr. Gerwick is interested in the administration of public lands and has found that area of law neglected among the foray of constitutional issues plaguing the Trump administration.