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USING FEDERAL PUBLIC LANDS TO MODEL A NEW ENERGY FUTURE: WHY THE BIDEN ADMINISTRATION SHOULD PRIORITIZE RENEWABLE ENERGY DEVELOPMENT ON PUBLIC LANDS

Meghen Sullivan*

I. INTRODUCTION AND BACKGROUND

Oil and gas extraction on public lands and waters is responsible for twenty percent of U.S. greenhouse gas emissions.¹ If American public lands were their own country, they would be the fifth-largest greenhouse gas emitter in the world.² As of 2020, only twenty percent of total U.S. electricity generation came from renewable energy sources.³ While renewable energy development on public lands has increased, most renewable energy comes from private lands.⁴ However, public lands contain immense renewable energy potential; for example, it is estimated that half of this country's geothermal resources are found on public lands.⁵ Despite underutilized renewable energy potential on public lands, wind and solar development is multiplying.⁶ Moreover, thanks to rapid technological advancements and government incentives, renewable energy is now cost-competitive with fossil fuels and continues to decrease—new wind and solar power plants are often less expensive than new coal and natural gas power plants.⁷

The diffuse public benefits of renewables are irrefutable.⁸ Unfortunately, the case for renewable energy (“RE”) development on public lands must contend with the regulatory burdens of longstanding environmental laws such as NEPA and ESA, state and local “NIMBYism,”⁹ and environmental groups concerned about adverse impacts to open space, plant and animal species, and hunting and other recreational uses.¹⁰ Despite these criticisms, the current statutory framework amply supports renewable energy development on federal public lands and should be prioritized to meet the Biden Administration's¹¹ and Congress'¹² ambitious renewable energy goals.

II. THE CURRENT LEGAL FRAMEWORK IS CONSISTENT WITH RE DEVELOPMENT

Renewable energy rightly fits into the current statutory framework. One of the biggest impediments to siting large-scale wind and solar projects is that these projects are highly land-intensive; thus, the projects' sustainability goals directly conflict with the public trust doctrine's open-space, aesthetic, and wildlife values.¹³ However, certain land use agencies, such as the Forest Service and Bureau of Land Management (BLM), already

have designated use regimes that allow extractive activities, such as oil and gas leases.¹⁴ The multiple-use and sustained yield (MUSY) definitions of conservation govern National Forest and BLM lands.¹⁵ These have different missions from the National Parks and Wildlife Refuges, for example, which are dominant-use regimes proffering missions favoring nature protection.¹⁶ MUSY is the most flexible of the designated use regimes,¹⁷ which renders it more amenable to a transitioning energy infrastructure. Where conventional energy development is allowed as a designated use, so too is renewable energy development.

A. ORGANIC LEGISLATION AND CLIMATE CHANGE

The comprehensive planning mandate of organic legislation¹⁸ seeks to ensure management decisions are not haphazard and promote the system's goals and mission.¹⁹ Adapting to climate change is becoming an increasing focus of agency planning efforts. For example, the Forest Service's 2012 rulemaking requires maintenance and restoration of ecosystem integrity, including connectivity,²⁰ taking system drivers such as climate change into account.²¹ Thus, the Forest Service, one of the primary energy leasing public agencies, acknowledges that the integrity of their lands depends on their ability to curtail the effects of climate change—this directly implicates the agency's choice between “dirty” and “clean” energy options.

Further, the substantive management criteria of the Federal Land Planning and Management Act (FLPMA) support RE development. FLPMA directs BLM to avoid “unnecessary or undue degradation” in allowing multiple uses on its lands.²² The addition and reliance on substantive management criteria have shifted the conversation of designated uses away from the worthiness of an activity toward measurable benchmarks of environmental consequences.²³ Through the rise of substantive management criteria, this trend toward focusing on material environmental outcomes reflects Congress's underlying utilitarian intent in managing public lands.²⁴ While any development has the potential to directly degrade the environment, the ultimate effects of RE development create the greatest good for the greatest number of people when compared with oil and gas leasing, which primarily serve to fill the pockets of oil and gas magnates and deplete shared and finite resources.

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B. CONGRESS STATES STATUTORY MISSIONS OF LONG-TERM SUSTAINABILITY

Congress has established a clear purpose of managing federal lands for long-term sustainability. In 1916, Congress directed the national parks be managed as to “leave them unimpaired for the enjoyment of future generations.”²⁵ Further, Congress directed the Forest Service in 1960 and the BLM in 1976 to achieve “sustained yield” and “maintenance in perpetuity” of renewable outputs of the lands under their care, “without impairment of the productivity of the land.”²⁶ Moreover, FLPMA includes meeting “the present and future needs of the American people” in its statutory definition of “multiple-use.”²⁷ These provisions establish climate adaptation as central to land management agencies’ statutory missions. RE development addresses this long-term sustainability mission by replacing conventional energy generation from fossil fuels that are gradually choking our planet.

III. “SMART” PLANNING MITIGATES MULTIPLE-USE CONCERNS AND CONSERVES AGENCY RESOURCES

Land management agencies can mitigate many of the multiple-use conflicts associated with RE development with strategic planning and siting. DOI agencies, including the BLM, have already done so.²⁸ Specifically, BLM revised their siting and environmental assessment approach for solar and wind development from a case-by-case to a regional approach in the 2012 Western Solar Plan (WSP). This “smart” approach incorporates the best available science from federal and state agencies, project developers, and the public to identify and assess pre-screened, priority development sites known as designated leasing areas, or “DLAs.”²⁹ BLM has designated 700,000 acres of priority DLAs, which are identified using three criteria: (1) excellent solar or wind resources; (2) proximity to existing or planned transmission and highway corridors; and (3) lower environmental, social, cultural and recreational impacts.³⁰ Other principles of this

“smart” approach also includes avoiding development in areas of high-quality wildlife habitat, wilderness-quality lands, areas of tribal and cultural resources, and offsetting or minimizing unavoidable impacts.³¹

Additionally, BLM has developed Regional Mitigation Strategies for several of the DLAs, which help anticipate impacts of development within DLAs and recommend a mitigation fee to help pay for conservation, habitat protection, and restoration.³² Therefore, this plan identifies and avoids fragile and at-risk habitats on federal lands in favor of better alternative locations, such as contaminated former agricultural or industrial sites.³³ Moreover, because these areas have been pre-screened, site assessment and environmental review of individual projects can be built upon, or “tiered,” based upon the regional assessment,³⁴ drastically expediting review requirements and saving precious time and resources.

IV. CONCLUSION & RECOMMENDATIONS

Successful adaptation to climate change will require public land agencies to focus management on the system goals of organic legislation. To start, the Biden Administration should continue to invest in implementing “smart” planning via DLAs by designating DLA’s for wind and solar based on the PEIS completed as part of the 2016 Rule. Additionally, Biden should establish a program for designating geothermal-specific DLA’s.³⁵ Moreover, the Biden Administration should tap into the underutilized geothermal³⁶ potential on public lands and facilitate this by extending the categorical exemption enjoyed by certain oil and gas wells to advanced geothermal projects that require similar infrastructure.³⁷ Ultimately, while siting large-scale renewable energy projects on public lands has the potential to implicate species habitat or other environmental values, the overall threat of climate change poses a much greater risk to the environment.



ENDNOTES

¹ *Federal Land Ownership: Overview and Data*, CONGRESSIONAL RESEARCH SERVICE, 2 (Feb. 21, 2020), <https://sgp.fas.org/crs/misc/R42346.pdf> (The federal government owns roughly 640 million acres, about 28% of the 2.27 billion acres of land in the United States.).

² Carla Ruas, *Report: Oil and Gas Drilling on Public Lands is Fueling Climate Change*, THE WILDERNESS SOC.: BLOG (Feb. 12, 2020), <https://www.wilderness.org/news/blog/report-oil-and-gas-drilling-public-lands-fueling-climate-change#>.

³ For the purposes of this article, renewable energy refers primarily to on and off-shore wind, solar, and geothermal energy sources. *Electricity Explained: Electricity Generation, Capacity, and Sales in the United States*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/energyexplained/electricity/electricity-in-the-us-generation-capacity-and-sales.php> (last updated: Mar. 18, 2021) (In 2020, about 60% of U.S. utility-scale electricity generation was produced from fossil fuels [coal, natural gas, and petroleum], about 20% was from nuclear energy, and about 20% was from renewable energy sources.).

⁴ Nikki Springer & Alex Daue, *Key Economic Benefits of Renewable Energy on Public Lands*, 15 (Yale Ctr. for Bus. and the Env’t & Wilderness Soc’y eds., 2020) (“The combined wind, solar, and geothermal generation

capacity on public lands accounted for less than five percent of all wind, solar, and geothermal capacity in the U.S. in 2019.”)[hereinafter Spring].

⁵ *Solar Energy Development on Federal Lands: The Road to Consensus: Oversight Field Hearing before the Subcommittee on Energy and Mineral Resources of the Committee on Natural Resources*, 107TH CONG. (2009) (statement of Jim Abbott, Cal. State Director, Bureau of Land Mgmt.), https://www.doi.gov/ocl/hearings/111/SolarEnergyDevelopment_051109; see also Megan E. Jenkins & Mitchell Lott, *A cleaner future for energy on federal lands*, CTR. FOR GROWTH AND OPPORTUNITY (Mar. 9, 2021), <https://www.thecgo.org/benchmark/a-cleaner-future-for-energy-on-federal-lands/>; <https://www.blm.gov/programs/energy-and-minerals/renewable-energy/wind-energy> (estimating that BLM manages as many as 30 million acres with solar and 21 million acres with wind potential)[hereinafter Jenkins].

⁶ *Wind Explained: Electricity generation from wind*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/energyexplained/wind/electricity-generation-from-wind.php> (last updated: Mar. 17, 2021) (explaining that wind, which is currently the most prevalent source of renewable electricity in the United States, grew 14% in 2020 from 2019. Solar generation was 3% of U.S.