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Reaping the Whirlwind: Federal Oil and Gas Development on Private Lands in the Rocky Mountain West

REAPING THE WHIRLWIND: FEDERAL OIL AND GAS DEVELOPMENT ON PRIVATE LANDS IN THE ROCKY MOUNTAIN WEST

KEITH G. BAUERLE[†]

For they sow the wind, and they shall reap the whirlwind.¹

This paper examines the conflict that has arisen from, and the opportunities that have been created by, the development of federal oil and gas reserves underlying private lands in the Rocky Mountain West. Many have characterized this conflict as one of the new, preservationist West squaring off against the old, extractive West.² This characterization fails to recognize the alliances between new and old West constituencies that this issue has generated, their goals, and the implications for how oil and gas development will proceed in the region. While these alliances have been forged across the West, I will concentrate on the Powder River Basin of northeastern Wyoming and southeastern Montana in this paper to demonstrate how these alliances can play an increasingly important role in shaping the course of oil and gas development in the region in the 21st century.

The situation in which property ownership is divided between the surface and subsurface is known as split estate.³ The federal government sowed the private surface/federal subsurface split estate whirlwind in the Powder River Basin with its land disposition statutes of the early twentieth century, in particular the Stock-Raising Homestead Act of 1916.⁴

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1. *Hosea* 8:7.

2. See, e.g., Gary C. Bryner, *Coalbed Methane Development: The Costs and Benefits of an Emerging Energy Resource*, 43 NAT. RESOURCES J. 519, 520 (2003). Mr. Bryner posits that much of the conflict is "rooted in widely discussed changes in the population of the West as recreational and preservationist interests increasingly clash with traditional extractive industries." *Id.*

3. *Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1245 (D. Wyo. 2005) ("A split-estate is one in which the surface and minerals are owned and controlled by different parties.")

4. Stock-Raising Homestead Act (SRHA) of 1916, 43 U.S.C. §§ 291-301 (repealed 1976, except § 299, by 43 U.S.C. § 702). Because much of the Basin was patented under SRHA, the surface estate is now primarily in private or state ownership, whereas much of the mineral estate is still largely owned by the federal government. Bureau of Land Management, Final Environmental Impacts Statement, Powder River Resource Area (1984) at 1-1.

These federal statutes, while seeking to promote settlement of the lands by giving them away, reserved the rights to the underlying minerals to the federal government.⁵ In the early part of the twentieth century, when mineral development involved pickaxes and spades, divorcing the surface from the minerals may have been a good idea. But these days, this divorce, like many others, has led to much acrimony and many attorneys.

The acrimony is to some extent inevitable given the incompatible conceptions of property rights present in the split estate situation. Ranchers and farmers in the Basin, like most ranchers and farmers across the West, subscribe to the traditional Anglo-American view of property rights that they own their land from the surface to the center of the earth.⁶ This conception of surface owner property rights is diametrically opposed to the property interests inherent in the split estate situation.⁷

However, the conflicts would likely not be so acrimonious but for the legal regimes governing mineral resources. In most states, including Wyoming, common law has set up the mineral estate as "dominant" over the surface estate.⁸ This generally means that mineral owners are entitled to access and use the surface estate to the extent reasonably necessary to develop the minerals.⁹ Federal statutes governing mineral extraction on split estate lands mirror this language, entitling oil and gas companies to use the surface owner's lands as is reasonably necessary for oil and gas production.¹⁰

5. *Id.* at § 299(a) ("All entries made and patents issued under the provisions of this subchapter shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands . . ."). The reservation of other minerals has been "read broadly" to include oil, gas, and other energy resources "in light of the agricultural purpose of the grant itself, and in light of Congress's equally clear purpose to retain subsurface resources, particularly sources of energy, for separate disposition and development in the public interest." *United States v. Union Oil Co.*, 549 F. 2d 1271, 1279 (9th Cir. 1977) *cert. denied*, 435 U.S. 911 (1978).

6. Andrew C. Mergen, *Surface Tension: The Problem of Federal/Private Split Estate Lands*, 33 LAND & WATER L. REV. 419, 423-24 (1998).

7. Michelle Andrea Wenzell, *Comment, The Model Surface Use and Mineral Development Accommodation Act: Easy Easements for Mining Interests*, 42 AM. U. L. REV. 607, 608 (1993) (concluding that split estates are antithetical to traditional western concepts of property ownership).

8. *See, e.g., Wyoming Outdoor Council*, 351 F. Supp. 2d at 1245 ("The mineral estate is the dominant estate.") (*citing* *Mingo Oil Producers v. Kamp Cattle Co.*, 776 P.2d 736, 741 (Wyo. 1989)).

9. *Id.* ("In Wyoming, the mineral estate owner has the right to use "that portion of the surface estate 'reasonably necessary' to the production and storage of the mineral . . ."). This dominance has begun to be limited in many states by both the judicial doctrine of accommodation and by state legislation attempting to level the playing field for surface owners. *See, e.g.,* Jan G. Laitos & Elizabeth H. Getches, *Multi-Layered, and Sequential, State and Local Barriers to Extractive Resource Development*, 23 VA. ENVTL. L. J. 1 5-8 (2004); *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 919 (Colo. 1997) (recent example of the application of the accommodation doctrine); Wyoming Surface Owners Accommodation Act, WYO. STAT. ANN. §§ 30-5-401 to -410 (2005).

10. *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 505 (1928) (interpreting the reservation of minerals in the Agricultural Act of 1914 and the procedures governing leasing and development of minerals under the Mineral Leasing Act of 1920 as dividing lands settled under the Agricultural Entry Act into surface and mineral estates and making the mineral estate dominant over the surface estate).

Oil and gas companies have construed this theory of dominance as providing them free reign to extract oil and gas with few, if any, constraints.¹¹ The federal government has imposed few constraints of its own¹² and has further exacerbated conflicts with its policies governing the leasing and development of its split estate oil and gas resources. For example, the BLM does not provide landowners with individual notice before leasing the minerals under their lands. As a result, some surface owners have been unaware that the gas reserves underneath them were sold until getting a visit from an oil and gas company representative.¹³ In addition, the surface owner's ability to obtain compensation for damages to his or her lands is limited. The Stock-Raising Homestead Act only requires that the mineral developer compensate the surface owner for "crops" and "improvements" damaged by mining operations, which terms have been strictly construed by courts to exclude natural vegetation relied upon by ranchers, non-agricultural buildings and improvements, and general loss of value of lands.¹⁴ As a result, oil and gas companies

11. This view (as well as a repugnant view of societal and gender roles) is forcefully expressed in a statement ascribed by Mary Brannaman to a representative of the oil and gas company that had leased the oil and gas underlying her and her husband's ranch. "Mary, it's just like you and I are married. I can do whatever I want, whenever I want, and however I want." See Tom C. Toner, "The Arrogance of Dominance/The Reason for Split Estate Legislation," Presentation to the 2005 Wyoming State Bar Annual Meeting (quoting the trial transcript from *Brannaman v. Paxton Resources, LLC*, Civil Action No. 02-2-47 (District Court of Sheridan County, Wyoming) (Trial Transcript VI, at 248) (on file with the author)).

12. There are three means by which a mineral owner can gain access to the surface to develop the oil and gas: (1) by written consent of the surface interest owner; (2) by executing a surface use agreement for the payment of damages to crops and improvements; or (3) by posting a "good and sufficient bond" to secure payment of damages to the surface owner. 43 C.F.R. § 3814.1(c) (2006). Unfortunately these bonds, which can be as low as \$1,000 per well site, are hardly ever "sufficient." For example, the Wyoming State BLM office accepted a surety bond in the amount of \$2,176 to cover nine CBM wells and associated infrastructure, whereas reclamation costs for nearby CBM wells were estimated at \$14,000 per well site, for a total of \$126,000. Bureau of Land Management, Wyoming State Office, Decision on BLM Bond No. WYB000252 (Sept. 7, 2005); Adami Ranch LLC, Request for State Director Review and Notice of Appeal (Sept. 14, 2005) (both documents on file with the author). Given the threat of the BLM approving inadequate bonds, many landowners have little bargaining power and see little choice but to accept what the companies give them in the surface use agreements. Telephone interview with Jill Morrison, Organizer, Powder River Basin Resource Council, in Denver, Colo. (Jan. 13, 2006). The BLM does not review surface use agreements. U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., PERMITTING OIL AND GAS ON SPLIT ESTATE LANDS AND GUIDANCE FOR ONSHORE OIL AND GAS ORDER NO. 1, INSTRUCTION MEMORANDUM NO. 2003-131 (Apr. 2, 2003), <http://www.blm.gov/nhp/efoia/wofy03/im2003-131.htm>.

13. This lack of notice prompted Representative Salazar to publicly pressure the BLM's Colorado State office to defer leasing 17,500 acres of split estate lands in western Colorado in May 2005. Donna Gray, *Critics Say BLM Not Notifying Public of Natural Gas Drilling*, ASPEN TIMES, June 15, 2005, available at <http://www.aspentimes.com/article/20050615/NEWS/106150029/1/rss01>. Montana Gov. Schweitzer, a rancher himself, has remarked that the BLM has created ill will by "failing to have the common courtesy of contacting ranchers to let them know the minerals beneath them were being sold." Todd Wilkinson, *Energy Boom is Crowding Ranchers*, CHRISTIAN SCI. MONITOR, May 10, 2005, <http://www.csmonitor.com/2005/0510/p01s02-usju.html>.

14. The Supreme Court has held that the SRHA does not require compensation for impairment of surface resources that do not constitute crops or permanent improvements directly related to agricultural production. *Kinney-Coastal Oil Co.*, 277 U.S. at 505. This presents a problem in the Basin because the naturally growing forage upon which ranchers rely to feed their livestock is not compensable because it is not a "crop." See *Gilbertz v. United States*, 808 F.2d 1374, 1380 (10th

are free to externalize the majority of the costs of developing the resource and place them on the surface owner.

At first glance, this could be viewed as merely a dispute over property rights. However, that would ignore the fact that the issue for the landowners is the viability of their ranches and farms, which viability depends on the health of the land. It is the threats posed by oil and gas development to the health of their split estate lands that caused the conservation community to become involved. Conservationists have recognized, as have the landowners, that neither the BLM, which leases the federal oil and gas, nor the state agencies that also regulate aspects of the subsequent development, are protecting lands across the West. With respect to the Powder River Basin, agrarian and conservation interests agree that neither the BLM nor the state of Wyoming have addressed the big problem concerning coalbed methane production – water.

Coalbed methane (CBM) is natural gas found in coal seams.¹⁵ These coal seams are also aquifers, containing water. The gas is held in the coal seams by water pressure. To get the gas out, one must remove that pressure, and hence, remove the water.¹⁶ In the Powder River Basin, one must pump out a lot of water to get to the gas. The BLM projects that a decade's worth of CBM development in Wyoming's portion of the Basin will produce three-million acre-feet of water.¹⁷

This massive dewatering of coal seam aquifers poses a huge threat to ranchers and farmers who depend upon that water for domestic pur-

Cir. 1987) (damage to grasses that previously grew on well and road locations is not compensable). Nor are landowners compensated for the diminution in their land's value. *Holbrook v. Cont'l Oil Co.*, 278 P.2d 798, 804-07 (Wyo. 1955). For a disturbing example of how this could play out in a residential and hardrock mining context, see CHARLES WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 60-61 (1992). See also George C. Coggins, *Overcoming the Unfortunate Legacies of Western Public Land Law*, 29 *LAND & WATER L. REV.* 381 n. 141 (1993) ("It is still theoretically possible for a hardrock mineral prospector to start digging trenches in suburban backyards, if the subdivision was patented under the Stock-Raising Homestead Act of 1916.")

15. *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1158 (9th Cir. 2003).

16. *Id.*; see also GARY BRYNER, *COALBED METHANE DEVELOPMENT IN THE INTERMOUNTAIN WEST: PRIMER* (July 2002), http://www.colorado.edu/Law/centers/nrlc/publications/CBM_Primer.pdf which provides a comprehensive overview of coalbed methane, and the accompanying Case Study 1 by Diana Hulme which provides a detailed exposition of the issues surrounding CBM development that constitute the basis for the conservationist and agrarian alliance discussed in this article. *Supra* at 86-06. For more information concerning CBM and water issues, see also RUCKELSHAUS INSTITUTE OF ENVIRONMENT AND NATURAL RESOURCES, *FINAL REPORT PREPARED FOR THE OFFICE OF THE GOVERNOR OF THE STATE OF WYOMING, WATER PRODUCTION FROM COALBED METHANE DEVELOPMENT IN WYOMING: A SUMMARY OF QUANTITY, QUALITY AND MANAGEMENT OPTIONS* (Dec. 2005), <http://www.uwyo.edu/enr/iennr/CBMWaterFinalReportDec2005.pdf>.

17. U.S. DEPT. OF THE INTERIOR, BUREAU OF LAND MGMT., *FINAL ENVIRONMENTAL IMPACT STATEMENT AND PROPOSED PLAN AMENDMENT FOR THE POWDER RIVER BASIN OIL AND GAS PROJECT 2-26, Tbl.2-8* (Jan. 2003) <http://www.wy.blm.gov/nepa/prb-feis/index.htm> [hereinafter *POWDER RIVER IMPACT STATEMENT*].

poses and for ranching and agricultural operations.¹⁸ Yet neither the BLM nor Wyoming have policies in place to prevent their wells from going dry or to make sure they have adequate replacement water for the decades it will take the aquifers to recharge.

Pumping hundreds of billions of gallons of water from the subsurface to surface also creates correspondingly huge problems of disposal. Where does one put close to a trillion gallons of water in an arid landscape?¹⁹ In Wyoming, the preferred method of disposal is to dump it on the surface, either in streambeds, dammed-up streambeds, or in specially constructed wastewater pits, because that is the cheapest means of disposal.²⁰ But dumping enormous amounts of water on the surface of an otherwise arid landscape creates drastic changes in the ecosystems, especially in streams that ran only seasonally or in response to rainfall before CBM development.²¹

To make matters worse, while the wastewater is usually safe for livestock, and in some cases, for people to drink, it can degrade soil and is often unfit for irrigation.²² The situation, then, is that CBM production in the Powder River Basin will produce close to a trillion gallons of water that cannot be disposed of untreated onto the surface without causing permanent harm to the land and the people who live there.

Not only are these environmental threats severe, their extent is immense. The Powder River Basin covers approximately 25,800 square miles, larger than Massachusetts and New Hampshire combined, of roll-

18. Groundwater in the Basin is a precious resource, essential for domestic uses and livestock. See JOHN WHEATON & JOHN METESH, MONT. BUREAU OF MINES AND GEOLOGY, POTENTIAL GROUND-WATER DRAINAGE AND RECOVERY FROM COALBED METHANE DEVELOPMENT IN THE POWDER RIVER BASIN, MONTANA 2, 5 (May 2002), <http://www.mt.blm.gov/mcfo/cbm/eis/CBM3DGWReport.pdf> ("Domestic and livestock water supplies are dependent on ground-water resources.").

Although the use of groundwater only represents 3 percent of the total water use, it is extremely critical because it provides almost 100 percent of the domestic water for farmsteads. It also constitutes the largest percentage of dependable stock water, because the groundwater is not seasonal or affected by drought, like surface water.

U.S. DEPT. OF THE INTERIOR, BUREAU OF LAND MGMT., FINAL STATEWIDE OIL AND GAS ENVIRONMENTAL IMPACT STATEMENT AND PROPOSED AMENDMENT OF THE POWDER RIVER AND BILLINGS RESOURCE MANAGEMENT PLANS 3-32 (Apr. 2003), <http://www.mt.blm.gov/mcfo/cbm/eis/volume1/Chapter3.pdf>.

19. See POWDER RIVER IMPACT STATEMENT, *supra* note 17, at 2-26. Table 2-8 calculates a total of 3,069,665 acre-ft. of water, which is the equivalent of $1.00025472 \times 10^{12}$ U.S. gallons.

20. The Bureau of Land Management proposes to dispose of this water in one of two principal ways: (1) putting it in infiltration pits, impoundments, or reservoirs; and (2) directly discharging it onto the ground or into ephemeral and intermittent drainages. See *id.* at 2-27.

21. See Wyoming Outdoor Council, 153 I.B.L.A. 379, 388 (2000) (stating "water production from CBM extraction in the Powder River Basin is on a magnitude that presents unique problems").

22. See *N. Plains Res. Council*, 325 F.3d at 1157-58 ("We hold that the unaltered groundwater produced in association with methane gas extraction, and discharged into a river, is a pollutant within the meaning of the CWA."). The Ninth Circuit accordingly determined that CBM wastewater is a "pollutant" under the Clean Water Act. *Id.*

ing upland plains in northeastern Wyoming and southeastern Montana.²³ The BLM estimates that in the eight-million-acre area where CBM development will occur in Wyoming, approximately seventy-six percent of the surface land is privately-owned while most of the oil and gas rights—as much as sixty-three percent in some areas—are federally-owned.²⁴ Putting the numbers together, it becomes plain that the close to a trillion gallons of wastewater threatens to irreversibly alter the ecosystems and decimate ranchers' and farmers' livelihoods on millions of acres of split estate lands.

Given the magnitude of the threats, it is obvious why the interests of conservationists have aligned, but it is also important to realize that this alliance is more than a marriage of convenience. As mentioned above, the Basin's ranchers and farmers maintain a traditional western culture of ownership putting them at odds with those who seek to use their lands for mineral development. But these ranchers also share a culture of ownership with conservationists in that they consider themselves stewards of the land.

This concept of stewardship and its concern for future generations mirror the core values of the conservation movement.²⁵ For example, Jeanie Alderson was a plaintiff in one of the cases challenging the BLM's plan for developing CBM in the Montana portion of the Powder River Basin.²⁶ She and her husband run the Bones Brothers Ranch with her father Irv Alderson near Birney, Montana. The Aldersons, like many members of WORC, joined the litigation in an effort to preserve it for future generations, like the grandchild that Irv Alderson hopes to take hunting with him on their ranch someday.

These shared values have laid the groundwork for a new alliance of the old west and new west. The Northern Plains Resource Council has led efforts in Montana to better protect that state's rivers and streams from CBM wastewater, and the Powder River Basin Resource Council has been leading the charge on that front in Wyoming.²⁷ Both the Pow-

23. U.S. ENV'T. PROT. AGENCY, EVALUATION OF IMPACTS TO UNDERGROUND SOURCES OF DRINKING WATER BY HYDRAULIC FRACTURING OF COALBED METHANE RESERVOIRS 1, attachment 5 (June 2004), http://www.epa.gov/OGWDW/uic/cbmstudy/pdfs/completestudy/attachment_05_6-5-04.pdf.

24. See POWDER RIVER IMPACT STATEMENT, *supra* note 17, at xv. "The proposed project would occur in a Project Area of almost 8 million acres." *Id.* at 3-229-30.

25. See, e.g., Jim DiPeso & Tom Pelikan, *The Republican Divide On Wilderness Policy*, 33 GOLDEN GATE U. L. REV. 339, 343-44 (2003) (stating "conservation and environmental protection are consistent with traditional conservative values of prudence, stewardship and intergenerational equity").

26. See Plaintiff's First Amended Complaint, *W. Org. of Res. Councils v. Clark*, No. 03-70-BLG-RWA (D. Mont. Feb. 17, 2004). This case was subsequently transferred to Wyoming. See, e.g., Amended Order on Initial Pretrial Conference, *W. Org. of Res. Councils v. Clark*, No. 04-CV-0018-J (D. Wyo. Mar. 8, 2004).

27. The Northern Plains Resource Council ("NPRC") brought and won a case establishing that CBM wastewater is a "pollutant" under the Clean Water Act. *N. Plains Res. Council*, 325 F.3d at 1163. NPRC subsequently petitioned the Montana Board of Environmental Review to adopt a

der River Basin Resource Council and its parent organization, the Western Organization of Resource Councils, have been partnering with conservationist groups like the Natural Resources Defense Council and have been represented by conservation, rather than property rights, law firms in challenging Montana and Wyoming plans for CBM development.²⁸

These rancher/green alliances show that the fight in the Powder River Basin is therefore not simply an instance of preservationist interests fighting with traditional extractive industries.²⁹ Rather, the rancher/green alliance catalyzed by oil and gas development in the west is one of old west agrarian interests joining with new west conservationist interests against a common, old west extractive foe.³⁰

I believe this distinction is important for a number of reasons. The first is that political and legal developments demonstrate that this progressive agrarian and conservation alliance has been able to achieve results that neither camp would have been able to achieve on its own. The best legal example of this is likely a case brought by the Powder River Basin Resource Council and the Wyoming Outdoor Council challenging an Army Corps of Engineers Clean Water Act permit that allowed oil and gas companies to dam streambeds to construct reservoirs to hold CBM wastewater.³¹ In its decision reversing and remanding the Army Corps permit, the Wyoming District Court held that the Corps had “clearly failed to address the concerns of . . . private landowners” in making its decision to authorize the permit, and that this failure “reflect[ed] indifference to the interests of surface owners of split-estates.”³² The Court was not pleased with the agency’s indifference: “Nowhere

rule to reduce the environmental impacts of CBM wastewater by: (1) repealing an antidegradation exception; (2) requiring that it be injected into the ground; or (3) in cases where reinjection is not feasible, requiring treatment of the wastewater before it is discharged. The Board adopted the petition’s antidegradation request, rejected reinjection, and has deferred a decision on whether to require treatment. Associated Press, *CBM Water Injection Rejected*, BILLINGS GAZETTE, Mar. 24, 2006, available at <http://www.billingsgazette.net/articles/2006/03/24/news/state/52-cbm-injection.txt>. The Powder River Basin Resource Council has petitioned Wyoming’s Environmental Quality Council to amend Department of Environmental Quality rules to require true beneficial use of coalbed methane water that is discharged as a byproduct, Press Release, Powder River Basin Resource Council, Landowners: Close CBM Discharge Water Loophole (Dec. 7, 2005), <http://www.powderriverbasin.org/cbm/pressreleases.shtml> (follow “Press Packet: CBM Water Quality Rule Making” hyperlink; then follow “Press Release/Member Statements” hyperlink).

28. See sources cited, *supra* note 26. Plaintiffs in both cases, who include the Natural Resources Defense Council and the Wyoming Outdoor Council are represented by Earthjustice.

29. See, e.g., Bryner, *supra* note 2. See also, David R. Little, *Local Regulation of Oil and Gas Operations: The Rockies Experience, in DEVELOPMENT ISSUES AND CONFLICTS IN MODERN GAS AND OIL PLAYS*, pt. 7, at 7-7 (Rocky Mountain Mineral Law Found., Mineral Law Series No. 4, 2004) (“In many instances, it is no doubt true that preservationists and recreationists are simply no longer willing to share public and even private lands with mineral developers.”).

30. In this respect, this agrarian/conservation alliance is implementing a larger, more cohesive progressive campaign that some have posited is necessary for traditional conservation groups to remain viable. See MICHAEL SHELLENBERGER & TED NORDHAUS, *THE DEATH OF ENVIRONMENTALISM* (2004), http://www.thebreakthrough.org/images/Death_of_Environmentalism.pdf.

31. *Wyoming Outdoor Council*, 351 F. Supp. 2d at 1237.

32. *Id.* at 1246.

does the [decision] express or demonstrate a consideration for those individuals whose livelihood depends on the vitality and sustainability of the land. The Court cannot accept the Corps' summary dismissal of the reasonably foreseeable impacts to private ranchlands.³³

Neither the ranchers and farmers, nor the conservationists, would have likely achieved this victory had they gone it alone. Rather, it was the combination of the expertise of the conservationists with respect to the Clean Water Act,³⁴ the National Environmental Policy Act,³⁵ and the statutes' environmental purposes with the expertise of the ranchers and farmers regarding what the challenged permits were doing to their property interests in their lands that won the case.

Furthermore, in failing to recognize the old and new west interests that have aligned in the alliance, many commentators have also missed the mark with respect to its goals by characterizing them as preservationist.³⁶ On the contrary, in response to the CBM development in the Powder River Basin, green groups have allied with the ranchers and farmers in what is essentially a conservationist, rather than preservationist, effort.³⁷ In the Powder River Basin, neither party to the alliance is seeking to put large areas off limits to CBM development. Rather, the groups have throughout their political, media and legal work sought only to ensure that the development happens in an environmentally responsible manner.³⁸

One of the reasons for this focus is that it would be impossible to stop natural gas development in the Rocky Mountain West, and particularly CBM development in the Powder River Basin. The more important point is that no one wants to. Conservationists and ranchers and farmers all recognize that natural gas, while not a panacea, is a cleaner-burning fuel than coal and that it can serve as a bridge fuel to this nation's energy

33. *Id.* at 1246-7.

34. Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000).

35. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347 (2000).

36. Bryner, *supra* note 2 at 520 (discussing how "recreational and preservationist interests" are opposing CBM extraction); Little, *supra* note 29.

37. See Holly Doremus, *Nature, Knowledge And Profit: The Yellowstone Bioprospecting Controversy And The Core Purposes Of America's National Parks*, 26 *ECOLOGY L.Q.* 401, 452 (1999) (characterizing preservationists as those "who believed nature should be protected in a state unaltered by man" in contrast to conservationists, "who believed in the wise use of all nature's resources for the greatest benefit of humanity"). I would further clarify that by "preservationist," I would borrow loosely from Joseph Sax, modifying it from the noun to the adjective to mean a view that seeks to maintain lands in their natural state without any industrialization. See JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS* 115 n.1 (1980).

38. See, e.g., *Legislative Hearing on Energy Policy Before H. Resources Comm.*, 108th Congress (2003) (statement of Eric Barlow on behalf of the Western Organization of Resource Councils and Powder River Basin Resource Council) (Mar. 19, 2003), <http://resourcescommittee.house.gov/archives/108/testimony/ericbarlow.htm>; Northern Plains Resource Council, *Doing It Right: A Blueprint for Responsible Coal Bed Methane Development in Montana*, <http://www.northernplains.org/ourwork/doingitright> (last visited Apr. 13, 2006).

future.³⁹ That is why conservation groups have concentrated their preservationist efforts—trying to keep oil and gas development out entirely—on only a small portion of the landscape that is just too ecologically important and/or fragile to drill. For instance, preservationist efforts have focused on areas like Otero Mesa in New Mexico because it is the North America's largest and wildest Chihuahuan Desert grassland remaining on public lands.⁴⁰

Whereas in the context of the split estate working landscapes in the Powder River Basin, the progressive rancher/green alliance is trying to protect these lands not by keeping development out, but rather by trying to ensure that it is accomplished in a responsible manner that protects the environment and cultural heritage for future generations. I believe that it is important to keep this overarching goal in mind because it can and should inform policy makers as to how development should proceed in the Powder River Basin. Not only does this goal resonate in the cultural context of borrowing the land that is the subject of this symposium, but also in the context of sustainable development.⁴¹

Sustainable development is a buzzword not often heard in the Rocky Mountain West.⁴² Most of the legal literature on sustainable development, especially that concerning energy resources, has focused heavily on international development.⁴³ Looking forward, however, I

39. See, e.g., NATURAL RESOURCES DEFENSE COUNCIL, A RESPONSIBLE ENERGY PLAN FOR AMERICA 17 (2005), <http://www.nrdc.org/air/energy/rep/chap3.asp> ("Natural gas is not sufficiently clean to be considered the long-term answer to America's energy needs, but it can act as a bridge to greater reliance on cleaner and renewable forms of energy.")

40. See, e.g., Associated Press, *State to Battle BLM Over Drilling Otero Mesa*, THE FREE NEW MEXICAN, June 8, 2005, <http://www.freewmexican.com/news/41212.html>.

41. "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE, 43 (1987), http://www.are.admin.ch/are/en/nachhaltig/international_uno/unterseite02330/. At the 1992 United Nations Conference on the Environment and Development in Rio de Janeiro, countries endorsed a global plan of action for sustainable development, Agenda 21. United Nations Conference on Environment and Development, June 3-14, 1992, Agenda 21, ¶¶ 1.1, 1.3, U.N. Doc. A/CONF.151.26, <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>. To implement Agenda 21, they also adopted a set of twenty-seven principles in the Rio Declaration. United Nations Conference on Environment and Development, June 3-14, 1992, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/r/Rev.1, 31 I.L.M. 874 (1992), www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

42. This is not to suggest that sustainable development is a concept never applied to the American West. See, e.g., CHARLES F. WILKINSON, THE EAGLE BIRD: MAPPING A NEW WEST 118-20 (1992); CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN 293-306 (1992) (describing how sustainable development might proceed in the American West). For a recent examination of what happens after the current energy boom plays itself out, see Ray Ring, *Gold from the Gas Fields*, HIGH COUNTRY NEWS, Nov. 28, 2005, at 8, available at http://www.hcn.org/servlets/hcn.Article?article_id=15938. However, it is apparent that the principles of sustainable development are but rarely applied to oil and gas development in the Rocky Mountain West.

43. See, e.g., Jay G. Martin and Ann L. MacNaughton, *Sustainable Development: Impacts of Current Trends on Oil and Gas Development*, 24 J. LAND, RESOURCES, & ENVTL. L. 257, 264 (2004); Patricia Nelson, *An African Dimension to the Clean Development Mechanism: Finding a*

would argue that there is a need and an opportunity to incorporate principles of sustainable development to better plan for oil and gas development in the Rocky Mountain West. In a subsequent article, I will develop and substantiate this argument and explore its legal and policy implications in contexts including litigation and legislation.

In the meantime, I will offer a short explanation of how this could benefit decision makers and stakeholders with respect to CBM development in Montana's portion of the Powder River Basin. The plan for developing the federal CBM resources there is currently in flux. In February 2005, the Federal District Court in Billings Montana ruled that the BLM's plan for developing thousands of coalbed methane gas wells in Montana's portion of the Basin was illegal under the National Environmental Policy Act due to the agency's failure to consider an approach that would "phase[]" or stage the CBM development over time and geography.⁴⁴

The rancher/green alliance, as well as the Northern Cheyenne Tribe, promoted such carefully paced development throughout the NEPA process. They demonstrated how phasing or staging of development to distribute its impacts over time and geography provides arguably the best means of ensuring the sustainability of the land and its resources in perpetuity. For example, by spreading the number of CBM wells developed in a given watershed over time, the amount of wastewater produced within that watershed at any given time, and its attendant impacts on the ecosystem, ranches and farms, could be reduced. Likewise, spreading development out over a longer period of time could help to prevent an economic boom and bust cycle and its socio-economic harms. Both geographic and temporal phasing of development would thus further sustainable development goal of "equitably meet[ing] developmental and environmental needs of present and future generations"⁴⁵

While development of CBM, like other mineral resources, cannot be termed sustainable in the strict sense because the resources themselves are non-renewable, the overarching purpose and tenets of sustainable development are nonetheless applicable and could be effectuated via a phased development alternative. This has been pointed out by Charles Wilkinson, who has remarked that "the idea of sustainability can easily be adapted to mineral development through attention to the duration of the mining activity. Carefully paced mineral development lasting, say,

Path to Sustainable Development in the Energy Sector, 32 DENV. J. INT'L L. & POL'Y 615, 615 (2004); Judith Kimerling, *International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law*, 26 COLUM. J. ENVTL. L. 289, 291 (2001).

44. See Order in consolidated cases, at 11-19, *N. Plains Res. Council v. U.S. Bureau of Land Mgmt.*, No. CV 03-69-BLG-RWA, and *N. Cheyenne Tribe v. Norton*, No. CV 03-78-BLG-RWA (D. Mont. Feb. 25, 2005).

45. United Nations Conference on Environment and Development, *supra* note 41, at ¶ 3.

as long as forty or fifty years, depending on the circumstances, can be considered sustainable.”⁴⁶

Now that the BLM has been forced to revisit its plan for developing CBM resources in Montana’s Powder River Basin, it should look to this principle and how it has been effectuated in oil and gas development to plan and pursue phased development lands in the Basin. Using sustainable development principles and practice offers the agency the best opportunity to strike a balance that will both satisfy the nation’s need for natural gas with its long-term interests in maintaining the nation’s lands, local communities, and cultures.

46. WILKINSON, CROSSING THE NEXT MERIDIAN, *supra* note 42, at 300.

