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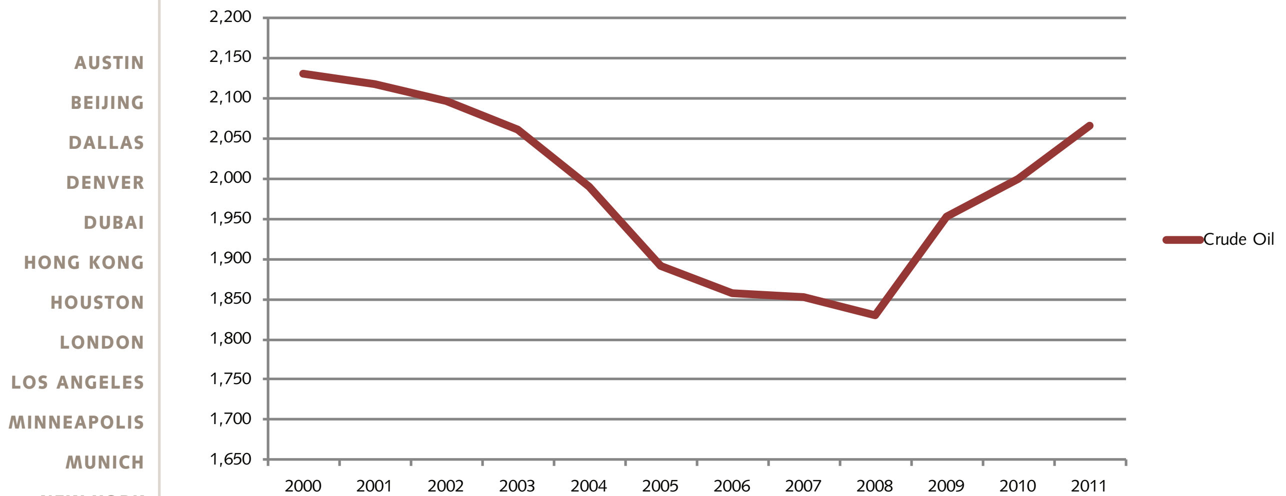
All of the Above?

by L. Poe Leggette - Partner-in-Charge, Denver [1]

Both political parties assure us they are pursuing an "all of the above" strategy in developing American energy. I am going to explore how that is playing out for the oil and gas industry on leases issued by the Federal Government.[1]

As nearly all of you know, the U.S. Department of the Interior administers oil and gas leasing seaward of the boundary of submerged lands granted to the coastal states by the Submerged Lands Act. That area quickly came to be known as the Outer Continental Shelf, or OCS. Onshore, Interior also administers mineral leasing of federally-owned oil and gas, whether the surface of the land is managed by the Bureau of Land Management, the Park Service, the Forest Service, the Fish and Wildlife Service, the Bureau of Reclamation, the Department of Defense or private surface owners of split estates. Interior administers this onshore leasing program through the Bureau of Land Management, or BLM.

It has been noted in the current Presidential campaign that U.S. production of oil and natural gas has increased since January 2009. This is true. For oil, U.S. production had declined to about 1.83 billion barrels per year in 2008 and has risen to 2.06 billion barrels per year in 2011. *See Figure 1*. For gas, U.S. production was at 25 trillion cubic feet per year in 2008 and rose to 28 Tcf in 2011. *See Figure 2*.



Source: http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=mcrfpus1&f=a

1 This paper was presented before the Oil, Gas and Mineral Law Section of the Houston Bar Association on September 25, 2012. The views expressed are those of the author alone, and do not reflect the views of Fulbright & Jaworski L.L.P. or the Houston Bar Association. The author thanks Sarah Zimmerman for her co-authorship of the final section of this paper.

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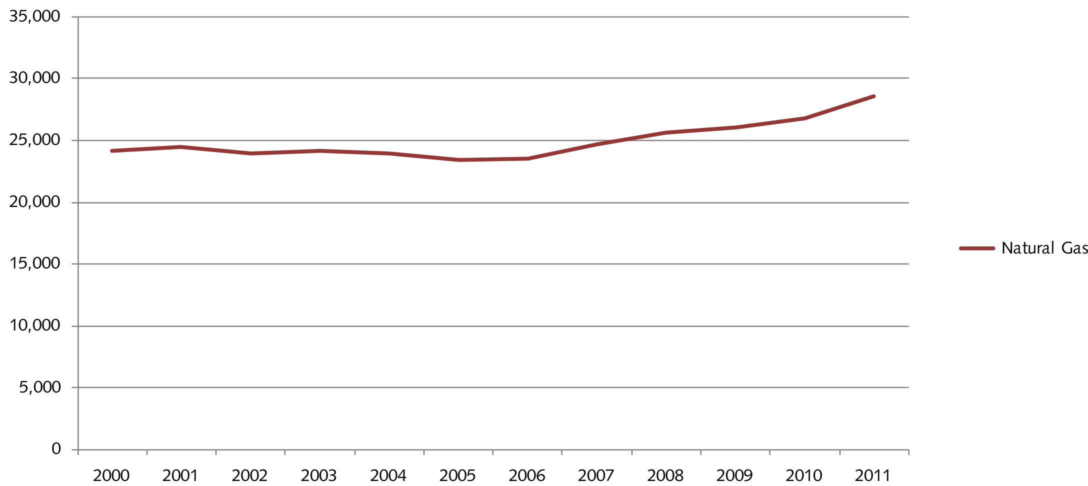
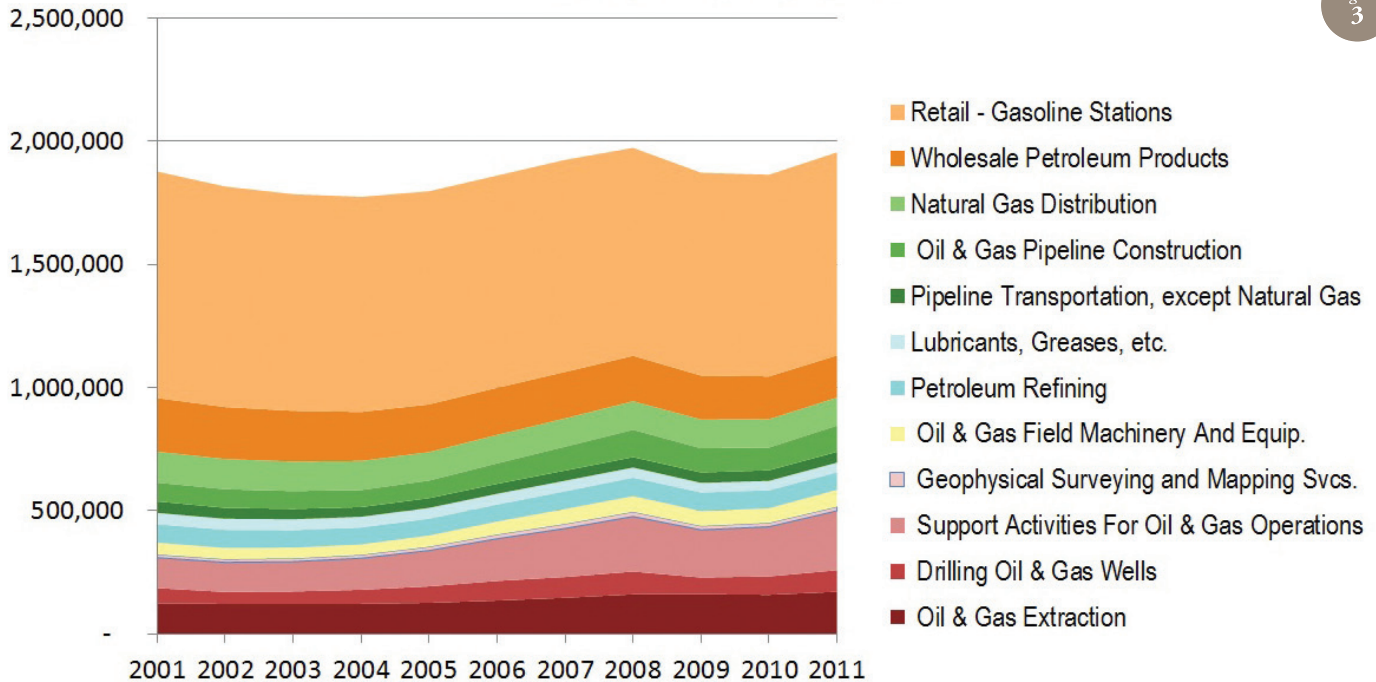
Figure 2



Source: http://www.eia.gov/dnav/ng/hist/n9010us2A.htm

That level of production has caused oil and gas related employment to reach its highest level in a decade, as this data from the U.S. Bureau of Labor Statistics attests. *See Figure 3*. About 2 million Americans are employed somewhere between the initial burst of the airgun or shake of the Vibroseis truck in the geophysical survey industry to that last point where natural gas burns in your furnace or the gasoline is pumped into your fuel tank. As *Figure 3* shows, these numbers do not include the petrochemical industry, just the upstream, midstream, refining, and downstream. Two million jobs is an impressive number. To put it in perspective, that is approximately equal to the number of lawyers in Washington, DC.

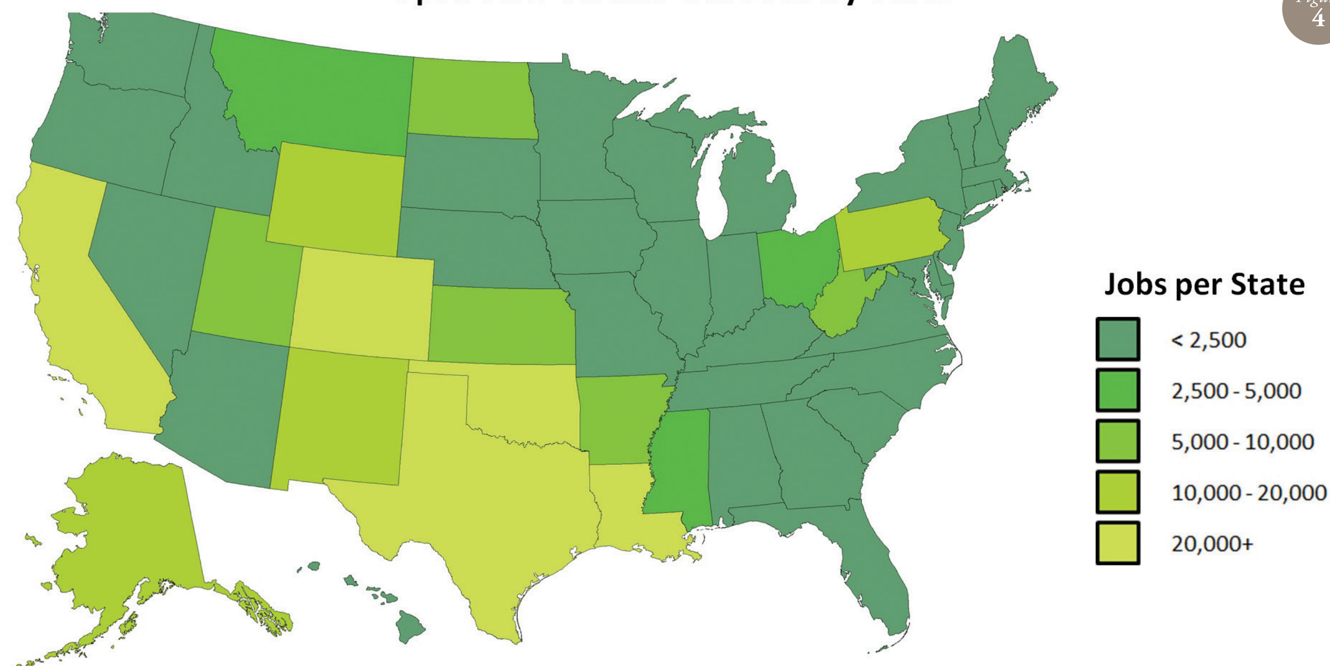
Figure 3



Source: http://oilindependents.org/petroleum-delivers-on-american-jobs/

Even in the upstream sector alone, there are employees in all 50 states. *See Figure 4*. Note, in particular, that Pennsylvania has turned the same shade of employment green as Wyoming and New Mexico. And here along the Gulf Coast, a study conducted by IHS apportions about 400,000 of those 2 million jobs to the offshore industry in the Gulf of Mexico.[2]

North Dakota's production of crude oil recently surpassed that of Alaska, with North Dakota exceeding 600,000 barrels per day. North Dakota is now the number 2 oil producer in America, if you leave aside the Gulf of Mexico OCS. Texas is still first at about 1.7 million barrels per day in 2012.[3]



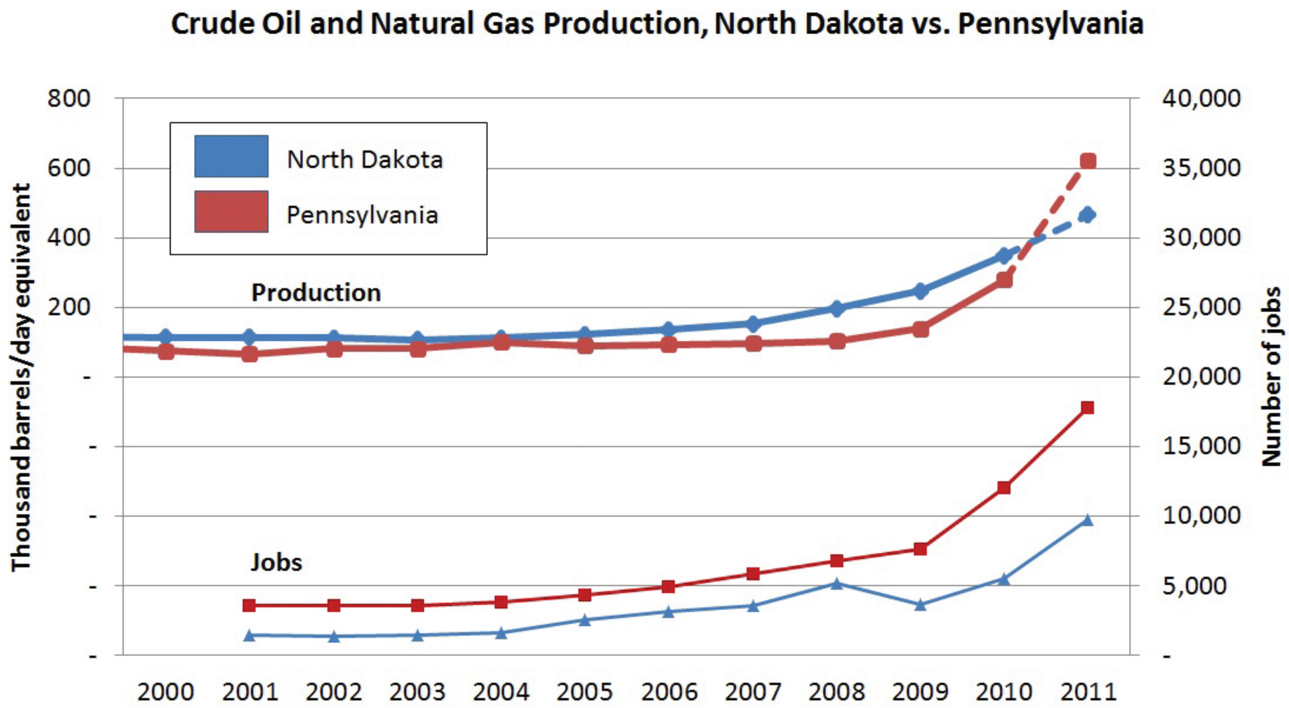
Source: http://oilindependents.org/petroleum-delivers-on-american-jobs/

Some credible projections don't have North Dakota peaking until it exceeds one million barrels per day in a few years. Production has increased so significantly that approximately half of Bakken oil leaves the state by rail tanker rather than pipeline.

Figure 5 compares the growth of production and jobs in North Dakota and Pennsylvania between 2000 and 2010. Pennsylvania is predominantly natural gas now and the comparison is based on barrels of oil equivalent. There are three happy facts about these two states: jobs are increasing, production is increasing, and neither state has any significant amount of land administered by the Department of the Interior.

2 Independent Petroleum Association of America, "The Federal Oil Plays: Gulf of Mexico and Alaska" at 4, (June 2012), *available at* http://oilindependents.org/the-federal-oil-plays-gulf-of-mexico-and-alaska-2/. (Hereinafter "Federal Oil Plays")

3 U.S. Energy Information Administration, "Petroleum & Other Liquids" at 1-2, (Aug. 2012), *available at* http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPTX1&f=M.



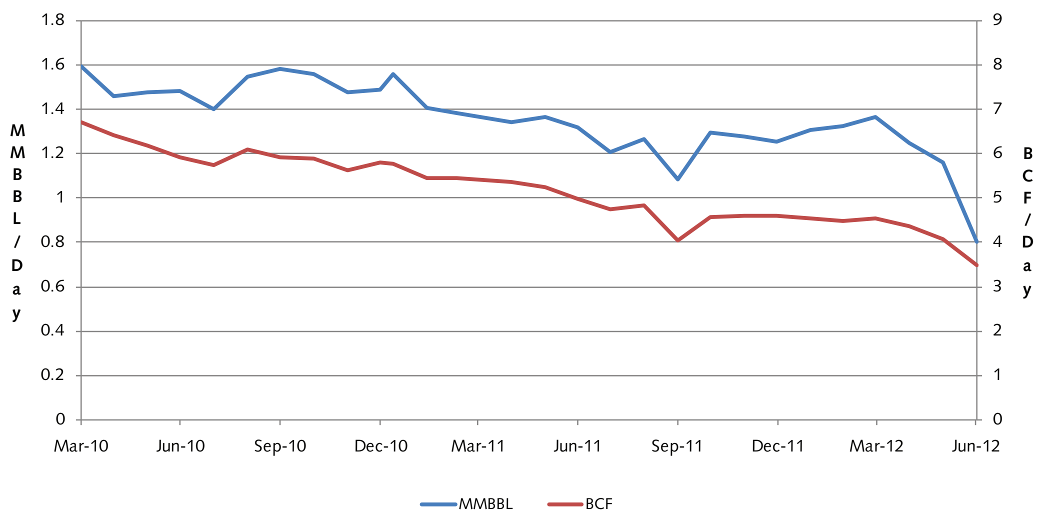
Source: http://oilindependents.org/petroleum-delivers-on-american-jobs/

Why does that matter to the prosperity of these states? Because these states do not enjoy the blessings of Interior Department land use planning and permit approvals.

Let me start with the Gulf of Mexico. In September 2009, the Gulf of Mexico OCS produced about 1.75 million barrels of oil per day.[4] *Figure 6* shows what happened to production in the Gulf after the Macondo blowout. In March 2010, production was at 1.6 million bpd. In March 2012, it was holding a little below 1.4 million bpd. I believe that incomplete data explains the precipitous drop in production after that date. Gas production has dropped throughout the period, from over 1.3 billion cubic feet per day in March 2010 to 0.9 Bcf per day two years later. Additionally, consider the total production from federal lands in recent years. For oil we saw a decline in federal production reverse in 2008, but decline again in 2011. *See Figure 7*. For gas we see a steady decline from 2008, with 2011 production a full one Tcf less that in 2007. *See Figure 8*. For oil and gas, federal production in 2011 is not only less in absolute terms; it is a smaller share of total U.S. production. What happened?

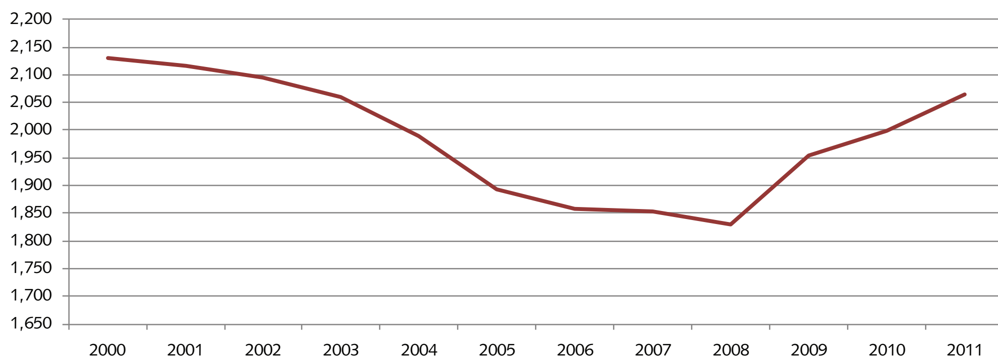
4 Federal Oil Plays at 3.

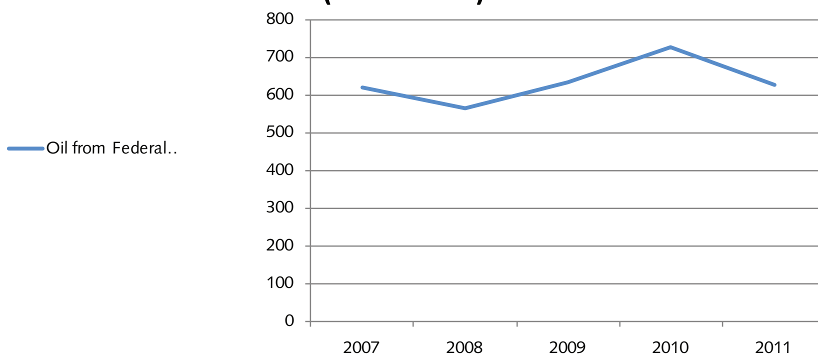
Figure 6



Source: BSEE Production by Planning Area
March 2010 – June 2012
http://www.data.bsee.gov/homepg/pubinfo/repcat/product/pdf/4115.pdf

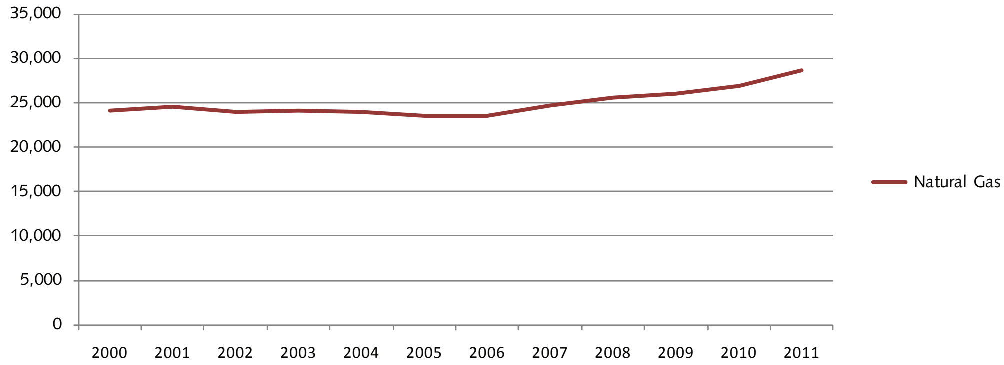
Figure 7

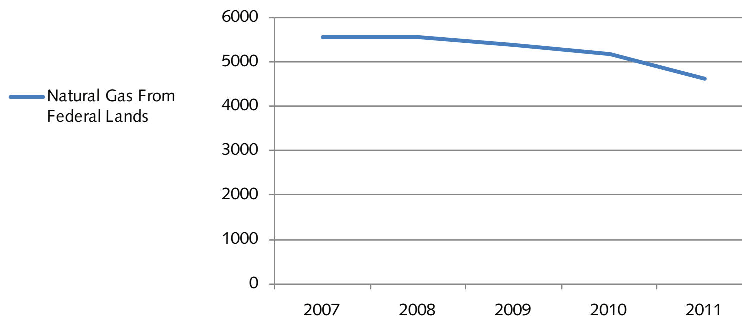




Source: http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=mcrfpus1&f=a & http://eenews.net/Greenwire/print/2012/02/27/4

Figure 8





Source: http://www.eia.gov/dnav/ng/hist/n9010us2A.htm & http://eenews.net/Greenwire/print/2012/02/27/4

Though I have played one in a televised Congressional hearing, I am not an economist. I can fairly assume, however, that the steady decline in gas production reflects in part a decline in gas prices, though our national output has increased by 3 Tcf per year despite lower prices. So gas prices are not the whole story; and for oil, price is not the story at all. The price for Louisiana light sweet crude oil at St. James was $111/barrel last week, $20/barrel higher than the price for West Texas Intermediate crude oil at Cushing, Oklahoma. The price of Bakken production is tied most directly to WTI at Cushing, and despite the lower Cushing price, Bakken production continues to rise.

A significant factor is not the Macondo blowout *per se*, but Interior's response to the blowout. You will recall that in May 2010 Interior required well-drilling from thirty-two exploration rigs to shut in immediately, despite no finding that they were in violation of drilling requirements.[5] New permitting came to a halt for almost a year, and resumed with a trickle as the agency spent several months re-engineering lessees' proposals for how they were designing their deepwater wells.[6] No new leases were offered in the Central Gulf of Mexico between March of 2010 and the summer of 2012.[7] In response to a lawsuit by environmental organizations, permits for geophysical

5 One of the wells to be shut in was the Moccasin exploration well in Keathley Canyon Block 736. At the time of the shut in order, Moccasin was already at a measured depth of 24,529 feet. The lessee had to redesigned the original well plan, and encounter new drilling risks as a result, before Interior allowed drilling to be completed. *See* Steven Bowman, "Altering an Existing Well Design to Meet New BOEMRE Worst-Case Discharge Criteria," Society of Petroleum Engineers Drilling & Completion 340-46 (September 2012).

6 Leggette, "A Safer and Swifter BOEMRE" at 4 (May 2011), available at www.fulbright.com.

7 Leggette, "The President's Speech and Regulatory Reality on the OCS" at 4 (February 2012), available at http://www.fulbright.com/index.cfm?fuseaction=publications.detail&pub_id=5312&site_id=494&detail=yes.

surveys were slowed significantly in 2010 and 2011 over concerns about impacts to whales and dolphins.

Now, there is one report that the pace of OCS permitting is returning to pre-Macondo levels.[8] This report notes that for the first quarter of 2012, Interior approved 44 deepwater APDs, as opposed to only 153 in the prior 24 months. Forty-four permits in three months, or fifteen per month, is close to the pre-Macondo average. What the report does not disclose is how long it took the agency to grant those APDs. Interior is still nowhere near approving APDs as promptly as it used to do.

Leasing, geophysical surveying, and exploration drilling are **essential inputs** for the desired output of producing oil and gas. Shrink the inputs now, and you shrink the output later. In deepwater, there is typically a three to five year lag between the discovery of a prospect through exploratory drilling and first production from that prospect. Using that rough rule of thumb, we can expect to see production declines of Gulf of Mexico oil to be most pronounced between 2014 and 2017.

Recent Developments in OCS Litigation

Let's look at recent developments in litigation affecting OCS leasing. First, Interior cannot offer an area for lease unless it is first included on a Five-Year OCS Oil and Gas Leasing Schedule. Secretary Salazar has approved a schedule for the years 2012-2017. As you see on *Figure 9*, all the sales are in the Gulf of Mexico and off Alaska. Nothing in the Pacific; nothing in the Atlantic. The states of Virginia and South Carolina have expressed interest in having oil and gas leasing off their coasts, but Secretary Salazar declined to oblige them. Bills have been introduced in Congress to remedy that.[9] We'll see what happens in the November election. As for litigation, I have not seen any notice that anyone has challenged the Schedule in court.

8 Rigzone - GlobalData, "Deepwater Drilling in GOM Predicted to Bounce Back to Pre-Blowout Levels", at 1, (Sept. 2012), *available at* http://rigzone.com/news/oil_gas/a/120823/Deepwater_Drilling_in_GOM_Predicted_to_Bounce_Back_to_PreBlowout_Levels.

9 See S. 3284 and H.R. 6082.

Figure 9

2012-2017 Lease Sale Schedule

Sale Number	Area	Year
229	Western Gulf of Mexico	2012
227	Central Gulf of Mexico	2013
233	Western Gulf of Mexico	2013
225	Eastern Gulf of Mexico	2014
231	Central Gulf of Mexico	2014
238	Western Gulf of Mexico	2014
235	Central Gulf of Mexico	2015
246	Western Gulf of Mexico	2015
226	Eastern Gulf of Mexico	2016
241	Central Gulf of Mexico	2016
237	Chukchi Sea	2016
248	Western Gulf of Mexico	2016
244	Cook Inlet	2016
247	Central Gulf of Mexico	2017
242	Beaufort Sea	2017

Source: http://www.boem.gov/Oil-and-Gas-Energy-Program/Leasing/Five-Year-Program/2007-2012-Lease-Sale-Schedule.aspx

Lease Sale Litigation

As for lease sale litigation, there have been some recent developments. Sale 213 was the sale in the Central Gulf of Mexico that occurred just before the Macondo blowout. It led to two lawsuits. The first is Defenders of Wildlife v. Bureau of Ocean Energy Management, filed in the Southern District of Alabama.[10] In the spring of 2010, Interior was in the middle of processing high bids from the March 17 lease sale. Macondo blew out on April 20. Interior continued to issue leases for the sale – an additional 331 of them – after that date.

For the environmental plaintiffs, this conduct raised three violations of law. The most significant, in my opinion, were two brought under the Endangered Species Act.[11] As many of you know, under that Act a federal agency has to seek a biological opinion from the National Marine Fisheries Service or the Fish and Wildlife Service[12] if a federal "action" may put an

10 __ F. Supp.2d __, 2012 WL 1640676 (S.D. Ala. 2012).

11 16 U.S.C. § 1536(a) & 1536(d).

12 These are sometimes referred to in this paper as "**the wildlife agencies**" for brevity.

endangered or threatened species in jeopardy. Even if it has received a biological opinion, the federal agency may have to seek a supplement if there is significant new information that might alter the conclusions of the initial opinion. This duty to seek a supplement is called "reinitiating consultation." Additionally, the Act forbids an agency to approve any activity that is likely to jeopardize the continued existence of any endangered species. So the Act has both a required procedure and a substantive ban.

After Interior had issued all the leases, it determined that the Macondo blowout called into question several of the assumptions on which a pair of 2007 biological opinions had been based, mostly to do with the assumed size of an oil spill. So it reinitiated consultation. The environmental plaintiffs raised a pair of issues. First, they said, Interior violated the law by continuing to issue Sale 213 leases after Macondo blew out. It should have stopped processing bids and awaited the results of a new biological opinion. Second, they said, that Interior violated its duty to assure that leasing activity would not jeopardize various species because, without new opinions, how could Interior be sure of anything? From comments in the Court's opinion, I think this last point struck District Judge William Steele with the simple clarity that we associate with Fox News commentator Bill O'Reilly: "If you don't *know*, how can you be *sure*?"

What saved the day for Interior and industry intervenors was a series of cases interpreting the 1978 amendments to the OCS Lands Act. Those amendments created the now-familiar **four stages of OCS oil and gas development**: the Five-Year Schedule, individual lease sales, individual exploration plans, and individual development and production plans. Congress had adopted this structure to avoid litigation over whether Interior had enough environmental information before issuing leases. In keeping with this structure and these precedents, Judge Steele concluded that nothing that happened in between issuing the leases and Interior's later approval of exploration plans would prevent Interior from imposing additional requirements on exploration or production activities. So Interior would have time to respond to the new opinions before drilling on these leases could begin.

The second was Center for Biological Diversity v. Salazar, filed in the District for the District of Columbia. That case also raised challenges that BOEM should have supplemented its leasing EIS before signing leases after Macondo, and should have re-consulted with the wildlife agencies under the Endangered Species Act. All parties stipulated to the dismissal of that suit last month after Interior completed an EIS that covered the same area and addressed the impacts of Macondo. The dismissal is without prejudice to CBD's right to re-file under the ESA if it is unhappy with a revised biological opinion soon to be issued. My side hales this as a victory, for the 331 leases are secured. Their side got a lot of what they asked for: a supplemental EIS and a commitment to new biological opinions. But they did not succeed in voiding the leases.

Exploration Plan Litigation

That's leasing. After leasing, but before drilling an exploratory well, an OCS lessee has to submit an **exploration plan** for Interior's approval. That approval is subject to judicial review directly in a federal court of appeals. Additionally, other approvals relevant to exploration may be challenged in federal district court. There have been several interesting developments on exploration, most of them involving Shell. Why Shell? Shell puts a lot of effort into, and takes a lot of pride in, community outreach and addressing the concerns of stakeholders. So it stands to reason that Shell would be sued a lot, because under one of the most fundamental laws of human nature, no good deed goes unpunished.

Two of the suits I will not dwell on today. Both concern proactive litigation Shell has filed in the District of Alaska to prevent Greenpeace in one

case, and the Center for Biological Diversity in the other, from engaging in familiar tactics to stop Shell's exploration this past summer. In both cases, Shell has persuaded a district judge to walk into new territory for the judiciary. If you have not done so already, I would encourage this Section to devote a luncheon to a lawyer for Shell who can tell the litigation story of Shell in the Arctic Ocean starting in 2006. It is a fascinating story, and if nothing else it reaffirms for Arctic exploration what Samuel Johnson said about a second marriage: it's "the triumph of hope over experience."

The third Shell suit involves its Appomattox prospect in the Gulf of Mexico. The case is called Defenders of Wildlife v. Bureau of Ocean Energy Management,[13] brought as a petition for review in the Eleventh Circuit Court of Appeals. The decision is a particularly important triumph for the Bureau, for Shell, and for lessees generally. It would be very easy for an OCS guy like me to really get deep into the seaweed on the issues in this case. I'll limit my focus to two issues. The first is of retrospective significance. You'll recall from my discussion of the Sale 213 litigation that Interior had reinstituted consultation with the wildlife agencies after the Macondo well was capped in July 2010. The environmental petitioners wanted a ruling that Interior could not approve Shell's plan until after it had heard back from the wildlife agencies. The Court held that the Endangered Species Act did not require Interior to wait. The court devoted a full page to addressing the issue, but the gist of its ruling was this sentence: "There is no precedent in our circuit to support Petitioners' argument that BOEM's choice to reinitiate consultation with NMFS and FWS automatically renders the former biological opinions invalid."[14]

The issue of prospective importance involves NEPA. At the February 2012 OCS Workshop in the Woodlands, with the Regional Director of the BOEM present, I raised the concern that the Region, when preparing NEPA documents on pending plans, was cutting and pasting too much from its lease sale environmental impact statements. My concern was that if a reviewing court put the administrative record under the judicial microscope, the agency was risking the same bad outcome it received in the Ninth Circuit in the Alaska Wilderness League case.[15] That case basically said that, after the lease sale stage is over, the time for generalities in environmental analysis is also over, and the NEPA documents have to be explicitly site-specific. I encouraged both lessees submitting plans, and Bureau employees reviewing them, to be more **specifically local** in discussing impacts.

It seems I worried too much. The Eleventh Circuit did not indulge in microscopic review, and affirmed the adequacy of the NEPA document in language as broad-brush as I have seen in my 32 years of OCS litigation.[16] The Court added an even broader statement of law on this point that will be very helpful in future challenges to plans. "**Absent unique site-specific characteristics**, BOEM is entitled to rely on broader prior analyses[,] and tiering is specifically encouraged by NEPA regulations."[17] Think about what that means. If neither the lessee nor the Bureau put anything about site-specific impacts into the record of the plan approval, a court would not know if there are unique site-specific characteristics to be addressed. So the burden falls to the plan's opponents to submit information about unique characteristics into the record before the plan is approved.

That leads to our next case. What about public participation in agency review of exploration plans? Recall that, by statute, Interior has only 30 days from the submission of a complete exploration plan to approve or disapprove it.[18] That deadline really makes the tortoise sprint. Shortly after Macondo, a group called the Gulf Restoration Network, allied with the Sierra Club and the Center for Biological Diversity,

13 684 F.3d 1242 (11th Cir. 2012).
14 684 F.3d at 1252.

15 *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815 (9th Cir. 2008), opinion vacated and withdrawn, No. 07-71457 (Order, March 6, 2009), appeal dismissed as moot *sub nom. Alaska Wilderness League v. Salazar*, 571 F.3d 859 (9th Cir. 2009).
16 684 F.3d at 1249.
17 684 F.3d at 1251 (emphasis added).
18 43 U.S.C. § 1340(c).

filed about 40 petitions for review of then-recently approved exploration plans and production plans. Those 40 were pruned down to nine by the petitioners themselves. Their claims were brought under the National Environmental Policy Act. The cases all shared a common trait. For each exploration plan and for each development plan, there is a process for public participation. These petitioners did not participate in that process. So these cases, consolidated by the court into one for disposition,[19] turned not on questions of energy law or environmental law, but on the scope of the jurisdiction of the court of appeals over these plans.

The statute governing judicial review was the OCS Lands Act's section 23. In relevant part, provides that plan approvals can be reviewed directly in a court of appeals. But the review is "available only to a person who participated in the administrative proceedings[.]"[20] That sounds jurisdictional. After a lengthy analysis, the Court concluded it was not. Instead, it was a requirement that a party exhaust administrative remedies.

The issue became, therefore, whether these petitioners should be excused from exhausting their remedies before Interior. The petitioners did not invoke any of the traditional excuses: that exhausting the remedy would have been futile or that the claim is constitutional and beyond the agency's power to address. They did ask the court to recognize a new excuse: that Interior's procedures for public participation were too obscure. The court actually required the parties to submit supplemental briefs on this question. The facts were not entirely favorable to the government. Let me quote the Court. Of the several plans at issue, "the DOI approved two on the same day that their public versions were posted on the internet; and in one instance the agency approved the plan before it had been posted. The petitioners' showing in this case, however, does not persuade us that they would have participated in those proceedings had there been more time between the postings and the approval of the plans."[21] So the Court left open the question of whether it had the power to create an exception to the exhaustion rule for procedural obscurity, and held against the petitioners. This is a rare case of bad facts making good law.

In presentations of this sort, the speaker ordinarily has a duty to be comprehensive. The duty to be comprehensive has a twin brother: the duty to exhaust the audience's patience. There should be an exception to this duty if the topic suffers from -- what shall we call it? -- "legal obscurity." I would prefer to invoke the exception and not discuss the next case. But the case raises a point of law under the Marine Mammal Protection Act that will be important in the Gulf of Mexico and in the Atlantic OCS, as Interior and the wildlife agencies work on so-called incidental take regulations that will affect future drilling and geophysical surveys.

The case, decided this year, is Center for Biological Diversity v. Salazar.[22] It concerns rules of the Fish and Wildlife Service for the incidental take of polar bears and Pacific walruses. The rules were issued in 2008. By statute, the rules last only five years. So the legality of these rules has been in question for 80% of their existence.

The rules concern operations in the Chukchi Sea and portions of the North Slope of Alaska. Incidental take rules have been in effect in the neighboring Beaufort Sea going back into the early 1990s.

Now, this is going to get painful for a couple of minutes. On the subject of "takes" of marine mammals, two statutes come into play: the ESA[23] and the MMPA.[24]

The ESA's chief command affects oil and gas companies indirectly. Section 7 the Act requires federal agencies assure that any activity for which

19 *Gulf Restoration Network, Inc. v. Salazar*, 683 F.3d 158 (5th Cir. 2012)
20 43 U.S.C. § 1349(c)(3)(A).

21 *Gulf Restoration Network, Inc. v. Salazar*, 683 F.3d at 178-79.
22 __ F.3d __, 2012 WL 3570667 (9th Cir. 2012).
23 16 U.S.C. § 1531 *et seq.*
24 16 U.S.C. § 1361 *et seq.*

it grants a permit "is not likely to jeopardize the continued existence of any endangered species[.]"[25] Agencies are to consult with NOAA's National Marine Fisheries Service ("NMFS") or the Fish and Wildlife Service and, in many cases, obtain a "biological opinion."[26] Biological opinions often include so-called "reasonable and prudent alternatives," measures the agency can implement to help conserve the species in question.[27] These alternatives often end up as mitigation measures included in the agency's permits. Additionally, the biological opinion may have to contain a so-called "incidental take statement." Cutting through the legalese in the statutory text, the incidental take statement basically incorporates the requirements for incidental take regulations under the MMPA,[28] a topic to which we'll turn in a moment.

Second, and directly, section 9 of the Act prohibits private actors from taking "any such species" of wildlife[29] unless the wildlife agency authorizes the take.[30]

To oversimplify, the ESA worries about the species first and the individual member of that species second. The MMPA worries about the individual first, the species second.

25 "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce, depending upon the species], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species of threatened species or result in the destruction of adverse modification of habitat of such species[.]" 16 U.S.C. § 1536(a)(2).

26 "Promptly after conclusion of consultation . . . , the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A). For certain marine species — such as walruses, seals, and polar bears — the Fish and Wildlife Service is the relevant agency under the ESA.

27 "If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which . . . can be taken by the . . . applicant in implementing the agency action.' 16 U.S.C. § 1536(b)(3)(A).

28 16 U.S.C. § 1536(b)(4)(B) & (C).

29 16 U.S.C. § 1538(a)(1)(B) & (C) (prohibiting takes "within . . . the territorial sea of the United States" or "upon the high seas").

30 16 U.S.C. § 1539(a)(1).

Thus, the MMPA prohibits individual "takes" of marine mammals, unless the take is authorized.[31] Authorization can come in several forms. Today I focus on incidental take regulations. Let me put the statute[32] into English. If you don't fish commercially, you can ask the wildlife agency to let you take "small numbers" of marine mammals in a given area, provided you don't *intend* to take them. The permission is only good for five years.

Before the wildlife agency gives permission, it must find that all the takings it allows will have no more than a "negligible impact" on the species or stock. And the wildlife agency must issue regulations telling you what "methods" of taking are permitted and what monitoring you must do.[33]

All of these requirements have been implemented in a two-part process, at least in Alaska. First, the wildlife agency issues the incidental take regulations. Then, under the authority of those regulations, the agency will issue an annual "letter of authorization" to individual applicants. I note this distinction in the two steps to make clear that this lawsuit challenged the first step: the FWS incidental take rules for 2008-2013.

Now, here's the really obscure point. Recall that I put "air quotes" around the phrases "small numbers" and "negligible impact." The Fish and Wildlife Service not only has five-year rules allowing incidental takes, it has a higher layer of rules governing the issuance of the five-year rules. And that higher level rule defines the phrase "small numbers" to mean any number of takes that will result in only a negligible impact on the stock of the given mammal. In other words, if the agency determines the impact of takes to be negligible, it automatically determines the number of takes to be small.

31 16 U.S.C. § 1371(a).

32 "Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specified geographical region, the Secretary shall allow, during periods of not more than five consecutive years each, the incidental, but not intentional, taking by citizens while engaging in that activity within that region of small numbers of marine mammals of a species or population stock[.]" 16 U.S.C. § 1371(a)(5)(A)(i).

33 16 U.S.C. § 1371(a)(5)(A)(i)(I) & (II).

The environmental plaintiffs objected to that reading. They said the definition gives no independent meaning to the term "small numbers." These incidental take rules for the Chukchi are invalid for ignoring a key term under the statute.

In response, Interior and the industry intervenors said, "Hold on. That definition was issued in 1983. This claim is time-barred." The court said, "Not so." If this were a facial challenge to the definition, it would be time-barred. But it is not a facial challenge. It is a challenge of the **application of the definition** to the 2008 rules. That challenge is timely.

On the merits of the plaintiffs' reading of the statute, the court agreed. The 1983 definition is clearly contrary to the Act because it gives no independent meaning to the term "small numbers." Then the 2008 rules are unlawful, right? The opinion is over. Ball game.

On the contrary, it's only the third inning. There are 25 more pages of opinion to go. As it turns out, the FWS was concerned that its 1983 rule was not in keeping with the Act. So in issuing the 2008 rules, it separately analyzed the issue of "small numbers" from the issue of "negligible impact." Instead of asking whether the numbers were small because the impact was negligible, the Service asked whether the numbers were small relative to the size of the population of the mammal. So the Service recognized that it could not allow the taking of a large number of mammals even if the impact would be negligible on the stock or species. The Court was satisfied.

There are even more weeds in those remaining 25 pages, but the key point is the one I just made. If you are advising clients on submitting an application to a wildlife agency to issue incidental take regulations, be sure the clients' supporting documentation treats the issue of small numbers differently from the issue of negligible impact. Otherwise, you are begging for even longer delays.

The OCS In Sum

So, to sum up things on the OCS, I predict the wave of environmental challenges to activities in the Gulf of Mexico has crested. The environmental groups have obtained no significant victory from the litigation they brought. If you cannot beat Interior under NEPA or the ESA in the aftermath of Macondo, then you've got no game.

The exception to that statement is that I think environmental challenges to geophysical surveys will continue to a limited extent, and there is likely to be a suit when Interior finally lifts its moratorium on geophysical surveys in the Atlantic. As for dealing with Interior, the delays will continue for two to six years, depending on the outcome of the Presidential election and a decision on who will be the Secretary of the Interior for the next four years.

Interior Psychology: It's Industry's Fault

On the subject of delay, I would be remiss if I did not share a few thoughts about the Department of the Interior's efforts to pursue an "all of the above" strategy onshore. I would need a full luncheon to cover the onshore as I've just discussed the OCS, so I will limit my comments to some observations about Interior Department psychology.

If you're not already convinced that my life is duller than last night's dishwater, consider that I read press releases of the Interior Department searching for gems of insight from Secretary Salazar. In April of this year he announced during a tour of the Bakken shale that the BLM "will implement new automated tracking systems that could reduce the review for drilling permits by two-thirds and expedite the sale and processing of federal oil and gas leases." This system is expected to be fully operational by May 2013 and "will improve communication between the BLM and industry, resulting in more consistent APD processing standards and timeframes and a significantly reduced review period."

How will an automated tracking system help? The Secretary explains. "Currently, on average, approximately two-thirds of the time it takes to process an APD is spent waiting for more information from the operator-applicant. The new system will allow the public and operators to view the BLM processing status of APDs, enabling operators to more promptly address deficiencies in their applications."[34] Let me make sure you understand the Secretary's point. BLM staff stands ready to approve APDs, but is hindered and frustrated by the incompetence of operators who just can't get off their duffs and submit the necessary information promptly. According to the Secretary, these delays are not caused by lengthy NEPA analyses taking place in permitting processes (although the Western Energy Alliance reports that NEPA reviews are taking up to seven years to complete).[35] Nor, in his view, are the delays be related to BLM not meeting statutory deadlines. (The Mineral Leasing Act requires BLM to issue leases by sixty days after payment of the bonus bid, but a GAO study found that BLM failed to meet this deadline 91% of the time when the parcels were protested, which they are most of the time.)[36] It is fortunate (and here a little sarcasm is irrepressible) that the Department has just the software package to solve a problem that a befuddled industry cannot recognize.

Additionally, new procedures added in 2010 created three additional, and some claim redundant, stages in the leasing process.[37] One of these stages was a leasing environmental assessment. These analyses are averaging four years, according to WEA, when the White House Council on Environmental Quality suggests that they should take 18 months or less.[38] These pre-leasing delays are utterly beyond industry's control.

If indeed lessees are responsible for these extensive delays onshore, is it fair to ask what BLM has been doing with the "extra time" it has while waiting on operators to provide additional information? It has conducted a study announced in May of this year. "According to the report, more than 70 percent of the tens of millions of offshore acres currently under lease are inactive, neither producing nor currently subject to approved or pending exploration or development plans." Using the same criteria for idleness, the report finds "56 percent of onshore leased acres" remain idle.[39] So, to incentivize lessees to drill these idle acres, the Secretary raises the minimum bid and the annual rental. And he slows the pace of leasing onshore.[40] After all, Interior reasons, why lease more if industry won't drill what it already has? However, what the Secretary fails to mention is that in the same report, Interior found that 55% of all **leases** *are* producing.[41] Paired with the significant reductions in leasing, the

34 Press Release, "Secretary Salazar Visits North Dakota's Oil Boom; Unveils Initiatives to Accelerate Drilling Permits and Leases on Federal Lands," (Apr. 3, 2012), *available at* http://www.doi.gov/news/pressreleases/Secretary-Salazar-Visits-North-Dakotas-Oil-Boom, last visited Sept. 10, 2012.

35 Western Energy Alliance, "Top Ten Ways the Federal Government is Preventing Onshore Oil and Natural Gas Production", at 1, (May 2011), *available at* http://westernenergyalliance.org/wp-content/uploads/2011/06/Western-Energy-Alliance-Prevention-of-Federal-Onshore-Production-Detailed1.pdf. (Hereinafter "Federal Prevention").

36 U.S. Government Accountability Office, "Onshore Oil and Gas: BLM's Management of Public Protests to its Lease Sales Needs Improvements" at 19, (GAO-10-670), (Jul. 2010), *available at* http://www.gao.gov/products/GAO-10-670 [last visited Sept. 27, 2012]. WEA found that 70.3% of Parcels in the West were protested between 2008 and 2011. Western Energy Alliance, "Federal Leasing" at 2, (Jul. 2012), link to "Click here to view the supporting data" *available at* http://westernenergyalliance.org/wp-content/uploads/2012/07/Western-Energy-Alliance-Dashboard-7-2012-Federal-Leasing1.pdf. (Hereinafter "Federal Leasing").

37 Western Energy Alliance, "Federal Onshore Oil & Natural Gas Process", at 3, (Apr. 2012), *available at* http://westernenergyalliance.org/wp-content/uploads/2010/02/Western-Energy-Alliance-Federal-Onshore-Process-Position-Paper.pdf. (Hereinafter "Federal Process"). *Figures 13 & 14* show the changes in the leasing process.

38 "Federal Prevention" at 1; Council on Environmental Quality, "Modernizing NEPA Implementation" (The NEPA Task Force Report to the Council on Environmental Quality) at 65, (Sep. 2003), *available at* http://ceq.hss.doe.gov/ntf/report/chapter6.pdf.

39 News Release, "DOI Releases Update on Unused Oil and Gas Leases," at 13, (May 15, 2012), available at http://www.doi.gov/news/pressreleases/DOI-Releases-Update-on-Unused-Oil-and -Gas-Leases, last visited Sept. 10, 2012. (hereinafter "Oil Update")

40 Using data that BLM provides directly on their national website under "Oil & Gas Statistics", WEA conducted an analysis on these numbers. They found that since 1988, new leases issued annually have decreased 76.3%. Additionally, new acres leased annually since 2008 have been reduced by almost 600,000 acres or 22.9%. See *Figures 10 &11* for charts of leasing in the West (which represents the vast majority of leasing nationwide).

41 Oil Update at 13.

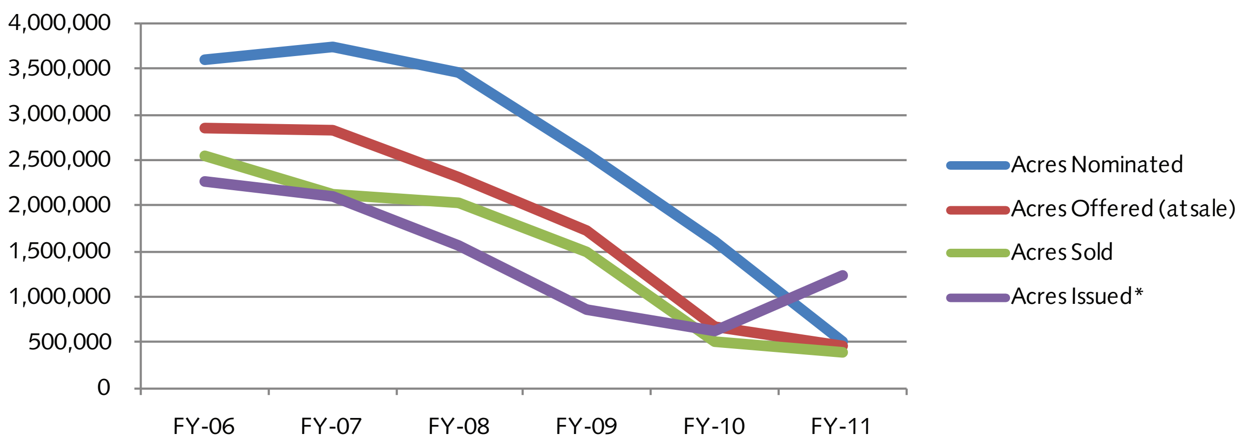
proportion of productive leases actually contributes to a steadily increasing utilization rate.[42] This means that operators are becoming more efficient with the land they lease.

Regardless, the percentage of producing acres and leases provides data lacking any practical use when you consider that oil and gas cannot be produced with equal success from every location. Prospects must first be tested by drilling. A "dry hole" on one lease makes it imprudent to drill a similar second well on surrounding leases. So the lessee either takes time to refine his exploration concept or sells the leases to someone who thinks she has a better geologic idea. Therefore, a company needs to lease many more acres than it will ultimately produce from. From 1981 through 2008, the Interior Department, under Democratic and Republican administrations, made a great deal of progress in understanding the geological risks in petroleum exploration. President Clinton in particular emphasized "partnering" -- his word – with the oil and gas industry to make federal procedures more accommodating to industry investments. During these times, there was an understanding of the benefits of promoting investments. This understanding the Department no longer possesses.

The Department's current understanding of why leasing and permitting are slow assures that the Department and the oil and gas industry will continue to be at odds. While the new automated system may improve transparency to the public and access to industry, will the new federal software speed the permitting process? Hope springs eternal, but probably not. Software doesn't tell federal employees what additional information to demand of applicants or how quickly to respond when they get it. More than likely, the new tracking system will provide concrete data that, in fact, most operators are prompt and thorough in their applications. Then who will the Department have to blame?

Oil and natural gas are likely to remain second class resources relative to wind and solar at the Department, and Interior's current vision of an "all of the above" strategy is not likely to result in increased production of oil and gas from federal leases.

Figure 10

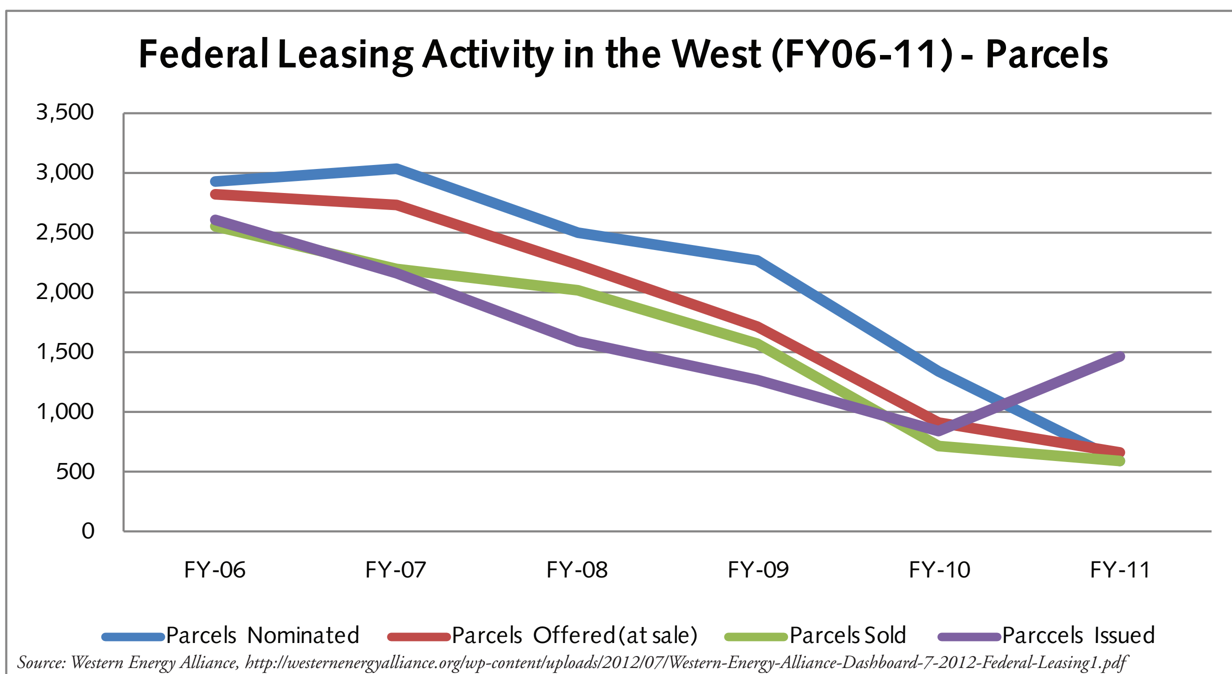


Source: Western Energy Alliance, http://westernenergyalliance.org/wp-content/uploads/2012/07/Western-Energy-Alliance-Dashboard-7-2012-Federal-Leasing1.pdf

*BLM Wyoming cleared a multi-year backlog of 1,200 lease parcels in 2011. Federal Leasing at 1.

42 Federal Leasing at 2. *See Figure 12.*

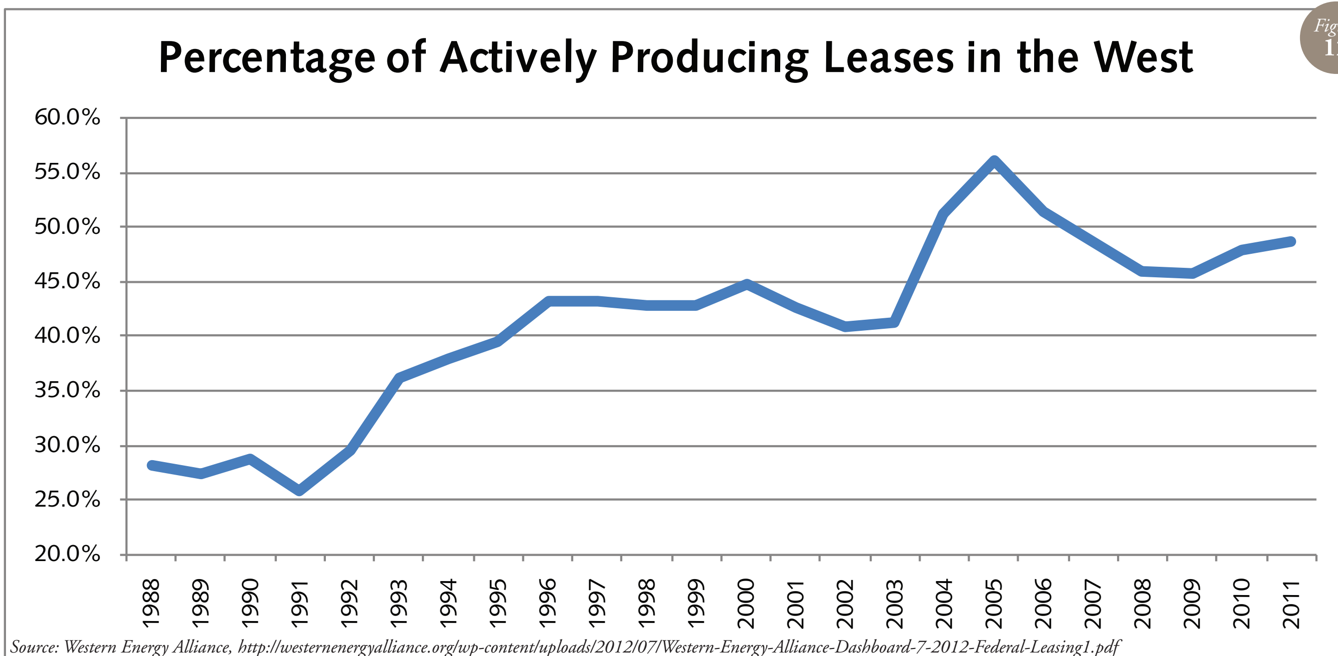
Figure 11



Source: Western Energy Alliance, http://westernenergyalliance.org/wp-content/uploads/2012/07/Western-Energy-Alliance-Dashboard-7-2012-Federal-Leasing1.pdf

*BLM Wyoming cleared a multi-year backlog of 1,200 lease parcels in 2011. Federal Leasing at 1.

Figure 12

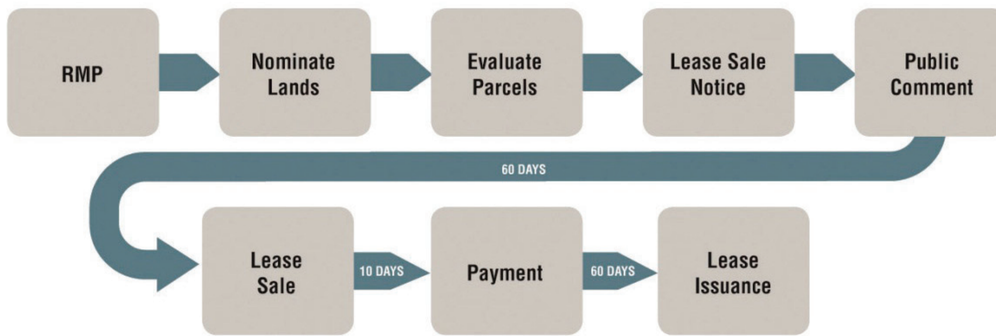


Source: Western Energy Alliance, http://westernenergyalliance.org/wp-content/uploads/2012/07/Western-Energy-Alliance-Dashboard-7-2012-Federal-Leasing1.pdf

Federal Leasing at 2.

Figure 13

Standard Leasing Process

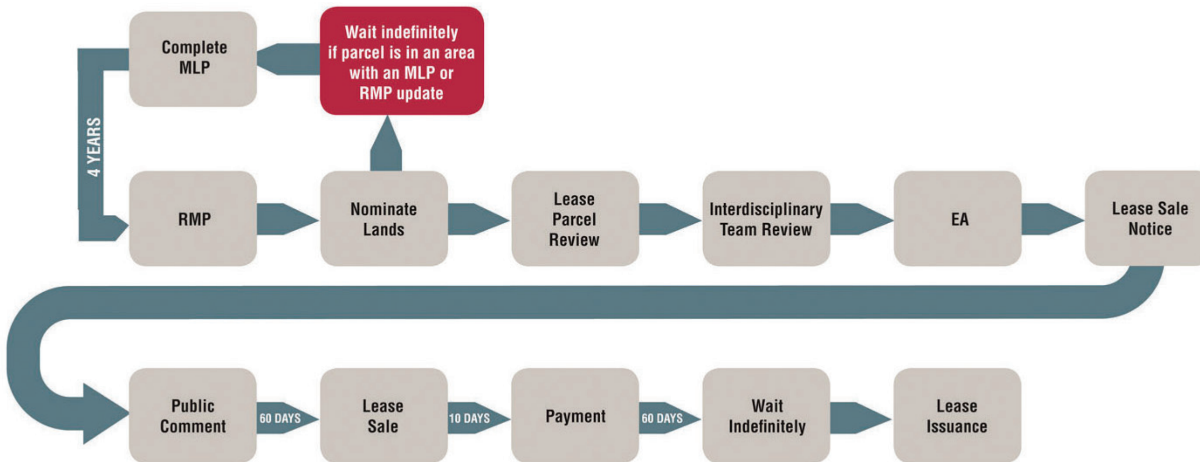


Source: Western Energy Alliance, http://westernenergyalliance.org/wp-content/uploads/2010/02/Western-Energy-Alliance-Federal-Onshore-Process-Position-Paper.pdf

Federal Process at 2.

Figure 14

Current Leasing Process with Redundant Layers



When a lease is finally issued, it doesn't mean a company can begin drilling. In fact, it's just the first step in a long and expensive process. The next process is NEPA analysis.

Source: Western Energy Alliance, http://westernenergyalliance.org/wp-content/uploads/2010/02/Western-Energy-Alliance-Federal-Onshore-Process-Position-Paper.pdf

Federal Process at 3.

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