



Executive Summary: A Mitigation-Based Rationale for Incorporating a Climate Change Impacts Fee into the Federal Coal Leasing Program

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September 2016

On January 15, 2016, Interior Secretary Sally Jewell announced the Department of the Interior (DOI or Interior) and Bureau of Land Management (BLM) would conduct a comprehensive environmental review of the federal coal leasing program and, if appropriate, update the regulatory and programmatic scheme for the first time in more than thirty years. The twin goals of the review are to ensure a fair return to the American people and to properly account for the program's environmental impacts, including climate change.

Arguably, the single best way for Interior and BLM to account for the climate impacts of the federal coal leasing program, to protect public lands from climate change impacts and to manage the program in such a way as to meet the United States' domestic and international climate goals is to make permanent the temporary moratorium on issuing new leases – to “leave it in the ground.” However, this is not the only potential management approach the agency may adopt. One alternative would be to impose a carbon price on federal coal. To assess its options, BLM can undertake an environmental review under the National Environmental Policy Act (NEPA) that accounts for greenhouse gas (GHG) emissions under a range of alternative scenarios and that uses the Social Cost of Carbon and Social Cost of Methane, or perhaps some other metrics, to assign a monetary value to associated climate impacts.

To complement this presumptive analytic framework, this paper develops an argument for using a mitigation-based rationale to deliver a climate change impacts fee on coal extracted from federal lands, and provides suggestions for how Interior and BLM can approach an analysis of the possibility in its programmatic environmental impact statement (Programmatic EIS). The paper makes several key points:

1. The federal government has a duty to mitigate climate impacts from downstream GHG emissions associated with the coal leasing program

There are at least four potential non-statutory sources of the federal government's affirmative duty to mitigate greenhouse gas emissions and associated climate impacts from federal coal: the principles of international law and the requirements set forth under the United Nations Framework Convention on Climate Change; the public trust doctrine; the federal common law of public nuisance; and private nuisance under state common law. Although it is plausible that none of these sources would result in an affirmative court decision holding the government liable for a breach of its duty, that shortfall does not negate the existence of the duty itself.

The statutes and regulations that govern Interior’s management of public lands provide other, and potentially even more forceful, sources for a duty to mitigate upstream and downstream greenhouse gas emissions and associated climate change impacts arising from the federal coal leasing program. Pursuant to the Federal Land Policy and Management Act (FLPMA), the Mineral Leasing Act (MLA) and NEPA, BLM has a duty to analyze and implement mitigation measures for the adverse environmental, social and public health impacts attributable to its management of fossil fuels on public lands.

2. The federal government has the discretion to mitigate climate impacts from downstream GHG emissions associated with the coal leasing program

Even if the duty to mitigate is of uncertain scope or enforceability, FLPMA, the MLA and NEPA all confer a definite discretion to mitigate climate change impacts. The multiple use mandate and unnecessary and undue degradation prohibition of FLPMA, the public interest requirements of the MLA and the ambitious goals and specific analytical requirements of NEPA individually and taken together grant the agencies broad discretion to mitigate foreseeable impacts, and to require compensation for impacts that cannot be avoided or minimized.

3. The duties imposed on and remedies available against lessors under tort and property law offer a persuasive rationale for assigning a climate change impacts fee to federal coal

Climate change impacts from the coal leasing program’s downstream GHG emissions will occur in locations, and to persons, both proximate to and remote from a given leased parcel. These impacted locations will include the leased parcel, other public lands and resources under BLM’s jurisdiction, other federal lands and resources under Interior’s jurisdiction, and private and public property within and outside the United States.

Impacts to federal lands—including the leased parcel and off-site lands—and even to the public fisc, more broadly writ, are compensable under the general principles of property law. For instance, it is a general principle of property law that tenants are required to restore leased property to its former condition, or else be subject to termination and/or damages. And although there may not be a hornbook principle along these lines to cite to, it makes profound sense that a lessor has within its authority the ability to protect its other properties, or to require compensation for impacts to them, from activities it permits on its land.

Moreover, the federal government, as lessor to coal mining companies, could, in principle, be held liable for damages for the climate change impacts associated with downstream GHG emissions. Section 379A of the Restatement (Second) of Torts and Section 18(4) of the Restatement (Second) of Property maintain similar standards for lessor liability for remote nuisances or personal injuries attributable to lessees’ activities. Because the federal government is consenting to the coal mining, and because the federal government is at this time well aware that coal leasing either involves an unreasonable risk or else contributes to the identifiable nuisance of climate change impacts, these principles of lessor liability put the government on the theoretical hook for damages.

4. Federal statutes, regulations and policy provide Interior and BLM with ample authority to adopt a fee as a form of compensatory mitigation

BLM has recognized that compensatory mitigation for unavoidable or residual climate change impacts arising from agency decisions is fully consistent with its mission and its multiple use mandate and that it possesses the discretion to require it, and has clarified that doing so is in fact the agency's policy. A climate change impacts fee for downstream GHG emissions fits within the agency's NEPA obligations and its compensatory mitigation policy.

The climate change impacts at issue in this paper are those that occur as a result of GHG emissions both at the coal mine and downstream, when the extracted coal is transported and eventually combusted for its end use. These downstream GHG emissions are considered "indirect effects" under NEPA, and the climate change impacts associated with those emissions are unavoidable or "residual" impacts. In undertaking the Programmatic EIS, Interior has recognized that NEPA requires it to analyze downstream emissions – a conclusion that comports with the current trajectory of courts' interpretations of NEPA. Under NEPA, then, the agency must also identify and assess appropriate mitigation measures for these emissions, including compensatory mitigation measures. The mitigation measures discussed in the Programmatic EIS should follow the "mitigation hierarchy," and should include both a "net zero" emissions offset program as well as a climate change impacts fee.

A climate change impacts fee would be consistent with recent directives, including the Presidential Memorandum *Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment*; Secretarial Order 3330, *Improving Mitigation Policies and Practices of the Department of the Interior*; and "Landscape-Scale Mitigation Policy," a new chapter in its Departmental Manual, which effectively operationalizes Order 3330. The sum total of the White House and Interior guidance is that BLM can and should assess and potentially implement mitigation measures, which might operate through any number of mechanisms, including lease stipulations and chargeable fees, among other things. The mitigation measure should first seek to avoid GHG emissions and their climate impacts; second, seek to minimize emissions and impacts; and third, compensate for unavoidable impacts, as through a climate change impacts fee.

5. Technical issues that the agency should address in the course of assessing this course of action through the Programmatic EIS

There are a number of key questions to address in developing a mitigation framework in any context: 1) whether to mitigate; 2) when to mitigate; 3) what mitigation should be required; 4) technical issues surrounding how to mitigate. The question of whether to mitigate was addressed above. The question of when to mitigate is one of practical consequence: advance mitigation in this context, based on acreage or projected production, might result in overcharging lessees and so basing mitigation on actual production would seem to be a more reasonable approach. The questions of what mitigation should be required and what technical issues the agency will necessarily confront are more complex they are. They are treated in summary form below.

a. *What mitigation should be required*

The Presidential Memorandum *Mitigating Impacts from Natural Resource Development* identifies three types or categories of resources: irreplaceable resources; resources that are important, scarce or sensitive; and other resources managed consistent with an agency's mission and objectives. There is an argument to be made that the climate in which human civilization took shape and in which we continue to exist constitutes an irreplaceable resource, and that the appropriate mitigation measure for continued GHG emissions and climate change impacts is avoidance. If BLM concludes that the climate is not an irreplaceable resource warranting avoidance to the maximum extent practicable the agency must conclude that it is nonetheless an important and sensitive resource, and that the appropriate mitigation standard is a minimum of no net loss, and preferably a net benefit. Such mitigation could be pursued on a number of different scales: planetary, national or regional.

b. *How to calculate a climate change impacts fee*

The question of what the proper amount to charge for federal coal has been the subject of several economic analyses, and this paper does not seek to answer it. Rather, the paper identifies a number of fee-related issues Interior and BLM should consider in the environmental review. These include: whether to use the Social Cost of Carbon and the Social Cost of Methane or other metrics; how to account for intervening actors; how to account for regulations on power plants and other coal users; how to account for the different carbon intensity of coal; whether and how to account for historic emissions; whether and how to account for historic costs; and how to account for the impacts different prices will have on different companies, industry sectors, states, tribes, and local communities. The paper also looks at different mechanisms for compensatory mitigation—such as in lieu fees, mitigation banks and permittee-responsible measures.

6. A Sample Framework for Developing a National Compensatory Mitigation Strategy for the Federal Coal Leasing Program

In considering employing a climate change impacts fee as a compensatory mitigation strategy for the federal coal leasing program BLM will not be starting from scratch. The paper uses the bureau's Regional Mitigation Strategies for Solar Development as a template to develop an analytic framework for the coal leasing program. Accordingly, the paper offers one set of possible responses that result in establishment of a climate change impacts fee as a compensatory mitigation strategy.