

## FINDING COMMON GROUND IN ENERGY POLICY IN DIVIDED TIMES

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I grew up in a small community of Toppenish, Washington, right in the middle of the reservation called the Yakima Reservation. Some of you may be familiar with that part of the country. It is a huge farming community where I had my upbringing as a child.

The closest thing I got to being where you are in law school was at the very end of my undergraduate degree, I decided I was going to go to law school. So, I took the LSAT, like you all have done and luckily, I pass the LSAT and was set to go to Lewis and Clark in Portland, Oregon. You know how life sometimes takes you on certain bends on the road of life? Well, one of those bends in the road of my life happened right about then. My wife, very young, had a stroke just as I was ready to go to law school. She was in the hospital for a long time. She could not walk for close to a year. We had three little babies; my youngest son at the time was only six months old. I decided I would not put her through what you go through over three years of law school. Instead, I decided to go work for the Forest Service in eastern Oregon. My life took another bend in the road in a whole different direction, and it has been an enjoyable time. I always have had a very soft spot in my heart for the study of law and the Socratic method to dissect issues and problems to their lowest common denominator. I always try to bring people with your skills to the Bureau of Land Management (“BLM”).

This afternoon I have a talk I was going to do about climate change and other things. But given what I heard this morning, I am going to still do that but spend a little more time on some of the things that we talked about this morning, such as the permitting process and how it works in the BLM, which I am familiar with. I will spend more time on that topic than the topic of climate change. You are all familiar with climate change.

But before I get going, let me just say thank you to whom you all call Professor Blake. I just call him Blake, and I have known him since he was in law school. And also thank you, Dean Pappas, for the wonderful staff that you have. I know there is a lot of work to be able to put this conference together, but Caitlin is at the top of her game, and I sure appreciate

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\* A recording of Mr. Palma’s presentation at the 2023 NORTH DAKOTA LAW REVIEW Energy Law Symposium can be found online at: <https://law.und.edu/library/cle/2023/ndlr-energy-symposium.html> [<https://perma.cc/64PC-VP2V>].

everything. Every time I had a question, the answer was right on my screen, so thank you so much.

What I am going to share with you is not so much a talk, but a conversation with you. It is a reflection of nearly forty years of my life that I spent in public land management, both for the Forest Service, as well as for the BLM. I will share some ideas, some things that I have learned along the road and along the journey. I want to be very clear that I am not a scientist, and I do not purport to be a scientist. But I am just simply going to share with you some of my own personal views about things that I have learned in my life. The topic that I was given is a complicated topic. It is called: *Finding Common Ground in Energy Policy in Divided Times*. And boy, do we have some challenging times. They are right when they say it was the best of times, and it was the worst of times. Where times are divided, there is always a lot of opportunity. I am going to spend a lot of time towards the end of my conversation with you, giving you some ideas about how we address some of these thorny topics of finding solutions to very complex problems of land management.

Let me begin my conversation with you with the latest Intergovernmental Panel on Climate Change (“IPCC”) report that just came out. I think it is the sixth report for the IPCC. I would like to share with you some of the things that are described in the report about climate. All of you have seen the dramatic statistics, but in essence, the report states that human activity is really impacting greenhouse gas emissions throughout the world. The bottom line of the report is that now is the time to take action. We are approaching an increase in temperature of 1.5 degrees Celsius which will create a lot of human dilemmas around the world.

All I can tell you is what I see and what I experience. I live in Las Vegas. I know some of you are saying, “Vegas?” but I like the warm weather. It is going to be about seventy to seventy-five degrees there in about two days. I like the nice warm weather in Las Vegas. But I will tell you what I see. There is a lake that has been built up by the Hoover Dam. I have been around the Vegas area for over thirty years and have never seen it that low. In fact, it is the lowest ever for Lake Mead. Unless we get some more moisture along the Colorado River Basin, I am not sure what we are going to do about water. I have gone to Lake Mead just in the last few weeks, and you can see boats that have sunk over the years stick out of the desert where there used to be water. I remember going to the shoreline of Lake Mead. The shoreline is a mile down. Where there used to be shorelines it is just desert now. I do not know about all the scientific climate change. All I can tell you is what I have seen with my own eyes. What impact does that have on places across the United States and the world? I think what they are saying is that if the temperatures continue to increase 1.5 degrees Celsius—we are not quite there

yet, but we are getting really close—then it will be drier, more drought. It will be wetter when it is wetter, it will be colder when it is cold, and hotter when it is hot. Vegetation will move south or north depending on the vegetation. Wildlife will move either upslope, up the mountains, or down the mountains, depending on the kind of wildlife. There will be changes on the regime of flora and fauna. We are seeing that already in a lot of different species where they are moving up or downslope or they are moving closer to riparian vegetation. Riparian areas will become very critical for wildlife. Wherever there is water will be critical for wildlife, not only birds but other kinds of species as well. Those are some of the impacts of climate change.

As you know, there has been a lot of discussion about what to do, not only around the world but including here in the United States. It is against this backdrop that the Biden-Harris administration has taken a lead. Some of you may agree, I think some of you have seen that. But the bottom line of the direction that this President has taken, is to achieve 100 percent carbon-free power generation by 2025 and reach net zero emissions by 2050. If you look at all the policies and all the things that are going on, like where investment is happening across the United States and other parts of the world and some of the things you heard this morning, the focus is really on those two things: how do we reduce carbon-free generation and how do we reach net zero emissions by 2050.

One example is at the BLM. We manage about 245 million acres across the United States. A lot of solar power is being generated right now or being both planned and generated, especially in the Southwest. If you ever drive from Nevada to California, you will see those solar plants, all along the freeway. There are all kinds of different kinds of technologies making this happen. The goal is to produce twenty-five gigawatts by 2025. That is an awful lot of electricity that is going to have to be produced by solar. A lot of incentives are being done to be able to do that. We are moving also not only into the large-scale solar operations but also in the homes. My home in Las Vegas has solar and I can really tell the difference in the price that I pay for my power bills, especially in the summer, when the temperatures get to 110 degrees in Vegas. So, there is a lot of work going on. The whole idea is that we want to reduce greenhouse gas emissions as soon as possible to do our part. It is against this backdrop that there are many important policies that are coming out from this administration. But along with this climate change backdrop that we see, there is also another policy that you heard about this morning and that is environmental justice. I want to talk for just a moment about this important topic.

My portfolio with the BLM includes both climate change and environmental justice. Environmental justice means that climate change impacts will have, in many instances, a disproportionate impact on

communities that can least afford it. So environmental justice is about investing in some of those communities where the disproportionate impacts will occur. This could be tribes, it could be reservations, it could be other communities across the United States and across the world. This administration has focused on investing funds from the Inflation Reduction Act (IRA) on many important projects and on environmental justice. Forty percent of the benefits of IRA money will go to either benefit or lower the impacts for some of these environmental justice communities. The terminology that we use for this initiative is Justice40. You are going to hear two different words. One word is environmental justice, which is a much broader umbrella. And then you are going to hear another word: Justice40. Justice40 is under the big umbrella and is focused specifically on the investment bills that were just signed. Justice40 is what it sounds: 40 percent of the benefits of IRA will be invested on environmental justice communities.

Let me give you an example of the kinds of things that Justice40 is looking at. The Department of Interior, which is what BLM is under, every year grants about 5.3 billion dollars. What do those grants go to? They go to all kinds of things including universities. What kinds of things do those grants fund? Well, let me give you an example. One that we are looking at right now with the various agencies within the Department of the Interior is how to clean water—how to clean brackish water and how to clean saltwater—because we know that water is going to be really critical. So universities can apply for grants from the Department of Interior, various universities that are experimenting with how to deal with brackish water and/or desalinate water. Those are the kinds of grants and many others.

We contract out, in the Department of Interior, about 5.5 billion dollars a year on all kinds of contracts. The spectrum of contracts is very broad. So we are trying to reach out to communities. Just about two months ago, I met over Zoom with about thirty or so university presidents—who mainly deal with Native American populations, Hispanic populations, or other minority populations—to let them know the kinds of grants and contracts that we provide at the Department of Interior to see if we can get more of them to apply. That is Justice40.

Under the umbrella of the much broader environmental justice that we are talking about, here are some of the things that we have done in the Department of Interior to address the issue. We have created two kinds of tools to help us identify where those communities are. The acronym of one of the tools is CJust, which is a tool that collects data from the Census Bureau and dozens of other databases. We give it some parameters and, using GIS, it maps out the locations of these communities. We also have developed a tool within BLM that narrows scopes even further than that. So, if we are proposing a pipeline, an oil and gas operation, or we some other project these

computer tools are able to locate very quickly with the right parameters these environmental justice populations. We can also change the parameters of these tools—to a half a mile out, two miles, five miles, ten miles etc.—depending on how far the impacts will be for a particular project. The program is able to identify where we need to go to address those issues because some of these communities have perhaps not been as engaged or involved in either the development planning of a project or in the impacts afterwards of the project. We want to engage and involve them. We are looking into grants because some of the smaller communities of environmental justice may not have the technical skills, staffing, people, or the technical know-how to know what kind of grants are there or how to apply for them. It is quite a rigorous process to be able to just identify those and how to have the skills to be able to do that. So we provide grants for planning and grants for technical sufficiency of some of these communities.

We are also looking at how we actually grant this money. For example, the kinds of grants that the Department of Interior gives are called reimbursable grants or reimbursable projects. What that means is that if you want to do a project in a reimbursable grant, you would have to pay for the costs upfront, and then you get reimbursed later. Later could be a month, or even longer. Well, some of the small environmental justice committees do not have that ability to pay for it ahead of time and get reimbursed much later. Those are the kinds of policies that we are working on that deal with environmental justice.

The two points that I am talking to you about, climate change and environmental justice, really go together. The reason they go together is because the impacts of climate change will be felt by everybody. We believe, to a large degree, they will be felt more by environmental justice communities, and that is why we are addressing them both together with policies and procedures. What we have done in BLM is that we have developed policies that give guidance to all of our land managers on how to engage these communities.

I am going to move on now and spend a lot more time with you on how we find common ground on some of these really critical topics. I spent many years in a place called Lake Tahoe. It is a beautiful spot on the mountains, a beautiful lake. But it is probably one of the most controversial spots that I have ever worked in.

In the 1960s, Lake Tahoe was subdivided to have 600,000 people live there. It would have been wall to wall homes. Ronald Reagan, who was Governor of California, said that we cannot destroy this lake. Nevada Governor Adam Laxalt at that time also said we cannot let this happen. And they are the ones that really worked hard to prevent that from happening. They helped create a bi-state compact, which is unusual anywhere else in the

country. There were only two places in the country that had bi-state compacts: Chesapeake Bay and Lake Tahoe. We call it the fourth level of government. For example, when you go build a home you get a permit from either the city or the county. In Lake Tahoe, you go to the Tahoe Regional Planning Agency (“TRPA”), which is neither a city nor a county. That creates conflict because the TRPA tells you whether you can or cannot build a home in Lake Tahoe.

After I managed all of the Forest Service lands around the Lake Tahoe region, I left and went to become the executive director of the TRPA. People would say that we could not tell them what they could and could not build on their property because that would be takings. We would say that we could. We went to the Supreme Court many times. The last time when I was there, we went to the Supreme Court on a class action lawsuit on the issue of takings. Our voice was a gentleman by the name of John Roberts. I think you know John Roberts. We won that particular case. Lake Tahoe is a very controversial place. How do you find common ground in such a controversial place?

This morning you heard that our National Environmental Policy Act (“NEPA”) is a very complex and convoluted process. And it is. NEPA is more of a disclosure procedure than it is a “finding common ground” procedure. I understood that when I was in Lake Tahoe, that it was more of a disclosure procedure than a human engagement process. As I began to look at the issues of Lake Tahoe and the things that we needed to do, I knew that if I followed the process of NEPA it would be years, if ever, to be able to get anything done. So I decided to go a different route. The different route I decided to take is a human route. The human route would save me much more time. If I went the procedure route, it would take more time to resolve issues. But if I went the human route, I bet that it would take less time.

Let me give you one example of where I used the human process to achieve a quicker NEPA process than normal. If you have gone to Lake Tahoe, you notice that the homes are actually embedded in the forested lands, they are in the pine trees. We knew that those forests had been changed over time because when they discovered silver in Virginia City, they cleared most of those mountains from timber to be able to shore up the tunnels as they were mining silver out of Virginia City. We know that most of the forests of Lake Tahoe had been cut in order to extract silver from the mines in Virginia City. Right after the Comstock era, sheep by the million were grazing along the mountains and that changed the vegetation in the late 1800s to early 1900s. Move forward 100 years in time and the forests that you see in Lake Tahoe, were not the forests that were natural to that area. The current forests are all that people have known now.

The human process in this case was to educate the people on what kind of forest existed before it was logged. This education was an important part of the process because the forest around Lake Tahoe at that time needed to be thinned to enhance the pines trees that were natural to that ecosystem. We would have to do some timber projects. Why was this so controversial? Because when I was doing this in the 1990s, the spotted owl had just been listed as an endangered species in Oregon and Washington, creating huge controversy and bringing timber projects to a halt. It was almost impossible to do any kind of a timber project in the Forest Service lands. But I focused on the human connection, education, and collaboration. I met with all key groups: their board members, their board chairs, and others. We had many meetings explaining to them the difference between a white fir conifer and a different kind of ponderosa: why they were different and what the impact was of the differences between those two. With a white fir conifer, the branches go all the way down to the ground. In a ponderosa pine, the branches thin themselves from the ground up. When lightning strikes and it starts a fire, the white fir whose branches go to the ground become fuel ladders for fire to travel to the bigger trees. So, we needed to do the timber projects to clean the forests of the white fir. Getting the environmental groups to understand our purpose took a lot of explaining, a lot of information. Once they understood why, then none of the timber projects we needed to do in Lake Tahoe were challenged. The process was 60 percent faster because I had gone this route. NEPA is a procedural disclosure more than a human interaction process, it really takes education. Sometimes scientists, wildlife biologists, social scientists, archaeologists, even us as individuals want to follow the scientific process. But one of the things that I would urge you to think about is that the kinds of land use issues that we are discussing are as much about human understanding and interactions than anything else.

Still in the human process, the next step after the timber projects were approved was to continue the education with community members. When I was younger, you used to go vote at the fire stations and people were used to going there. People feel a certain amount of safety when they go to a fire station. So, we had community meetings at the fire station. We needed to educate the community members. These timber projects were literally in people's backyards. We needed to educate them on how we were going to do these projects, and what the project would look like. Every project you do, is a little messy, especially thinning the forest becomes a little messy. We needed to let the public know what it looked like. Then we chose neighborhood captains, who could then talk to their neighbors. We were then able to do hundreds of acres of timber projects outside of the subdivisions of Lake Tahoe. NEPA is a disclosure process, but if you really want to speed it up, make it a human process as well.

The other thing that I want to talk about is that the BLM, for all good intentions I am sure, has been bound by certain laws. One of those is called the Federal Advisory Committee Act (“FACA”). The law says if I have an issue to resolve, with a company or an individual, I cannot go to that individual and ask to sit down and talk it through. FACA says I cannot do that. I must go through a full disclosure using the NEPA process, which allows everybody to join that conversation. Let me give you a suggestion on how you may want to address this. I believe under any administration this will work because I have used it the past. The BLM has created over many years now, a group called the Resource Advisory Council (“RAC”). The RAC is composed of individuals from all walks of life, private citizens. If you are on the RAC, you can officially advise the BLM on planning, projects, policies, etc. The RAC is the official channel for private citizens. However, the issue is that those RACs could operate more efficiently than they have in the past. For those who are having dilemmas with issues you are working with, I would ask if you are connected to these RACs. I think that is the venue for you to bring your issue that you may have. The RAC can provide suggestions or recommendations to BLM leadership at the local and regional level. Connecting with RACs is one more suggestion if you are trying to find common ground. If the RAC is not functioning well in your area, I suggest you take the time to figure out what you need to do to make it function better.

The other place to look, as you are trying to find common ground, is in the law that created the BLM, the Federal Land Management Policy Act (“FLPMA”). Congress passed FLPMA in 1976 and gave BLM the direction of what we would do to manage those 245 million acres of land. One of those things, amongst many, was that we would do Resource Management Plans (“RMPs”). These plans direct the land managers, over the next twenty to thirty years, how to use those lands. They are akin to a local city or a local county master plan. The RMPs give direction to the local managers about which acres of land will be used for which purpose: some acres will be used for wilderness, some for development, some to sell. We actually sell BLM land if it is identified in RMPs or at the direction of Congress. The plans provide directions for those purposes. If you have real concerns about how some of those lands are being managed, then that is the place or venue to be able to address those concerns and issues through the RMP. Local BLM managers will rely on RMPs to decide what projects may or may not move forward. Once a RMP is complete, is it locked in cement? The answer is no; you can amend it. So, we do that, we do amend RMPs from time to time. Sometimes you may call it variances in the local terminology. The BLM uses the word variance, but not in this case and not for this purpose. We call it an amendment. So that is another place where you may want to address some of your issues and concern at the more foundational level in the RMP.



Going back to NEPA, NEPA is really a surrogate to the divided world that we have. NEPA is a surrogate for one side of the issue, which says you should not do any kind of development on public lands. NEPA sometimes is a surrogate from the other side to be able to say we need to do development. And it is in the conflict of those two sides that local managers find themselves in quite a dilemma. I will give you some suggestions on what you may want to do if you find your project or programs in a bit of a quandary as you have these conflicts.

Inside of the Department of Interior is the Center for Alternative Dispute Resolution (“CADR”). Some of you might have worked with them. We have staff of federal employees whose job is to work with controversial projects and use an alternative dispute resolution to find solutions. I work with them. They are wonderful. If you have not heard of CADR, I urge you to write it down and talk to them. If you come across an issue that you just cannot seem to get through to local managers, you need to call CADR and ask if they might be able to facilitate a conversation. These individuals have very strong facilitation skills and they could help with anything from human misunderstandings, inside and outside of the organization. So may I suggest to you as you are looking to find common ground in these divided times that CADR is an opportunity for you to do that.

The other suggestion that I have for you is that some states have actually established an office for public lands within the governor’s office. For example, Utah has a strong office for public lands. Some states may or may not have those offices. I know some do, some do not. You may want to consider a state office, even if it is a small office because that office has been given a certain ability and authority to talk to the BLM about all kinds of projects. I would suggest that if you do not have an office of public lands within your governor’s office to create one. That office is a really good place to solve some of the problems that you may face as you work to find that common ground with the federal side.

Another suggestion, if you have some projects that might be having some dilemmas is that sometimes third parties can provide a really good opportunity. Let me give you an example of where I have used third parties when I used to manage all of the state of Utah. In order to not violate FACA, I had to think about how I could really talk to people. I knew that if we sat down and talked, we could find an answer, but the law says I cannot do that outright. So how do I go about doing that legally? I went to my friend, Mayor Dave Moore of Moab, Utah. I knew we could sit down and talk to the oil and gas industry, the recreation industry people in Moab, Utah, and others interested in the rental community. I cannot call a meeting to work something out. Dave says, “I will call the meeting as the mayor and I will have a facilitator. I will bring the snacks, the water, and the other things. And I will

invite BLM to come and join us.” Dave calling the meeting was okay to do. That is what I mean by third parties. Find out who can help you solve the issue that you have. We had several meetings that Dave organized and facilitated with his staff on the city council and just simply invited me to come along and visit with them. That was okay to do and stayed within the umbrella of FACA. I have used that approach in many issues in many instances.

Another suggestion that I would have, which I am sure you use, is associations. There are all kinds of associations, organizations, and businesses that are definitely critical and important to use.

Relationships take time. Sometimes it is not in our job descriptions but developing relationships takes time, energy, and focus. If your projects are stuck, I highly recommend you take the time to really develop those relationships with those local BLM managers. I used to manage all of the lands in the southern part of the state of Nevada. My office was in Las Vegas, Clark County. Las Vegas is an extremely controversial place for managing public lands. I used a lot of these same concepts to be able to help me address the issues that happen there. As we address the issue of finding common ground in all of the issues of public land management, I urge you to take the time to get to know your local BLM, Forest Service, U.S. Army Corps of Engineers managers. I know it is hard and it is tough. They are a little shy sometimes to come and meet with you because they feel like they cannot negotiate with you individually. But if you get to know them on an individual basis, you will be surprised how much you will be able to do.

I retired from managing public lands in 2015. I was minding my own life doing what retired people do, and I started getting calls from friends of mine that I have come across in my life to solve this issue or that issue. Most of the issues that I resolved were related to land use and connections to public lands. And sure enough, I can fill out the right-of-way form, the SF 299 form, and I can do our plan of development that needs to be attached to the SF 299 form. I can do all of that, those are just technical things. That was not the difficult part of my consulting work with my clients. I was filling the role of a land man when solving those issues. I discovered that the issue was not in the technicality of the forms or the process, it was in getting a response from BLM on a particular issue in a timely fashion. I really took the time to get to know the local managers. That is what people paid me for, to be able to solve those problems for them in a timely fashion. What I am sharing with you is not esoteric or something I learned in a book.

I want to talk to all of you, but especially the students, about potential employment with BLM. I cannot leave this room without doing that. We have lost about 25 percent of our workforce over the last little while, and we got

such big mandates in the last bills that have been passed. We are not going to be able to achieve those mandates unless we bring great staff to help us out.

Let me ask the question: how many of you are aware that there is such a thing as a RAC within BLM? One or two hands up. That is a problem. The way this is structured is that BLM has been given the authority to have these RACs. In general, these are composed of the following: a certain number from industry, a certain number from environmental, a certain number of elected officials from either a county or a city, a certain number from the governor's office, recreation, dispersed recreation, and so on. Generally, there are about fifteen members on these councils from all walks of life.

The dilemma is: are they functioning the way they are supposed to be? And the answer is, in my view: they could use a little help. One reason is that we need to get some people that really want to get involved and be part of the RACs. In general, the state office of public lands gets together with the BLM manager, and they recommend names for the RACs. The second challenge is that while BLM has some wonderful staff, we really do—wildlife biologists, soil scientists, archaeologists and so on—sometimes we do not necessarily have staff that have come up the ranks of being a board member or a staff member that staffs a board. They do not know how to really staff a RAC to function as efficiently as it could function. So there is internal work that we need to do to be able to make them work better.

How do you get involved with a RAC? We advertise when there are vacancies. So, keep your ear to the ground because we advertise when we need people. For example, Montana-Dakotas is the BLM main office for this area, located in Montana and we have an office for North Dakota.

Let me conclude in the last minute that I have. The topic that I was given was finding common ground, and I am going to add, in these divided times. I have twelve siblings. You heard me right. I have seventy-six nieces and nephews from all walks of life in my family: different political affiliations, different religious affiliations. And we love each other as a family. When we get together it is a room as big as this, and we love to get together to meet and visit. Yet, we know that we all have different views about different things.

We can get along. We can make progress, even when we have different views, because our commonality is the tremendous blessing we share to live in this country. Every day I never take it for granted. If you travel in the world, we live in such a beautiful place: the United States of America. It is such a tremendous honor for all of us, you and me to participate in making this democracy every day a little better. And that is what we need to do. Thank you so much for having me.