University of Colorado Law Review

Volume 91 | Issue 2 Article 3

Spring 2020

Streamlining or Steamrolling: Oil and Gas Leasing Reform on Federal Public Lands in the Trump Administration

Marcilynn A. Burke

STREAMLINING OR STEAMROLLING: OIL AND GAS LEASING REFORM ON FEDERAL PUBLIC LANDS IN THE TRUMP ADMINISTRATION

MARCILYNN A. BURKE*

*Dean and Dave Frohnmayer Chair in Leadership & Law, University of Oregon School of Law. Former Deputy Director for Policy and Programs, Bureau of Land Management, and Acting Assistant Secretary for Land and Minerals Management, U.S. Department of the Interior. I wish to thank my research assistant, Alyssa Bonini, and law reference librarian, Jaye Barlous, for their invaluable help. And thank you to the employees of the BLM and DOI who continue to work hard every day as stewards of our public resources, no matter how the political winds blow.

INTRODUCTION

President Donald Trump promised on the campaign trail that he would make American energy "great again."[1] He explained that much of the nation's energy resources remained untapped and that the country suffered from a self-inflicted wound. He said it was time to heal, and he had a plan: an "America First" energy plan.[2] Trump planned to eliminate excessive regulation, open up more federal land to oil and gas development, and bring back the coal industry.[3] This plan contained few details but many promises. President Trump boasted, "Under my presidency, we will accomplish complete energy independence . . . . We will become totally independent of the need to import energy from the oil cartel or any nation hostile to our interest."[4]

Trump frequently criticized President Barack Obama for restricting energy development.[5] As this Article explains, one of the Obama Administration's goals for oil and gas development on federal public lands was to restore the proper balance among the multiple uses of public land. The Obama Administration believed that, in many cases, the balance had been shifted too

---

1. *See* Leigh Paterson, *The Future of U.S. Energy, According to Donald Trump*, INSIDE ENERGY (May 27, 2016), http://insideenergy.org/2016/05/27/the-future-of-u-s-energy-according-to-donald-trump/ [https://perma.cc/J5U3-L9ZV] (quoting Donald Trump as saying, "A Trump administration will develop an American First energy plan. America first folks, America first. Make America great again! Make America great again!").

2. Jill Colvin & Matthew Daly, *Trump to Deliver Energy Policy Speech in North Dakota*, BUSINESS INSIDER (May 26, 2016, 10:42 PM), https://www.businessinsider.com/ap-trump-to-deliver-energy-policy-speech-in-north-dakota-2016-5 [https://perma.cc/2Y5X-F2DY].

3. Scott Detrow, *Trump Wants to Make Energy Production Great Again—Even as It Sets Records*, NPR (May 27, 2016, 5:00 AM), https://www.npr.org/2016/05/27/479660989/trump-wants-to-make-energy-production-great-again-even-as-it-sets-new-records [https://perma.cc/SR5Y-9XBU].

4. Ashley Parker & Coral Davenport, *Donald Trump's Energy Plan: More Fossil Fuels and Fewer Rules*, N.Y. TIMES (May 26, 2016), https://www.nytimes.com/2016/05/27/us/politics/donald-trump-global-warming-energy-policy.html [https://perma.cc/4XZW-RSMA].

5. *See, e.g.*, Timothy Cama & Devin Henry, *Trump Outlines 'America First' Energy Plan*, THE HILL (May 26, 2016, 4:41 PM), https://thehill.com/policy/energy-environment/281430-trump-outlines-america-first-energy-plan [https://perma.cc/A377-AXVE].

heavily in favor of energy development over other uses of public lands. To achieve this proper multiple-use balance, the Obama Administration sought to engage the public fully in the decision-making process and update the analyses upon which oil and gas leasing decisions were made. Achieving both of those goals rested in part upon performing additional analysis and review before offering any new land for leasing.

In contrast, the George W. Bush Administration's practice was to rely upon analyses in decades-old land use plans and offer land without resolving the public's formal objections to the leasing. Even though the Bush Administration offered leases for sale, it had to resolve any objections, known as protests, before it could issue many of the leases it sold. Meanwhile, successful bidders who had already paid for the leases awaited resolution of the protests without knowing how or when that process would conclude. The Obama Administration instead shifted site-specific impact analysis to the front end of its decision-making process rather than postponing that analysis until after the sale. Thus, while leasing decisions took more time, the Obama Administration believed the decisions were better informed because they were based on site-specific, up-to-date analyses. Moreover, stakeholders could participate in the decision-making process and had greater certainty that once a lease was offered for sale, the lease would be issued in a timely manner. In Trump's mind, however, the Obama Administration was unnecessarily burdening the oil and gas industry and hampering the nation's economic progress.[6]

The oil and gas industry also frequently criticized the Obama Administration,[7] but with Trump as the Republican Party's nominee, the industry prepared itself for the next oil

6. Notwithstanding Trump's criticism, thirteen of the largest fifteen U.S. oil and gas producers' filings with the U.S. Securities and Exchange Commission indicate that compliance with environmental regulations does not materially affect their operations or financial conditions. *See* Richard Valdmanis, *As Trump Targets Energy Rules, Oil Companies Downplay Their Impact*, REUTERS (Mar. 23, 2017, 4:08 AM), https://it.reuters.com/article/companyNews/idUKKBN16U1A9 [https://perma.cc/8D79-JS3H] (outlining Reuters' review of filings by the top oil and gas companies, which report the impact of regulatory compliance).

7. *E.g.*, Jennifer A. Dlouhy, *Despite Protests, Oil Industry Thrives Under Obama Agenda*, BLOOMBERG (Jan. 5, 2016, 3:00 AM), http://www.bloomberg.com/news/articles/2016-01-05/despite-protests-oil-industry-thrives-under-obama-energy-agenda [https://perma.cc/4RH6-8T3U]; Phil Taylor, *Industry Group, BLM Spar Over Leasing Decline*, GREENWIRE (Dec. 17, 2010), https://www.eenews.net/greenwire/stories/1059943355/ [https://perma.cc/6RHJ-PV8S].

boom. Trump promised increased development and millions of new, energy-related jobs.[8] Once in office, Trump's statement about energy development on federal lands was short and straightforward:

> The Trump Administration will embrace the shale oil and gas revolution to bring jobs and prosperity to millions of Americans. We must take advantage of the estimated $50 trillion in untapped shale, oil, and natural gas reserves, especially those on federal lands that the American people own. We will use the revenues from energy production to rebuild our roads, schools, bridges and public infrastructure. Less expensive energy will be a big boost to American agriculture, as well.[9]

While many observers understood the motivation underlying Trump's statements, they deemed his promises nonsensical. For example, "experts say that such remarks display a basic ignorance of the workings of the global oil markets."[10] Moreover, Trump was silent about the fact that the fossil fuel market followed a typical boom-and-bust cycle during Obama's presidency.[11] Thus, the Obama Administration could not be assigned all the credit or the blame for market conditions.[12] Additionally,

---

8. *See* Annie Knox & Kim Palmer, *Trump Taps Well of Protest with Calls for More Drilling in National Parks*, REUTERS (Jan. 11, 2017, 4:12 PM), https://www.reuters.com/article/us-usa-trump-energy-nationalparks-idUSKBN14V1EP [https://perma.cc/5CXW-F69U] ("With Trump poised to take office on January 20, energy companies and their lobbyists are eyeing a new gusher of federal drilling and mining leases after a period of stagnation under the administration of Barack Obama. . . . 'This opportunity is unique, maybe once in a lifetime,' said Jack Gerard, president of the Washington D.C.-based American Petroleum Institute lobby group, referring to prospects for increased access to federal leases.").

9. Jonathan Garber, *Trump's Energy Plan: 'We Must Take Advantage of the Estimated $50 Trillion in Untapped Shale, Oil, and Natural Gas Reserves,'* BUS. INSIDER (Jan. 20, 2017, 10:34 PM), https://www.businessinsider.com/donald-trumps-america-first-energy-plan-2017-1/commerce-on-business-insider [https://perma.cc/7727-SWSY] (quoting statement released by the White House, since deleted from the White House website).

10. Parker & Davenport, *supra* note 4.

11. *See* James Osborne, *Out West, Trump Eyes Federal Lands for Oil and Gas Boom*, HOUS. CHRON. (Jan. 21, 2017, 1:39 AM), https://www.houstonchronicle.com/business/article/Out-West-Trump-eyes-federal-lands-for-oil-and-10869823.php [https://perma.cc/Z45V-9LZB] ("Interest in federal lease sales has declined along with prices, with oil and gas companies buying just 23 percent of the leases offered last year, according to the Department of Interior. Coming off one of the worst oil busts ever, the appetite for forging into frontier areas remains low, said Clay Lightfoot, a Houston-based research analyst with Wood Mackenzie.").

12. Lori Robertson, *Obama's Misleading Oil Boast*, FACTCHECK.ORG (Nov. 30,

Trump's policy failed to acknowledge increasing drought conditions and other effects of climate change, which could diminish the effectiveness of his pro-development policies.[13] For example, hydraulic fracturing—the technique responsible for much of the current oil boom—requires tremendous amounts of water compared to conventional drilling techniques.[14] To compound this problem, extreme water scarcity is an issue in many parts of the country where hydraulic fracturing is occurring.[15]

Regardless of one's take on Trump's promises to make the United States "energy independent," to revive the coal industry, and to withdraw from the Paris Agreement,[16] it is undeniable that he went straight to work trying to fulfill them. He issued numerous executive orders to set his plan in motion; for example, he required certain agencies to expedite environmental reviews and permitting.[17] Then-Secretary of the Interior Ryan Zinke zealously began making changes to undo Obama-era onshore oil and gas leasing reforms. Significant changes included returning to the practice of offering parcels for leasing before resolving administrative protests and requiring every field office to conduct a lease sale each quarter, regardless of the office's ability to update its analysis of the potential impacts of such

---

2018), https://www.factcheck.org/2018/11/obamas-misleading-oil-boast/ [https://perma.cc/6Y2F-LLQJ] (explaining that neither Obama nor Trump could rightly take credit for the United States' increasing crude oil production, but, instead, technology and market forces played bigger roles than either administration).

13. Trump has claimed that climate change is a hoax. In a 2012 tweet, he said, "The concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive." Louis Jacobson, *Yes, Donald Trump Did Call Climate Change a Chinese Hoax*, POLITIFACT (June 3, 2016, 12:00 PM), https://www.politifact.com/truth-o-meter/statements/2016/jun/03/hillary-clinton/yes-donald-trump-did-call-climate-change-chinese-h/ [https://perma.cc/FRE5-JKES]. Interestingly, one policy analyst posited that China was filling the vacuum left by U.S. policy. Thus, the analyst reasoned that China would be the true beneficiary of Trump's energy plan, not the United States. Friedbert Pflüger, *Trump's "America First" Energy Policy Puts China Ahead in Energy*, ENERGYPOST (Dec. 21, 2017), https://energypost.eu/trumps-america-first-energy-policy-puts-china-ahead/ [https://perma.cc/3PB6-3ETB].

14. Andrew J. Kondash et al., *The Intensification of the Water Footprint of Hydraulic Fracturing*, SCIENCE ADVANCES, Aug. 15, 2018, at 1, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6093634/pdf/aar5982.pdf [https://perma.cc/T6R4-TTN8].

15. *Id.* at 6.

16. Peter Stone, *'Trump's Promises Are Empty': Energy Experts Lay Waste to Proposals*, GUARDIAN (Sept. 29, 2016, 6:00 AM), https://www.theguardian.com/us-news/2016/sep/29/donald-trump-energy-proposals-coal-natural-gas [https://perma.cc/UJ4Q-TPJF].

17. *See* discussion *infra* Part I.

leasing.[18]

The degree to which the Trump Administration has changed oil and gas leasing is not surprising. Elections that result in a shift in party-dominance often lead to pendulum swings in law and policy.[19] Harvard Law School Professor Jody Freeman, former White House Counselor for Energy and Climate Change for President Obama, suggested that the Trump Administration is perhaps "not as bad as it seems" because it faces significant legal, political, and practical barriers as it tries to roll back environmental regulations.[20] While it is true that the Trump Administration has faced barriers as any other administration would in making regulatory changes, the type of changes this administration is putting forth seem categorically different—in degree and scope.

Perhaps I am painfully aware of how significant the Trump Administration's policy changes are due to my previous experience as a senior political appointee overseeing resource development and protection. For three-and-a-half years, I was a political appointee of President Obama's at the U.S. Department of Interior (DOI). I first served as the deputy director for programs and policy for the Bureau of Land Management (BLM). The BLM has primary responsibility for oil and gas leasing on federal public lands. As deputy director, I was a leader in revising the BLM's oil and gas policies and in drafting the rule to regulate hydraulic fracturing on public lands, which supplemented existing drilling regulations. Then, I served as the acting assistant secretary for land and minerals management for DOI, overseeing the BLM and three other bureaus. I also am concerned because cronyism motivates many of President Trump's policy changes.[21] Then

18. *See* discussion *infra* Part III.

19. *See* Lily Rothman, *History Is a Pendulum Not an Arc*, TIME (Nov. 17, 2016), https://time.com/4571218/history-pendulum-donald-trump/ [https://perma.cc/D7ST-K8UJ] (reviewing moments in U.S. politics when the pendulum has swung, sometimes to extremes). "That's how a pendulum works: All along, as the mass goes as far as it can in one direction—even if that direction is a good direction—the energy is growing that could one day pull it to the other side." *Id.*

20. Jody Freeman, *2016 Election Implications for Climate and Energy Regulation: Not as Bad as It Seems?*, HARVARD LAW TODAY (Nov. 10, 2016), https://today.law.harvard.edu/freeman-2016-election-implications-climate-change-regulation-not-bad-seems/ [https://perma.cc/TXD2-RSLP].

21. *E.g.*, Simon Tisdale, *Trump's Cronies Are in Secret Talks to Sell Nuclear Tech to Saudi. The Risks Are Clear.*, GUARDIAN (Feb. 23, 2019, 1:39 PM), https://www.theguardian.com/us-news/2019/feb/23/trump-cronies-secret-talks-nuclear-tech-saudi-arabia [https://perma.cc/RM4U-MM5D]; Jessica Owley, *Taking the Public Out of Public Lands: Shifts in Coal-Extraction Policies in the Trump*

again, the losing party often accuses the winning one of helping their friends, instead of their constituents.[22]

Rather than fixating on "politics as usual," this paper focuses on the Trump Administration's policy changes to BLM oil and gas leasing for federal public lands. The overwhelming majority of these changes come at the expense of resources other than oil and gas for which the BLM is also responsible. "Congress tasked the BLM with a mandate of managing public lands for a variety of uses such as energy development, livestock grazing, recreation, and timber harvesting while ensuring natural, cultural, and historic resources are maintained for present and future use."[23] With this mandate—known as the BLM's "multiple-use mission"—no use is uniformly privileged over another. By privileging oil and gas development above all other uses, Trump's policy runs counter to Congress's direction and the BLM's mission statement: "to sustain the health, diversity, and productivity of public lands for the use and enjoyment of present and future generations."[24]

The Trump Administration's approach is reminiscent of the George W. Bush Administration's, which the Obama Administration sought to correct. The Obama Administration's work in onshore oil and gas development was motivated by several fac-

---

Administration, 13 FIU L. Rev. 35, 36 n.2 (2018) (positing that Trump is masking his cronyism with promotion of federalist ideals); Geoff Colvin, *Donald Trump's Crony Capitalism*, FORTUNE (Dec. 7, 2016), http://fortune.com/2016/12/07/donald-trumps-crony-capitalism/ [https://perma.cc/TD58-SEWR].

22. *See, e.g.*, *Editorial: Obama's Crony Capitalism: Friends of the President Are Given Billions in Government Largesse*, WASH. TIMES (Jan. 26, 2012), https://www.washingtontimes.com/news/2012/jan/26/obamas-crony-capitalism-667847839/ [https://perma.cc/X4VL-U49E] (charging that Obama and his allies saw "government as a means of rewarding their friends and punishing their enemies"); Joel Kotkin, *The Biggest Winners from President Obama's Re-Election: Crony Capitalists*, FORBES (Nov. 7, 2012, 7:30 AM), https://www.forbes.com/sites/joelkotkin/2012/11/07/the-biggest-winners-from-president-obamas-re-election-crony-capitalists/#540d328e5927 [https://perma.cc/H4RJ-3KCD] (arguing that manufacturing, particularly the auto industry and the renewable energy industry, were among the big winners); Andrew Wilford, *Cronyism Is Bad Policy, But Good Politics*, AM. SPECTATOR (Mar. 13, 2018, 12:00 AM), https://spectator.org/ cronyism-is-bad-policy-but-good-politics/ [https://perma.cc/5QSY-QDVX] (reporting on research on the deleterious phenomenon of cronyism in state-level politics). *But see* Nomi Prins, *The Magnitude of Trump's Cronyism Is Off the Charts—Even for Washington*, NATION (Dec. 9, 2016), https://www.thenation.com/article/the-magnitude-of-trumps-cronyism-is-off-the-charts-even-for-washington/ [https://perma.cc/7JH6-JHDA].

23. *Who We Are, What We Do*, U.S. BUREAU LAND MGMT., https://www.blm.gov/about/our-mission (last visited Aug. 25, 2019) [https://perma.cc/U56K-2JGQ].

24. *Id.*

tors. One was a group of leases in the Moab, Utah area, known as the "Utah 77" leases. These leases were issued at the end of the Bush Administration and were controversial because they were near national parks and other sensitive landscapes and cultural resources. Many feared these leases had been rushed through the process[25] without adequate environmental review and analysis[26] because the Obama Administration would not have approved them. People were so concerned about leasing near sensitive areas that one man, who was not in the oil and gas business, risked criminal prosecution to bid on leases so that he could prevent others from developing the land.[27]

Another motivating factor for the Obama Administration was the sense that the leasing system was "broken." Over 40 percent of all parcels offered for sale were under administrative protest by environmental groups and other concerned stakeholders, and the federal government was holding bids totaling millions of dollars in suspense, awaiting resolution of protests.[28] Moreover, developers with permits were not diligently developing the resources.[29] Fifty-six percent of all acres under lease in the lower forty-eight states were neither under production nor exploration.[30] More generally, many recognized that the BLM's land use plans were outdated and did not sufficiently address certain concerns such as climate change,[31] lands with wilderness

25. Outgoing administrations have a long-standing tradition of hurrying through decisions and regulations at the end of their terms. Jack M. Beerman, *Midnight Deregulation*, *in* TRANSITIONS: LEGAL CHANGE, LEGAL MEANINGS 17, 19 (Austin Sarat ed., 2012).

26. *Report to Secretary Ken Salazar Regarding the Potential Leasing of 77 Parcels in Utah*, U.S. DEP'T INTERIOR [hereinafter Hayes Report], https://www.doi.gov/node/11113 [https://perma.cc/ER4V-AFXX].

27. Ashley Powers, *Activist Who Faked Utah Energy Lease Bids Sentenced to 2 Years*, L.A. TIMES (July 27, 2011, 12:00 AM), https://www.latimes.com/world/la-xpm-2011-jul-27-la-na-oil-leases-20110727-story.html [https://perma.cc/8KLF-HZHS].

28. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-670, ONSHORE OIL AND GAS: BLM'S MANAGEMENT OF PUBLIC PROTESTS TO ITS LEASE SALES NEEDS IMPROVEMENT (2010).

29. U.S. DEP'T OF THE INTERIOR, OIL AND GAS LEASE UTILIZATION, ONSHORE AND OFFSHORE UPDATED REPORT TO THE PRESIDENT (2012), https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Final-Report.pdf [https://perma.cc/3YY7-27NV] (noting that "tens of millions of acres that are currently under lease remain idle. Because these areas are not undergoing exploration, development, or production, taxpayers are not getting the full advantage of America's resource potential.").

30. *Id.* at 12.

31. The BLM continues to struggle with incorporating climate change analysis into its decision-making. For example, in March 2019, a U.S. District Court judge

characteristics,[32] and potentially endangered species.[33]

Against that backdrop, the Obama Administration earnestly reviewed certain policies that it thought might either be skewed toward oil and gas development or did not consider the BLM's "multiple-use mission."[34] While serving in the Obama Administration, I recall one senior manager telling me that he did not have time to engage in a review of the oil and gas leasing policies. He had seen this movie before: the changing of the guard resulting in policy upheaval. The BLM was a "going concern," not the new administration's plaything to be used to show its supporters (namely, environmental interest groups) that there was "a new sheriff in town."

While reviewing the existing policies was daunting, we ultimately engaged in a thoughtful review and made changes when appropriate to fulfill the BLM's mission. This review led to oil and gas leasing reform, among other things. The BLM provided new guidance to the field on how to fulfill its obligations for leasing and give due consideration to the multiple uses of the public lands.

With my somewhat unique perspective, I will review the state of oil and gas leasing on public lands and evaluate some

---

remanded to the BLM its work under the National Environmental Policy Act associated with five oil and gas lease sales in Wyoming between May 2015 and August 2016. The court stated:

> Having reviewed the record and the relevant law, the Court concludes that—withholding judgment on whether BLM's leasing decisions were correct—BLM did not sufficiently consider climate change when making those decisions. BLM summarized the potential on-the-ground impacts of climate change in the state, the region, and across the country. It failed, however, to provide the information necessary for the public and agency decisionmakers to understand the degree to which the leasing decisions at issue would contribute to those impacts. In short, BLM did not adequately quantify the climate change impacts of oil and gas leasing.

Wild Earth Guardians v. Zinke, 368 F. Supp. 3d 41, 51 (D.D.C. 2019). The court did not vacate the sales because of the "serious possibility that BLM may be able to substantiate the conclusions drawn in its [environmental analyses]." *Id.* at 85.

32. *See, e.g.*, Oregon Nat. Desert Ass'n v. BLM, 625 F.3d 1092, 1101 (9th Cir. 2010) (holding that the BLM was obligated to consider wilderness characteristics outside existing wilderness study areas in its land use plan).

33. *See, e.g.*, Letter from John Buse, Senior Att'y, Ctr. for Biological Diversity to Ken Salazar, Sec'y, U.S. DEP'T INTERIOR (May 13, 2009), https://www.biologicaldiversity.org/programs/public_lands/energy/pdfs/Ely_RMP_Notice.pdf [https://perma.cc/X67Z-NSUY] (letter entitled "60-Day Notice of Intent to Sue [BLM and U.S. Fish and Wildlife Service] for Violations of the Endangered Species Act Concerning the Ely Resource Management Plan").

34. *Who We Are, What We Do*, *supra* note 23.

key policy changes under the Trump Administration. I will consider whether the policy changes are achieving their stated goals and whether pursuit of those goals is in the interest of the country. In Part I, this Article will review the state of affairs when President Obama took office. Part II of this Article will outline the Trump Administration's initial actions to change the course of onshore oil and gas leasing. Part III will then compare the centerpiece for both administrations: an instruction memorandum to the BLM regarding oil and gas leasing. And finally, Part IV will evaluate the Trump Administration's effectiveness in achieving its stated goals as well as some of its negative externalities.

I. THE LANDSCAPE AT THE BEGINNING OF THE OBAMA ADMINISTRATION

In 2009, the Obama Administration found a broken oil and gas leasing system. Then-BLM Director Robert Abbey explained the state of affairs to a subcommittee of the Senate Committee on Appropriations in 2012. Abbey testified that when he came into office in 2009, he "inherited an onshore oil and gas program that was on the verge of collapse."[35] More than 40 percent of all lease sales were protested and millions of dollars in bids remained in suspense for months on end while the protests were resolved.[36]

The Obama Administration identified several issues with the oil and gas leasing system. One issue the Obama Administration considered especially problematic was the use of outdated Resource Management Plans (RMPs), which are the BLM's land use plans.[37] The BLM is supposed to update these plans to reflect changes in land conditions and new information

35. *Hearing on the Department of the Interior, Environment, and Related Agencies Appropriations for Fiscal Year 2013 Before the S. Comm. on Appropriations, Subcomm. on the Interior, Env't, and Related Agencies*, 112th Cong. (2012) (statement of Robert V. Abbey, Director, BLM), https://www.govinfo.gov/content/pkg/CHRG-112shrg29104485/html/CHRG-112shrg29104485.htm [https://perma.cc/2NK7-U2EL].

36. *See id.*

37. RMPs have three primary purposes: "1. Allocate resources and determine appropriate multiple uses for public lands; 2. Provide strategy to manage and protect resources; and 3. Establish systems to monitor and evaluate the health of resources and effectiveness of management practices over time." *Planning 101*, BUREAU OF LAND MGMT., https://www.blm.gov/programs/planning-and-nepa/planning-101 (last visited Sept. 24, 2019) [https://perma.cc/DYG8-Q8SM].

or scientific knowledge; furthermore, the BLM must consider new uses not contemplated in the original plan as well as adaptive management to correct any failures to meet health standards.[38] Another issue was the overly broad use of categorical exclusions (CXs) under the National Environmental Policy Act (NEPA).[39] Under NEPA, federal agencies must evaluate likely environmental impacts of both their own actions and those that they are authorizing. This evaluation usually comes in the form of an Environmental Assessment (EA) or, for action likely to affect the environment significantly, an Environmental Impact Statement (EIS). CXs are categories of actions that the BLM or Congress has predetermined will have no significant environmental impact, and thus the agency generally does not need to prepare an EA or an EIS.[40] The BLM's use of CXs was overly broad, inconsistent, and contrary to its own policies.[41]

While many oil and gas leasing activities were problematic for environmental groups, none was more emblematic than the sale that included the Utah 77 leases. In the Bush Administration's final days, the BLM-Utah held a quarterly oil and gas lease sale and auctioned 116 parcels for development. Before the BLM could issue leases for those parcels—a necessary step before winning bidders can begin development operations[42]—seventy-seven of those lease sale parcels became the subject of litigation. In January 2009, a federal district court issued a temporary injunction to prevent the BLM from issuing the leases.[43] The complaint alleged that the BLM had violated NEPA by not

38. *How Plans Are Updated*, BUREAU LAND MGMT., https://www.blm.gov/programs/planning-and-nepa/planning-101/how-plans-are-updated (last visited Sept. 24, 2019) [https://perma.cc/XXT9-72V4].

39. *See* BUREAU OF LAND MGMT., INSTRUCTION MEMORANDUM NO. 2010-118, ENERGY POLICY ACT SECTION 390 CATEGORICAL EXCLUSION POLICY REVISION (May 17, 2010) [hereinafter IM 2010-118 ON 390 CXS], https://www.blm.gov/policy/im-2010-118 [https://perma.cc/8US2-Q3EP] (addressing issues raised by the public and Congress about the BLM's interpretation of section 390 of the Energy Policy Act of 2005).

40. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-872, ENERGY POLICY ACT OF 2005: GREATER CLARITY NEEDED TO ADDRESS CONCERNS WITH CATEGORICAL EXCLUSIONS FOR OIL AND GAS DEVELOPMENT UNDER SECTION 390 OF THE ACT 1-2 (2009) [hereinafter GAO REPORT ON 390 CXS].

41. *Id.* at 51–53.

42. TAXPAYERS FOR COMMON SENSE, THE FEDERAL OIL AND GAS LEASING PROCESS (2018), https://www.taxpayer.net/wp-content/uploads/2018/09/Oil-and-Gas-Lease-Process-101-with-Images.pdf [https://perma.cc/DG2Q-5LR3].

43. S. Utah Wilderness All. v. Allred, Civil Action No. 08-2187 (RMU), 2009 WL 765882 (D.D.C. Jan. 17, 2009) (order granting temporary injunction).

assessing the impact of leasing on air quality. The complaint also alleged that the BLM violated the Federal Land Policy and Management Act (FLPMA) and the National Historic Preservation Act (NHPA) by failing to determine if development would impact historic properties.[44] Interestingly, the relevant RMPs were completed in October 2008,[45] so the BLM was not basing its leasing decisions on outdated information, but plaintiffs contended that the decisions were based on incomplete information.

Once the Obama Administration assumed office, then-Secretary of the Interior Ken Salazar ordered a special review of the lease sale, had the leases withdrawn, and directed the return of bonus bid payments to the bidders.[46] Salazar asked then-Deputy Secretary David Hayes to lead a departmental review of the sale and make recommendations. The document containing these recommendations became known as the Hayes Report, and it recommended four changes: (1) improving communications between the BLM and the National Park Service (NPS) and other stakeholders; (2) providing more guidance to help BLM make parcel-specific leasing decisions; (3) reinstating some leases; and (4) creating a comprehensive air quality strategy for the region. For the Utah 77 leases specifically, the Hayes Report recommended the formation of a multidisciplinary team of experienced BLM staff—who had not been involved in the initial decision-making—to make site-specific decisions on whether to reinstate any of the leases. The report also recommended that the team first review the protests that had been lodged against the parcels and then address those protests in its final decisions. The Report advised that the team decide whether to (1) reoffer the parcels to the original bidders with the original conditions, (2) reoffer the parcels in a new auction under different conditions, or (3) defer offering the parcels.[47]

---

44. *Id.* at *1–*2.

45. *See, e.g.*, BUREAU OF LAND MGMT., VERNAL FIELD OFFICE, RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN (Oct. 2008), https://eplanning.blm.gov/epl-front-office/projects/lup/68145/86218/103392/VernalFinalPlan.pdf [https://perma.cc/2H6R-5RTM]; BUREAU OF LAND MGMT., PRICE FIELD OFFICE, RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN (Oct. 2008), https://eplanning.blm.gov/epl-front-office/projects/lup/67041/83197/99802/Price_Final_Plan.pdf [https://perma.cc/F2VJ-9BBP]; BUREAU OF LAND MGMT., MOAB FIELD OFFICE, RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN (2008), https://eplanning.blm.gov/epl-front-office/projects/lup/66098/80422/93491/Moab_Final_Plan.pdf [https://perma.cc/85GT-FGWV].

46. Hayes Report, *supra* note 26, at 1.

47. *Id.* at 8.

Following the Hayes Report recommendations, the then-Acting Director of the BLM selected a team of eleven people from the BLM, NPS, and the U.S. Forest Service (USFS). The sole member from the USFS was Mark Stiles,[48] who led the Review Team. The selected individuals were experienced in the planning, leasing, and operational aspects of oil and gas development on public lands.[49] After conducting its review, the Team produced a report known as the Stiles Report, which contained more specific recommendations than the Hayes Report.[50]

The Review Team's method is noteworthy because it differed from how BLM-Utah state and field offices had previously conducted their work. The Team was careful to not criticize their colleagues' previous work and instead emphasized the differences in circumstances. The following factors led the Review Team to arrive at conclusions distinct from the BLM-Utah staff:

> 1. On-the-ground review of all parcels by a diverse, experienced interdisciplinary review team with time and attention dedicated to a single task of reviewing the parcels;
>
> 2. Hindsight provided by the various lease protests and legal challenges and the opportunity to compare approaches, parcels, and decisions;
>
> 3. Interaction between the Review Team and the responsible land managers and their staff; and
>
> 4. Separation from historical issues, baggage, and preconceptions.[51]

Perhaps the most significant difference was the available

48. BUREAU OF LAND MGMT., FINAL BLM REVIEW OF 77 OIL AND GAS LEASE PARCELS OFFERED IN BLM-UTAH'S DECEMBER 2008 LEASE SALE 2–3 (2009) [hereinafter Stiles Report]. Mark Stiles had BLM line management responsibilities under the authority of "Service First." *Id.* at 3. Service First is a statutorily blessed partnership between agencies within the U.S. Departments of the Interior and Agriculture, allowing them to create programs to conduct activities jointly or on behalf of one another and make reciprocal delegations of their respective authorities, duties, and responsibilities, among other things. *See* 43 U.S.C. § 1703 (2018). Stiles also had worked for the BLM for twenty-two years before going to the USFS. Stiles Report, *supra*, at 34. Thus, Stiles was no stranger to the BLM.

49. Stiles Report, *supra* note 48, at 34–39.

50. *Id.*

51. *Id.* at 14.

time and attention. Though the review was rapid for any government endeavor,[52] the Team had time and attention to devote solely to reviewing parcels—a luxury the officials who made the initial decisions simply did not have.[53] Given the volume of expressions of interest or nominations from industry that the BLM routinely received, state and field offices could not have handled the normal workload in the way the Review Team did. With that acknowledgement, the Team recommended that the BLM narrow its scope of work at any given time so that it could perform more effectively. To this end, the Review Team recommended:

> (1) Quarterly lease offerings could be concentrated in certain field offices and rotated around the state, allowing more time to concentrate on the review of upcoming sales and to have a "breather" between sales.
>
> (2) Field work could be conducted in "blocks," planned and completed ahead of time, and could better anticipate, avoid, and prepare to respond to lease protests.
>
> (3) Lease protesters could focus their arguments on more-specific areas and resource concerns.
>
> (4) Lease parcels could be configured to better ensure orderly development, and "pioneer" or speculative leases could be avoided by concentrating leasing in areas where development is most likely to occur.[54]

These recommendations aimed to restore the balance among the multiple uses of public lands that the Bush Administration, without due regard for the BLM's mission, had tilted in favor of oil and gas development. The next Section will contrast these steps by the Obama Administration with the early days of the Trump Administration and its approach to oil and gas leasing on federal lands. The Trump Administration's philosophy, as well as the state of the market, made all the difference in the world.

---

52. The Hayes Report was issued in June 2009, and the Stiles Report was issued four months later in October 2009.

53. Stiles Report, *supra* note 48, at 14.

54. *Id.* at 18–19.

II. THE TRUMP ADMINISTRATION'S EARLY FULFILLMENT OF PROMISES

President Trump acted on his America First energy plan within days of taking office. First, he issued an executive order titled "Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects."[55] This order establishes a process by which the chair of the White House Council on Environmental Quality (CEQ) may determine that an infrastructure project is one of "high priority" and work with the relevant agencies to expedite environmental reviews and approvals.[56] Moreover, the order established that the head of the agency will be held accountable for not meeting any of the deadlines established with the CEQ.[57] About two months after he issued the first executive order, Trump issued another executive order on "Promoting Energy Independence and Economic Growth."[58] This order called for agencies to review "all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources."[59] Within 180 days, agencies were to submit reports that detailed their review and included specific recommendations on how to "alleviate or eliminate aspects of agency actions that burden domestic energy production."[60] This order also rescinded six of Obama's executive orders, memoranda, and reports regarding pollution, climate change, and the impact of development on natural resources, as well as the CEQ's 2016 guidance on energy and climate change. Moreover, Trump ordered agencies to adjust any actions taken in accordance with those rescinded documents.[61] Finally, Trump ordered the Secretary of the Interior to review all regulations related to oil and gas development.[62]

---

55. Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, Exec. Order No. 13,766, 82 Fed. Reg. 8,657 (Jan. 24, 2017).

56. *Id.* at 8,657, § 2.

57. *Id.* at 8,657, § 3.

58. Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

59. *Id.* at 16,093, § 2(a).

60. *Id.* at 16,094, § 2(d), (e).

61. *Id.* at 16,094, § 3.

62. *Id.* at 16,096, § 7(b).

President Trump followed up later in the year with yet another executive order, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure."[63] This executive order sought to address the complexity of infrastructure projects, which involve multiple agencies, laws, and permits. Efforts to streamline permitting are not new and cross political party lines.[64] This order, however, took the efforts one step further: environmental reviews and authorizations must be completed on average within two years.[65] According to the Government Accountability Office (GAO), the average time for a review through Environmental Impact Statement (EIS) was 4.6 years in 2012.[66] Under Trump's order the agencies involved are to set a "permitting timetable," to be reviewed and updated at least quarterly.[67] It also establishes the "One Federal Decision" (OFD) policy.[68] Under the OFD, the agencies are to issue one joint Record of Decision (ROD),[69] and authorization decisions are to be made within ninety days of the issuance of the ROD.[70]

Then-Secretary Ryan Zinke, following the president's direction, executed the orders at the Department of the Interior. The Trump Administration wasted no time changing BLM policies to favor energy development above all uses, notwithstanding the BLM's multiple-use mission. Arguably, Zinke went even further in his efforts to streamline oil and gas leasing than the executive orders required. For example, Secretarial Order 3355 limits the length of documents that agencies draft to comply with the requirements of NEPA—such as EAs and EISs—to 150 pages (300

63. Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 15, 2017).

64. *Compare* Improving Performance of Federal Permitting and Review of Infrastructure Projects, Exec. Order No. 13,604, 77 Fed. Reg. 18,887 (Mar. 22, 2012) (Barack Obama), *with* Issuance of Permits with Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States, Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004) (George W. Bush).

65. Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,464 § 4(a)(i)(B) (Aug. 15, 2017).

66. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-369, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES, REPORT TO CONGRESSIONAL REQUESTERS 13 (2014), http://www.gao.gov/assets/670/662543.pdf [https:// perma.cc/9H4W-Q96S].

67. Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,466 § 5(a)(ii) (Aug. 15, 2017).

68. *Id.* at § 5(b).

69. *Id.* at § 5(b)(ii).

70. *Id.* at § 5(b)(iii).

if the project is complex), directs bureaus to develop limitations for EAs, and requires bureaus to complete EISs in one year.[71] The BLM then issued a report in response to the secretarial order, indicating that it would enhance its use of Determinations of NEPA Adequacy (DNAs), develop new CXs, and rely more heavily on NEPA tiering. Together, these changes meant little to no environmental review would be required when making leasing decisions.[72] These changes paved the road back to the practices that prevailed during the Bush Administration.

To accomplish Trump's goal of expanding areas available for leasing, the BLM also opened up much of the National Petroleum Reserve-Alaska (NPR-A) to oil and gas development.[73] Then Trump shrank two national monuments—Bear's Ears National Monument and Grand Staircase-Escalante—to allow for mineral development without the strictures of such designations.[74] Zinke also ordered review of the conservation plans for sage-grouse, with the aim of providing greater flexibility in resource development.[75] The Trump Administration's BLM also rescinded the Obama-era fracking rule,[76] which was five years

71. U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3355, STREAMLINING NATIONAL ENVIRONMENTAL POLICY ACT REVIEWS AND IMPLEMENTATION OF EXEC. ORDER 13807 § 5 (Aug. 31, 2017).

72. BLM REPORT IN RESPONSE TO SECRETARIAL MEMORANDUM ON IMPROVING PLANNING AND NEPA PROCESSES AND SECRETARIAL ORDER 3355, at 9 (Sept. 27, 2017) [hereinafter BLM RESPONSE TO SECRETARIAL ORDER 3355], https://assets.documentcloud.org/documents/4374829/BLM-Report-on-Improving-Planning-and.pdf [https://perma.cc/YQD9-8WZ8].

73. Press Release, Bureau of Land Mgmt., BLM Offers Largest Number of Tracts Ever for Oil & Gas Lease Sale Within the NPR-A (Oct. 25, 2017), https://www.blm.gov/press-release/blm-offers-largest-number-tracts-ever-oil-gas-lease-sale-within-npr [https://perma.cc/9HCD-U6SM].

74. Eric Lipton & Lisa Friedman, *Oil Was Central in Decision to Shrink Bears Ears Monument, Emails Show*, N.Y. TIMES (Mar. 2, 2018), https://www.nytimes.com/2018/03/02/climate/bears-ears-national-monument.html [https://perma.cc/SV6U-E4PP].

75. DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3353, GREATER SAGE-GROUSE CONSERVATION AND COOPERATION WITH WESTERN STATES § 4(b)(iii) (June 7, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/so_3353.pdf [https://perma.cc/3CT4-HACH] (ordering review of plans recognizing the lands are important for use and development as well as conservation).

76. Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 61,924 (Dec. 29, 2017) (rescinding Oil and Gas; Hydraulic Fracturing on Federal Land and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015)). "The BLM final rule on hydraulic fracturing serves as a much-needed complement to existing regulations designed to ensure the environmentally responsible development of oil and gas resources on Federal and Indian lands, which were finalized nearly thirty years ago, in light of the increasing use and complexity of hydraulic fracturing coupled with advanced horizontal drilling technology." *Id.* at

in the making. The BLM had originally promulgated the fracking rule in response to the exponential growth in the use of hydraulic fracturing and horizontal drilling and growing concern that these techniques would adversely impact human health and the environment.[77] The Trump Administration's changes are antithetical to the BLM's multiple-use mission. Not surprisingly, experts predicted these policies would cause mass destruction of natural resources.[78]

Following these many policy changes, the BLM posted record oil and gas lease sales in 2018 after every field office with available land resumed quarterly sales.[79] However, these increases were concentrated in certain areas. For example, New Mexico sales accounted for 84 percent of the revenue in 2018.[80] These concentrated results cast doubt on the decision to resume quarterly sales in every field office. By preparing for lease sales every quarter, field offices are necessarily sacrificing other resource-management work. Some managers in New Mexico acknowledge this limitation. That is, they are unable to fulfill their multiple-use mission while also privileging oil and gas development over other uses.[81] And, the impacts extend well beyond New Mexico—the entire nation is affected when federal resources are at issue. Furthermore, neighboring and distant states are negatively affected by oil and gas emissions because

---

16,128.

77. Hydraulic Fracturing on Federal Land and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015). The rule established "new requirements to ensure wellbore integrity, protect water quality, and enhance public disclosure of chemicals and other details of hydraulic fracturing operations." *Id.* at 16,129.

78. *E.g.*, Merisa Heiling & Hillary Hoffman, *Vermont Law Top 10 Environmental Watch List 2019: Trump's America First Energy Plan Puts Industry First, Environment Last*, VT. J. ENVTL. L. (Dec. 20, 2018), http://vjel.vermontlaw.edu/topten/trumps-america-first-energy-plan-puts-industry-first-environment-last/ [https://perma.cc/TRW4-6JCR]; *see also, e.g.*, Roland Hwang & Kit Kennedy, *Trump's "America First" Energy Plan Leaves America Behind*, NRDC: EXPERT BLOG (Jan. 30, 2017), https://www.nrdc.org/experts/roland-hwang/trumps-america-first-energy-plan-leaves-america-behind [https://perma.cc/MY4T-FYVB].

79. Press Release, U.S. Dep't of the Interior, Energy Revolution Unleashed: Interior Shatters Previous Records with $1.1 Billion in 2018 Oil and Gas Lease Sales (Feb. 6, 2019) [hereinafter Energy Revolution Unleashed Press Release], https://www.doi.gov/news/energy-revolution-unleashed-interior-shatters-previous-records-11-billion-2018-oil-and-gas [https://perma.cc/9MKD-722N].

80. *Id.*

81. Adrian Hedden, *Carlsbad BLM Office the Busiest in the Nation*, CARLSBAD CURRENT-ARGUS (Oct. 24, 2018, 4:59 PM), https://www.currentargus.com/story/news/local/2018/10/24/carlsbad-blm-apd-gas-oil-drilling-permit-petroleum-land-management-office-health/1733996002/ [https://perma.cc/N3WG-PKXR].

air pollution cannot be contained within state boundaries.[82]

In some areas, however, leasing activity was negligible. For example, though national park advocates criticized the lease sales in Utah at the end of 2018 as being detrimental to several parks, there was very little interest in the offerings.

> The . . . sale was Utah's biggest offering of public lands for oil and gas leasing since the George W. Bush administration, but it appeared to be a bust—despite a resurgence in commodity prices and renewed interest in drilling after four years of dormancy. Of the 109 lease parcels offered around the state, 42 sold for the minimum $2-an-acre bid and 40 received no bids.[83]

Some question why the BLM is executing these sales given the costs and the actual returns.[84] These sales may represent a no-holds-barred approach to leasing. The Administration was determined to make a statement, notwithstanding the meager gains to the U.S. Treasury. The Trump Administration's cost-benefit analysis to support these policy decisions appears to be related to returns on the oil and gas industry's investment in the Trump presidency. Missing from the equation are returns directly to the U.S. taxpayers, who are paying for the BLM to conduct the lease sales and are experiencing the direct and indirect negative impacts on public health, safety, and welfare due to this emphasis on leasing.

In the early days of his Administration, a group of energy lawyers reviewed Trump's energy policy. As they explained:

> The foundation of the America First energy policy is straight-

---

82. JOHN GRAHAM & DAVID MCCABE, CLEAN AIR TASK FORCE, HEALTH RISKS IN ARIZONA FROM OIL AND GAS AIR POLLUTION (2017), https://www.catf.us/wp-content/uploads/2018/10/CATF_Pub_HealthEffectsByState.pdf [https://perma.cc/57CG-U38Q] (explaining that while Arizona has very little oil and gas development, development in its neighboring state, New Mexico, results in pollution in Arizona); NATIONAL RESEARCH COUNCIL, GLOBAL SOURCES OF LOCAL POLLUTION: AN ASSESSMENT OF LONG-RANGE TRANSPORT OF KEY AIR POLLUTANTS TO AND FROM THE UNITED STATES (2010) (confirming that pollutants travel long distances from their sources, even across oceans to other countries).

83. Brian Maffly, *Criticism High, Bidding Low for Utah's Biggest Oil, Gas Lease Sale Since the Bush Years*, SALT LAKE TRIB. (Sept. 12, 2018), https://www.sltrib.com/news/environment/2018/09/11/criticism-high-bidding/ [https://perma.cc/2P95-9P9L].

84. *See id.*

> forward: pursue policies that (1) promote American energy independence, and (2) create American jobs. The world of energy, however, is not straightforward. It is global and layered and complex. As a result, the design of an America First energy policy will necessarily become more nuanced and sophisticated as the policy-makers seeking to implement these principles navigate the legal, commercial and political structures of the energy industry.[85]

These questionable sales in Utah, for example, occurred almost two years into Trump's presidency. Perhaps the nuance and sophistication will emerge in the last two years of his Administration.

The next Section will compare how the two administrations approached oil and gas leasing "reform" through their guidance to state and field offices of the BLM. The Obama Administration worked to balance the multiple uses of public land in accordance with the BLM's mandate. The Trump Administration is laser focused on one use—oil and gas development—to the detriment of all others.

III. THE REARVIEW MIRROR: IS IT ALL A MATTER OF PERSPECTIVE?

To decide how best to reform the oil and gas leasing system, both the Obama and Trump administrations evaluated preceding systems and policies. There is a reason the rearview mirror is smaller than the windshield. When one is in the driver's seat, the view ahead is more important than the one behind. Yet the rearview mirror is often clearer than the view ahead. The Stiles Report gave the Obama Administration a snapshot of what was happening in the oil and gas leasing program during the George W. Bush Administration. The Trump Administration similarly looked back at the Obama Administration's policies and concluded that the road ahead should include more oil and gas leasing. Accordingly, it changed the policies.

The Stiles Report led directly to the Obama Administration's oil and gas leasing reforms. The BLM made those changes via an internal guidance document known as an Instruction

85. Scot Anderson et al., *The America First Energy Policy of the Trump Administration*, 35 J. ENERGY & NAT. RESOURCES L. 221, 270 (2017).

Memorandum (IM). The BLM issued the "Oil and Gas Leasing Reform Land Use Planning and Lease Parcel Reviews" IM in May of 2010 ("Reform IM of 2010").[86] The Reform IM of 2010 has three parts. The first part "addresses land use plan review, state office standardization of lease stipulations, and adaptive management." The second part "introduces the Master Leasing Plan concept." And the third part "identifies process requirements for reviewing oil and gas leasing expressions of interest."[87]

Below I will review the salient parts of the Reform IM of 2010 alongside the Trump Administration's changes in 2018 through its IM entitled "Updating Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews" ("Updated Reform IM of 2018"). As the BLM explained the rationale for the Updated Reform IM of 2018:

> After more than 7 years of implementation, the BLM identified aspects of the previous policy that needed improvement. Implementation of the previous policy resulted in delays by increasing the time required for sale notice posting. Furthermore, protests have increased, not decreased, in recent years (FY16 and FY17) compared to pre-2010 levels. This IM aims to simplify and streamline the leasing process for more efficient and effective oil and gas lease management.[88]

The Reform IM of 2010 unquestionably slowed down the leasing process by extending the notice requirement for sales. At the beginning of the Obama Administration, over 40 percent of parcels offered for sale were under protest.[89] From 2012 to 2014, protests were at a low of 17 to 18 percent. In 2015, however, the level rose to 47 percent and by 2017, the first year of the Trump

86. BUREAU OF LAND MGMT., INSTRUCTION MEMORANDUM NO. 2010-117, OIL AND GAS LEASING REFORM LAND USE PLANNING AND LEASE PARCEL REVIEWS (May 17, 2010) [hereinafter Reform IM of 2010], https://www.blm.gov/policy/im-2010-117 [https:// perma.cc/9EZW-SMQW].

87. *Id.* at 1.

88. BUREAU OF LAND MGMT., INSTRUCTION MEMORANDUM NO. 2018-034, UPDATING OIL AND GAS LEASING REFORM – LAND USE PLANNING AND LEASE PARCEL REVIEWS 4 (Jan. 31, 2018) [hereinafter Updated Reform IM of 2018] (interpreting law to require quarterly lease sales in every state/field office).

89. *Table 14 Protest Table FY 2019*, in *Oil and Gas Statistics*, BUREAU LAND MGMT., https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics [https://perma.cc/B86F-6TZF] (expand "Table 14 Parcels Offered, Parcels Protested and Parcels Posted on the Original Sale Notice," then follow the "Download the table here" hyperlink).

Administration, the rate was 88 percent. Following the new policy, which was issued in January 2018, the protest level was 68 percent.[90] While protests curiously increased under the Obama Administration, the Trump Administration's changed policies have not necessarily reduced the number of protests. One reason for the increase that began in 2015 may have been that environmental groups were advancing a two-pronged energy strategy: pushing for renewables and simultaneously pushing against fossil fuels. Another reason the levels remain high could be that protesters have returned to the practice of filing general, broad protests in response to the shortened time period allowed for protests before a sale, as discussed below.[91]

Reactions to both administrations' policies were as expected. Oil and gas interests argued that the Obama Administration's policies added unnecessary layers of red tape designed to delay and prevent development of oil and gas resources.[92] Environmental groups, in contrast, were cautiously optimistic.[93] They leapt at the opportunity to suggest ways the BLM could keep its promise to make better leasing decisions. For example, environmental groups offered unsolicited, detailed proposals for "Master Leasing Plans" (MLPs).[94] The Trump Ad-

---

90. *Id.*

91. *See* discussion *infra* Sections III.C.3 and III.C.6.

92. *E.g.,* Noelle Straub, *Interior Finalizes Onshore Leasing Reforms*, E&E NEWS (May 17, 2010), https://www.eenews.net/stories/91066 [https://perma.cc/4NAA-V7R8] (outlining the Independent Petroleum Association of Mountain States' criticism of the new policy); *Leasing*, WESTERN ENERGY ALLIANCE, https://www.westernenergyalliance.org/knowledge-center/land/onshore-development/leasing (last visited Feb. 8, 2019) [https://perma.cc/Z9XE-YPFQ] ("[R]ecent policies and actions have restricted public lands from productive, responsible energy development. For instance, leasing policies instituted in 2010 added three additional layers to the process . . . .").

93. Straub, *supra* note 92. The Wilderness Society concluded that the BLM had made significant progress in restoring a healthy balance among multiple uses on federal public lands through the Reform IM of 2010.

> The reforms adopted by the Department of the Interior in response to the Stiles Report are returning balance to the onshore oil and gas leasing program—a program that appeared to be permanently broken just a few years ago. Areas prized by the public for their wildlife, recreational, or aesthetic values are increasingly being avoided. When leasing does occur in areas that could threaten other resources and uses, the BLM is taking additional steps—through the preparation of MLPs, for example—to ensure that protective measures are in place.

THE WILDERNESS SOCIETY, MAKING THE GRADE (ALMOST): THE BLM'S PROGRESS AND IMPROVEMENTS TO OUR NATION'S ONSHORE OIL AND GAS LEASING PROGRAM 19 (July 2012) (on file with author).

94. I recall receiving copious submissions, including shapefiles, from environ-

ministration's policy changes also had supporters and detractors: environmentalists viewed the changes as removing protections while the oil and gas industry saw them as removing barriers.[95] The discussion below reviews each of the major parts of the IMs: land use planning, MLPs, and the lease sale process.

A. Land Use Planning: Adequacy, Consistency, and Adaptive Management

Both administrations' IMs address three elements of land use planning. First, they consider whether existing RMPs provide adequate information for making leasing decisions in accordance with the BLM's multiple-use mandate. Second, the IMs also address the need for consistent permit conditions for similar resource conditions. Finally, each IM takes a different approach to the concept of adaptive management.

1. Resource Management Plan Adequacy and Deferments

The Reform IM of 2010 called for a review of RMPs to ensure they adequately protected resources "in light of changing circumstances, updated policies, and new information." The IM acknowledged that these reviews could lead decision-makers to conclude that leasing decisions—in line with the BLM's stewardship obligations—could not be made without further analysis and planning. Indeed, the IM stated, "[w]hile an RMP may designate land as 'open' to possible leasing, *such a designation does not mandate leasing*."[96] This statement was meant to dispel some field officials' long-standing beliefs that the BLM had no

---

mental groups proposing MLPs.

95. *See* Imari Walker Karega, *BLM Order 2018-034: Updating Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews*, DUKE SCIPOL (June 4, 2018), http://scipol.duke.edu/content/blm-order-2018-034-updating-oil-and-gas-leasing-reform-%E2%80%93-land-use-planning-and-lease-parcel [https://perma.cc/Y4CM-DZ5D]; Cooper McKim, *BLM Pushes More Oil And Gas Production, Narrows Public Input and Review*, WYO. PUB. MEDIA (Apr. 20, 2018), https://www.wyomingpublicmedia.org/post/blm-pushes-more-oil-and-gas-production-narrows-public-input-and-review#stream/0 [https://perma.cc/FB2N-UM5A]; Dennis Webb, *BLM Dumps Leasing Reforms*, DAILY SENTINEL (Feb. 1, 2018), https://www.gjsentinel.com/news/western_colorado/blm-dumps-leasing-reforms/article_46477a24-07e7-11e8-ac67-10604b9f7e7c.html [https://perma.cc/H866-DLH6].

96. Reform IM of 2010, *supra* note 86, at 2 (emphasis added).

discretion once an RMP designated an area as "open."[97] That one sentence was a game changer (until it wasn't). It meant that the BLM was not going to offer parcels for sale if the information in the RMP regarding the parcels did not reflect the current circumstances.[98] In sum, the BLM would no longer make leasing decisions without considering the most current information, regardless of an RMP's designations.

The Updated Reform IM of 2018 makes a few changes to this aspect of the policy. While maintaining the prefatory language about reviewing RMPs for adequacy, the end of the policy statement strikes a decidedly different tone. The Updated Reform IM of 2018 first underscores the fact that RMPs remain in effect until amended or revised.[99] It further explains that "the BLM will not routinely defer leasing when waiting for an RMP amendment or revision to be signed."[100] Even if the BLM has significant information, triggering an amendment or revision to an RMP, it is supposed to charge ahead based upon the outdated RMP, except in rare cases. They would necessarily be rare because the Updated Reform IM of 2018 requires the State Director to "consult with the Washington Office (WO) before deciding to defer leasing of any parcels."[101] Requiring the state director to consult with the WO unequivocally signals that discretion is to be exercised sparingly.

The Trump Administration's policy change that instructed the BLM to defer to RMPs rather than assess "current circumstances" may not seem significant. However, while the BLM had put considerable work into updating RMPs over the last decade, not all RMPs are updated. Therefore, the BLM could be basing decisions on historical circumstances and outdated analyses. For example, one area stands out as being very active for oil and gas leasing and yet operating under very old plans: the Permian Basin. The Permian Basin stretches across west Texas and southeastern New Mexico.[102] "By the end of 2018, production had

97. *See* Stiles Report, *supra* note 48, at 17.

98. Even if industry submitted expressions of interest for parcels that were designated "open" in an outdated RMP, the BLM first would have to determine if a different leasing decision was appropriate under the current circumstances. Other options could have included leasing with different stipulations, deferring leasing until the BLM performed additional analysis, or removing the parcels from consideration for leasing.

99. Updated Reform IM of 2018, *supra* note 88, at 1.

100. *Id.*

101. *Id.* at 1–2.

102. Carol M. Tang, *Permian Basin*, ENCYCLOPEDIA BRITANNICA, https://

reached 3.8 million BPD [barrels per day], vaulting the Permian Basin into second place among the world's leading oil fields."[103] The BLM's Carlsbad Field Office (CFO) handles the oil and gas activities in the Permian Basin.[104] New Mexico also generated almost 90 percent of the BLM's 2018 record-breaking oil and gas lease sales.[105] Notwithstanding this boom, the Carlsbad RMP has been under revision since 2010.[106] The current plan originally was signed in 1988; it was amended in 1997 and again in 2008. Those amendments, however, do not address the issues raised by the increased oil and gas development in the region due mainly to horizontal drilling and hydraulic fracturing. The BLM explains the need for a new plan, which may seem self-evident.

> A revision to the 1988 RMP is necessary because a number of changes have occurred in the CFO planning area since its publication. New resource issues have emerged, new resource data are available for consideration, and new policies, guidelines, and laws have been established. . . . The changes are in part due to continuing fluid and solid mineral extraction and energy developments in the area and new technologies being used to extract those resources. Concurrent extraction of both fluid and solid mineral reserves presents a new management challenge not addressed adequately in the 1988 RMP and its amendments.[107]

---

www.britannica.com/place/Permian-Basin (last visited Aug. 25, 2019) [https://perma.cc/3FKS-V8VW].

103. Robert Rapier, *Why the Permian Basin May Become the World's Most Productive Oil Field*, FORBES (Dec. 27, 2018, 10:01 AM), https://www.forbes.com/sites/rrapier/2018/12/27/why-the-permian-basin-may-become-the-worlds-most-productive-oil-field/#79a8e8f15ccb [https://perma.cc/3M4L-VDSL].

104. *Carlsbad Field Office*, BUREAU LAND MGMT., https://www.blm.gov/office/carlsbad-field-office (last visited Aug. 25, 2019) [https://perma.cc/DF2K-MA6B].

105. *See* Energy Revolution Unleashed Press Release, *supra* note 79 (reporting that New Mexico accounted for $972 million of the BLM's $1.1 billion in 2018 sales).

106. The BLM published its notice of intent to prepare a new Carlsbad RMP on June 10, 2010. Notice of Intent to Prepare a Resource Management Plan for the Carlsbad Field Office, New Mexico and Associated Environmental Impact Statement, 75 Fed. Reg. 32,962 (June 10, 2010).

107. BUREAU OF LAND MGMT., CARLSBAD FIELD OFFICE, PECOS DISTRICT, NEW MEXICO, DRAFT RESOURCE MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT, VOLUME I, ES-2 (2018), https://eplanning.blm.gov/epl-front-office/projects/lup/64444/153042/187358/BLM_CFO_Draft_RMP_-_Volume_I_-_EIS_-_August_2018_(1).pdf [https://perma.cc/Q9JQ-ETH8].

Nonetheless, the BLM is making resource management decisions in one of the most active basins in the world[108] based upon a plan that is over thirty years old. Most importantly, the Updated Reform IM of 2018 has significantly impacted current leasing in Carlsbad. The BLM is not routinely deferring leasing in Carlsbad because the 1988 RMP remains in effect until the BLM completes the revision. The BLM should be concerned about the potential disconnect between the 1988 plan and the current circumstances and knowledge about resources. However, rather than being concerned, the BLM may be invoking the old mantra "drill, baby, drill"[109] while the tortured RMP revision process ambles along.

Despite this change in policy to proceed with leasing under outdated plans, the BLM is not forging full speed ahead in all instances. State Directors have exercised their discretion to defer leasing in several instances during the Trump Administration. Circumstances making the BLM more likely to defer include gubernatorial and congressional delegation involvement, grassroots opposition, and location near national parks or other special areas. For example, Senator Tom Udall (D-NM), conservationists, and Native American tribes requested a ten-mile buffer around Chaco Culture National Historical Park.[110] As a result, in February 2019, New Mexico's State Director announced that the BLM was deferring the leasing of nine parcels within ten miles of Chaco so that it could continue gathering information to inform its decisions about leasing in the area.[111] While Senator Udall praised the decision to defer the parcels, he also noted that "this is the third time under this administration that BLM has chosen to defer parcels in this area—and this stop-start, shoot-from-the-hip approach is not sustainable or in anyone's best interest."[112] He called for "a real joint management

108. Some even predict that the Permian Basin will become the most productive oil field in the world. Rapier, *supra* note 103.

109. Michael Steele, former lieutenant governor of Maryland, is said to have first used this phrase at the 2008 Republican National Convention. Over time, it became closely associated with then-vice-presidential candidate Sarah Palin. *See* Ben Geman, *Steele Had Doubts About 'Drill, Baby, Drill,'* THE HILL (Aug. 29, 2012, 6:36 PM), https://thehill.com/policy/energy-environment/246453-drill-baby-drill-origin-story-revealed-in-tampa [https://perma.cc/7HRA-AHUR].

110. Scott Streater, *BLM Removed Chaco Parcels from Upcoming Lease Sale*, E&E NEWS (Feb. 8, 2019), https://www.eenews.net/eenewspm/stories/1060120091 [https://perma.cc/5ML9-2YTZ].

111. *Id.*

112. Press Release, Tom Udall, Senator for New Mexico, Udall Statement on

plan [in which] robust and meaningful Tribal consultation has been implemented, health impacts are assessed, and a thorough ethnographic study of the area's cultural resources is conducted."[113] The BLM New Mexico State Director did not give any indication that the BLM is interested in pursuing a management plan that would provide such a buffer.[114]

Importantly, Chaco is also in a region with an outdated RMP. The Farmington Marcus-Gallop RMP is sixteen years old. In 2012, the Farmington Field Office recognized the need to amend the plan and formally began the process in 2014.[115] The primary reason for amending the plan is to analyze potential impacts that were not anticipated when the BLM completed the plan in 2003.[116] As of this writing the BLM has not published a draft amendment. Due to a surge in oil and gas leasing, the Farmington Field Office appears to be too busy to plan for use of the public lands.

The BLM also deferred leasing in Colorado's North Fork Valley at the end of 2018.[117] Environmental and agricultural groups, local activists, and federal, state, and local government officials wanted the BLM to defer leasing in that area pending completion of a new RMP.[118] Governor of Colorado John W. Hickenlooper's letter to the BLM, which included thirty-two pages of recommendations for wildlife and property stipulations,

---

BLM Deferring Chaco Lease Sales (Feb. 8, 2019), https://www.tomudall.senate.gov/news/press-releases/udall-statement-on-blm-deferring-chaco-lease-sales [https://perma.cc/G8CW-AAE7].

113. *Id.*

114. *See* Press Release, Bureau of Land Mgmt., BLM New Mexico Defers Nine Parcels for March Lease Sale (Feb. 8, 2019), https://www.blm.gov/press-release/blm-new-mexico-defers-nine-parcels-march-lease-sale [https://perma.cc/Q32A-W4D4] (announcing the deferral without any mention of a buffer).

115. BUREAU OF LAND MGMT., FARMINGTON MANCOS-GALLUP RESOURCE MANAGEMENT PLAN AMENDMENT AND ENVIRONMENTAL IMPACT STATEMENT, SCOPING REPORT – VOLUME 1 1-1 (2017), https://eplanning.blm.gov/epl-front-office/projects/lup/68107/108404/132730/FMG_FinalScopingRpt_Vol1_508.pdf [https://perma.cc/49T6-6KJA].

116. *Id.* at 1-3 to 1-4.

117. Judith Kohler, *Colorado BLM Will Offer Only 8,347 Acres for Oil, Gas Leases—Down from 224,341 Acres*, DENVER POST (Nov. 2, 2018, 8:07 PM), https://www.denverpost.com/2018/11/02/colorado-blm-oil-leases/ [https://perma.cc/74DF-SVGJ].

118. Press Release, Michael Bennet, U.S. Senator for Colorado, Bennet, Hickenlooper Call on BLM to Defer Colorado Oil and Gas Leases Slated for December Sale (Sept. 11, 2018), https://www.bennet.senate.gov/public/index.cfm/2018/9/bennet-hickenlooper-call-on-blm-to-defer-colorado-oil-and-gas-leases-slated-for-december-sale [https://perma.cc/9H2H-TNAL].

pinpointed the errors that BLM-Colorado made in selecting the parcels that it intended to offer in the lease sale.[119] U.S. Senator Michael Bennet (D-CO) also weighed in on this controversy, noting that local governments had asked the BLM to defer the sale until the BLM amended the RMP.[120] The BLM's May 2018 Northwest Colorado Greater Sage-Grouse Draft Resource Management Plan Amendment and Environmental Impact Statement provided for enhanced coordination between the state and federal conservation plans, as well as greater flexibility for the BLM to work with the state on a landscape level.[121] According to the BLM, "[b]etter coordination with the State of Colorado provides more of an all-lands approach that, due to multiple jurisdictions with regulatory authority over land and mineral ownership, may result in better landscape-scale protections for Greater Sage-Grouse and Greater Sage-Grouse habitat."[122] Under the Updated Reform IM of 2018, however, the existing RMP remained in effect, and the BLM was not to "routinely" defer leasing while awaiting completion of a new plan amendment.

In July 2018 the BLM yielded to a tribal government's request to defer leasing because it would have impacted the tribe's ancestral land and a national park. The BLM deferred the sale of parcels near Great Sand Dunes National Park pending consultation with Navajo Nation officials. The Navajo Nation owns twenty-six square miles of tribal ancestral land near the park and requested consultation with the BLM after it announced the planned sales.[123] The BLM agreed to consultation, "but main-

119. Nineteen of the parcels in the lease sale notice were within one mile of a greater sage-grouse lek, which the 2015 RMP Amendment closed to new leasing. Moreover, the parcels in the BLM's Kremmling Field Office did not attach the stipulations required under the 2015 RMP Amendment. Those parcels amounted to over 20,000 acres, or roughly 10% of the total acreage that BLM proposed to offer for sale. The proposed sale initially included "143 parcels totaling approximately 108,600 acres in priority and general habitat for Greater Sage-grouse (GRSG). That equates to 62% of total parcels and 46% of total acreage in the sale." Letter from John W. Hickenlooper, Governor, State of Colorado, to Gregory Shoop, Acting BLM Colorado State Director 1–2 (July 17, 2018) (on file with author).

120. Press Release, *supra* note 118.

121. BUREAU OF LAND MGMT., NORTHWEST COLORADO GREATER SAGE-GROUSE: DRAFT RESOURCE MANAGEMENT PLAN AMENDMENT AND DRAFT ENVIRONMENTAL IMPACT STATEMENT, at ES-5 to ES-6 (2018), https://eplanning.blm.gov/epl-frontoffice/projects/lup/105596/143661/176861/CO_GRSG-DEIS_201805_508.pdf [https://perma.cc/ET5F-SFHH].

122. *Id.* at 4–5.

123. Rae Ellen Bichell, *BLM Delays Leasing Land for Drilling so It Can Consult with Navajo Nation*, KUNC (July 12, 2018), https://www.kunc.org/post/blm-delays-leasing-land-drilling-so-it-can-consult-navajo-nation#stream/0 [https://perma.cc/

tain[ed] that the land could still be offered at a future auction."[124]

The foregoing examples demonstrate that deferments are possible under this Administration. However, these deferments did not arise because the BLM, exercising its discretion, conducted careful analyses and determined deferment was appropriate. Instead, outside pressure from federal, state, local, and tribal governments led to the deferments. Making judgments about whether to defer leasing is part of the BLM's mandate as steward of these resources, and such decisions should not depend upon whether stakeholders make enough noise urging the BLM to fulfill that mandate.

2. Stipulation Consistency and Adaptive Management

The Reform IM of 2010 called for each state office to form an Interdisciplinary Consistency Review Team (IDCR Team) to ensure that stipulations were written in the proper format and that language was consistent for similar resources.[125] It also required the Office of the Solicitor to review stipulations for enforceability.[126] The Trump Administration made two key changes here: (1) it made formation of IDCR Teams discretionary; and (2) it removed the requirement that state offices must consult the Office of the Solicitor, as was the case generally during the Bush Administration.[127] Without the IDCR Teams, the BLM is likely to return to inconsistent regulation of similar resources. Such inconsistency complicates compliance with stipulations for both the regulator and the regulated industry. Applying different rules to similar situations smacks of arbitrariness. Moreover, by sidelining the Office of the Solicitor, which helps ensure that the BLM's actions comply with law and its own policies, the Trump Administration removes an important check on

---

F8BZ-LCPT].

124. Sam Schipani, *Public Blasts Proposal for Oil and Gas Leasing Near Colorado National Park: The Fate of Lands Neighboring Great Sand Dunes National Park Is Uncertain*, SIERRA (Apr. 11, 2018), https://www.sierraclub.org/sierra/public-blasts-proposal-for-oil-and-gas-leasing-near-colorado-national-park [https://perma.cc/3BBU-78AP].

125. Reform IM of 2010, *supra* note 86, at 5.

126. *Id.* at 2.

127. When I began at the Department of the Interior (DOI), some career solicitors complained that they had been sidelined when it came to policy development during the Bush Administration. They may be back on the bench.

the exercise of the BLM's authority.

Another important feature of the Reform IM of 2010 was that plan and lease stipulations were required to "allow for an increasing level of environmental protection when changing circumstances warrant stronger measures to meet goals, objectives, and outcomes identified in RMPs."[128] This requirement acknowledged that circumstances change, new understandings emerge, and additional information becomes available that should lead to changes in land management strategies, that is, adaptive management.[129] The IM also noted that successful adaptive management requires active monitoring and called for using the designated funding to engage in active monitoring.[130] Before the Reform IM of 2010, the BLM was not known for successfully engaging in adaptive management.[131] The requirement for using the Congressionally-designated funding specifically for monitoring may seem odd; however, the BLM's track record in this regard was wanting.[132] The Updated Reform IM of 2018

---

128. Reform IM of 2010, *supra* note 86, at 3.

129. A DOI guide explains:

> An adaptive approach involves exploring alternative ways to meet management objectives, predicting the outcomes of alternatives based on the current state of knowledge, implementing one or more of these alternatives, monitoring to learn about the impacts of management actions, and then using the results to update knowledge and adjust management actions.

BRYON K. WILLIAMS, ROBERT C. SZARO & CARL D. SHAPIRO, ADAPTIVE MANAGEMENT: THE U.S. DEPARTMENT OF THE INTERIOR TECHNICAL GUIDE 1 (2009), https://www.doi.gov/sites/doi.gov/files/migrated/ppa/upload/TechGuide.pdf [https://perma.cc/D3TB-4D44].

130. Reform IM of 2010, *supra* note 86, at 3.

131. See Tomas M. Koontz & Jennifer Bodine, *Implementing Ecosystem Management in Public Agencies: Lessons from the U.S. Bureau of Land Management and the Forest Service*, 22 CONSERVATION BIOLOGY 60, 65 (Feb. 1, 2008) (reporting results from surveying BLM employees who ranked adaptive management as the weakest part of the BLM's ecosystem management).

132. *See* Emiline Ostlind, *BLM Stays Course in Wyoming Gas Patch Despite Mule Deer Decline*, HIGH COUNTRY NEWS (Mar. 21, 2011), https://www.hcn.org/issues/43.5/blm-stays-course-in-wyoming-gaspatch-despite-mule-deer-decline [https://perma.cc/J686-UEMR] (criticizing the BLM for setting thresholds for adaptive management but not making any changes to management once the thresholds were triggered); U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-1014T, FEDERAL OIL AND GAS MANAGEMENT: OPPORTUNITIES EXIST TO IMPROVE OVERSIGHT, at 5 (Sept. 16, 2009) (statement of Frank Rusco, Dir., Natural Res. & Env't, GAO), https://www.gao.gov/assets/130/123312.pdf [https://perma.cc/5SWY-KUBJ] ("[L]and managers may be unable to determine the effectiveness of various mitigation measures . . . and decide whether these measures need to be modified, strengthened, or eliminated."); W.H. Moir & W.M. Block, *Adaptive Management on Public Lands in the United States: Commitment or Rhetoric?*, 28 ENVTL. MGMT. 141,

omitted any mention of flexibility to increase environmental protections and the need for active monitoring.[133] Following these changes—if past behavior is an indicator of future behavior—the BLM is unlikely to engage in adaptive management despite RMPs providing for such management. The BLM will persist in its current management even when it learns more about resources at stake or has reason to believe that management changes could help achieve the resource management objectives.

B. Master Leasing Plans

Master Leasing Plans (MLPs) were another significant part of the Reform IM of 2010.[134] This direction was perhaps environmentalists' most sought-after policy while it was industry's most dreaded. MLPs represented the BLM's attempt to engage in additional planning and analysis when changing circumstances, updated policies, and new information could materially affect decisions before it was too late to make meaningful resource-protective decisions. MLPs required revisiting RMP leasing decisions, even those of recent vintage, and would typically result in a land use plan amendment. MLPs were required when all four of the following criteria were met:

- A substantial portion of the area to be analyzed in the MLP is not currently leased.
- There is a majority Federal mineral interest.
- The oil and gas industry has expressed a specific interest in leasing, and there is a moderate or high potential for oil and gas confirmed by the discovery of oil and gas in the general area.
- Additional analysis or information is needed to address likely resource or cumulative impacts if oil and gas development were to occur where there are:
    - multiple-use or natural/cultural resource

145 (2001) (arguing that lack of funding and trained personnel lead to "pseudomonitoring").

133. *See* Updated Reform IM of 2018, *supra* note 88, at 2.

134. Reform IM of 2010, *supra* note 86, at 3–4.

conflicts;

- impacts to air quality;
- impacts on the resources or values of any unit of the National Park System, national wildlife refuge, or National Forest wilderness area, as determined after consultation or coordination with the NPS, the FWS, or the FS; or
- impacts on other specially designated areas.[135]

Environmental groups submitted scores of unsolicited data along with their recommendations for MLPs.[136] Industry participants accused the BLM of being in cahoots with those groups. During my time in the Obama Administration, we tried to assure industry participants that we had not encouraged such submissions and that they would be invited to consult through the NEPA process. Members of the oil and gas industry were free to submit their own proposals. They understandably did not submit any because doing so would lead to more analysis and potentially more stipulations, lease sale deferments, and the closing of areas previously open to leasing. Interestingly, the additional analysis undertaken because of an MLP *could* lead the BLM to issue less restrictive stipulations, move forward with sales, or open areas previously closed to leasing. The idea was not to predetermine the outcomes of the analyses but rather to reach better decisions through more refined assessments.

While the field readily accepted some aspects of the Reform IM of 2010, the BLM state offices did not embrace the MLP concept. The BLM WO held live trainings and weekly conference calls to lead, coax, and cajole the state offices into reviewing the areas in their states for possible MLPs. BLM-Colorado was particularly recalcitrant.[137] As the Colorado State Director ex-

135. *Id.*

136. *See* SHELDON KYE ENERGY LLC, PREPARED FOR WESTERN ENERGY ALLIANCE, MASTER LEASING PLAN PROJECT RESOURCE ASSESSMENT 14, 16, 18, 20 (2012), https://www.westernenergyalliance.org/wp-content/uploads/2013/ 08/MLP-Assessment-Document-052012-Final.pdf [https://perma.cc/K4CX-FX9T] (listing groups that proposed MLPs to the BLM).

137. *See Analysis: Colorado BLM Failing to Enact Obama Energy Reforms – Creating Red Tape, Uncertainty*, CHECKS & BALANCES PROJECT: INVESTIGATIVE WATCHDOG BLOG (May 23, 2013), https://checksandbalancesproject.org/analysis-

plained, "BLM Colorado used this opportunity to include the same detailed analysis and planning of a proposed MLP as part of our planning process. We felt it was more efficient in terms of time, resources and money. We chose not to duplicate ongoing planning efforts for the same acres of public land."[138] In other words, rather than complying with the letter of the Reform IM of 2010, the office was choosing its own path to comply with the spirit of the IM. In the end, however, the states proposed more than forty MLPs, with Wyoming and Utah leading the way.[139] The BLM finalized its first MLP in 2014 in Wyoming.[140]

Through the Updated Reform IM of 2018, the Trump Administration agreed with the industry, determined that MLPs created "duplicative layers of NEPA review," and thus eliminated MLPs as a process of additional analysis.[141] Though the industry may count this change as a win, it may have simply kicked the proverbial can down the road. As Nada Culver of The Wilderness Society explained, "the BLM is merely dodging the problem: 'These are conflicts that have been going on for a long time, and they're not going to go away just because you take away the tool that was created to try to address them.'"[142] More legal battles are certain to ensue, with non-industry stakeholders claiming that the BLM has failed to comply with NEPA. While I was in the Obama Administration, we often referred to RMPs as the 30,000-foot view and the MLPs as the 10,000-foot view. The idea was that the MLP, though not completely on the

---

obama-failures-in-colorado-causing-red-tape-uncertainty/ [https://perma.cc/YJQ6-GC8W] (noting that the number of protested parcels offered for lease are almost three times as high in Colorado than the other Rocky Mountain surrounding states, and linking the higher number with BLM-Colorado's failure to implement the BLM's oil and gas leasing reforms); Scott Streater, *BLM Backpedaling on Protection of Sensitive Lands, Say Critics*, LAND LETTER (Feb. 26, 2012), https://www.eenews.net/landletter/stories/1059960065/ [https://perma.cc/6YS2-JU57] (concerning the BLM's decision to not develop stand-alone MLPs for the North and South Park regions of Colorado).

138. Helen Hankins, *BLM Colorado's Oil, Gas Leasing Reform: My Side*, POSTINDEP. (Mar. 19, 2012), https://www.postindependent.com/news/blm-colorados-oil-gas-leasing-reform/ [https://perma.cc/5B69-GKWU].

139. SHELDON KYE ENERGY LLC, *supra* note 136, at 4 (listing groups that proposed MLPs to the BLM).

140. Phil Taylor, *BLM Poised to Finalize First Master Leasing Plan*, E&E NEWS (June 25, 2014), https://www.eenews.net/eenewspm/stories/1060001957 [https://perma.cc/2D87-J5S3].

141. Updated Reform IM of 2018, *supra* note 88, at 2.

142. Josh Lappen, *The Short Life of The BLM's Master Leasing Plans*, STAN. U.: . . . & THE WEST BLOG (Jan. 22, 2018), https://west.stanford.edu/news/blogs/and-the-west-blog/2018/master-leasing-plans [https://perma.cc/JA3Z-AW93].

ground, would provide more site-specific information than the RMP, which provides the "Big Picture." With a closer assessment of the impacts of proposed leasing actions, the BLM could make better decisions. I now turn to a discussion of how the Reform IM of 2010 sought to improve the on-the-ground lease parcel review process.

C. Lease Parcel Review and Lease Issuance

The final and most detailed portion of the Reform IM of 2010 described the "Lease Parcel Review and Lease Issuance Process."[143] The changes in the Updated Reform IM of 2018 are numerous. This Section will discuss only the most salient features of the policy. Some of the guiding principles in 2010 were the desire to:

1. allow sufficient time to review the nominated parcels;
2. include subject matter experts for the resources potentially impacted by leasing, as well as specialists from other agencies if their resources could be impacted by leasing;
3. conduct analysis through interdisciplinary teams as groups, rather than one-by-one in isolation;
4. provide site-specific analysis and documentation;
5. increase public participation; and
6. resolve as many protests as possible before sales.

On the other hand, the Trump Administration's changes to the BLM's oil and gas leasing policy are designed to speed up the process by reducing the amount of notice required before a sale and to "simplify and streamline the leasing process."[144] Simplifying and streamlining may seem innocuous and even likely to produce desirable outcomes, yet in the current Administration, they are anything but. As explained in more detail below, these

143. Reform IM of 2010, *supra* note 86, at 5–9.
144. Updated Reform IM of 2018, *supra* note 95, at 4.

changes are problematic because they support the Trump Administration's aim to maximize leasing at the expense of any other considerations.

1. Parcel Review Timeframes

The Stiles Report indicated that the Review Team and BLM-Utah reached some different conclusions because the Team had a single mission—to review the leasing decisions—and more time to complete the review.[145] The Review Team also noted that BLM-Utah maintained a "sizeable" and "overwhelming" backlog of nominated parcels.[146] BLM-Utah had deferred leasing many of those parcels while it completed the RMPs. One can imagine that the political pressure—perceived and actual—to offer those deferred parcels mounted once the RMPs were completed.[147] Many of those parcels were added late in the review process for the December 2008 lease sale.[148]

Before the Obama Administration, the BLM interpreted its legal obligation under the Mineral Leasing Act and applicable regulations to require each field office to hold quarterly lease sales. The Mineral Leasing Act provides in relevant part, however, that "[l]ease sales shall be held *for each State* where eligible lands are available at least quarterly and *more frequently if the Secretary of the Interior determines such sales are necessary*."[149] The BLM and Office of the Solicitor determined that each *state*

145. Stiles Report, *supra* note 48, at 17.

146. *Id.* at 24–25.

147. *See id.* at 17 ("The Team did hear some anecdotal accounts of perceived political pressures in relation to Federal resource development's effect on neighboring lands and economies . . . ."). DOI's Office of the Inspector General (OIG) investigated allegations that BLM-Utah's employees were under undue pressure to complete the RMPs and were rushed to include deferred parcels in the December 2008 sale. The OIG did not find evidence of undue pressure to complete the RMPs, but found that the BLM itself contributed to that perception because "BLM failed to provide advance notice to NPS of the revised sale list containing proposed lease parcels in close proximity to National Parks; BLM refused to defer the parcels identified by NPS prior to the list being posted for sale; and BLM announced the December 2008 sale on November 4, 2008, Election Day." U.S. DEP'T OF THE INTERIOR, OFFICE OF THE INSPECTOR GEN., INVESTIGATIVE REPORT: BLM UTAH LEASE SALE 2 (Dec. 29, 2009), https://www.doioig.gov/sites/doioig.gov/files/BLM-Lease-Report_508.pdf [https://perma.cc/8FM9-FFC7].

148. Stiles Report, *supra* note 48, at 24–25.

149. Mineral Leasing Act, 30 U.S.C. § 226(b)(1)(A) (2018) (emphasis added). The regulations also refer to state, not field, offices. "Each proper BLM *Sate* [sic] *office* shall hold sales at least quarterly if lands are available for competitive leasing." 43 C.F.R. § 3120.1-2(a) (2019) (emphasis added).

office—not each *field* office—was required to hold a quarterly lease sale. Thus, the BLM was holding many more sales than legally required. This revelation led to the policy direction for each state to hold a quarterly sale on a rotating basis through its field offices, giving the field offices sufficient time to implement the new review policy established by the IM.[150]

The Western Energy Alliance (WEA), an oil and gas industry trade group, sued the Department of the Interior over its interpretation of the MLA's quarterly lease sale requirement in 2016.[151] WEA charged that BLM-New Mexico was violating the MLA by only conducting two lease sales during fiscal year 2015.[152] Note that WEA did not argue that the BLM's policy violates the MLA but rather that its implementation of the policy violates the MLA. Taking a leap of logic, WEA argued that the court should order the BLM to abandon the policy entirely.[153] After taking office in 2017, the Trump Administration met with WEA to discuss settlement of the case.[154] The Trump Administration then "gilded the lily," so to speak, and interpreted the MLA to require "state/*field* offices" to hold quarterly lease sales.[155] The Updated Reform IM of 2018 states that the BLM will no longer use a rotating sales schedule. Accordingly, WEA filed a stipulation to dismiss the case with respect to quarterly lease sales the day after the BLM issued the Updated Reform IM of 2018.[156]

The BLM held twenty-eight lease sales in 2018 and planned the same for 2019.[157] The Updated Reform IM of 2018 also limits the review period to no more than six months, with exceptions for "unforeseen circumstances."[158] Under the Obama Admin-

150. Reform IM of 2010, *supra* note 86, at 5.

151. Complaint, Western Energy All. v. Jewell, No. 1:16-cv-00912-WJ-KBM, 2017 WL 3600741 (D. N.M. Aug. 11, 2016).

152. *See New Mexico Oil and Gas Lease Sales*, BUREAU LAND MGMT., https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/new-mexico (last visited Aug. 15, 2019) [https://perma.cc/9D8H-QA4Z] (listing three sales for the calendar and fiscal year of 2015: one each in October 2014, July 2015, and October 2015).

153. Jewell, No. 1:16-cv-00912-WJ-KBM, 2017 WL 3600741, Compl. at 1.

154. JAYSON O'NEILL, A YEAR OF ENERGY INDUSTRY INFLUENCE AND ACCESS AT INTERIOR (2018), https://westernvaluesproject.org/report-a-year-of-energy-industry-influence-and-access-at-interior/ [https://perma.cc/CKC6-JE69].

155. Updated Reform IM of 2018, *supra* note 88, at 2 (emphasis added).

156. Stipulation of Partial Dismissal, Western Energy Alliance v. Zinke, No. 1:16-cv-00912-WJ-KBM, 2017 WL 3600741 (D. N.M., Feb. 1, 2018).

157. Energy Revolution Unleashed Press Release, *supra* note 79.

158. Updated Reform IM of 2018, *supra* note 88, at 2.

istration's review procedures, twelve to eighteen months could elapse between an expression of interest and the lease sale. During that time period, the BLM would have conducted additional site-specific analysis if deemed appropriate, meaningfully engaged the public in the decision-making process, and tried to resolve protests before proceeding. The process is much faster under the Trump Administration, and the deficiencies noted in the Stiles Report are therefore likely to arise again.

2. Interdisciplinary Review of Lease Sale Parcels

The Stiles Report concluded that interdisciplinary field review was another key reason for the difference between the Review Team's conclusions and BLM-Utah's conclusions. Previously, review was multidisciplinary, that is, many different resource specialists reviewed the parcels in question. Yet these specialists did not do so together and therefore did not analyze, synthesize, or harmonize information across disciplines. The Review Team members had considerable experience in oil and gas leasing, as well as management of other resources on public lands, just as the state office had. Their results were different, however, "[m]ost importantly, [because] the Team met with BLM-Utah personnel together, visited the lease parcels together, reviewed all the available documentation together, and discussed and compared notes together."[159] Togetherness was a key distinction.[160]

Following the Review Team's example, the Reform IM of 2010 required each field office to form an Interdisciplinary Parcel Review Team (IDPR Team).[161] The IM further directed the field offices on how to make the best use of their resource expertise. For instance, to "benefit from the team's skills, experience, and expertise, the parcel reviews should be conducted in a group setting, thereby encouraging group discussion and interaction. Data and recommendations should be reviewed and discussed as

159. Stiles Report, *supra* note 48, at 16.

160. Research supports the idea that group decision-making has several advantages over individual decision-making, including collection of more information and consideration of more views, approaches, and interests. *See* Leon Teeboom, *Group vs. Individual Decision Making for a Business*, HOUS. CHRON. (Updated Oct. 26, 2018), https://smallbusiness.chron.com/group-vs-individual-decision-making-business-448.html [https://perma.cc/2TBV-2Y45] (reviewing the literature on group versus individual decision-making).

161. Reform IM of 2010, *supra* note 86, at 5.

a team, allowing parcels to be compared and contrasted in an open discussion."[162] The Updated Reform IM of 2018 made IDPR Teams *optional*.[163] Only time will tell whether the field offices will continue to form such teams or the experts will return to their respective silos in which the analysis of petroleum engineers, for example, will drive decision-making, while the analysis of natural resources specialists and cultural specialists will bring up the rear, almost as afterthoughts.

3. Site Visits

On-the-ground review was yet another factor the Stiles Report cited for the differences between the Review Team's conclusion and BLM-Utah's. The Team spent nine days in the field visiting the seventy-seven parcels under review. In so doing, the Team was able to "ground-truth the maps and data" and see the potential issues on the tracts and in the vicinity.[164] The report noted: "It seems, however, [the field office resource] specialists were not afforded the opportunity to visit the specific lease parcels and assess the configuration of parcels to be offered in the December 2008 sale."[165] Instead, the specialists based their review upon existing documentation. Another benefit of the Review Team's field work was "the opportunity to observe, study, and consider the specific configuration of a final lease offering."[166] This ability was important to help the team determine whether certain configurations could inhibit orderly mineral development. For example, deferring individual parcels in the middle of a larger block could isolate the parcels on the outer edges of the block. The team could also determine that leasing of some parcels could significantly impact other resources, such as visual quality, without providing much in terms of development opportunities.[167]

The Updated Reform IM of 2018 unmistakably changes the policy from one encouraging site visits to one discouraging site visits. The Reform IM of 2010 said that the IDPR Team would "*usually* conduct site visits to validate existing data or gather

162. *Id.*
163. Updated Reform IM of 2018, *supra* note 88, at 2.
164. Stiles Report, *supra* note 48, at 15.
165. *Id.*
166. *Id.*
167. *Id.*

new information in order to make an informed leasing recommendation."[168] The Updated Reform IM of 2018 instead states, "Site visits are not required and should only be considered when deemed necessary by the authorized officer on a case-by-case basis."[169] Site visits take time and are not consistent with the Trump Administration's goals of streamlining and expediting. The Updated Reform IM of 2018 explains that, instead of relying on site visits for information, "[a]dvanced technology and information of high quality, such as geographic information system (GIS) and existing scientific reports[,] should be used to the greatest extent practicable."[170] Technological advancements and updates to numerous RMPs over the past decade may make it less critical for teams to visit sites physically. Thus, this change may not be as significant as it may seem at first blush and may in fact be more efficient. Yet, the Reform IM of 2018 discourages field specialists from using their best judgment about how to gather the data necessary to make informed decisions.

4. Public Participation: Notice and Comment

The Obama Administration believed that the public's inability to participate meaningfully in the decision-making process caused both the backlog of protests and general concern about the BLM's oil and gas leasing program. Before the Reform IM of 2010, each state office developed its own practice for making information about protests publicly available, and protesters complained about untimely and incomplete disclosures.[171] Accordingly, the Obama Administration added or expanded notice and comment periods for public participation, required additional types of notice, and included more types of stakeholders in the notice process.[172] The Trump Administration's Updated Reform IM of 2018 reduces or eliminates the Obama Administration's notice-and-comment periods and makes no mention of specific outreach to stakeholders. Moreover, the Reform IM of 2010 added a thirty-day public review and comment period when any leasing decision was based upon a "Determination of NEPA

168. Reform IM of 2010, *supra* note 86, at 7 (emphasis added).
169. Updated Reform IM of 2018, *supra* note 88, at 3.
170. *Id.*
171. *See* GAO-10-670, ONSHORE OIL AND GAS, *supra* note 28, at 12–13 (finding variability in the information about protests being made publicly available across the four BLM state offices reviewed).
172. Reform IM of 2010, *supra* note 86, at 7–9.

Adequacy" (DNA) or an EA accompanied by a "Finding of No Significant Impact" (FONSI).[173] The Updated Reform IM of 2018 eliminates the comment period for DNAs and does not discuss FONSIs.[174]

Additionally, both administrations made significant changes to the final sale notice. The Obama Administration required at least a 90-day notice[175] and also established a 30-day protest period that began the day the BLM posted the sale notice.[176] With that timeline, the public had time to review the proposed sale and protest it, and the BLM in turn had time to review and resolve the protest before the scheduled sale date. The Stiles Report noted that although the field offices in eastern Utah were familiar with typical protests, they did not have the opportunity to review the site-specific protests before deciding whether the BLM should offer a particular parcel for sale.[177] The Trump Administration reduced the lease sale notice timeframe by half, back to forty-five days, and cut the protest period down by two-thirds, to ten days. One could speculate that protests are likely to be more general under the new policy because of the shortened timeframes for protesters to marshal their arguments. The Trump Administration's policy added that the number of protested parcels and the status of the protests must be posted *the day before the sale* in order to put prospective bidders on notice. The Obama Administration's policy did not specify when protest information should be posted. One day's notice does not provide much time, however, for bidders to adjust their strategies.

In at least one instance, a court has blocked the Trump Administration's efforts to limit public participation. A federal magistrate judge in Idaho enjoined the BLM from shortening the protest period—as outlined in the Updated Reform IM of 2018—when the areas to be leased fall within federally-recognized sage-grouse habitat.[178] The court also ordered the reinstatement of the portions of the Reform IM of 2010 regarding "Public Participation" and "NEPA Compliance Documentation."[179] As the

173. *Id.* at 8.
174. *See* Updated Reform IM of 2018, *supra* note 88, at 4.
175. Reform IM of 2010, *supra* note 86, at 8–9.
176. *Id.* at 9.
177. Stiles Report, *supra* note 48, at 16.
178. Western Watersheds Project v. Zinke, 336 F. Supp. 3d 1204, 1248 (D. Idaho 2018).
179. *Id.* There appears to be an error in the order at 1248, part 1(a). It says

court explained:

> Doing so will remedy for present purposes the harm and hardships caused by BLM's curtailment or preclusion of the opportunity for meaningful public participation in the oil and gas leasing process (as implemented in IM 2018-034), which on the present record appears to violate public participation requirements of both FLPMA [Federal Land Policy and Management Act] and NEPA. Further, the requirements of the preliminary injunction will serve the public interest by providing BLM with the benefit of more meaningful public participation in the agency decision-making process.[180]

In another effort to address public participation, the Reform IM of 2010 directed state and field offices to (1) "identify groups and individuals with an interest in local BLM oil and gas leasing, including surface owners of split estate lands where Federal minerals are being considered for leasing"; (2) keep those groups, individuals, and split estate surface owners informed; and (3) invite them to comment during the NEPA compliance process.[181] The Updated Reform IM of 2018 does not detail who the BLM should inform and makes it *optional* for state and field office to provide for public participation during the NEPA process.[182] State and field offices are now free to once again have their own policies, making it more challenging for interested stakeholders and industry participants to know what to expect from office to office and to develop cohesive strategies.

5. NEPA Compliance Documentation and Categorical Exclusions

The Energy Policy Act of 2005 established five new categorical exclusions (CXs) for the development of oil and gas.[183] Congress created these CXs to help expedite development. The CXs relieved the BLM of its obligation under NEPA to conduct site-specific analysis before making leasing decisions under certain

---

"Parcel Review Timeframes," but I think it should say "Public Participation."

180. *Id.* at 1212.

181. Reform IM of 2010, *supra* note 86, at 7.

182. Updated Reform IM of 2018, *supra* note 88, at 3.

183. Energy Policy Act of 2005, Pub. L. No. 109-58, § 390, 119 Stat. 723, 42 U.S.C. § 15,942 (2005).

conditions as specified in the act.[184] Members of Congress, governors, and environmental groups challenged the wisdom of this provision, arguing that it would lead to avoidable, negative environmental impacts.[185]

The BLM's use of these new statutory CXs was indeed problematic. In 2009, the Government Accountability Office (GAO) issued a report concluding that the BLM's use of CXs under section 390 of the Energy Policy Act of 2005 was inconsistent and often did not comply with law and the BLM's own guidance.[186] The GAO recommended that the BLM issue detailed and explicit guidance to address the gaps and shortcomings in its existing guidance.[187] One of the central unanswered questions, according to the GAO, was whether the Energy Policy Act required the BLM to conduct "extraordinary circumstances" reviews for Applications for Permit to Drill (APDs).[188] Extraordinary circumstances are instances in which a normally excluded action may have a significant environmental effect and thus require additional analysis and action.[189] If the BLM found extraordinary circumstances in its analysis of whether to use an administrative CX (as opposed to statutory CXs), BLM guidance precluded use of the CX.[190]

---

184. GAO REPORT ON 390 CXS, *supra* note 40, at 1.

185. *See, e.g.*, *Impacts to Onshore Jobs, Revenue, and Energy: Review and Status of Sec. 390 Categorical Exclusions of the Energy Policy Act of 2005: Oversight Hearing Before the Subcomm. on Energy & Mineral Res. of the H. Comm. on Nat. Res.*, 112th Cong. 7–8 (2011) (statement of Rush D. Holt, Ranking Member, Subcomm. on Energy & Mineral Res.) ("The categorical exclusions established in Section 390 to expedite the approval of oil and gas drilling permits were unnecessary and unwise . . . . [The exclusions] cause environmental impacts, such as ozone levels that have reached or exceeded allowable levels and habitat fragmentation that has harmed elk, antelope, and other wildlife in the West."); W. GOVERNORS' ASS'N, WGA POLICY RESOLUTION 07-01: PROTECTING WILDLIFE MIGRATION CORRIDORS AND CRUCIAL WILDLIFE HABITAT IN THE WEST (Feb. 27, 2007), https://www.eenews.net/features/documents/2007/02/27/document_pm_01.pdf [https://perma.cc/75XU-WU7U] (calling for the amendment of section 390(B)(3) "to remove the categorical exclusion for NEPA reviews for exploration or development of oil and gas in wildlife corridors and crucial wildlife habitat"); Press Release, NRDC, BLM Exempts Oil and Gas Exploration from Environmental Review (Aug. 14, 2007), https://www.nrdc.org/media/2007/070814 [https://perma.cc/S3LN-QSRR] (claiming that "countless potentially harmful projects involving oil and gas exploration, logging and grazing on public lands are no longer subject to a key federal law that protects our nation's natural resources").

186. GAO REPORT ON 390 CXS, *supra* note 40.

187. *Id.* at 53.

188. *Id.* at 34–37.

189. 40 C.F.R. § 1508.4 (2019).

190. *See* GAO REPORT ON 390 CXS, *supra* note 40, at 4.

In 2010, the BLM settled a case brought by an environmental group in Utah regarding the BLM's issuance of thirty APDs on leased parcels without site-specific environmental review.[191] The BLM had issued the APDs in accordance with its own guidance for applying CXs under section 390 of the Energy Policy Act of 2005. That guidance did not require the BLM to screen for extraordinary circumstances. As part of the settlement, the BLM agreed to issue new guidance directing its field offices to consider whether any proposed authorization covered by a section 390 CX presented "extraordinary circumstances" that would require further environmental analysis.[192]

In accordance with both the settlement and the GAO's recommendations, the Obama Administration developed a new IM on the use of CXs.[193] The new IM directed the field offices to conduct a review for extraordinary circumstances whenever considering use of any section 390 CX. If extraordinary circumstances existed, the BLM would not be able to use the CX and would have to conduct environmental review.[194] The Western Energy Alliance then sued the BLM, challenging its interpretation of section 390 of the Energy Policy Act and the need to conduct review for extraordinary circumstances. The district court of Wyoming did not decide whether the BLM's interpretation was allowable, but instead ruled that the BLM failed to comply with its obligations for notice and comment under the Administrative Procedures Act.[195] The court so concluded because it found the new IM to be "a complete 'about-face'" compared to the BLM's past practices, and the IM bound the BLM. The court reasoned that the IM was not a policy statement, but it was instead a rule, imposing or affecting individual rights and duties.[196]

With that decision barring its use of the new IM on CXs, the BLM began the process of drafting new regulations with a clear process for notice and comment. The BLM ultimately, however, did not pursue rulemaking or issue additional CX-specific guidance.[197] Instead the BLM issued the Reform IM of 2010, which

191. Settlement Agreement, Nine Mile Canyon Coal. v. Stiewig, No.2:08 CV586 DB, 2009 WL 1096785 (D. Utah, Mar. 30, 2010).

192. *Id.* at 2.

193. IM 2010-118 on 390 CXs, *supra* note 39.

194. *Id.* at A.2.

195. Western Energy All. v. Salazar, No. 10- CV237F, 2011 WL 3738240, at *7 (D. Wyo., Aug. 12, 2011).

196. *Id.*

197. As I recall, the BLM did not move forward because of the pending onshore

required site-specific NEPA compliance documentation for all oil and gas leasing.[198]

The Reform IM of 2010 stated that most parcels available for leasing would require site-specific review. If a field office determined that such a review was not necessary, it could document that decision through a DNA or an EA together with a FONSI. The Reform IM of 2010 established review and comment periods for DNAs, as well as EAs with FONSIs to give stakeholders the opportunity to challenge the BLM's determination that site-specific analysis was not required.[199] The Updated Reform IM of 2018 removed the presumption that site-specific NEPA analysis normally would be required and eliminated the new review and comment periods.[200] These two changes were further efforts to speed up leasing and to prevent the public from participating in the decision-making process.

Apparently to double down on CXs, the BLM issued an Information Bulletin (IB) entitled "NEPA Efficiencies for Oil and Gas Development" in June 2018.[201] The IB's purpose is to "remind BLM offices" of the existing tools for streamlining reviews, including DNAs, statutory and administrative CXs, and field-wide programmatic NEPA analyses based upon "reasonable foreseeable development scenarios."[202] This IB cements the practices that the GAO found problematic in 2009 and that the BLM pledged to change as part of the 2010 settlement.

6. Leasing Recommendations and the Use of Discretion

The Obama Administration learned, through anecdotal information, that some BLM managers were struggling with both using the CXs and determining the scope of their discretion in the leasing context. For example, the Stiles Report indicated that several employees in the field office thought that "they were

---

orders and other rulemaking priorities.

198. Reform IM of 2010, *supra* note 86, at 8.

199. *Id.*

200. *See* Updated Reform IM of 2018, *supra* note 88, at 3 ("If the BLM concludes that a DNA will adequately document that existing NEPA analysis is sufficient to support the proposed action and the action is consistent with the RMP, *no further public comment period is required for the DNA*." (emphasis added)).

201. BUREAU OF LAND MGMT., INFORMATION BULLETIN NO. 2018-061, NEPA EFFICIENCIES FOR OIL AND GAS DEVELOPMENT (June 6, 2018), https://www.blm.gov/policy/ib-2018-061 [https://perma.cc/7G49-JHRY].

202. *Id.* at 1.

required by law to give greater deference to mineral leasing proposals than to the protection of other land uses."[203] The Review Team did not know how that notion came to be "commonly believed," but it was "not encumbered by this misperception." The Obama Administration began dispelling that notion throughout the BLM even before the Reform IM of 2010. In its March 2010 guidance on sage-grouse, the Washington Office explicitly stated that the state and field offices could exercise their discretion to either defer or withhold sale of parcels in whole or in part.[204] Furthermore, in response to the Review Team's observation, the Reform IM of 2010 listed a range of recommendations that could be made as a result of parcel review.[205] The Updated Reform IM of 2018 deleted that clarification. While this reform may seem minor, the belief that the BLM was required by law to defer to the industry's expressions of interest may explain some of the questionable leasing activity. Even though various entities protested the sale of many parcels, the BLM offered them for sale notwithstanding the protests. This Article will now discuss how the Obama Administration dealt with leasing in the face of so many protests and how the Trump Administration has returned the BLM to its former practice of forging ahead, notwithstanding the protests.

7. Lease Sale Parcel Protests and Lease Issuance

While IMs from both administrations recommend that state offices attempt resolving protests before the lease sale, they differ in how to handle protested parcels. The Reform IM of 2010 provided that unresolved protests did not prevent bidding on protested parcels.[206] State offices exercised discretion to either offer protested parcels before the protests were resolved or to defer protested parcels for which protests had not been resolved. The Updated Reform IM of 2018 removes that discretion and states that parcels subject to unresolved protests will be offered

203. Stiles Report, *supra* note 48, at 17.

204. BUREAU OF LAND MGMT., INSTRUCTION MEMORANDUM NO. 2010-71, GUNNISON AND GREATER SAGE-GROUSE MANAGEMENT CONSIDERATIONS FOR ENERGY DEVELOPMENT (SUPPLEMENT TO NATIONAL SAGE-GROUSE HABITAT CONSERVATION STRATEGY) (Mar. 5, 2010), https://endangeredspecieslawandpolicyredesign.lexblogplatformtwo.com/files/2013/12/BLM-guidance-on-sage-grouse.pdf [https://perma.cc/6LY5-89RH].

205. Updated Reform IM of 2018, *supra* note 88, at 8.

206. Reform IM of 2010, *supra* note 86, at 9.

regardless of protest status.[207] This change is yet another example of the Trump Administration removing discretion from the state and field offices to choose any option other than leasing.

Moreover, the Updated Reform IM of 2018 provides that state offices should resolve protests and decide whether to issue the protested leases within sixty days of receiving full payment from the bidder. If the state office believes that resolution will take more than sixty days, it must notify the WO in a memorandum describing the circumstances giving rise to the longer period.[208] One can imagine that a state office is loath to find itself in that situation.

History suggests, however, that BLM offices will have difficulty meeting the sixty-day deadline for issuing leases. In 2010, the GAO reviewed protests in the BLM state offices of Colorado, New Mexico, Utah, and Wyoming.[209] The GAO found that from 2007 to 2009, 74 percent of the parcels whose leases were sold competitively were protested.[210] Given the high volume of unresolved protests at the time of the sales, the BLM was unable to meet the MLA's sixty-day deadline 91 percent of the time.[211] Unless the Trump Administration plans to devote more resources to resolving protests, it is likely to find itself repeating the past: leases will go unissued and millions of dollars in bids will be held in suspense.

The Obama Administration's reforms added more analysis and time for public comment before the BLM made leasing decisions. The Obama Administration wanted the BLM to be able to offer leases with confidence that it had struck the right balance among multiple uses and avoid lengthy, costly post-sale protests and litigation. The Trump Administration established the America First Energy Plan and determined that time was of the essence. The reforms of 2018 are numerous and cumulatively profound, and the message is unmistakable: oil and gas development take precedence over all other activities. Though recognizing that many of the BLM's RMPs for oil- and gas-rich areas are outdated, the Trump Administration will not slow down development for additional analysis. It will push for more expedited development and will do so without much regard for

207. Updated Reform IM of 2018, *supra* note 88, at 4.
208. *Id.*
209. GAO-10-670, ONSHORE OIL AND GAS, *supra* note 28.
210. *Id.* at 14.
211. *See id.* at 19.

the costs to the other resources or the public's concerns. Notwithstanding all of the problems presented above, the next Section of this Article will review some of the ways the Trump Administration has been successful in achieving its America First Energy Plan.

IV. SCORECARD FOR AMERICA FIRST ENERGY PLAN

By many measures, the Trump Administration has been successful with respect to oil and gas leasing. Its policy changes have paved the way for increased oil and gas development. For instance, it increased onshore leasing in the calendar years of 2017 and 2018. In 2018, the BLM held twenty-eight lease sales and sold 1,412 parcels covering nearly 1.5 million acres. It generated revenue of $1.1 billion, nearly tripling the previous record of $408 million in 2008.[212] As then-Acting Secretary of the Interior David Bernhardt explained:

> "Responsible production of domestic energy keeps energy prices low for American families and businesses, reduces our dependence on foreign oil, creates American jobs, and generates billions of dollars in revenue to the Federal Treasury . . . . The President's visionary address last night has set the stage for this Administration's second act on American energy dominance. With a bold, new approach to energy development, and a President who recognizes that conventional wisdom is meant to be challenged, we are starting to see what a great America looks like."[213]

This Section will examine why some say the Trump Administration has fulfilled its promises but why I say it is merely repeating past mistakes. Increasing domestic oil and gas production undoubtedly provides the United States with some energy security. Yet the way the Trump Administration is achieving this security is pushing the BLM, as the public lands' steward, into familiar, undesirable territory. This rush to development creates many opportunities for mistakes and unacceptably puts other public lands' resources at risk. The costs to the public resources outweigh the benefits of accelerated development.

---

212. Energy Revolution Unleashed Press Release, *supra* note 79 (quoting David Bernhardt).

213. *Id.*

A. Success by the Numbers

The Trump Administration has made one announcement after another touting its successful oil and gas lease sales in the *calendar* years of 2017 and 2018.[214] When comparing the Trump Administration's reporting to that of previous administrations, it is important to note that the BLM historically reports data on a *fiscal* basis. The Trump Administration has not outdone previous administrations by every measure, despite its constant announcements to that effect. For example, in fiscal year 2018, the BLM held twenty-eight lease sales[215] and issued over 1,300 new leases,[216] covering almost 1.3 million acres.[217] By comparison, the Obama Administration's high-water mark was in fiscal year 2011 also with twenty-eight lease sales but yielded almost 2,200 new leases, covering over two million acres. Revenue from lease sales in fiscal year 2018 dwarfs that of fiscal year 2011, however, with $1.1 billion versus $256 million.[218] Not coincidentally, the largest part of this growth in revenue came from the Permian Basin of New Mexico, which generated "approximately $972 million in bonus bids for 142 parcels. The two-day lease sale, held in September, brought in more revenue than all BLM oil and gas lease sales in 2017 combined and broke all previous records."[219] And as discussed above, the BLM is operating under outdated RMPs in the Permian Basin. Updated RMPs that consider the

---

214. *See, e.g.*, *They Said it Couldn't Be Done: Trump Admin Dominates with Billion-Dollar Oil and Gas Sale*, BUREAU LAND MGMT. (Sept. 7, 2018), https://www.blm.gov/press-release/they-said-it-couldnt-be-done-trump-admin-dominates-billion-dollar-oil-and-gas-sale [https://perma.cc/76B5-T7ZH] (detailing New Mexico sale of over $972 million).

215. Press Release, Bureau of Land Mgmt., BLM to Hold Oil and Gas Lease Sale October 1, 2019 (Aug. 16, 2019), https://www.blm.gov/press-release/blm-hold-oil-and-gas-lease-sale-october-1-2019 [https://perma.cc/BZ54-SKBZ].

216. Bureau of Land Mgmt., *Table 4 Number of Acres Leased During the Fiscal Year*, in *Oil and Gas Statistics*, BUREAU OF LAND MGMT., *supra* note 89 (expand "Table 4 Acreage in New Leases Issued" then follow the "Download the table here" hyperlink).

217. Bureau of Land Mgmt., *Table 3 Number of New Leases Issued During the Fiscal Year*, in *Oil and Gas Statistics*, BUREAU LAND MGMT., *supra* note 89 (expand "Table 3 Number of New Leases Issued by BLM" then follow the "Download the table here" hyperlink).

218. *Oil & Gas Lease Sales Garner $256 Million for American Taxpayers in 2011: Sale Revenue up 20% over 2010; 32 Additional Sales Set for This Year*, DEP'T INTERIOR (Jan. 10, 2012), https://www.doi.gov/news/pressreleases/Onshore-Oil-and-Gas-Lease-Sales-Garner-256-Million-for-American-Taxpayers-in-2011 [https://perma.cc/WBD5-GP35].

219. Energy Revolution Unleashed Press Release, *supra* note 79.

now-known impacts of oil and gas development could slow the growth in that region.

Protests during the Trump Administration have also decreased as a percentage. The percentage of parcels protested in fiscal year 2018 was 68 percent, down 4 percent from fiscal year 2016—the last full year of the Obama Administration—and down 20 percent from fiscal year 2017.[220] The volume has increased, however, given the increased number of parcels the Trump Administration has offered for sale. In fiscal year 2016 under the Obama Administration, protested parcels from the original sale notices totaled 593. That number more than doubled in fiscal year 2017 to 1,257 and skyrocketed by almost 260 percent by fiscal year 2018 to 2,118. Thus, the Updated Reform IM of 2018 has not yet been successful in reducing the number of protested parcels.

Though not directly related to leasing reform, the BLM's waiting times to process completed APDs has plummeted. In fiscal year 2016, the waiting times were 139 "BLM days."[221] By fiscal year 2017, those days dropped to 120; by fiscal year 2018, they fell to 63.[222] Several factors contributed to these drops in wait times, none of which the Trump Administration initiated. First, by April 20, 2017, the BLM required electronic submissions of APDs unless it granted the operator a waiver.[223] Second, since section 365 of the Energy Policy Act of 2005 established the "permit processing improvement fund,"[224] there has been a tremendous increase in appropriations to support permitting operations. In fiscal year 2016, the fund balance was $23 million.

---

220. *Table 14 Protest Table FY 2019*, *supra* note 89.

221. *Table 12 Time to Complete an Application for Permit to Drill (APD) Federal and Indian, in Oil and Gas Statistics*, *supra* note 96 (expand "Table 12 Time to Complete an APD" then follow the "Download the table here" hyperlink).

222. *Id.*

223. *Id.*

224. Energy Policy Act of 2005, § 365(g), 42 U.S.C. § 15,924 (2018) (as amended by the National Defense Authorization Act of 2015); *Implementation of the Provisions of the Energy Policy Act of 2005: Hearings on Enhancing Oil and Gas Production; Geothermal Energy and Other Renewables; and Hydrogen and Fuel Cell Research and Development before the S. Comm. on Energy and Natural Resources*, 109th Cong. (June 27, 2006) (prepared statement of Kathleen Clarke, Dir., BLM, and H. Dale Hall, Dir., U.S. Fish and Wildlife Service, on Enhancing Oil and Gas Production) ("Section 365 authorized an estimated $20 million in mandatory funding for these offices from the Federal share of rental receipts from onshore oil and gas leasing. The Treasury Account for the Permit Processing Improvement Fund for the Pilot Project Offices was established on November 1, 2005, and the authorized receipts are now being placed in that account.").

It ballooned to $43 million in fiscal year 2018 and is estimated to be $50 million in fiscal year 2020.[225] Third, the BLM released an updated version of its online permitting system, Automated Fluid Minerals Support System 2 (AFMSS 2), at the end of fiscal year 2016. This new version was several years in the making.[226] Processing times for fiscal years 2017 and 2018 include APDs processed through the old system, AFMSS 1, and the new system, AFMSS 2. When comparing the processing times for applications through AFMSS 2, the number of BLM days increased somewhat surprisingly. In fiscal year 2017, the average number of BLM days for APDs submitted through AFMSS 2 was fifty and in fiscal year 2018, the average number of BLM days was sixty-eight. Possible causes for an uptick in BLM days could be the increased volume of APDs submitted as well as an overall increased workload in the oil and gas leasing program. The BLM is struggling to keep pace, even with the almost two-fold increase in funding for permitting.

Yet not all of the numbers indicate success. For example, the number of requests under the Freedom of Information Act (FOIA) has significantly increased. From 2016 to 2018, the requests to DOI leapt 30 percent to 8,350 requests.[227] The BLM reported that it received just under 1,000 requests in fiscal year 2017. The BLM reported that in fiscal year 2016, it spent almost $3 million on FOIA-related costs.[228] As part of its 2017 report to the Secretary in response to Secretarial Order 3355 on streamlining review under NEPA, the BLM recommended legislation to limit the number of FOIA requests, despite their importance to public participation in the NEPA review process. This increase in FOIA requests signals that at least some segments of the public are increasingly concerned about the BLM's actions. The Trump Administration's proposed legislation is another attempt to streamline the public out of the process.

Others have speculated that this emphasis on oil and gas

225. DEP'T OF THE INTERIOR, BUDGET FOR FISCAL YEAR 2020: LAND AND MINERALS MANAGEMENT 602, https://www.govinfo.gov/content/pkg/BUDGET-2020-APP/pdf/BUDGET-2020-APP-1-14.pdf [https://perma.cc/58LV-QLP5].

226. *Well and Permitting Development*, BUREAU LAND MGMT., https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/operations-and-production/permitting (last visited Oct. 10, 2019) [https://perma.cc/HZ5B-P8JQ].

227. Michael Doyle, *GOP Senators Blast Department's FOIA Plans*, E&E NEWS (Mar. 5, 2019), https://www.eenews.net/eenewspm/stories/1060123191/ [https://perma.cc/8B72-XERP].

228. BLM RESPONSE TO SECRETARIAL ORDER 3355, *supra* note 72, at 14 n.19.

development on public lands will lead to more lawsuits.[229] An attorney for Earthjustice predicted that the Updated Reform IM of 2018 would backfire and that courts would prevent sales for failure to comply with law.[230] Reportedly, there will be a surge of oil and gas related protests and litigation in the second half of the Trump Administration, initiated by groups such as WildEarth Guardians and the Center for Biological Diversity.[231]

B. Inevitability of Mistakes

With its push to expedite leasing, it is not surprising that the Trump Administration has made some mistakes along the way. As the saying goes, "haste makes waste." This Article has outlined two of BLM-Colorado's high-profile missteps. The first misstep was the December 2018 sale in which the BLM proposed to lease parcels in areas previously designated as sage-grouse protection areas. The second misstep was the BLM's failure to consult with the Navajo Nation as it prepared for a lease sale in September 2018. BLM-Colorado posted for comment an Environmental Assessment that was internally inconsistent with respect to consultation. It stated in one place that it had consulted with sixteen Native American tribes, but the Navajo Nation was not among them.[232] Later in the document, the BLM stated it had consulted with the Navajo Nation.[233] In fact, the BLM ap-

---

229. *See* Jacqueline Toth, *Obama's CEQ Head: NEPA Guidance Repeal Contrary to Trump's Energy Goals*, CONG. Q. ROLL CALL (Mar. 28, 2017), 2017 WL 1148147. As Toth states:

> It is ironic, [Christy Goldfuss, former managing director of the CEQ] added, that by getting rid of the guidance, project permit times could actually slow by creating inconsistencies between agencies on addressing NEPA, which in turn could result in additional legal challenges. "When you take away the guidance, you open up those questions all over again," she said.

230. Ellen M. Gilmer, *Critics on New Leasing Policy: 'BLM Is Inviting Lawsuits,'* ENERGYWIRE (Feb. 2, 2018), https://www.eenews.net/stories/1060072713 [https://perma.cc/3YUG-FLGM].

231. Nichola Groom, *U.S. Green Groups Ramp Up Legal Attacks on Federal Oil Leases*, CNBC (June 13, 2019, 6:00 AM), https://www.cnbc.com/2019/06/13/reuters-america-u-s-green-groups-ramp-up-legal-attacks-on-federal-oil-leases.html [https://perma.cc/GPP7-WPDA].

232. BUREAU OF LAND MGMT., DOI-BLM-CO-F020-2018-00003-EA, ENVIRONMENTAL ASSESSMENT FOR THE SEPTEMBER 2018 COMPETITIVE OIL AND GAS LEASE SALE 57 (2018), https://eplanning.blm.gov/epl-front-office/projects/nepa/92394/151627/185844/RGFO_EA_Protest_Sept2018_Lease_Sale.pdf [https://perma.cc/8ZB8-K55J].

233. *Id.* at 68.

parently had not consulted with the Navajo Nation. Once the Navajo Nation brought this mistake to the BLM's attention, the BLM removed over 18,000 acres from the sale, pending that consultation.[234] The BLM said that it pulled the acreage from the sale when it learned that the Navajo Nation had acquired property in the area in late 2017.[235] The acreage pulled was nearly 85 percent of what the BLM had planned to offer in the sale.[236]

Though BLM-Colorado knew that over 20,000 of the acres identified for the September 2018 sale were split-estate land, it had not consulted with the owners. The Reform IM of 2010 required consultation with split-estate owners, and thus, under Obama-era policies, the BLM would have consulted with the split-estate owner. Once the BLM identifies the owner as a federally-recognized tribe, the BLM is obligated under law and a host of federal policies, including the BLM's own policy, to enter into government-to-government tribal consultation.[237] The Up-

234. *See Colorado September 2018 Oil and Gas Lease Sale Node*, BUREAU OF LAND MGMT. (2018), https://www.blm.gov/basic/colorado-september-2018-oil-and-gas-lease-sale-node [https://perma.cc/LRT5-NSX4].

235. *See* Press Release, The Navajo Nation Office of the President and Vice President, In the Shadows of Tsisnaasjini' Navajo Purchases Boyer Ranch (Jan. 4, 2018), https://mailchi.mp/c8789a09e23f/press-release-in-the-shadows-of-tsisnaasjini-navajo-purchases-boyer-ranch?e=62cab45fa2 [https://perma.cc/R5UH-NLAX] (announcing ownership as of December 15, 2017).

236. *See Colorado September 2018 Oil and Gas Lease Sale Node*, *supra* note 234.

237. The BLM's handbook on tribal consultation provides the following direction:

> When it becomes apparent that the nature and/or the location of an activity could affect Indian tribal issues or concerns, the BLM manager should initiate appropriate consultation with potentially affected Indian tribes, as soon as possible, once the general outlines of the land use plan (LUP) or the proposed project-specific land use decision have been determined.

BUREAU OF LAND MGMT., HANDBOOK (H) 1780-1, IMPROVING AND SUSTAINING BLM-TRIBAL RELATIONS III-7 (Dec. 15, 2016), https://www.blm.gov/sites/blm.gov/files/uploads/H-1780-1__0.pdf [https://perma.cc/P2GJ-BQCF]. *See also* DEP'T OF THE INTERIOR, DEPARTMENT MANUAL 512, CH. 5: PROCEDURES FOR CONSULTATION WITH INDIAN TRIBES (Nov. 9, 2015), https://www.doi.gov/sites/doi.gov/files/uploads/dm_chapter_5_procedures_for_consultation_with_indian_tribes.pdf [https://perma.cc/HF2V-HBWF]; DEP'T OF THE INTERIOR, DEPARTMENT MANUAL 512, CH. 4: DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES AND ALASKA NATIVE CORPORATIONS, https://www.boem.gov/Departmental-Tribal-Guidance/ [https://perma.cc/LSJ7-H6ZA]. These manuals adopt consultation principles derived from Presidential Memorandum on Tribal Consultation (Nov. 5, 2009) and Executive Order 13175 (Nov. 6, 2000). *See also* DEPARTMENT OF THE INTERIOR'S POLICY ON CONSULTATION WITH INDIAN TRIBES AND THE CONSULTATION COMMITTEE OF THE INTERAGENCY WORKING GROUP ON INDIAN AFFAIRS, as adopted in the Departmental Manual – 512 DM 4 and 5 (Nov. 9, 2015).

dated Reform IM of 2018 removes the requirement for consultation with split-estate owners generally, but if the tribe had not raised the issue with the BLM, the BLM would have proceeded with the sale, violating both law and policy regarding tribal consultation. The Navajo Nation is a well-established government with a Division of Natural Resources and an Environmental Protection Agency.[238] One could easily imagine a scenario in which a tribe lacking similar capacities would not have learned of a sale impacting its interests in time to object. This example highlights the importance of the BLM—at a minimum—identifying split-estate owners so that it may determine if any laws or policies other than the Updated Reform IM of 2018 independently require the BLM to consult owners.

C. Possible Neglect of Other Resources

FLPMA mandates that the BLM's management of the public lands "be on the basis of multiple use and sustained yield unless otherwise specified by law."[239] Those multiple uses include energy development, livestock grazing, recreation, timber harvesting, and preservation of other natural, cultural, and historic resources. The BLM's mission is "to sustain the health, diversity, and productivity of public lands for the use and enjoyment of present and future generations."[240] The Trump Administration's renewed emphasis on oil and gas development calls into stark relief the BLM's lack of vigor in carrying out its other responsibilities. Nada Culver, senior counsel and director of the Wilderness Society's BLM Action Center, said she wished the Department of the Interior's enthusiasm in announcing the record lease sale revenues extended to the agency's "actual mission to manage our public lands for all Americans, which includes protecting national monuments, national parks, wilderness, wildlife, clean air and clean water."[241] Culver added, "All of these equally im-

---

This manual adopts consultation principles derived from Presidential Memorandum on Tribal Consultation (Nov. 5, 2009) and Executive Order 13175 (Nov. 6, 2000).

238. Navajo Nation, Welcome to the Navajo Nation Government, NAVAJO NATION, http://www.navajo-nsn.gov/govt.htm (last visited Oct. 10, 2019) [https://perma.cc/CJ8G-7CBQ].

239. 43 U.S.C. §§ 1701(a)(7)–1782 (2018).

240. *Who We Are, What We Do*, *supra* note 23.

241. Scott Streater, *BLM Nets Record Revenue; Bernhardt Touts "Energy Dominance"*, GREENWIRE (Feb. 7, 2019), https://www.eenews.net/greenwire/stories/1060119933 [https://perma.cc/RN7V-92X3].

portant resources are suffering at the hands of this single-minded focus on turning over lands to oil and gas companies."[242]

One example of this undue focus on oil and gas development at the expense of management of other resources comes from the Carlsbad Field Office (CFO). This field office has been breaking records in oil and gas leasing revenue despite being woefully understaffed. With a staff of 103 employees, it received authorization to hire twenty-five new employees.[243] Not only is the field office greatly increasing revenue—which means preparing parcels for sale, conducting sales, resolving protests, and issuing leases—it also is receiving and issuing a record number of APDs. In fiscal year 2018, the CFO received over 1,500 APDs, almost double the number for fiscal year 2017.[244] BLM-New Mexico approved almost 1,200 APDs during that time and presumably the bulk of those came through the CFO. That number represents 35 percent of all APDs approved in fiscal year 2018 for the entire bureau.[245] The district and assistant field managers acknowledged that with all the permitting work and preparing for sales every quarter, the CFO had difficulty doing any other work and serving the public generally.

> [The district manager Jim Stovall] said the increase in activity and staffing could allow the BLM to look into more conservation efforts, improving watersheds and strengthening access to public land.
>
> "It's not about just oil and gas," Stovall said. "We realize there's quite the geology here for oil and gas. We've tried to take the perspective that there are other (land) uses."
>
> Meanwhile, [Ty] Allen [assistant field manager] said the BLM will continue to serve its mission of improving the health of public land, and public access to resources.
>
> "There's oil here," he said. "But we're going to do our best

242. *Id.*
243. Hedden, *supra* note 81.
244. *Id.*
245. *See Table 7 Number of Approved Applications for Permit to Drill (AAPDS)*, in *Oil and Gas Statistics*, *supra* note 89 (expand the "Table 7 Number of Approved Applications for Permit to Drill (AAPDS)" option, then follow the "Download the table here" hyperlink) (reporting 1,198 approved APDs in BLM-New Mexico and 3,388 for the BLM as a whole).

to meet all the needs of the public."[246]

These statements from the leadership do not spark great confidence that other resources will receive the attention that they deserve, particularly because it is unlikely that activity will slow down in the Permian Basin.[247] It is evident that the managers are aware of their limitations and do not seem optimistic that the Trump Administration's priorities will shift to allow for sufficient attention to resources other than oil and gas.

Staffing shortages, the frequency of lease sales, and the number of APDs processed, for example, are easily documented. What is more difficult to assess is the probable demoralization of BLM employees who want to conduct "responsible" oil and gas leasing but simply do not have time or other resources to do so. There is a cadre of employees who have mostly conducted oil and gas lease sales under the Reform IM of 2010. After almost eight years of operating under that IM, they were told essentially that their work was duplicative, inefficient, unnecessary, and standing in the way of America's greatness. One might argue that such messages are often delivered when there is a change of party in the executive branch.[248] The Obama Administration's Stiles Report, however, was careful not to criticize the work of BLM-Utah, but rather to criticize the circumstances under which the office worked. Indeed, the Review Team praised the work of BLM-Utah.[249] The Obama Administration's message to BLM employees was that they needed more time for planning, analysis, coordination with other agencies and governments, site visits, public participation, resolving protests, and the like to do their best work. The employees deal with the wreckage of each new administration working to undo the policies of the last and

246. Hedden, *supra* note 81.

247. *See* Press Release, U.S. Dep't of Interior, USGS Identifies Largest Continuous Oil and Gas Resource Potential Ever Assessed (Dec. 6, 2018), https://www.doi.gov/pressreleases/usgs-identifies-largest-continuous-oil-and-gas-resource-potential-ever-assessed [https://perma.cc/PQZ2-SCV9] (announcing that the Delaware Basin within the Permian Basin contains an estimated mean of 46.3 billion barrels of oil, 281 trillion cubic feet of natural gas, and 20 billion barrels of natural gas liquids, representing the largest assessment ever of continuous oil by the U.S. Geological Survey).

248. An associate solicitor once explained to me that political appointees are the "A Team" and career employees are the "B Team." I rushed to correct her, saying that we are all of part of the "Dream Team." I then stood corrected as she explained that being the "B Team" meant, "we be here, when you be gone."

249. *See* Stiles Report, *supra* note 48, at 4–5.

potentially invalidating the employees' efforts to fulfill the BLM's mission.

CONCLUSION

I see the work of the Obama Administration in the rearview mirror and look ahead with much trepidation. Yes, elections have consequences, and a certain (indeed, great) amount of change is to be expected. However, the Trump Administration's wholesale undoing of policy after policy does not seem to be in service to the country. The Trump Administration has set out to undo the work of the Obama Administration with a sweeping generalization that any regulation or policy standing in the way of unbridled oil and gas development must go. This sentiment is echoed throughout the Trump Administration. For example:

> Steve Bannon, Senior Advisor to the President (and widely believed to have powerful influence over Mr. Trump), in rare public comments, proclaimed in February at conservative loyalists' Conservative Political Action Conference that the new administration and Trump's Cabinet picks would rip up the Obama regulatory agenda, and are focused on "deconstruction of the administrative state", and will weaken regulatory agencies and other bureaucratic entities by emphasizing what's good for business and the economy. . . . Such statements are remarkably radical, even for a conservative presidential administration.[250]

As one advocate said, when the current Administration says that it is streamlining the process, it is really undermining the system.[251] The Trump Administration appears to have a myopic view that is inconsistent with the BLM's multiple-use mission. While revenue has increased tremendously, the question remains: to what extent are the American people willing to privilege oil and gas development over the other uses of the public lands? The Trump Administration largely has been successful

250. Anderson et al., *supra* note 85, at 244 (citing David Z. Morris, *Steve Bannon Says Trump's Cabinet Picks Are Intended to 'Deconstruct' Regulation and Agencies*, FORTUNE (Feb. 25, 2017), http://fortune.com/2017/02/25/bannon-trump-cabinet-cpac [https://perma.cc/V54M-RK6M].

251. *Streamlining or Undermining?*, CONSORTIUM FOR OCEAN LEADERSHIP (Jan. 16, 2018), https://oceanleadership.org/streamlining-or-undermining/ [https://perma.cc/6SSP-TBCV].

under its own terms: speeding up the leasing process and removing regulatory barriers to increased oil and gas development. The Trump Administration has been responsive to the oil and gas industry, and to such an extent that it is unquestionably sacrificing the welfare of current and future generations.[252]

The Hayes Report and the Stiles Report explained the conditions under which BLM-Utah understandably made some errors in its leasing decisions in December 2008 that led to litigation and a review at the beginning of the Obama Administration. Those errors included an initial failure to consult with the National Park Service on parcels that were next to Arches National Park, Canyonlands National Park, and Dinosaur National Monument.[253] The reports also identified problems with the volume of parcels BLM-Utah was leasing immediately after completion of the RMPs. BLM-Utah was trying to implement the plans and use the automated systems for identifying lease stipulations, notices, and other conditions.[254] Those circumstances "significantly tested" the staff's capacity to handle the workload.[255] The Obama Administration issued the Reform IM of 2010 largely to address those issues and help the BLM make better leasing decisions.

The Updated Reform IM of 2018 takes a giant step backwards with respect to land use planning, reviewing parcels for potential leasing, and issuing leases. Of note are the ways in which the IM limits public participation and the exercise of managers' discretion in making leasing decisions if those decisions could result in something other than immediate leasing. There is seemingly no effort to make policies that balance the multiple uses of the public lands.

It will be some years before the impact of the Updated Reform IM of 2018 is fully realized. While many may cheer in the short term, the long view suggests that the pendulum has indeed swung too far. One commentator suggests that most of the electorate are tired, suffer from "motion sickness," and seek a pro-

252. Owley, *supra* note 21, at 36 ("When adopting these policies, the Trump Administration sometimes acknowledges that it is working to promote energy extraction businesses, but also often suggests that changing policy efforts are based on a desire to give states more power in controlling natural resources within their borders. In this way, President Trump can argue that he is working to promote his federalist ideals as a mask for his cronyism.").

253. Hayes Report, *supra* note 26, at 2.

254. Stiles Report, *supra* note 48, at 4.

255. *Id.*

ductive equilibrium.[256] Equipoise remains elusive.

256. Nick Troiano, *A Way Out of Pendulum Politics*, REALCLEAR (Nov. 7, 2018), https://www.realclearpolitics.com/articles/2018/11/07/a_way_out_of_pendulum_politics__138578.html [https://perma.cc/L9NZ-VZ64].