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Cc: [Chase Huntley](#)
Subject: Review of 2015 Sage-Grouse Plans
Date: Tuesday, August 15, 2017 4:49:31 PM
Attachments: [TWS Sage-grouse Plans Review letter - 8-15-17.pdf](#)

Dear Mike – Attached is a letter from The Wilderness Society regarding the ongoing review and potential changes to the content and implementation of the 2015 Sage-Grouse Plans. We appreciate the agency’s efforts to evaluate how to make the plans most effective and hope to have an opportunity to continue our engagement.

Nada Culver

Senior Counsel and Director, BLM Action Center

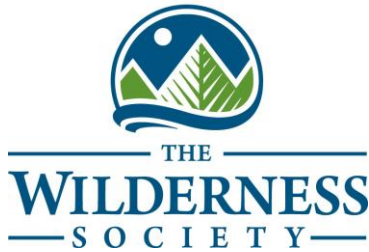
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August 15, 2017

Via electronic mail

Mike Nedd
Acting Director
Bureau of Land Management
1849 C Street NW, Rm. 5665
Washington DC 20240

Re: Review of 2015 Sage-Grouse Plans

Dear Acting Director Nedd:

We are writing to emphasize our interest and concerns in the review of the greater sage-grouse plans conducted pursuant to Secretarial Order (S.O.) 3353. The Wilderness Society has been engaging in efforts to conserve the greater sage-grouse for more than a decade, including in the plans developed by the Bureau of Land Management and U.S. Forest Service. We take pride in the collaborative efforts that resulted in the management plans signed in September 2015 and the finding by the U.S. Fish and Wildlife Service (FWS) that listing of the greater sage-grouse under the Endangered Species Act was no longer warranted. As part of implementing the recommendations of the August 4 Memorandum from Secretary Zinke and the Report from the Sage-Grouse Review Team, we urge you to take the following into consideration.

Maintain the critical elements of the 2015 Sage-Grouse Plans.

As the Western Governors Association's Sage-Grouse Task Force has stated, including in the context of the review being conducted by the Department of the Interior, wholesale changes are not likely needed although there may be opportunities to improve the 2015 Sage-Grouse Plans. There are a number of critical elements of the plans that must be maintained in order to support the finding of the FWS and to ensure the greater sage-grouse and the more than 350 species that depend on these lands are not put at risk.

1. Protect the highest value habitat.

The structure of the plans was developed to provide the most protections to the highest value habitat (thus ensuring it is sufficiently protected) while providing more flexibility for other activities to occur outside habitat and in other habitat areas. For example, while most plans did not close any lands to oil and gas development, no surface occupancy is permitted in priority

habitat management areas; development outside priority habitat is permitted subject to less restrictive conditions. Further, the vast majority of high and moderate oil and gas potential is outside of priority habitat.¹ Consequently, maintaining the overall structure of the plans to focus on protecting the highest value habitat is not only the most likely to succeed in conserving the species, it is also having limited impacts on activities like oil and gas development. It is essential for the functioning of the plans that Priority Habitat Management Areas (and/or Core Habitat), including Sagebrush Focal Areas, are maintained and provided with the most protections.

2. Maintain provisions to address the key threats to the greater sage-grouse.

In addition to invasive grasses and wildland fire, which are highlighted in S.O. 3353, FWS has identified other “leading threats” to the greater sage-grouse and its habitat. While these threats are particularly important in the Great Basin region, oil and gas development is identified as a primary threat in most of the Rocky Mountain region, except for Montana, where the principal threat is agricultural conversion. Further, development and habitat fragmentation are identified as priority threats by both the FWS and the states.²

Consequently, in order for the plans to be effective, provisions addressing energy development and other causes of habitat fragmentation must be incorporated. These provisions include:

- No surface occupancy provisions for oil and gas development;
- Similar direction on appropriate locations for development of wind, solar and transmission lines; and
- Limitations on the amount and timing of surface-disturbing activities, such as surface disturbance caps and buffers around leks.

Notably, these types of provisions are also integral parts of the approaches that western states utilize in managing and conserving greater sage-grouse, including in those states that have formal sage-grouse conservation plans.

3. Ensure unavoidable impacts to greater sage-grouse habitat are mitigated.

The 2015 Sage-Grouse Plans comply with the mitigation hierarchy (i.e., avoid impacts where possible; minimize impacts where avoidance is not practicable; and mitigate or offset unavoidable impacts) and this compliance is necessary for their success. By providing the greatest protection for the highest value habitat and setting out specific management provisions for different activities, the 2015 Sage-Grouse Plans seek to avoid or minimize impacts to sage-grouse habitat. Nonetheless, the plans also recognize that some harm to habitat cannot be sufficiently avoided or minimized, and therefore mitigation through compensatory actions is required to restore or replace the damaged habitat. Evaluation of mitigation is required by the

¹ See

[https://d3n8a8pro7vhmx.cloudfront.net/backcountryhunters/pages/3172/attachments/original/1497040181/Sage-Grouse_Energy_Overlap_Report_060917_\(1\).pdf?1497040181](https://d3n8a8pro7vhmx.cloudfront.net/backcountryhunters/pages/3172/attachments/original/1497040181/Sage-Grouse_Energy_Overlap_Report_060917_(1).pdf?1497040181)

² See <https://www.fws.gov/greatersagegrouse/findings.php>

National Environmental Policy Act³ and management for multiple use and sustained yield and avoidance of unnecessary or undue degradation to these uses and values of the public lands (including wildlife) is required the Federal Land Policy and Management Act.⁴ The BLM's current manual and handbook on mitigation (Manual 1794, Handbook H-1794-1) acknowledge the BLM's authority to condition land uses on mitigation and to deny approval of uses when impacts cannot be sufficiently mitigated.⁵ Similarly, the Department of Interior's Manual on Mitigation "affirms its authority to identify and plan for the extent, nature, and location of mitigation, including compensatory mitigation, and to require the implementation of effective mitigation."⁶

By designing appropriate mitigation measures, the plans provide a path forward for permitting more activities on the public lands that may harm greater sage-grouse habitat (such as activities that would otherwise exceed the scientifically-set surface disturbance caps) while ensuring those harms will be sufficiently addressed to offset unavoidable harms (such as restoring habitat or providing intact habitat). Mitigation is a necessary part of the plans' structure and is also a key part of the management approaches taken by the western states, including those states that have formal sage-grouse conservation plans. Mitigation measures have been developed based on years of experience with various industries. These industries now rely on compensatory mitigation to provide certainty regarding requirements associated with development and assurances that the mitigation will be successful to actually offset the harm that has occurred. While these provisions in the plans can certainly be elaborated upon, they need to be maintained.

4. Provide for ongoing monitoring and adjustment of the plans.

In order to ensure that key goals of the plans are met, the plans must also be nimble - showing that any major problems (such as precipitous drops in population or habitat condition) will be identified and can be addressed quickly. The plans include a Habitat Objectives Table, Habitat Assessment Framework, and Assessment, Inventory and Monitoring procedures that provide for data collection and measurement of conditions and analysis. These elements of the plans yield detailed information to show that the plans are working. They can also feed into the plans' adaptive management framework, which leads to immediate action when certain triggers are met.

This constellation of tools is needed to demonstrate to FWS that its finding that listing is not warranted continues to be justified, including during the review expected no later than five years from the date the applicable records of decision were signed. While aspects of the adaptive management framework could be clarified going forward, its elements must be maintained.

³ See 40 C.F.R. §§ 1508.8, 1502.14, 1502.16.

⁴ See 43 C.F.R. §§ 1701, 1732(b).

⁵ See, e.g., BLM Handbook, H-1794-1 Mitigation (P) (Dec. 22, 2016), <https://www.blm.gov/sites/blm.gov/files/uploads/BLM%20H-1794-1%20Mitigation%20FINAL.docx>, and BLM Manual, MS-1794 Mitigation § 1.6.E.2 (Dec. 22, 2016), https://www.blm.gov/sites/blm.gov/files/uploads/BLM_MS-1794%20Mitigation%20FINAL.docx

⁶ See U.S. Dep't of Interior Manual, 600 DM § 6.5, Landscape-Scale Mitigation Policy (Oct. 23, 2015) <https://www.doi.gov/sites/doi.gov/files/uploads/TRS%20and%20Chapter%20FINAL.pdf>

Any changes to the 2015 Sage-Grouse Plans must be scientifically-supported.

We understand and support the need for additional clarifications regarding implementation of the 2015 Sage-Grouse Plans, including, for instance, updating habitat maps, elaborating on standards for mitigation and detailing various aspects of the monitoring and adaptive management process. Nonetheless, alterations to the plans, including both clarifications and more substantive changes, must be consistent with scientific standards.

For instance, as detailed by the Western Association of Fish and Wildlife Agencies, focusing on population objectives or using captive breeding, are unlikely to be successful as tools to measure the status of the species or support its health.⁷

In addition, current aspects of the plans, such as surface disturbance caps and lek buffers, are based on scientific consensus and cannot simply be ignored or reduced without accounting for the likely impacts from activities that would then harm grouse habitat, such as energy development. The scientific basis for the key provisions of the 2015 Sage-Grouse Plans, including the certainty in how they are applied, is the reason that FWS could rely on the plans to find that listing under the Endangered Species Act was no longer warranted. Any changes to the plans must meet this high standard.

Provide for public participation in implementation of the report.

Both the Secretary's Memorandum and the Report provide that BLM should work with the Sage-Grouse Task Force to engage with stakeholders, but does not commit the agency to public outreach or engagement. The Sage-Grouse Task Force is a key part of implementing the 2015 Sage-Grouse Plans and, as a vital partner in developing the plans, will also play a similar role in any changes. However, the Task Force is part of the Western Governors Association and does not owe the same obligation to the public as the BLM, which is obligated under its statutory mandate to manage the public lands for all Americans according to principles of multiple use and sustained yield.

BLM is subject to a multiple-use mandate, which prohibits the Department of the Interior from managing public lands primarily for energy development or in a manner that unduly or unnecessarily degrades other uses. *See* 43 U.S.C. § 1732(a).⁸ Instead, the multiple-use mandate directs the agency to achieve "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations." 43 U.S.C. § 1702(c). Further, as co-equal, principal uses of public lands, outdoor recreation, fish and wildlife, grazing, and rights-of-way must receive the same consideration as energy development. 43 U.S.C. § 1702(l). The context of BLM's decisions requires the proactive engagement of the public.

⁷ *See* WAFWA Sage-grouse White Papers, available at: http://www.wafwa.org/initiatives/sagebrush_ecosystem_initiative/

⁸ *See also New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009) ("It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses.").

Where actions trigger the application of the National Environmental Policy Act (NEPA), BLM must make all diligent efforts to engage the public. NEPA requires BLM to meaningfully engage the public in analyzing the environmental effects of proposed federal actions, including soliciting and considering public comments, making “diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 C.F.R. § 1506.6(a). However, in this situation, BLM should not seek to avoid or delay public engagement unless or until there is a formal NEPA process.

The 2015 Sage-Grouse Plans were created with the input of millions of comments and extended efforts from a host of interested members of the public. Although the public was not provided an opportunity to provide input into the 60-day review that led to this report, numerous members of the public still echoed the input of the Western Governors Association’s Sage-Grouse Task Force in urging that the fundamental structure of the plans be preserved. The BLM should not exclude the public from the evaluations that are being conducted pursuant to the recommendations in the report. Rather, the agency should provide opportunities for meaningful public participation as it considers and implements the report.

We appreciate the BLM’s efforts to both implement and improve the 2015 Sage-Grouse Plans and hope these recommendations will be helpful. We would welcome the opportunity to discuss this letter and the ongoing process further at your convenience.

Sincerely,

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cc: James Cason
Kathleen Benedetto
Katherine MacGregor

From: Nada Culver
To: Margaret_bradley@ios.doi.gov
Subject: submission of Petition under the Administrative Procedure Act
Date: Thursday, September 14, 2017 12:09:24 AM
Attachments: [APA Petition - oil and gas fiscal policies --9-14-17 - final.pdf](#)

Dear Ms. Bradley – Attached please find a Petition to the Department of the Interior and Bureau of Land Management requesting rule-making and guidance pursuant to the Administrative Procedure Act. This Petition seeks action to reform the fiscal terms and management processes applicable to the onshore oil and gas program. The Petition is submitted by Dan Bucks, the Powder River Basin Resource Council and The Wilderness Society. We request a prompt response and appreciate the Department of the Interior’s attention to this matter.

It is our understanding that you can accept this Petition on behalf of the Secretary and the Department. We would appreciate confirmation of your receipt and ability to accept our submission. I will also be at meetings at the Department on Thursday, September 14th, and would be able to deliver this document in person if that would be preferable.

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**PETITION TO THE DEPARTMENT OF THE INTERIOR AND BUREAU OF LAND MANAGEMENT TO
INITIATE RULE-MAKING AND ISSUE GUIDANCE TO MODERNIZE THE ONSHORE OIL AND GAS
PROGRAM FOR THE BENEFIT OF ALL AMERICANS**

Submitted September 14, 2017

I. Executive Summary

This petition is submitted under the Administrative Procedure Act, which gives citizens the right to request action from a federal agency to issue, repeal or amend a rule, and entitles them to a prompt response. The petition asks the Department of the Interior to reform the fiscal terms and management processes regarding oil and gas leasing to yield the legally-required fair market value return to the American people for the resources they own and to fulfill the Department's multiple use mandate. The proposals made here are intended to maintain oil and gas production from public lands most suitable for that purpose while generating greater revenues and greater public benefits through more productive use of certain lands for other commercial, recreational, and conservation uses.

These beneficial results will result from more rigorous, market-oriented fiscal terms and management practices that ensure public lands are efficiently, productively and appropriately used for public purposes and that the waste and neglect of resources due to speculative holding of chronic, non-producing oil and gas leases are minimized if not eliminated. The proposals will not detract from oil and gas production. To the contrary, the cumulative effect of the proposed changes is to better ensure that economically-feasible, oil and gas leases end up in the hands of diligent and competent producers of oil and gas, and are not held unused by non-producing speculators.

The problem: current practices tie up lands without producing energy or revenues.

Poor, indecisive and inefficient Interior management of oil and gas resources provides hidden subsidies to speculators who do not diligently pursue development. Because Interior often fails to actively manage public lands with dormant oil and gas leases for other public uses, it effectively denies the public—persons, organizations, and companies—the certainty they need to use these lands for beneficial economic, conservation, recreational or other purposes. When the federal agencies leave lands in limbo because of the remote possibility that a long dormant, low-value oil or gas lease might be developed some day, uncertainty reigns, and neither the public nor other industries can make long-term commitments to alternative uses of those lands. The economic, social and environmental benefits of those other uses are thus lost.

Below market royalty and rental rates, low minimum lease bids, inadequate bonds, lengthy and lax lease suspensions, unjustified reinstatements of lapsed leases, and leasing low potential lands encourages speculators to tie up federal lands often for decades—preventing decisions to either expeditiously develop the oil and gas resources for energy or, alternatively, maximize the benefits flowing from other uses of public lands. By subsidizing and enabling dormant leases, current practices tie up lands without producing energy or revenues for the American people and simultaneously preventing those lands from being used for other purposes. Scattered in checkboard fashion across the American West are neglected public lands not utilized for the

greatest good because of Interior's mismanagement and misguided subsidies for non-beneficial uses. Interior's neglect of these lands fails the multiple use standard of federal law.

The solution: charging market rates and discouraging unproductive leasing will yield the right balance of uses and returns.

To provide the greatest benefit to the American public, Interior should incentivize the timely production of oil and gas from public leases by charging market rates at every stage of the leasing and production process, and also decisively managing land and resources to support the most appropriate combination of multiple uses. Federal leases are issued for terms (ten years) that are longer than those used by many states or private parties so the industry already has ample time to develop leased lands. Interior, as manager of all leases of public lands and minerals, should focus on making sure those leases are ended if they are not being used productively and ensure leases are yielding a fair return while they are tying up public lands. Accordingly, this petition asks Interior to more effectively meet the standards of multiple use management and a fair return of revenues to the public by:

1. Charging higher, market-tested royalty rates (such as those used by states and the private sector) instead of the inadequate, subsidy-providing 12.5% rate;
2. Increasing rental rates on federal leases to a level sufficient to incentivize oil and gas production so that the percentage of federal leases that produce energy would rise well-above the current, unsatisfactory levels (e.g. only 50% in Rocky Mountain States);
3. Increasing minimum lease bids, as recommended by the Congressional Budget Office, to deter companies from purchasing leases for speculative purposes only;
4. Updating bonding requirements to reflect current costs associated with reclamation and restoration of lands used for oil and gas production;
5. Reforming lease suspension practices to establish rigorous standards guaranteeing that undeveloped oil and gas leases are either diligently placed into production or cancelled so that the land can be managed for other beneficial uses;
6. Updating lease reinstatement practices to require consistent and higher standards of justification for reinstating lapsed leases, with minimal tolerance for defaults on rental payments; and
7. Stopping the leasing of lands with low potential for oil and gas production and managing those lands for other purposes of greater benefit to the public.

The combination of these policies will generate millions of dollars annually for the American people, as well as states and local communities that benefit from federal oil and gas production. As numerous economic and fiscal studies indicate, higher royalty rates will generate large amounts of additional revenue with negligible impact on production. Indeed, several of the other changes proposed here will ultimately incentivize more timely production of oil and gas from federal lands and minerals, which raises the prospect for a net increase in energy production overall. Finally, and more importantly, a diversity of beneficial uses of federal land will expand as the waste and neglect of lands with dormant, speculative leases decline. Overall, better management of public lands will result in better uses in the right places, including renewable energy, recreation and conservation. More rigorous, decisive and efficient management will

greatly increase the revenues and benefits to the American people from public lands and minerals.

II. Context and Overview

Petitioners request the Department of the Interior (Interior) and Bureau of Land Management (BLM) develop regulations and policies to update the fiscal aspects of its management of onshore oil and gas leasing and development.

On April 15, 2015, BLM issued an Advanced Notice of Proposed Rulemaking (ANOPR) seeking input on potential changes to fiscal policies related to its onshore oil and gas leasing program. As the agency stated: “The anticipated updates to BLM’s onshore oil and gas royalty rate regulations and other potential changes to its standard lease fiscal terms address recommendations from the Government Accountability Office (GAO), and will help ensure that taxpayers are receiving a fair return from the development of these resources.” 80 Fed. Reg. 22148 (Oil and Gas Leasing; Royalty on Production, Rental Payments, Minimum Acceptable Bids, Bonding Requirements, and Civil Penalty Assessments). BLM should follow up on this recognition, as well as similar findings related to other aspects of managing its onshore oil and gas program, to both provide a fair return to the taxpayers who own these resources and also better fulfill its broader obligations as stewards of our public lands. BLM should issue updated policies and commence or continue rulemakings to address these major inadequacies in its onshore oil and gas program.

This Petition identifies two types of policies that need to be updated:

- (1) Revenue-generating policies, which involve payments that are being made but not at sufficient levels to ensure a fair return to the American people and to encourage timely development of resources. These policies include royalty, rental and bid rates.
- (2) Hidden subsidies, which are causing lost revenues needless giveaways to the oil and gas industry and are undermining multiple use management. These policies include bonding rates, lease suspensions, lease reinstatements and leasing low potential lands.

Through the requested rulemaking, Interior and BLM have an opportunity to structure a fiscally responsible oil and gas program that reflects multiple use and sustained yield in the 21st century. BLM must modernize fiscal elements of its oil and gas program to responsibly steward our public lands and ensure a fair return to American taxpayers.

BLM’s onshore oil and gas leasing program has been plagued with economic and environmental problems, stemming from low leasing rates, low royalty rates, low bonding rates and high emissions and gas waste. The Government Accountability Office has repeatedly concluded that “the inflexibility of royalty rates to changing oil and gas prices has cost the federal government billions of dollars in foregone revenues.” GAO-08-691 (Oil and Gas Royalties) at 16. Furthermore, GAO has found that Interior can recoup these revenues with “negligible” impacts on oil and gas production. GAO-17-540 (Oil, Gas, and Coal Royalties) at 16.

Additional systemic problems contribute to BLM's failure to recover revenue for federal resources and ensure producers are diligently developing leased lands. For example, inappropriate use of lease suspensions and unitization allows industry to hold leases indefinitely without production. As of March 2015, there were 3.25 million acres of federal minerals in suspended leases, many dating back to the 1980s and 1990s.¹ Because BLM regularly declines to adopt conservation management for lands encumbered by leases, holding leases in undue suspension is tantamount to removing those lands from multiple use. Similarly, the thousands of idle and orphaned federal wells could be better addressed by sufficient bonding, but instead are risking environmental damage and putting a financial burden on the BLM. Through this rulemaking process, BLM should take the opportunity to address these issues in a way that makes sound economic *and* environmental sense.

BLM is modernizing into an agency that embraces conservation as an integral element of multiple use and sustained yield. As provided in the Federal Land Policy and Management Act (FLPMA), 17 U.S.C. § 1701, et seq., multiple use management does not require the balance of uses on every tract of public land, but rather a combination of resource conservation and uses to “best meet the present and future needs of the American people.” The notion that resource development must be balanced with conservation management is explicit in the definition of “multiple use”:

[T]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; . . . *the use of some land for less than all of the resources*; a combination of balanced and diverse resource uses that takes into account the long term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, *and natural scenic, scientific and historical values*; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the lands and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

43 U.S.C. § 1702(c) (emphasis added).

Managing and planning for multiple use and sustained yield necessarily means that there must be a significant portion of public lands devoted to conservation in order to sustain public resources. Sustained yield does not support a focus on outputs from resource extraction or industrial uses. FLPMA specifically directs BLM to maintain in perpetuity “a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.” FLPMA, 43 U.S.C. § 1702(h). Therefore, sustained yield requires BLM to sustain high-level yields of natural landscapes, scenic resources, clean air and water, wildlife, night skies, soundscapes, and opportunities for solitude, quiet-use, and primitive types of recreation.

BLM's current oil and gas leasing policies recognize that oil and gas development is but one use of the public lands which should be balanced with other multiple uses and considered on equal

¹ Data accessed through LR2000.

ground. Instruction Memorandum 2010-117 explicitly states that in some cases, oil and gas leasing is inconsistent with protection of other public lands resources and values. IM 2010-117 goes on to affirm that, “**Under applicable laws and policies, there is no presumed preference for oil and gas development over other uses.**”

Courts have confirmed the agency’s discretion and obligation to consider protecting environmental values. For example, in *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683 (10th Cir. 2009), the court rejected the BLM’s argument that its analysis under the National Environmental Policy Act (NEPA) did not have to include an alternative that closed Otero Mesa to oil and gas drilling because doing so would violate the its multiple use mandate. *Id.* at 710. Noting that “a delicate balancing is required,” the court explained that “[d]evelopment is a *possible* use, which BLM must weigh against other possible uses – including conservation to protect environmental values.” *Id.* (emphasis in original).

BLM’s onshore oil and gas program must be modernized to ensure that the agency is meeting its broader obligations to the American people. Public lands should not be automatically ceded to the oil and gas industry upon demand. Where public lands and minerals are turned over to the oil and gas industry, other resources must be protected and responsible development diligently pursued.

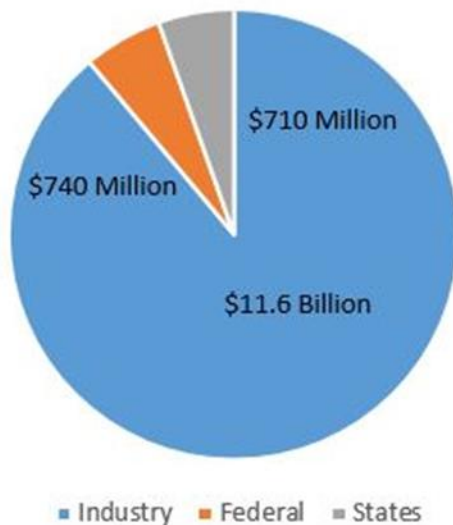
As has been shown by numerous studies, many aspects of the program are outdated and inadequate; key rates have not been updated for decades. Consequently, BLM is conservatively leaving millions of dollars on the table every year that should be compensating the American taxpayer for turning public lands and minerals over to the oil and gas industry. Instead of providing a fair return to taxpayers, oil and gas companies are reaping the benefits of the increased levels of oil and gas production from public resources. State, private and even offshore rates of return are significantly higher, showing that the BLM’s approach can and should be improved.

A recent study found that, due to many of these outdated policies, including royalty rates, the oil and gas industry shares a very small percentage of what they collect from producing federal minerals with taxpayers. In FY 2016, companies developing federal lands and minerals gained some \$11.6 billion selling oil and gas from public lands and minerals, but BLM collected only \$1.4 billion in royalties.² The resulting half of this portion shared with states and counties is thus unfairly decreased, as well; these are unnecessarily small pieces of the pie.

² <https://www.gao.gov/assets/690/685335.pdf>; see also <http://westernvaluesproject.org/rigged-taxpayers-pay-for-big-oil-companies-profits-from-public-lands/>

Federal Onshore Oil and Gas Royalty Revenues

FY 2016



Overall, modernizing the policies that are central to the federal onshore oil and gas program will boost revenues without hindering development while better fulfilling the BLM’s legal obligations under FLPMA and the Mineral Leasing Act (MLA), as discussed in more detail below.

III. Interests of Petitioners

All Americans have a vested interest in the management and use of their public lands and minerals. To the extent that these public resources are being turned over to the oil and gas industry, taxpayers are entitled to a fair return. Lands and minerals held by the oil and gas industry generally deprive citizens of the use and enjoyment of public and private split estate lands and resources for hunting, fishing and other types of recreation, solitude, clean air and water, renewable energy development, grazing, and other activities to support their own businesses. BLM’s obligations including ensuring this interference with multiple use is justified. The parties submitting this petition are seeking to enforce those obligations, because the current onshore oil and gas program does not fulfill them.

Dan Bucks is an expert in public revenue and land management issues with over forty years of experience in state government administration. Over this period, he advised elected officials on natural resource revenue and growth management policies. He administered Montana’s state and local revenue laws for coal, oil, gas, and other minerals. He initiated and oversaw Montana’s participation in the joint federal-state mineral auditing program. He actively engaged Interior’s policy making processes from 2015 forward on mineral leasing and royalty issues and testified to Congress on such matters. He has been a witness to four decades of changes in energy production on the Northern Plains—from the growth in Powder River Basin coal, to the Bakken oil boom in Bakken and the emergence of commercial wind farms. From this experience, he acquired a deep understanding of the relationship of these changes to the human and natural environment. He served as Director (2005-2013) and Deputy Director (1981-1988) of the Montana Department of Revenue, Executive Director of the Multistate Tax Commission (1988-

2004), Director of Science and Natural Resources, National Conference of State Legislatures (1980-81), Consultant to the Montana Governor's Office (1979-80), Bush Leadership Fellow (1977-1979) South Dakota State Planning Commissioner (1974-77), and South Dakota Director of Executive Reorganization (1971-1974).

The **Powder River Basin Resource Council** ("Resource Council") is a grassroots community conservation and family agriculture organization in Wyoming. Resource Council members live throughout the state of Wyoming, but the majority of them are rural landowners, many of whom live in a split estate situation with federally-controlled minerals underlying their lands. Resource Council members thus have a keen interest in the BLM's management of oil and gas resources.

Marjorie West is a member of the Resource Council. Along with her husband, Bill, Marge owns a ranch on Spotted Horse Creek in the Powder River Basin of Wyoming, where they grow dry land wheat and raise cattle. Her ranch was homesteaded by Bill's father and expanded by the family over the generations. The Wests' ranch includes a combination of private and federal oil and gas, and the family has been living with the impacts of development of these resources since the coalbed methane boom in the early 2000s. Now that coalbed methane has busted, the Wests are dealing with idle and orphaned wells that have been left on their land.

Leland (L.J.) Turner and his family own a 10,000-acre ranch near the town of Wright, Wyoming in the heart of the one of the largest oil and gas fields in the country. L.J.'s grandfather homesteaded the ranch in 1918 and it has been in the family ever since. The ranch currently has sheep and cattle, and is impacted by oil and gas development from a mix of privately owned and federally owned minerals.

The Wilderness Society is the leading conservation organization working to protect wilderness and inspire Americans to care for our wild places. Founded in 1935, and now with more than one million members and supporters, The Wilderness Society is committed to sound management of our shared national lands, which includes recognizing the values of some lands for conservation and recreation, while also continuing responsible energy development.

IV. Policies requiring new rulemakings

A. Revenue-generating Policies

1. BLM has the duty and authority to modernize its revenue-generating policies for onshore oil and gas development.

BLM has a legal obligation under FLPMA, the MLA and related authorities to modernize its revenue-generating policies for onshore oil and gas development. Under FLPMA, BLM must ensure that American taxpayers "receive fair market value of the use of the public lands and their resources. . . ." 43 U.S.C. § 1701(a)(9). This requirement is also found in the MLA, which demands regular adjustments to royalty and rental rates and minimum bids, in order to "enhance financial returns to the United States. . . ." 30 U.S.C. § 225(b)(1)(B); *see also id.* §§ 225(b)(1)(A), 225(d) (authorizing royalty and rental rates increases). Thus, BLM has a clear duty to update its revenue-generating policies and must do so now, given how outdated those

policies have become and the significant amount of revenue that is not going to American taxpayers.

Congress never intended for onshore royalty rates to remain stagnant. That is why onshore royalties are set “at a rate of *not less than* 12.5 percent. . . .” 30 U.S.C. § 225(b)(1)(A) (emphasis added). This rate represents a floor which Interior must adjust upward as oil and production rises and to avoid the oil and gas industry enjoying windfall profits that rightfully belong to the American people. For instance, in 2009, Interior raised the offshore royalty rate from 12.5 percent to 18.75 percent, in response to rising oil prices.³ However, even though onshore oil production has nearly doubled since 2008, the onshore royalty rate has not changed.⁴

BLM has a similar duty to increase rental rates. All federal leases are “conditioned upon payment . . . of a rental *not less than* \$1.50 acre per acre” for the first five years and \$2.50 per acre for the remaining years. 30 U.S.C. § 225(d) (emphasis added). These rates are well below what is currently needed to incentivize oil and gas development, as less than half of the leased acres on public lands are actually producing oil or gas.⁵ As the Congressional Budget Office (CBO) recently explained: “A higher rental fee increases the cost of holding a lease, giving leaseholders an incentive to either explore parcels or return them to the government. In practice, the current incentive is weak because the fees are small relative to the cost of developing a lease.”⁶ Thus, current rental rates are not creating the necessary incentives to maximize revenue from the development of publicly owned oil and gas resources.

Finally, BLM must increase minimum bids, which are encouraging wasteful speculation by companies that are not diligently developing their leases. Under the MLA, minimum bids must be adjusted to “enhance financial returns to the United States. . . .” 30 U.S.C. § 225(b)(1)(B). Yet, the minimum bid for a competitive lease is just \$2.00 per acre. This is well-below the level needed to deter companies from purchasing leases for speculative purposes. According to CBO, over one-quarter of competitive leases sold for the minimum bid between 2003 and 2012.⁷ A separate analysis found that over half of the companies that currently hold federal leases in the Rocky Mountain states are not even recognized as “active” operators by state oil and gas commissions.⁸ Not only would higher minimum bids help deter these companies from locking-up public lands to the detriment of other income-generating activities, like outdoor recreation, but they would also generate more revenue for taxpayers:

³ Congressional Research Service, Mineral Royalties on Federal Lands: Issues for Congress at 4 (Jan. 2015), available at

https://www.everycrsreport.com/files/20150119_R43891_3bd50f51ada1b53821153ce674b442bc7df659de.pdf.

⁴ Office of Natural Resources Revenue, Production Data, available at <https://onrr.gov/About/production-data.htm>.

⁵ BLM, Oil and Gas Statistics, available at <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics#quickset-programs-oil-and-gas-statistics> 5.

⁶ Congressional Budget Office, Options for Increasing Federal Income from Crude Oil and Natural Gas on Federal Lands at 8, available at <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51421-oil-and-gas-options.pdf>.

⁷ *Id.* at 18.

⁸ Western Values Project, Rugged: Industry already has the keys to the kingdom, available at <http://westernvaluesproject.org/industry-already-has-the-keys-to-the-kingdom/>.

Raising the minimum bid in an auction to \$10 per acre and requiring that same amount to be paid for parcels leased noncompetitively would boost net federal income by an estimated \$50 million over 10 years, CBO estimates. That effect is the net result of increases in federal income from higher bonus bids for some parcels, including all parcels leased noncompetitively, and decreases in rental and royalty income for parcels that attract no bids (though such parcels would have generated relatively little production and royalty income).⁹

For all of these reasons, BLM has an obligation under FLPMA and the MLA to modernize its royalty and rental rates and minimum bids, and to ensure that American taxpayers are receiving a fair return from onshore oil and gas development.

2. BLM's revenue generating policies are woefully outdated and no longer ensure that the American people are receiving fair market value for the use of public lands and resources.

BLM's revenue-generating policies for oil and gas development are woefully outdated, have not kept pace with inflation, and are weaker than equivalent policies for offshore oil and gas development and those used by many western states. As a consequence of these weak and outdated fiscal policies, CBO predicts that taxpayers could miss out on roughly \$1 billion in revenue over the next decade.

BLM has never updated its royalty rates for onshore oil and gas development. They have remained at 12.5% ever since 1920, when Congress first passed the Mineral Leasing Act. Since that time, oil and gas development – along with the oil and gas industry's profits – have grown exponentially. Oil production from onshore oil and gas wells has soared in recent years – more than doubling since 2007.¹⁰ And there are nearly twice as many active wells on public lands – more than 94,000 – as there were 30 years ago.¹¹ Yet, in spite of this surging production, Interior has made little effort to increase royalty rates to ensure that taxpayers are getting their fair share.

Rental rates and minimum bids have also not been updated since 1987, and have not kept up with inflation. According to Taxpayers for Common Sense (TCS), a nonpartisan budget watchdog organization, rental rates

should at the least be raised to follow inflation, and adjusted annually by regulation. According to the Bureau of Labor Statistics inflation calculator, \$1.50 in 1987 is now \$3.12, and \$2.00 is now \$4.17. An immediate increase in rental rates to these levels would not only increase income to ensure fair return to taxpayers, but would also create incentive for timely development rather than speculation on federal leases.¹²

⁹ CBO, Options for Increasing Federal Income from Crude Oil and Natural Gas on Federal Lands at 32.

¹⁰ ONRR, Production Statistics, available at <https://onrr.gov/About/production-data.htm>.

¹¹ BLM, Oil and Gas Statistics, available at <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics>.

¹² TCS, Comments to the Bureau of Land Management (BLM) on the Oil and Gas Leasing; Royalty on Production, Rental Payments, Minimum Acceptable Bids, Bonding Requirements,

TCS recommended similar adjustments for minimum bids. Not only would this generate increased revenues for taxpayers, it would also deter companies from engaging in wasteful speculation.

Interior's failure to modernize the fiscal structure for onshore development contrasts sharply with its approach for offshore development. In 2007, Interior initiated a series of updates to its offshore fiscal policies, "in an effort to ensure a fair return on oil and gas resources."¹³ These included royalty rate increases of 50 percent, escalating rental rates in order "to encourage faster exploration and development of leases" and minimum bid increases "to account for increases in oil prices. . . ."¹⁴ These changes are expected to generate several billion dollars in additional revenue over the next 30 years, and thus far, "demand [has] remained strong for newly offered leases. . . ."¹⁵

Private mineral leases typically have a royalty rate of 18 percent to 20 percent. Several western states have also taken steps to modernize their fiscal policies for oil and gas development, and to ensure that taxpayers are receiving a fair return on the development of publicly owned oil and gas resources. For example, in February 2016, the State of Colorado increased its royalty rate from 16.67 percent to 20 percent.¹⁶ Since then, demand for state leases in Colorado has actually increased by 22 percent, based on the average number of acres leased per sale.¹⁷ State officials agree with this conclusion, which is not limited to Colorado:

according to state officials, there had been no slowdown in interest in new leases as of August 2016. In fact, Colorado state officials said they were unsure whether the higher royalty rate played much of a role in companies' decision making. Additionally, Texas officials told us that over 30 years ago, Texas began charging a 25-percent royalty for most oil and gas leases on state lands, and this increase has not had a noticeable impact on production or leasing.¹⁸

At this point, federal onshore royalty rates are lower than the rates used by every major western oil and gas producing state.¹⁹ Thus, Interior's fiscal policies must be modernized, in keeping with recent changes for offshore development and by several western states.

3. BLM's outdated fiscal policies are costing taxpayers millions in revenue every year.

and Civil Penalty Assessments (June 19, 2015), available at <http://www.taxpayer.net/library/article/comments-to-blm-on-oil-and-gas-rulemaking>

¹³ GAO, Actions Need for Interior to Better Ensure a Fair Return 13 (Dec. 2013), available at <http://www.gao.gov/assets/660/659515.pdf>.

¹⁴ *Id.* at 13-15.

¹⁵ *Id.* at 14.

¹⁶ *Id.* at 21.

¹⁷ Colorado State Land Board, Oil & Gas Auction Information and Results, available at <https://docs.google.com/document/d/1A8yfmfXmcMtx802wRxktdSuzkFeCrF5tE9XT8ms3Qa0/edit>.

¹⁸ *Id.* at 22.

¹⁹ *Id.* at 9.

Raising federal onshore royalty, rental and bid rates to match or exceed federal offshore rates and rates charged on state and private lands would increase overall revenues and receipts generated by the federal onshore oil and gas program. Recent studies find that outdated federal onshore rates are costing taxpayers tens of millions of dollars in revenues every year.

Royalties, rents and bids are the primary source of revenue for the federal onshore oil and gas program. In FY 2016, the Office of Natural Resources Revenue (ONRR) collected \$1.4 million in royalty payments, \$123 million in bonus bids and \$21 million in lease rental payments. Royalties provide the largest share of federal onshore oil and gas receipts.

Recent studies also find that raising the federal onshore royalty rate to levels consistent with state and private lands leases would generate tens of millions of dollars in additional revenues each year. An April 2016 CBO study found that raising the royalty rate to 18.75 percent would increase net ONRR income by \$200 million over the next 10 years, with an identical amount going to the states.

An earlier, 2011 report by Enegis, LLC examined the effect of increasing the royalty rate to 16.67, 18.75 and 22.5 percent. Like the CBO study, the Enegis report found that net revenue would increase in each of the three scenarios, from \$125 million to as much as \$939 million over the next 25 years. Both the CBO and Enegis reports accounted for any decrease in leasing or production that might result from increasing federal rates.

Raising federal onshore rental and bid rates would also increase net revenues. In addition to analyzing royalty rates, the April 2016 CBO Report estimated that raising the minimum bid to \$10/acre (for competitive and non-competitive leases) would increase revenues by \$50 million over the next 10 years. This same study found that increasing the rental rate by \$6/acre/year would generate an additional \$200 million.

Raising the federal royalty, rent and bid rates would significantly increase revenues and receipts generated by the onshore oil and gas program. If these rates were updated to reflect rates charged on state and private lands, the federal onshore program would likely gain at least half a billion dollars in net revenues over the next decade, with similar amounts going to the states.

4. There are significant revenue-related benefits to modernizing the onshore program's fiscal policies.

Updating royalty, rent and bid rates would also confer other, less obvious benefits. ONRR splits half of all royalty, bid and rental revenues with state governments based on where federal leases are located. So state governments, many of which are struggling with budget shortfalls caused by the downturn in energy prices, would realize about half of increased revenues from reforming federal onshore rates.

Increasing bid and rental rates would also discourage speculation and encourage diligent development of federal leases. On average, operators on federal lands drill on only 1 in 10 leases issued by the BLM. At present, there are more than 16,000 unused, non-producing oil and gas leases on federal lands, covering more than 14 million acres. By making it more expensive to

speculate, increasing bid and rental rates would encourage operators to drill and explore these unused leases, putting more leases into production and generating more royalty revenues.

Finally, by discouraging speculation, increasing bid and rental rates would help address opportunity costs associated with public lands oil and gas leasing. In making planning decisions, BLM often declines to manage lands with oil and gas leases for other resources and resource values, even when leases in these areas are unused and non-producing. Raising bid and rental rates would incentivize companies to purchase leases where they actually intend to develop, so that other, un-leased areas could be devoted to other important public lands uses. In this way, increasing bid and rental rates would help reduce opportunity costs associated with speculative leasing.

5. New revenue-generating regulations and policies

BLM should act on its own findings, as well as those of numerous external reviewers, and commence new rulemakings to update its royalty, bid and rental rates.

B. Hidden Subsidies

1. BLM has the duty and authority to update its policies regarding bonding rates, lease suspensions and reinstatements, and leasing low potential lands.

As noted above, FLPMA requires that BLM ensure a fair return for use of public lands and resources. BLM also has an obligation to ensure that the public lands are managed in accordance with principles of multiple use and sustained yield, such that the variety of uses and users of the public lands are given due consideration. Oil and gas leasing and development may not be treated as the dominant use of public lands at the expense of these statutory mandates.

Further, in leasing public resources, oil and gas companies agree to diligently develop those resources while also protecting the other resources of the public lands, while acknowledging the authority of the BLM to require such diligence. As stated in Section 4 of BLM's standard lease terms (Form 3100-011), when leasing public lands:

Lessee must exercise reasonable diligence in developing and producing, and must prevent unnecessary damage to, loss of, or waste of leased resources. Lessor reserves right to specify rates of development and production in the public interest...

In addition, BLM's regulations and guidance set out obligations that require BLM to update these policies, as discussed in detail below.

2. BLM's policies on bonding rates, lease suspensions and reinstatements, and leasing low potential lands are essentially providing subsidies to the oil and gas industry and encouraging the speculative holding of dormant leases.

By not updating and clarifying policies on bonding, lease suspensions, lease reinstatements and leasing low potential lands, BLM is subsidizing the oil and gas industry's costs to hold inactive

leases for excessive periods and to operate on public lands – in spite of the billions of dollars in industry profits from public lands drilling – and undermining the industry’s obligations of diligent development. The failure to update and clarify these policies especially encourages non-active speculators to retain a large share of leases involving substantial land areas in an undeveloped state for years and even decades on end.

(a) Bonding

BLM’s regulations require that bond amounts are to be set:

...to ensure compliance with the act, including complete and timely plugging of the well(s), reclamation of the lease area(s), and the restoration of any lands or surface waters adversely affected by lease operations after the abandonment or cessation of oil and gas operations...

43 C.F.R. § 3104.1(a). BLM’s guidance provides that the regulatory levels are minimums and also for adjusting bonding levels based on different risk factors that may arise on existing leases or existing unit, statewide or nationwide bonds. However, the agency’s practice is to charge the regulatory minimum.²⁰

BLM’s bonding policies have not been updated in almost sixty years. Minimum bond amounts set in statute no longer reflect the true cost of reclamation or inflation and the agency’s review and tracking procedures for determining bond adequacy and the government’s own liabilities fall far short of where they need to be. As a result, orphaned and abandoned wells are left unclaimed while American taxpayers are left to cover the costs of the oil and gas industry’s negligence.

The bond minimum of \$10,000 for individual bonds was last set in 1960, and the bond minimums for statewide bonds—\$25,000—and for nationwide bonds—\$150,000—were last set in 1951. According to a 2010 GAO report, “If adjusted to 2009 dollars, these amounts would be \$59,360 for an individual bond, \$176,727 for a statewide bond, and \$1,060,364 for a nationwide bond.”²¹ Based on inflation alone, current bond minimums are far lower than originally intended. Taking into account the increasing costs of reclamation further highlights the benefits given to oil and gas companies. A report by Inside Energy shows that the cost of reclaiming a single well can cost up to \$527,829 and that some newer, deeper wells may cost more than \$17 million per well to reclaim.²² It is important to note that minimum individual bond amounts are set per lease not per well. With many leases containing multiple pads and multiple wells per pad, that \$10,000 is even more inadequate. A later 2011 GAO report concluded, “Specifically, the minimum bond amounts—not updated in more than 50 years—may not be sufficient to encourage all operators

²⁰ See, e.g., BLM overview of bonding, setting out only the minimum amounts as amounts to be posted. <http://www.blm.gov/es/st/en/prog/minerals/bonds.html>

²¹ GAO-10-245

²² Stephanie Joyce, Wyoming Public Radio and Jordan Wirfs-Brock. (2016, October 17). The Rising Cost Of Cleaning Up After Oil And Gas. Retrieved July 17, 2017, from <http://insideenergy.org/2015/10/01/the-rising-cost-of-cleaning-up-after-oil-and-gas/>

to comply with reclamation requirements.”²³ And BLM field office managers agree. BLM officials interviewed by GAO at 12 of the 16 field offices agreed that these minimum bond amounts are inadequate for managing potential liability.²⁴ This is because the minimum amounts are not sufficient to serve as an incentive to encourage operators to comply with reclamation requirements and the cost to reclaim a well site far outweighs the value of the existing bonds. Unfortunately, this creates a perverse financial incentive for an oil and gas operator to walk away from a well and leave it orphaned, forcing taxpayers to pick up the plugging and reclamation tab.

In addition to staggeringly low bond amounts, the BLM is not properly tracking or reviewing bond adequacy. According to GAO, “limitations with the data system BLM uses to track oil and gas information on public land restrict the agency’s ability to evaluate potential liability and monitor agency performance.”²⁵ To manage potential liability BLM has policies for reviewing bond adequacy and for managing idle wells (wells that have not produced for at least 7 years) and orphan wells (wells that generally have no responsible or liable parties). These policies direct field offices to develop an inventory and rank and prioritize wells for reclamation. According to a 2011 GAO report, “BLM has not consistently implemented its policies for managing potential liabilities.”²⁶ As an example, GAO notes that according to their own survey of field offices, as of 2009 there were approximately 2,300 idle wells that had been inactive for seven or more years. However, Interior databases showed the number of idle wells was nearly double that amount.²⁷ Moreover, states like Wyoming consider a well idle after a lack of production of only one year. Waiting until year seven not only underestimates the number of wells, but also makes it more likely that the oil and gas operator has already abandoned the well site, and the wait makes it more difficult to start collection from a leaseholder or other responsible party.

The 2015 ANOPR referenced above stated: “the intent of any potential bonding updates would be to ensure that bonds required for oil and gas activities on public lands adequately capture costs associated with potential non-compliance with any terms and conditions applicable to a Federal onshore oil and gas lease.” The ANOPR further acknowledged that the current minimums “do not reflect inflation and likely do not cover the costs associated with the reclamation and restoration of any individual oil and gas operation.”²⁸ The current bonding rates and practices allow oil and gas companies to develop public resources without having to post sufficient bonds or otherwise reclaim drilling sites.

(b) Lease suspensions

²³ Government Accountability Office. (2011). Oil and Gas Bonds: BLM Needs a Comprehensive Strategy to Better Manage Potential Oil and Gas Well Liability. (GAO Publication No. 11-292). Washington, D.C.: U.S. Government Printing Office

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

Federal leases already have longer terms than many state and private leases, and are supposed to be terminated at the end of their ten-year terms. Lease suspensions result in companies holding federal lands and minerals for longer (often much longer) time periods without paying rentals or generating energy or royalties.

BLM's current policy guidance governing lease suspensions, set forth in BLM Manual 3160-10, was issued in 1987. The manual does not provide clear direction to BLM for how and when to exercise its discretion to reject lease suspension requests, and therefore the agency routinely grants suspensions that are not warranted or required by law. This has led to an extensive portfolio of suspended leases on federal lands. As of March 2015, there were 3.25 million acres of federal minerals in suspended leases, many dating back to the 1980s and 1990s.²⁹

The manual also does not direct BLM on how to manage currently suspended leases. Without such direction, BLM rarely evaluates the status of actively suspended leases to determine whether suspensions should be lifted, allowing suspensions to remain in place long after the circumstances that originally justified the suspension no longer exist. Thus, the 1987 manual does not provide direction or assurance that BLM holds suspension requests to the high standard set out in the regulations, provides limited terms for suspension and actively monitors and ends suspensions when they are no longer necessary.

This outdated guidance contributes to BLM's failure to recover revenue for federal resources and ensure producers are diligently developing leased lands. Inappropriate use of lease suspensions allows industry to hold leases indefinitely without making rental payments or producing energy. In this way, lease suspensions can allow industry to evade Congressional intent to diligently develop and provide timely and reasonable access to federal oil and gas resources.

The outdated guidance is also inconsistent with BLM's multiple use mandate. Because BLM regularly declines to adopt conservation management for lands encumbered by leases, holding leases in undue suspension is tantamount to removing those lands from multiple use.

(c) Lease reinstatements

BLM's current policy guidance for reinstatements, set forth in BLM Manual Handbook 3108-1, was last revised in 1995. The guidance does not provide clear direction for BLM to evaluate and approve or deny reinstatements to ensure consistency with the Mineral Leasing Act and agency regulations. Oil and gas leases are automatically terminated "by operation of law" if annual rental rates are not paid by the anniversary date of the lease.³⁰ However, the BLM "may" reinstate these leases under several conditions.³¹ By law, the BLM is only to reinstate leases in cases in which the failure to timely submit the rental was "justified" or "not due to lack of reasonable diligence" by the lessee.

²⁹ Data accessed through LR2000.

³⁰ 43 C.F.R. § 3108.2-1

³¹ *Id.* §§ 3108.2-2, 3108.2-3, and 3108.2-4

According to the BLM Handbook, justification can occur if “sufficiently extenuating circumstances or factors beyond the control of the lessee [] occurred at or near the lease anniversary date.”³² BLM’s regulations provide for three types of reinstatements: Class I (reinstatement at existing rental and royalty rates), Class II (reinstatement at higher rental and royalty rates), and Class III (conversions of unpatented oil placer mining claims). However, the agency’s guidance does not clearly direct which type of reinstatement is appropriate, what specific criteria must be met for a reinstatement to be authorized, or when the agency should exercise its discretion to deny reinstatement requests. Due to the outdated guidance, BLM is permitting oil and gas leases that have been terminated to be reinstated without sufficient basis, providing the oil and gas industry with an extra opportunity to retain leases at the expense of diligent development, and frequently in situations where industry has intentionally defaulted on rental payments because of low prices, only to apply for reinstatements when prices increase.

(d) Leasing low potential lands

As shown in a recent analysis conducted by The Wilderness Society³³, more than 90% of minerals managed by the BLM are currently available for oil and gas leasing - an allocation that is clearly not based on reasonably foreseeable development potential or a strategic evaluation of other multiple uses. The root of this problem is outdated planning guidance that leads BLM to make the vast majority of federal minerals available to leasing in land use plans, regardless of the likelihood of development and in conflict with multiple use management and fiscal responsibility.

BLM’s handbook for fluid minerals planning (Handbook H-1624-1) directs BLM to plan for oil and gas development on federal lands in light of where recoverable deposits of oil and gas are most likely to exist. Chapter III of the handbook requires that BLM use development potential to predict where future drilling activity will take place and where impacts from oil and gas development are likely to be focused within a planning area. Using this information, the handbook directs BLM to assign lease stipulations and other management prescriptions to protect competing resources and mitigate unwanted impacts from drilling and development.

However, when faithfully applied, the handbook often produces illogical management prescriptions that result in significant resource conflicts. With respect to management prescriptions, the handbook leads BLM to *open* low and no potential lands to leasing, and, in many instances, applies weaker protections and stipulations in these areas than high potential areas. Since low potential lands are open to leasing with weak stipulations, they are frequently targeted for speculative leasing. In turn, speculative leases in low potential areas often preclude designations and management decisions that might benefit alternative resources, including decisions for protecting wilderness quality lands and conserving wildlife.³⁴

³² BLM Handbook H-3108-1 at 31

³³ *Open for Business* (October 2014), available at http://wilderness.org/sites/default/files/TWS%20--%20BLM%20report_0.pdf

³⁴ See TWS Development Potential Technical Report for detailed analysis and case studies: <http://wilderness.org/sites/default/files/Development%20Potential-Technical%20Report%20.pdf>.

BLM Handbook H-1624-1 has not been overhauled since 1990. BLM’s guidance for considering and making decisions based on development potential in land use planning must be updated to take a more comprehensive approach to oil and gas allocations.

3. These outdated policies are harming taxpayers and our public lands.

(a) Bonding

Pursuant to 43 CFR 3104.8 “The authorized officer shall not give consent to termination of the period of liability of any bond unless an acceptable replacement bond has been filed or until all the terms and conditions of the lease have been met.” According to Onshore oil and Gas Order No. 1 final abandonment will not be approved until “the surface reclamation work required in the Surface Use Plan of Operations or Subsequent Report of Plug and Abandon has been completed...”³⁵ The BLM Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development or “Gold Book” states, “In most cases, this means returning the land to a condition approximating or equal to that which existed prior to the disturbance.”³⁶ For a variety of reasons, as noted above, operators may not complete final reclamation or receive approval for final abandonment resulting in an abandoned or orphaned well. A well is considered orphaned when the bond is not sufficient to cover well plugging and surface reclamation and there are no responsible or liable parties to cover the costs. These wells pose serious environmental fiscal threats.

From an environmental standpoint, orphaned wells can leak methane, provide a pathway for surface runoff, brine, or hydrocarbon fluids to contaminate surface water and groundwater, and contribute to habitat fragmentation and soil erosion.³⁷ There are already a staggering number of unreclaimed or improperly reclaimed sites across the country. An assessment of ecological recovery at oil and pads on the Colorado Plateau found that more than half of well pads were below the 25th percentile of reference areas.³⁸

Fiscally speaking, once a well is considered orphaned BLM must use federal dollars to fund reclamation. However, “there is no dedicated budget line item to fund orphaned well reclamation; instead, it is dependent on whatever funds are available from BLM state offices and the BLM Washington office...”³⁹ Additionally, reclamation costs have been found to range from \$300 to \$580,000 per well with newer deeper wells costing as much as \$17 million. A 2010 GAO study showed “as of December 2008, oil and gas operators had provided 3,879 bonds, valued at \$162 million, to ensure compliance with lease terms and conditions for 88,357 wells.” That’s only \$1,833 per well. For context, the state of Wyoming may be looking at a price tag of between \$14.7 and \$19 million, or an average cost of more than \$100,000 per well to plug its

³⁵ Onshore Oil and Gas Order No. 1 (XII.B)

³⁶ BLM Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development, Ch. 6

³⁷ Ho, J., et al., (2016). *Plugging the Gaps in Inactive Well Policy*. Washington, D.C.: Resources for the Future

³⁸ Nauman, T.W., et al., Disturbance automated reference toolset (DART): Assessing patterns in ecological recovery from energy development on the Colorado..., *Sci Total Environ* (2017), <http://dx.doi.org/10.1016/j.scitotenv.2017.01.034>

³⁹ GAO 2010

newest and deepest wells.⁴⁰ It is for this very reason that Wyoming, along with several other western states, recently increased its bonding rates, which are now several times higher than the federal rates.⁴¹

Outdated requirements are costing taxpayers. The same 2010 GAO report found “For fiscal years 1988 through 2009, BLM spent about \$3.8 million to reclaim 295 orphaned wells in 10 states...” The report also identified 144 orphaned wells in 7 states that need to be reclaimed. The total cost to reclaim just 102 of those wells is estimated at \$1,683,490.⁴² And this problem is not going away. A subsequent 2011 GAO analysis of OGOR data as of July 7, 2010, showed that of the approximately 5,100 wells idle for 7 years or longer, roughly 45 percent, or about 2,300 wells, have not produced oil or gas for more than 25 years.⁴³ Many of those wells may need government resources to be properly plugged and reclaimed, such that the BLM is subsidizing the oil and gas industry at the expense of taxpayers.

(b) Lease suspensions

Lease suspensions, particularly those that are unwarranted, harm US taxpayers primarily in two ways: lease suspensions cheat U.S. taxpayers of rental and royalty payments; and lease suspensions can preclude the BLM’s ability to manage the public lands for multiple uses.

Unmanaged lease suspensions are fiscally imprudent. A federal mineral lease suspension, under the Mineral Leasing Act, tolls the operating and production requirements of a lease, including the obligations to make rental and royalty payments, and extends the primary term of the lease by the length of the suspension – and longer, given the lax enforcement of suspension terms by BLM. As of March 2015, 2.65 million acres of federal minerals were held in suspended leases and not generating rental or royalty payments for the federal government. These suspensions include millions of acres that have been on hold for decades and have already cost taxpayers more than \$80 million in lost rents alone. This practice deprives US taxpayers of revenue that should be paid for holding these public lands in lease.

In addition to being fiscally imprudent, maintaining suspensions that are not justified based on BLM’s regulations interferes with multiple use management. Unwarranted lease suspensions can and do prevent recreation, conservation and other uses from occurring on these lands. For example, in the Proposed Resource Management Plan for the Grand Junction Field Office, the BLM proposed not to manage South Shale Ridge to protect its wilderness characteristics based at least in part on the presence of suspended oil and gas leases.⁴⁴

Unwarranted suspensions granted for ordinary and foreseeable agency delays “relieve [lessees and/or operators] of the consequences of their poorly timed decisions and actions,” while

⁴⁰ Inside Energy 2016

⁴¹ http://trib.com/business/energy/wyoming-raises-bonding-requirements-for-oil-and-gas-wells/article_74fe1dff-3305-5e5d-881a-27a6d6b874c8.html

⁴² GAO 2010

⁴³ GAO 2011

⁴⁴ See [Grand Junction Proposed Resource Management Plan](#) at Appendix F, p. F-6.

inadequate agency oversight of suspended leases allows suspensions to remain in place years after the reason for the suspension has passed. *See Vaquero Energy*, 185 IBLA at 237. These failures are precluding land management opportunities that might otherwise confer valuable benefits to the public at the same time as they deprive the public of valuable tax revenue.

(c) Lease reinstatements

Federal regulations provide that the BLM has discretion in whether to reinstate leases that were terminated for non-payment. Research indicates that the BLM exercises this discretionary authority frequently – there are 703 currently-authorized federal leases covering 530,000 acres that were terminated and subsequently reinstated. More than one thousand leases affecting over one million acres of federal minerals have been reinstated since the year 2000. This indicates there is a widespread pattern of industry failing to pay rents due the US government, and American public, and not being penalized.

Failing to pay rent to the federal government is contrary to the interests of the United States and cheats American taxpayers. Lease reinstatements allow for oil and gas companies to hold publicly-owned lands and minerals for free – and then simply pay back rent penalty-free if and when the BLM completes the process of terminating the lease. This practice comes at significant cost to the American public, who are owed these rental payments and unable to prosecute the lack of payment.

The failure to pay rentals on time also raises a significant question about whether operators are being diligent in the pursuit of development of their oil and gas leases, which is required under BLM regulations and the Mineral Leasing Act. Leases are supposed to have the purpose of insuring “reasonable diligence, skill, and care.”⁴⁵ It can hardly be argued that companies are exercising diligence and care when they are failing to even make rental payments, and are simply speculating in public lands owned by all Americans while they wait for more favorable market conditions. In addition, federal leases contain provisions to ensure the “protection of the interests of the United States” and the “safeguarding of the public welfare.”⁴⁶ The agency’s current guidance for considering and authorizing reinstatements does not achieve either of these directives.

(d) Leasing low potential lands

Application of the current guidance results in land use planning decisions that make low potential areas open to leasing with relatively weak lease stipulations, regardless of the presence of other resources that could be harmed should development happen, and⁴⁷ regardless of whether BLM’s own data show there is low—or even no—potential for oil and gas. This fundamental flaw in BLM’s guidance has led to a current total of 27 million acres leased for oil and gas development, with less than half in production.⁴⁸ A Congressional Budget Office report recently found that, for parcels leased between 1996 and 2003 (all of which have reached the end of their 10-year exploration period), only about 10 percent of onshore leases issued competitively and

⁴⁵ 30 U.S.C. 187.

⁴⁶ *Id.*

⁴⁷ <http://wilderness.org/sites/default/files/Development%20Potential-Technical%20Report%20.pdf>

⁴⁸ <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics>

three percent of those issued noncompetitively actually entered production.⁴⁹ This means 90% of competitively-issued onshore leases never generated royalties for the US government.

As demonstrated in The Wilderness Society's technical report, the practice of making areas with low development potential available to oil and gas leasing frequently leads to these areas becoming encumbered with speculative leases. Since low potential lands have favorable lease stipulations and can be acquired and held for minimal cost, low potential areas are often targeted for speculative leasing, though rarely drilled and developed. Speculative leasing ties up public lands, creates unnecessary public conflict, and generates minimal revenue.

These decisions have real impacts on multiple use management. For example, in the Proposed Resource Management Plan for the Colorado River Valley Field Office, the BLM proposed not to manage the "Grand Hogback Unit" to protect its wilderness characteristics based on the presence of oil and gas leases, stating:

The Grand Hogback citizens' wilderness proposal unit contains 11,360 acres of BLM lands. All of the proposed area meets the overall required criteria for wilderness character... There are six active oil and gas leases within the unit, totaling approximately 2,240 acres. None of these leases shows any active drilling or has previously drilled wells. The ability to manage for wilderness characteristics in the unit would be difficult. If the current acres in the area continue to be leased and experience any development, protecting the unit's wilderness characteristics would be infeasible...⁵⁰

In the Proposed White River Field Office Resource Management Plan Amendment, the BLM acknowledged that oil and gas leases "preclude other land use authorizations not related to oil and gas... in those areas," including authorizations for renewable energy projects, stating: "Areas closed to leasing... indirectly limit the potential for oil and gas developments to preclude other land use authorizations not related to oil and gas (e.g., renewable energy developments, transmission lines) in those areas."⁵¹ As these examples show, oil and gas leases, even when not developed, preclude other uses of the public lands.

Speculative leases are also fiscally burdensome. Leases in low potential areas generate minimal revenue but can carry significant cost. In terms of revenue, they are most likely to be sold at or near the minimum bid of \$2/acre, and they are least likely to actually produce oil or gas and generate royalties.⁵² See Bighorn Basin PRMP (2015) at p. 73 ("Leasing may be based on

⁴⁹ https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51421-oil_and_gas_options.pdf

⁵⁰ See [Colorado River Valley Proposed Resource Management Plan \(2014\)](#) at Chapter 3, p. 3-135.

⁵¹ See [White River Proposed RMP, Chapter 4](#) at p. 4-498.

⁵² [Center for Western Priorities, "A Fair Share"](#) ("Oil Companies Can Obtain an Acre of Public Land for Less than the Price of a Big Mac. The minimum bid required to obtain public lands at oil and gas auctions stands at \$2.00 per acre, an amount that has not been increased in decades. In 2014, oil companies obtained nearly 100,000 acres in Western states for only \$2.00 per acre. . . . Oil companies are sitting on nearly 22 million acres of American lands without producing oil and gas from them. It only costs \$1.50 per year to keep public lands idle, which provides little incentive to generate oil and gas or avoid land speculation.").

speculation, with leases within high risk prospects usually purchased for the lowest prices.”); White River PRMP (1996) at p. A-7 (“At any given time, most of the acreage that is available for oil and gas leasing in the WRRRA is under lease. . . . Most of the area is leased for speculative purposes and consequently only a small percentage of leases will ever be developed.”). Nonproducing leases generate less than two percent of total revenue generated by the federal onshore system; 90 percent comes from royalties paid on producing leases.⁵³ In terms of costs, leasing in low potential areas requires processing lease nominations, preparing environmental reviews, and resolving protests and resource use conflicts.

In summary, leasing lands and minerals with low potential for oil and gas development – speculative leasing – carries significant costs by precluding BLM from managing for other multiple uses, creating unnecessary public conflict, and wasting agency resources while generating minimal revenue.

4. Updating these policies will benefit taxpayers and the public lands.

(a) Bonding

The benefits associated with updating the BLM’s bonding policies are obvious. If bond minimums are set at an amount equal to the estimated cost of reclamation the government limits the chance it will have to bear the expenses associated with reclaiming orphaned wells. This in turn means that American taxpayers will not be left footing the bill for the industry’s negligence. This will also help deter financially unstable companies or companies that are only interested in speculation from purchasing federal leases. Additionally, proper reclamation of wells pads will help restore federal lands for other uses like recreation and grazing and will help to restore wildlife habitat and limit fragmentation. Improving tracking and review of bond adequacy will also help the government periodically assess liabilities and increase bond amounts or adjust agency practices in response to findings.

A common refrain from the oil and gas industry is that raising bond minimums will discourage development. However, there is little if any evidence of such a result. In fact, many states have higher minimum bond amounts or more practical methods for determining bond amounts but have not seen a decrease in permitting or drilling as a result. For example, Wyoming calculates individual bonds based on well characteristics and depth and California bases statewide bond amounts on the number of wells a company operates. North Dakota, South Dakota, and Utah all have bonding amounts for single wells and all are over \$50,000 and operators continue to drill in those states.⁵⁴

(b) Lease suspensions

⁵³ https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51421-oil_and_gas_options.pdf, p. 2.

⁵⁴ Western Organization of Resource Councils. Weak Oil and Gas Bonding Will Contribute to Reclamation Crisis. (2016, August 15). Retrieved July 17, 2017, from <http://www.worc.org/weak-oil-gas-bonding/>

Updating the agency's policy governing suspensions would ensure BLM is recovering owed rental payments and returning undeveloped lands to multiple use management. By issuing new guidance that directs BLM to exercise its discretion to reject unjustified lease suspensions and monitor existing suspensions to remove those that are no longer justified, BLM would eliminate a hidden subsidy that is currently available to the oil and gas industry. Agency and public scrutiny of lease suspensions would also ensure that public lands are not removed from multiple use management as a result of oil and gas companies illegitimately holding them in suspended status.

In addition to benefiting the public by managing lease suspensions in a fiscally responsible way and protecting multiple use management, updating the agency's policy governing suspensions would help BLM demonstrate that it is managing oil and gas resources consistent with the Mineral Leasing Act and diligent development requirements.

(c) Lease reinstatements

BLM would prevent oil and gas companies from cheating American taxpayers out of rental payments by ensuring lease reinstatements are appropriately evaluated, issued under the proper classification, and exercising discretion to deny reinstatements when warranted. Updating policy guidance for reinstatements would also ensure the BLM is complying with Section 187 of the MLA. Leases are supposed to have the purpose of insuring "reasonable diligence, skill, and care" and to seek the "protection of the interests of the United States" and the "safeguarding of the public welfare." 30 U.S.C. 187. Updating BLM's guidance for reinstating leases would allow the agency to ensure these directives are being upheld.

(d) Leasing low potential lands

Under current agency guidance, BLM is supposed to use development potential to formulate lease stipulations and management prescriptions that will mitigate conflicts between fluid mineral development and other competing uses. However, in its current form, the guidance leaves low and no potential areas open to leasing with weaker protections than moderate and high potential areas. The result is oil and gas management allocations that leave the door open to future resource conflicts and allow speculative oil and gas leasing in low/no potential areas to limit alternative management decisions. Updating the agency's guidance would allow for BLM to better achieve its objective of mitigating oil and gas conflicts and realize multiple use management.

Limiting leasing in low potential areas conflicts the least with industry objectives and can confer significant public benefits. Low potential lands are the "low-hanging fruit" by which BLM can fulfill other objectives of its multiple-use mission, such as managing for wilderness, wildlife and recreation. Yet, as described above, speculative leases on low potential lands can prevent the BLM from otherwise managing lands for alternative purposes and fulfilling its multiple-use mandate. *See also* White River DRMPA (2012) at p. 4-377 ("... authorized oil and gas uses would likely preclude other incompatible land use authorizations"). In addition, limiting exploration and development on low potential lands necessarily conflicts the least with industry objectives. As discussed in the Bighorn Basin PRMP (2015):

[A]lternatives D and F place additional stipulations on oil and gas-related surface disturbances in the Absaroka Front, Fifteenmile, and Big Horn Front MLP analysis areas for the protection of big game, geologic features, and LRP soils. As a result, alternatives D and F could have additional adverse impacts on oil and gas development in these MLP analysis areas. . . . However, because of the generally low to very low potential for oil and gas development and redundancies with other restrictions on mineral leasing from the management of other program areas, management specific to the MLP is less likely to adversely affect oil and gas development in these areas.

Bighorn Basin PRMP at p. 4-87; *see also* White River DRMP (1994) at p. 4-21 (“Prohibiting development in Class I areas would not affect oil and gas production because oil and gas potential in these areas is low.”).

Eliminating the presumption that all lands, regardless of development potential, should be open to leasing would help ensure that other resources and uses of the public lands, such as wildlife, recreation and water, are on equal footing with oil and gas development. Doing so would also create opportunities to enhance the management of those other resource and uses, particularly in areas with low/no development potential.

5. New regulations and policies are needed to halt hidden subsidies to the oil and gas industry.

(a) Bonding

Common sense reforms are necessary to protect taxpayers and the environment. BLM’s new regulations and guidance should include the following:

- Increase the minimum bond amount. At the very least the minimum should be adjusted to reflect inflation. Using a simple consumer price index (CPI) conversion that would set the individual bond at \$81,000, the statewide bond at \$231,000, and the nationwide bond at \$1,390,000. However, we recommend that bond amounts be set on a case by case basis at an amount that will cover the estimated cost of reclamation. This approach is similar to that employed in federal coal and hardrock mining regulations. Bond amounts could be reviewed periodically and adjusted up for new development on a lease or down for completion of final reclamation of a pad.
- Bond amounts should be set per well. This would bring the regulation in line with current oil and gas drilling practices where operators often drill multiple pads per lease and multiple wells per pad. This is similar to many state regulations. Additionally, bonds should take into consideration the relevant characteristic of a well that might impact reclamation costs; including among other things type, depth and target formation.
- Improve review of bond adequacy and liability tracking. This recommendation mirrors that made by GAO in 2011. BLM must “and improve its data system to better evaluate potential liability and agency performance...”⁵⁵

⁵⁵ GAO 2011

- Improve reclamation standards. In addition to the bonding regulations themselves, BLM’s reclamation standards pose a significant issue. BLM’s lack of clear reclamation standards has created a piecemeal approach, where standards change from land use plan to land use plan, creating inconsistent reclamation requirements on federal lands. BLM should adopt broad, uniform, performance-based standards that ensure that all wells drilled on federal lands meet acceptable minimum requirements for reclamation. This approach allows operators to employ their considerable resources and expertise to achieve satisfactory reclamation. It will provide a consistent and more flexible standard across field offices to promote better and more frequent reclamation potentially reducing an operator’s desire to shirk responsibilities if they find current reclamation requirements too prescriptive or rigid.

(b) Lease suspensions

BLM should issue new guidance for managing suspensions that includes clear direction for considering suspension requests and denying unwarranted suspensions; monitoring existing suspensions on a regular basis and removing those that are no longer justified; and providing for public review of lease suspensions. BLM is currently not holding suspension requests to the high standard set out in the regulations, and revised guidance is necessary to ensure compliance.

- Update criteria for granting suspensions: BLM should issue revised direction for considering suspension requests that includes clear criteria for when the agency does and does not have discretion to grant a suspension request. Pursuant to 43 C.F.R. § 3103.4-4(a), obligations regarding all operations and production of oil and gas leases may be suspended “only in the interest of conservation of natural resources” and obligations regarding either operations or production may be suspended only when “the lessee is prevented from operating on the lease or producing from the lease, despite the exercise of due care and diligence, by reason of force majeure, that is, by matters beyond the reasonable control of the lessee”; and must be justified by the applicant. Revised policy should provide the agency with guidance for implementing these regulations and appropriately considering whether to approve lease suspension requests.
- Establish a monitoring and tracking system for suspensions: A lease suspension is not intended to be unending; BLM requires that a suspension terminates when it is “no longer justified in the interest of conservation, when such action is in the interest of the lessor, or as otherwise stated by the authorized officer in the [suspension] approval letter.” 43 C.F.R. § 3165.1(c). BLM’s existing manual directs the agency to “monitor the suspension on a regular basis to determine if the conditions for granting the suspension are extant, and should terminate the suspension when it is deemed no longer necessary.” BLM Manual 3160-10.3.31.C.3. However, in practice this requirement is not applied through any regular or consistent mechanism. More explicit guidance should direct when and how this monitoring occurs. A verification system to ensure regular oversight including directing state offices to evaluate suspended leases on a quarterly basis and report to DC in a publicly available format should also be incorporated into the suspended lease management strategy.

- Increase transparency and opportunities for public involvement in lease suspensions and monitoring: BLM should be required to post documentation of lease suspension requests and decisions, including on its NEPA log, but also in a dashboard available via state office websites. Information on suspended leases, including status and reason for suspension, should also be made public to provide for public oversight and accountability on the length of suspensions in annual oil and gas program reports. A summary of lease suspensions should be included in the BLM’s annual reporting of oil and gas statistics, as well.
- Evaluate need for NEPA review: Finally, BLM should evaluate whether categorical exclusions are appropriate for individual suspensions, applying the “extraordinary circumstances” criteria, and if any of those criteria are met, then an environmental assessment or environmental impact statement must be prepared.

(c) Lease reinstatements

BLM must update its guidance for evaluating and approving or denying lease reinstatements to ensure oil and gas companies are complying with the directives set forth in the Mineral Leasing Act and that taxpayers are receiving rental payments for leased public mineral resources. The practice of reinstating leases that have been terminated for failure to pay the annual rental fee needs to be evaluated by the BLM and much more stringent provisions for reinstatement should be put in place. By law, the BLM is only to reinstate leases in cases in which the failure to timely submit the rental was “justified” or “not due to lack of reasonable diligence” by the lessee. In updating the agency’s guidance, BLM should establish narrow and specific guidelines for when these criteria may be considered to be met.

- Require evidence of extenuating circumstances and reasonable diligence: According to the BLM Handbook, justification can occur if “sufficiently extenuating circumstances or factors beyond the control of the lessee [] occurred at or near the lease anniversary date.”⁵⁶ BLM should ensure that any excuse of non-payment of rent is in fact beyond the control of the lessee—any claimed basis for failure to pay on time must be a “causative factor” showing control had been lost.⁵⁷ Failing to pay rent on time also can only rarely be excused as having occurred despite the exercise of reasonable diligence. To claim diligence, a lessee must be able to show they sent the rental “sufficiently in advance of the due date to account for normal delays.”⁵⁸ Lessees seeking lease reinstatements must be required to provide detailed support that they meet these criteria, and only in the rare circumstances in which they are clearly met should reinstatements be authorized.
- Class I reinstatements should be generally unavailable: BLM should exercise its discretion to not authorize Class I reinstatements (reinstatement at existing rental and royalty rates), except in the most extraordinary circumstances.
- Define “inadvertence” to mean “not duly attentive”: Regarding Class II reinstatements, the failure to pay rent on time should only rarely be excused as having occurred because of inadvertence. Inadvertent means “not duly attentive.” While inadvertence may be

⁵⁶ BLM Handbook H-3108-1 at 31

⁵⁷ *Id.*

⁵⁸ *Id.*

unintentional, it is synonymous with “careless.” This lack of attention should not be readily excused for such a simple task as paying your rent on time. If an oil and gas lease has real value to the operator, certainly they should be attentive enough to pay their rent on time. The failure to pay rent on time is evidence the lease is not valuable to the operator, and therefore leaving the termination in place is justified. The failure to pay rent on time probably signals a general lack of diligence, such as not seriously engaging in actual drilling operations. *See* 43 C.F.R. § 3107.1 (allowing for extension of lease terms if actual, diligent drilling is commenced prior to the end of the primary term).

BLM’s guidance defining when inadvertence can be excused is so broad as to be meaningless. “Inadvertence” is viewed by the BLM to include failure to pay due to carelessness, negligence, an unintentional or accidental oversight, inattention, a mistake, a financial inability to pay timely, or any other reason.” BLM Handbook H-3108-1 at 37. This meaningless view of what constitutes inadvertence must be abandoned. A definition that recognizes inadvertence means “not duly attentive” needs to be put in place. Being careless, negligent, inattentive or not having the financial inability to pay on time are not due reasons to excuse nonpayment.⁵⁹

- *Reinstated leases should not have their terms extended or royalty rates reduced.* The BLM should not extend the terms of the lease or reduce the royalty rate when a lease is reinstated. Reinstatement of oil and gas leases for failure to pay rent should be an exception rather than a rule in the interest of multiple-use management of our public lands.

(d) Leasing low potential lands

BLM should use development potential to plan for oil and gas development on federal lands in ways that mitigate resource conflicts, accommodate multiple uses of public lands without preference, and encourage development in areas that are most economic for oil and gas production. Limiting leasing in areas with low or no development potential would reduce administrative costs, mitigate conflicts between competing resources, and be more faithful to BLM’s multiple-use mandate.

This approach would also be consistent with the MLA, which directs BLM to hold periodic oil and gas lease sales for “lands... which are known or believed to contain oil or gas deposits...” 30 U.S.C. § 226(a); *see also Vessels Coal Gas, Inc.*, 175 IBLA 8, 25 (2008) (“It is well-settled under the MLA that competitive leasing is to be based upon reasonable assurance of an existing mineral deposit.”). These sales are supposed to foster responsible oil and gas development, which lessees must carry out with “reasonable diligence.” 30 U.S.C. § 187; *see also* BLM Form

⁵⁹ The Interior Board of Land Appeals has ruled that being financially unable to pay rent is not considered inadvertent and is, therefore, not grounds for Class II reinstatement. *Dena F. Collins*, 86 IBLA 32 (1985). But BLM policy is nevertheless that “if a lessee does later secure the financial ability and timely files a petition for reinstatement, the petition is to be processed.” BLM Handbook H-3108-1 at 37. BLM should expect that lessees will maintain an ability to meet and abide by their lease terms on a continuous basis; lessees should be ready to pay rent when due, and if they cannot they should be willing to give up the lease and move on to other business opportunities.

3100-11 § 4 (“Lessee must exercise reasonable diligence in developing and producing...leased resources.”).

- BLM plans should set out a framework for oil and gas development that supports closing lands to leasing where development is unlikely to occur: If BLM closes or defers leasing in low-potential areas, and conditions change to make development in those areas more likely, the agency can then complete additional analysis and planning to ensure that development occurs responsibly and accounts for current resource conditions. An updated approach to planning for oil and gas leasing should meaningfully account for development potential and conflicts with other resources.⁶⁰
- Modernize the handbook with an approach that provides for closing lands to leasing and limits leasing in low- or no-potential areas: Updating the handbook would not only support BLM’s obligation to consider managing lands for fish and wildlife, recreation and wilderness values, but also have minimal impacts on industry objectives. In locations like the Ely District in Nevada, where federal minerals are almost 90 percent open to leasing, only 32 wells were authorized over the past 101 years (as of May 21, 2014), even though there are 936 active leases covering just over two million acres of public land.⁶¹ Closing these lands to speculative leasing will not harm responsible oil and gas development.
- Consider basing oil and gas lease sales on a “List of Lands Available for Competitive Nominations,” as authorized by BLM regulations: BLM currently allows the oil and gas industry to nominate any public lands for leasing, which encourages widespread speculation in low potential areas and creates unnecessary conflicts with other multiple uses. This is extremely inefficient and wasteful system for leasing public lands is not the only model available to BLM, however, as current rules also permit BLM to create and utilize a “List of Lands Available for Competitive Nominations.” 43 C.F.R. § 3120.3-1. Such a list would allow BLM to proactively direct industry to areas with better odds of development and with lower resource conflicts, while eliminating areas from consideration that are clearly speculative and unlikely to generate any oil and gas revenues for American taxpayers.

Limiting development in low/no potential areas would allow BLM to minimize the risk of impacts and conflict altogether in areas where development is likely to be minimal in the first place. This practice would also limit speculative leasing practices by the industry, which can foreclose alternative management decisions and burden the BLM with increased administrative costs and conflicts associated with leasing in low potential areas. Under a more strategic approach to making oil and gas allocations in land use planning, lands would be made available for leasing by evaluating both an estimate of oil and gas potential and the conflicts with or

⁶⁰ See TWS No Exit Report for detailed recommendations on an updated approach to making oil and gas allocations in land use planning:

http://wilderness.org/sites/default/files/TWS%20No%20Exit%20Report%20Web_0.pdf

⁶¹ See BLM Nevada Preliminary EA for the Dec. 2015 Oil and Gas Lease Sale, p. 1.4.

potential harm to other resources present on those same lands. We direct BLM to and incorporate by reference the recommendations made in the TWS reports cited above (attached and incorporated herein by reference).

III. Conclusion

This petition is presented under the Administrative Procedure Act, which provides that each agency “shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule”⁶² and the United States Constitution, which protects the right to “petition the Government for the redress of grievances.”⁶³ Interior must respond to this petition “within a reasonable time”⁶⁴ and Interior regulations state that petitions will be given “prompt consideration.”⁶⁵ Courts have found that “a reasonable time for agency action is typically counted in weeks or months, not years.”⁶⁶

The agency must notify petitioners of the denial of a petition, in whole or in part, and with limited exception, a denial must include an explanation on the grounds for denial.⁶⁷ A reviewing court shall compel agency action “unlawfully withheld or unreasonably delayed.”⁶⁸ We request that Interior and BLM respond to this petition and commence both rulemaking and issuance of new guidance in no less than three months of the date of receipt. We also notes that Interior regulations authorize the Secretary to publish this petition in the Federal Register to solicit public comments on the proposed rule-making if those public comments “may aid in the consideration of the petition.”⁶⁹ In light of the BLM’s previous acknowledgment of the need for many of these updates to regulations and policies, and the suitability of a public process, we request that Interior and BLM also public this petition for comment.

The current regulations and guidance underpinning the BLM’s onshore oil and gas leasing program are in dire need of updating. Analyses of these decades-old policies has shown that they are harming the taxpayers that the BLM is obligated to ensure receive the benefits of leasing and the public lands that BLM is obligated to ensure are managed for multiple use and sustained yield. Additionally, updating these rules will help cure widespread violations of the diligent development requirement that is an essential obligation in every federal lease. Updating these

⁶² 5 U.S.C. § 553(e).

⁶³ U.S. Const., amend. I.

⁶⁴ 5 U.S.C. § 555(b)

⁶⁵ 43 C.F.R. § 14.3.

⁶⁶ *In Re: American Rivers and Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (internal citation and quotations omitted). See *Midwest Gas Users Asso. v. Federal Energy Regulatory Com.*, 266 U.S. App. D.C. 91, 833 F.2d 341, 359 (D.C. Cir. 1987) (“This court has stated generally that a reasonable time for an agency decision could encompass ‘months, occasionally a year or two, but not several years or a decade.’” (quoting *MCI Telecommunications Corp. v. Federal Communications Com.*, 200 U.S. App. D.C. 269, 627 F.2d 322, 340 (D.C. Cir. 1980))); *Fund for Animals, et. al. v. Norton, et. al.*, 294 F.Supp. 2d 92, 115 (D.D.C 2003) (petitioners are “entitled to an answer within a reasonable amount of time.”) (emphasis in original)

⁶⁷ 5 U.S.C. § 555(e); 14 C.F.R. § 14.3.

⁶⁸ 5 U.S.C. § 706(1). See *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70, 76-77 (D.C. Cir. 1984).

⁶⁹ 14 C.F.R. § 14.4.

policies will not harm the oil and gas industry, which is currently receiving unnecessary subsidies while profiting at the expense of the American public.

From: Nada Culver
To: [Katharine MacGregor](#); [Benedetto, Kathleen](#); [Cason, James](#); casey_hammond@ios.doi.gov; mnedd@blm.gov; timothy_williams@ios.doi.gov
Cc: [Chase Huntley](#)
Subject: submission of Petition under the Administrative Procedure Act
Date: Thursday, September 14, 2017 12:20:01 AM
Attachments: [APA Petition - oil and gas fiscal policies --9-14-17 - final.pdf](#)

Hello - Attached is a Petition to the Department of the Interior and Bureau of Land Management requesting rule-making and guidance pursuant to the Administrative Procedure Act. This Petition seeks action to update the fiscal terms and management processes applicable to the onshore oil and gas program. The Petition is submitted by Dan Bucks, the Powder River Basin Resource Council and The Wilderness Society.

We are also submitting this to Ms. Margaret Bradley for formal submission to the Secretary and the Department, but wanted to provide a copy to you, as well. We appreciate your attention to this matter and would be happy to answer any questions you may have or discuss further if that is of interest.

Nada Culver

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**PETITION TO THE DEPARTMENT OF THE INTERIOR AND BUREAU OF LAND MANAGEMENT TO
INITIATE RULE-MAKING AND ISSUE GUIDANCE TO MODERNIZE THE ONSHORE OIL AND GAS
PROGRAM FOR THE BENEFIT OF ALL AMERICANS**

Submitted September 14, 2017

I. Executive Summary

This petition is submitted under the Administrative Procedure Act, which gives citizens the right to request action from a federal agency to issue, repeal or amend a rule, and entitles them to a prompt response. The petition asks the Department of the Interior to reform the fiscal terms and management processes regarding oil and gas leasing to yield the legally-required fair market value return to the American people for the resources they own and to fulfill the Department's multiple use mandate. The proposals made here are intended to maintain oil and gas production from public lands most suitable for that purpose while generating greater revenues and greater public benefits through more productive use of certain lands for other commercial, recreational, and conservation uses.

These beneficial results will result from more rigorous, market-oriented fiscal terms and management practices that ensure public lands are efficiently, productively and appropriately used for public purposes and that the waste and neglect of resources due to speculative holding of chronic, non-producing oil and gas leases are minimized if not eliminated. The proposals will not detract from oil and gas production. To the contrary, the cumulative effect of the proposed changes is to better ensure that economically-feasible, oil and gas leases end up in the hands of diligent and competent producers of oil and gas, and are not held unused by non-producing speculators.

The problem: current practices tie up lands without producing energy or revenues.

Poor, indecisive and inefficient Interior management of oil and gas resources provides hidden subsidies to speculators who do not diligently pursue development. Because Interior often fails to actively manage public lands with dormant oil and gas leases for other public uses, it effectively denies the public—persons, organizations, and companies—the certainty they need to use these lands for beneficial economic, conservation, recreational or other purposes. When the federal agencies leave lands in limbo because of the remote possibility that a long dormant, low-value oil or gas lease might be developed some day, uncertainty reigns, and neither the public nor other industries can make long-term commitments to alternative uses of those lands. The economic, social and environmental benefits of those other uses are thus lost.

Below market royalty and rental rates, low minimum lease bids, inadequate bonds, lengthy and lax lease suspensions, unjustified reinstatements of lapsed leases, and leasing low potential lands encourages speculators to tie up federal lands often for decades—preventing decisions to either expeditiously develop the oil and gas resources for energy or, alternatively, maximize the benefits flowing from other uses of public lands. By subsidizing and enabling dormant leases, current practices tie up lands without producing energy or revenues for the American people and simultaneously preventing those lands from being used for other purposes. Scattered in checkboard fashion across the American West are neglected public lands not utilized for the

greatest good because of Interior's mismanagement and misguided subsidies for non-beneficial uses. Interior's neglect of these lands fails the multiple use standard of federal law.

The solution: charging market rates and discouraging unproductive leasing will yield the right balance of uses and returns.

To provide the greatest benefit to the American public, Interior should incentivize the timely production of oil and gas from public leases by charging market rates at every stage of the leasing and production process, and also decisively managing land and resources to support the most appropriate combination of multiple uses. Federal leases are issued for terms (ten years) that are longer than those used by many states or private parties so the industry already has ample time to develop leased lands. Interior, as manager of all leases of public lands and minerals, should focus on making sure those leases are ended if they are not being used productively and ensure leases are yielding a fair return while they are tying up public lands. Accordingly, this petition asks Interior to more effectively meet the standards of multiple use management and a fair return of revenues to the public by:

1. Charging higher, market-tested royalty rates (such as those used by states and the private sector) instead of the inadequate, subsidy-providing 12.5% rate;
2. Increasing rental rates on federal leases to a level sufficient to incentivize oil and gas production so that the percentage of federal leases that produce energy would rise well-above the current, unsatisfactory levels (e.g. only 50% in Rocky Mountain States);
3. Increasing minimum lease bids, as recommended by the Congressional Budget Office, to deter companies from purchasing leases for speculative purposes only;
4. Updating bonding requirements to reflect current costs associated with reclamation and restoration of lands used for oil and gas production;
5. Reforming lease suspension practices to establish rigorous standards guaranteeing that undeveloped oil and gas leases are either diligently placed into production or cancelled so that the land can be managed for other beneficial uses;
6. Updating lease reinstatement practices to require consistent and higher standards of justification for reinstating lapsed leases, with minimal tolerance for defaults on rental payments; and
7. Stopping the leasing of lands with low potential for oil and gas production and managing those lands for other purposes of greater benefit to the public.

The combination of these policies will generate millions of dollars annually for the American people, as well as states and local communities that benefit from federal oil and gas production. As numerous economic and fiscal studies indicate, higher royalty rates will generate large amounts of additional revenue with negligible impact on production. Indeed, several of the other changes proposed here will ultimately incentivize more timely production of oil and gas from federal lands and minerals, which raises the prospect for a net increase in energy production overall. Finally, and more importantly, a diversity of beneficial uses of federal land will expand as the waste and neglect of lands with dormant, speculative leases decline. Overall, better management of public lands will result in better uses in the right places, including renewable energy, recreation and conservation. More rigorous, decisive and efficient management will

greatly increase the revenues and benefits to the American people from public lands and minerals.

II. Context and Overview

Petitioners request the Department of the Interior (Interior) and Bureau of Land Management (BLM) develop regulations and policies to update the fiscal aspects of its management of onshore oil and gas leasing and development.

On April 15, 2015, BLM issued an Advanced Notice of Proposed Rulemaking (ANOPR) seeking input on potential changes to fiscal policies related to its onshore oil and gas leasing program. As the agency stated: “The anticipated updates to BLM’s onshore oil and gas royalty rate regulations and other potential changes to its standard lease fiscal terms address recommendations from the Government Accountability Office (GAO), and will help ensure that taxpayers are receiving a fair return from the development of these resources.” 80 Fed. Reg. 22148 (Oil and Gas Leasing; Royalty on Production, Rental Payments, Minimum Acceptable Bids, Bonding Requirements, and Civil Penalty Assessments). BLM should follow up on this recognition, as well as similar findings related to other aspects of managing its onshore oil and gas program, to both provide a fair return to the taxpayers who own these resources and also better fulfill its broader obligations as stewards of our public lands. BLM should issue updated policies and commence or continue rulemakings to address these major inadequacies in its onshore oil and gas program.

This Petition identifies two types of policies that need to be updated:

- (1) Revenue-generating policies, which involve payments that are being made but not at sufficient levels to ensure a fair return to the American people and to encourage timely development of resources. These policies include royalty, rental and bid rates.
- (2) Hidden subsidies, which are causing lost revenues needless giveaways to the oil and gas industry and are undermining multiple use management. These policies include bonding rates, lease suspensions, lease reinstatements and leasing low potential lands.

Through the requested rulemaking, Interior and BLM have an opportunity to structure a fiscally responsible oil and gas program that reflects multiple use and sustained yield in the 21st century. BLM must modernize fiscal elements of its oil and gas program to responsibly steward our public lands and ensure a fair return to American taxpayers.

BLM’s onshore oil and gas leasing program has been plagued with economic and environmental problems, stemming from low leasing rates, low royalty rates, low bonding rates and high emissions and gas waste. The Government Accountability Office has repeatedly concluded that “the inflexibility of royalty rates to changing oil and gas prices has cost the federal government billions of dollars in foregone revenues.” GAO-08-691 (Oil and Gas Royalties) at 16. Furthermore, GAO has found that Interior can recoup these revenues with “negligible” impacts on oil and gas production. GAO-17-540 (Oil, Gas, and Coal Royalties) at 16.

Additional systemic problems contribute to BLM's failure to recover revenue for federal resources and ensure producers are diligently developing leased lands. For example, inappropriate use of lease suspensions and unitization allows industry to hold leases indefinitely without production. As of March 2015, there were 3.25 million acres of federal minerals in suspended leases, many dating back to the 1980s and 1990s.¹ Because BLM regularly declines to adopt conservation management for lands encumbered by leases, holding leases in undue suspension is tantamount to removing those lands from multiple use. Similarly, the thousands of idle and orphaned federal wells could be better addressed by sufficient bonding, but instead are risking environmental damage and putting a financial burden on the BLM. Through this rulemaking process, BLM should take the opportunity to address these issues in a way that makes sound economic *and* environmental sense.

BLM is modernizing into an agency that embraces conservation as an integral element of multiple use and sustained yield. As provided in the Federal Land Policy and Management Act (FLPMA), 17 U.S.C. § 1701, et seq., multiple use management does not require the balance of uses on every tract of public land, but rather a combination of resource conservation and uses to "best meet the present and future needs of the American people." The notion that resource development must be balanced with conservation management is explicit in the definition of "multiple use":

[T]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; . . . *the use of some land for less than all of the resources*; a combination of balanced and diverse resource uses that takes into account the long term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, *and natural scenic, scientific and historical values*; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the lands and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

43 U.S.C. § 1702(c) (emphasis added).

Managing and planning for multiple use and sustained yield necessarily means that there must be a significant portion of public lands devoted to conservation in order to sustain public resources. Sustained yield does not support a focus on outputs from resource extraction or industrial uses. FLPMA specifically directs BLM to maintain in perpetuity "a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." FLPMA, 43 U.S.C. § 1702(h). Therefore, sustained yield requires BLM to sustain high-level yields of natural landscapes, scenic resources, clean air and water, wildlife, night skies, soundscapes, and opportunities for solitude, quiet-use, and primitive types of recreation.

BLM's current oil and gas leasing policies recognize that oil and gas development is but one use of the public lands which should be balanced with other multiple uses and considered on equal

¹ Data accessed through LR2000.

ground. Instruction Memorandum 2010-117 explicitly states that in some cases, oil and gas leasing is inconsistent with protection of other public lands resources and values. IM 2010-117 goes on to affirm that, “**Under applicable laws and policies, there is no presumed preference for oil and gas development over other uses.**”

Courts have confirmed the agency’s discretion and obligation to consider protecting environmental values. For example, in *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683 (10th Cir. 2009), the court rejected the BLM’s argument that its analysis under the National Environmental Policy Act (NEPA) did not have to include an alternative that closed Otero Mesa to oil and gas drilling because doing so would violate the its multiple use mandate. *Id.* at 710. Noting that “a delicate balancing is required,” the court explained that “[d]evelopment is a *possible* use, which BLM must weigh against other possible uses – including conservation to protect environmental values.” *Id.* (emphasis in original).

BLM’s onshore oil and gas program must be modernized to ensure that the agency is meeting its broader obligations to the American people. Public lands should not be automatically ceded to the oil and gas industry upon demand. Where public lands and minerals are turned over to the oil and gas industry, other resources must be protected and responsible development diligently pursued.

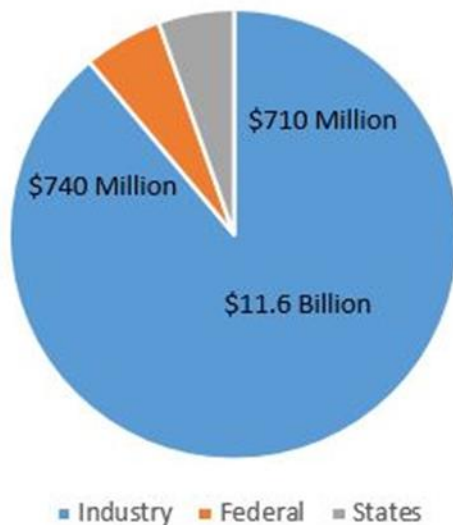
As has been shown by numerous studies, many aspects of the program are outdated and inadequate; key rates have not been updated for decades. Consequently, BLM is conservatively leaving millions of dollars on the table every year that should be compensating the American taxpayer for turning public lands and minerals over to the oil and gas industry. Instead of providing a fair return to taxpayers, oil and gas companies are reaping the benefits of the increased levels of oil and gas production from public resources. State, private and even offshore rates of return are significantly higher, showing that the BLM’s approach can and should be improved.

A recent study found that, due to many of these outdated policies, including royalty rates, the oil and gas industry shares a very small percentage of what they collect from producing federal minerals with taxpayers. In FY 2016, companies developing federal lands and minerals gained some \$11.6 billion selling oil and gas from public lands and minerals, but BLM collected only \$1.4 billion in royalties.² The resulting half of this portion shared with states and counties is thus unfairly decreased, as well; these are unnecessarily small pieces of the pie.

² <https://www.gao.gov/assets/690/685335.pdf>; see also <http://westernvaluesproject.org/rigged-taxpayers-pay-for-big-oil-companies-profits-from-public-lands/>

Federal Onshore Oil and Gas Royalty Revenues

FY 2016



Overall, modernizing the policies that are central to the federal onshore oil and gas program will boost revenues without hindering development while better fulfilling the BLM’s legal obligations under FLPMA and the Mineral Leasing Act (MLA), as discussed in more detail below.

III. Interests of Petitioners

All Americans have a vested interest in the management and use of their public lands and minerals. To the extent that these public resources are being turned over to the oil and gas industry, taxpayers are entitled to a fair return. Lands and minerals held by the oil and gas industry generally deprive citizens of the use and enjoyment of public and private split estate lands and resources for hunting, fishing and other types of recreation, solitude, clean air and water, renewable energy development, grazing, and other activities to support their own businesses. BLM’s obligations including ensuring this interference with multiple use is justified. The parties submitting this petition are seeking to enforce those obligations, because the current onshore oil and gas program does not fulfill them.

Dan Bucks is an expert in public revenue and land management issues with over forty years of experience in state government administration. Over this period, he advised elected officials on natural resource revenue and growth management policies. He administered Montana’s state and local revenue laws for coal, oil, gas, and other minerals. He initiated and oversaw Montana’s participation in the joint federal-state mineral auditing program. He actively engaged Interior’s policy making processes from 2015 forward on mineral leasing and royalty issues and testified to Congress on such matters. He has been a witness to four decades of changes in energy production on the Northern Plains—from the growth in Powder River Basin coal, to the Bakken oil boom in Bakken and the emergence of commercial wind farms. From this experience, he acquired a deep understanding of the relationship of these changes to the human and natural environment. He served as Director (2005-2013) and Deputy Director (1981-1988) of the Montana Department of Revenue, Executive Director of the Multistate Tax Commission (1988-

2004), Director of Science and Natural Resources, National Conference of State Legislatures (1980-81), Consultant to the Montana Governor's Office (1979-80), Bush Leadership Fellow (1977-1979) South Dakota State Planning Commissioner (1974-77), and South Dakota Director of Executive Reorganization (1971-1974).

The **Powder River Basin Resource Council** ("Resource Council") is a grassroots community conservation and family agriculture organization in Wyoming. Resource Council members live throughout the state of Wyoming, but the majority of them are rural landowners, many of whom live in a split estate situation with federally-controlled minerals underlying their lands. Resource Council members thus have a keen interest in the BLM's management of oil and gas resources.

Marjorie West is a member of the Resource Council. Along with her husband, Bill, Marge owns a ranch on Spotted Horse Creek in the Powder River Basin of Wyoming, where they grow dry land wheat and raise cattle. Her ranch was homesteaded by Bill's father and expanded by the family over the generations. The Wests' ranch includes a combination of private and federal oil and gas, and the family has been living with the impacts of development of these resources since the coalbed methane boom in the early 2000s. Now that coalbed methane has busted, the Wests are dealing with idle and orphaned wells that have been left on their land.

Leland (L.J.) Turner and his family own a 10,000-acre ranch near the town of Wright, Wyoming in the heart of the one of the largest oil and gas fields in the country. L.J.'s grandfather homesteaded the ranch in 1918 and it has been in the family ever since. The ranch currently has sheep and cattle, and is impacted by oil and gas development from a mix of privately owned and federally owned minerals.

The Wilderness Society is the leading conservation organization working to protect wilderness and inspire Americans to care for our wild places. Founded in 1935, and now with more than one million members and supporters, The Wilderness Society is committed to sound management of our shared national lands, which includes recognizing the values of some lands for conservation and recreation, while also continuing responsible energy development.

IV. Policies requiring new rulemakings

A. Revenue-generating Policies

1. BLM has the duty and authority to modernize its revenue-generating policies for onshore oil and gas development.

BLM has a legal obligation under FLPMA, the MLA and related authorities to modernize its revenue-generating policies for onshore oil and gas development. Under FLPMA, BLM must ensure that American taxpayers "receive fair market value of the use of the public lands and their resources. . . ." 43 U.S.C. § 1701(a)(9). This requirement is also found in the MLA, which demands regular adjustments to royalty and rental rates and minimum bids, in order to "enhance financial returns to the United States. . . ." 30 U.S.C. § 225(b)(1)(B); *see also id.* §§ 225(b)(1)(A), 225(d) (authorizing royalty and rental rates increases). Thus, BLM has a clear duty to update its revenue-generating policies and must do so now, given how outdated those

policies have become and the significant amount of revenue that is not going to American taxpayers.

Congress never intended for onshore royalty rates to remain stagnant. That is why onshore royalties are set “at a rate of *not less than* 12.5 percent. . . .” 30 U.S.C. § 225(b)(1)(A) (emphasis added). This rate represents a floor which Interior must adjust upward as oil and production rises and to avoid the oil and gas industry enjoying windfall profits that rightfully belong to the American people. For instance, in 2009, Interior raised the offshore royalty rate from 12.5 percent to 18.75 percent, in response to rising oil prices.³ However, even though onshore oil production has nearly doubled since 2008, the onshore royalty rate has not changed.⁴

BLM has a similar duty to increase rental rates. All federal leases are “conditioned upon payment . . . of a rental *not less than* \$1.50 acre per acre” for the first five years and \$2.50 per acre for the remaining years. 30 U.S.C. § 225(d) (emphasis added). These rates are well below what is currently needed to incentivize oil and gas development, as less than half of the leased acres on public lands are actually producing oil or gas.⁵ As the Congressional Budget Office (CBO) recently explained: “A higher rental fee increases the cost of holding a lease, giving leaseholders an incentive to either explore parcels or return them to the government. In practice, the current incentive is weak because the fees are small relative to the cost of developing a lease.”⁶ Thus, current rental rates are not creating the necessary incentives to maximize revenue from the development of publicly owned oil and gas resources.

Finally, BLM must increase minimum bids, which are encouraging wasteful speculation by companies that are not diligently developing their leases. Under the MLA, minimum bids must be adjusted to “enhance financial returns to the United States. . . .” 30 U.S.C. § 225(b)(1)(B). Yet, the minimum bid for a competitive lease is just \$2.00 per acre. This is well-below the level needed to deter companies from purchasing leases for speculative purposes. According to CBO, over one-quarter of competitive leases sold for the minimum bid between 2003 and 2012.⁷ A separate analysis found that over half of the companies that currently hold federal leases in the Rocky Mountain states are not even recognized as “active” operators by state oil and gas commissions.⁸ Not only would higher minimum bids help deter these companies from locking-up public lands to the detriment of other income-generating activities, like outdoor recreation, but they would also generate more revenue for taxpayers:

³ Congressional Research Service, Mineral Royalties on Federal Lands: Issues for Congress at 4 (Jan. 2015), available at

https://www.everycrsreport.com/files/20150119_R43891_3bd50f51ada1b53821153ce674b442bc7df659de.pdf.

⁴ Office of Natural Resources Revenue, Production Data, available at <https://onrr.gov/About/production-data.htm>.

⁵ BLM, Oil and Gas Statistics, available at <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics#quickset-programs-oil-and-gas-statistics> 5.

⁶ Congressional Budget Office, Options for Increasing Federal Income from Crude Oil and Natural Gas on Federal Lands at 8, available at <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51421-oil-and-gas-options.pdf>.

⁷ *Id.* at 18.

⁸ Western Values Project, Rigged: Industry already has the keys to the kingdom, available at <http://westernvaluesproject.org/industry-already-has-the-keys-to-the-kingdom/>.

Raising the minimum bid in an auction to \$10 per acre and requiring that same amount to be paid for parcels leased noncompetitively would boost net federal income by an estimated \$50 million over 10 years, CBO estimates. That effect is the net result of increases in federal income from higher bonus bids for some parcels, including all parcels leased noncompetitively, and decreases in rental and royalty income for parcels that attract no bids (though such parcels would have generated relatively little production and royalty income).⁹

For all of these reasons, BLM has an obligation under FLPMA and the MLA to modernize its royalty and rental rates and minimum bids, and to ensure that American taxpayers are receiving a fair return from onshore oil and gas development.

2. BLM's revenue generating policies are woefully outdated and no longer ensure that the American people are receiving fair market value for the use of public lands and resources.

BLM's revenue-generating policies for oil and gas development are woefully outdated, have not kept pace with inflation, and are weaker than equivalent policies for offshore oil and gas development and those used by many western states. As a consequence of these weak and outdated fiscal policies, CBO predicts that taxpayers could miss out on roughly \$1 billion in revenue over the next decade.

BLM has never updated its royalty rates for onshore oil and gas development. They have remained at 12.5% ever since 1920, when Congress first passed the Mineral Leasing Act. Since that time, oil and gas development – along with the oil and gas industry's profits – have grown exponentially. Oil production from onshore oil and gas wells has soared in recent years – more than doubling since 2007.¹⁰ And there are nearly twice as many active wells on public lands – more than 94,000 – as there were 30 years ago.¹¹ Yet, in spite of this surging production, Interior has made little effort to increase royalty rates to ensure that taxpayers are getting their fair share.

Rental rates and minimum bids have also not been updated since 1987, and have not kept up with inflation. According to Taxpayers for Common Sense (TCS), a nonpartisan budget watchdog organization, rental rates

should at the least be raised to follow inflation, and adjusted annually by regulation. According to the Bureau of Labor Statistics inflation calculator, \$1.50 in 1987 is now \$3.12, and \$2.00 is now \$4.17. An immediate increase in rental rates to these levels would not only increase income to ensure fair return to taxpayers, but would also create incentive for timely development rather than speculation on federal leases.¹²

⁹ CBO, Options for Increasing Federal Income from Crude Oil and Natural Gas on Federal Lands at 32.

¹⁰ ONRR, Production Statistics, available at <https://onrr.gov/About/production-data.htm>.

¹¹ BLM, Oil and Gas Statistics, available at <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics>.

¹² TCS, Comments to the Bureau of Land Management (BLM) on the Oil and Gas Leasing; Royalty on Production, Rental Payments, Minimum Acceptable Bids, Bonding Requirements,

TCS recommended similar adjustments for minimum bids. Not only would this generate increased revenues for taxpayers, it would also deter companies from engaging in wasteful speculation.

Interior's failure to modernize the fiscal structure for onshore development contrasts sharply with its approach for offshore development. In 2007, Interior initiated a series of updates to its offshore fiscal policies, "in an effort to ensure a fair return on oil and gas resources."¹³ These included royalty rate increases of 50 percent, escalating rental rates in order "to encourage faster exploration and development of leases" and minimum bid increases "to account for increases in oil prices. . . ."¹⁴ These changes are expected to generate several billion dollars in additional revenue over the next 30 years, and thus far, "demand [has] remained strong for newly offered leases. . . ."¹⁵

Private mineral leases typically have a royalty rate of 18 percent to 20 percent. Several western states have also taken steps to modernize their fiscal policies for oil and gas development, and to ensure that taxpayers are receiving a fair return on the development of publicly owned oil and gas resources. For example, in February 2016, the State of Colorado increased its royalty rate from 16.67 percent to 20 percent.¹⁶ Since then, demand for state leases in Colorado has actually increased by 22 percent, based on the average number of acres leased per sale.¹⁷ State officials agree with this conclusion, which is not limited to Colorado:

according to state officials, there had been no slowdown in interest in new leases as of August 2016. In fact, Colorado state officials said they were unsure whether the higher royalty rate played much of a role in companies' decision making. Additionally, Texas officials told us that over 30 years ago, Texas began charging a 25-percent royalty for most oil and gas leases on state lands, and this increase has not had a noticeable impact on production or leasing.¹⁸

At this point, federal onshore royalty rates are lower than the rates used by every major western oil and gas producing state.¹⁹ Thus, Interior's fiscal policies must be modernized, in keeping with recent changes for offshore development and by several western states.

3. BLM's outdated fiscal policies are costing taxpayers millions in revenue every year.

and Civil Penalty Assessments (June 19, 2015), available at <http://www.taxpayer.net/library/article/comments-to-blm-on-oil-and-gas-rulemaking>

¹³ GAO, Actions Need for Interior to Better Ensure a Fair Return 13 (Dec. 2013), available at <http://www.gao.gov/assets/660/659515.pdf>.

¹⁴ *Id.* at 13-15.

¹⁵ *Id.* at 14.

¹⁶ *Id.* at 21.

¹⁷ Colorado State Land Board, Oil & Gas Auction Information and Results, available at <https://docs.google.com/document/d/1A8yfmfXmcMtx802wRxktdSuzkFeCrF5tE9XT8ms3Qa0/edit>.

¹⁸ *Id.* at 22.

¹⁹ *Id.* at 9.

Raising federal onshore royalty, rental and bid rates to match or exceed federal offshore rates and rates charged on state and private lands would increase overall revenues and receipts generated by the federal onshore oil and gas program. Recent studies find that outdated federal onshore rates are costing taxpayers tens of millions of dollars in revenues every year.

Royalties, rents and bids are the primary source of revenue for the federal onshore oil and gas program. In FY 2016, the Office of Natural Resources Revenue (ONRR) collected \$1.4 million in royalty payments, \$123 million in bonus bids and \$21 million in lease rental payments. Royalties provide the largest share of federal onshore oil and gas receipts.

Recent studies also find that raising the federal onshore royalty rate to levels consistent with state and private lands leases would generate tens of millions of dollars in additional revenues each year. An April 2016 CBO study found that raising the royalty rate to 18.75 percent would increase net ONRR income by \$200 million over the next 10 years, with an identical amount going to the states.

An earlier, 2011 report by Enegis, LLC examined the effect of increasing the royalty rate to 16.67, 18.75 and 22.5 percent. Like the CBO study, the Enegis report found that net revenue would increase in each of the three scenarios, from \$125 million to as much as \$939 million over the next 25 years. Both the CBO and Enegis reports accounted for any decrease in leasing or production that might result from increasing federal rates.

Raising federal onshore rental and bid rates would also increase net revenues. In addition to analyzing royalty rates, the April 2016 CBO Report estimated that raising the minimum bid to \$10/acre (for competitive and non-competitive leases) would increase revenues by \$50 million over the next 10 years. This same study found that increasing the rental rate by \$6/acre/year would generate an additional \$200 million.

Raising the federal royalty, rent and bid rates would significantly increase revenues and receipts generated by the onshore oil and gas program. If these rates were updated to reflect rates charged on state and private lands, the federal onshore program would likely gain at least half a billion dollars in net revenues over the next decade, with similar amounts going to the states.

4. There are significant revenue-related benefits to modernizing the onshore program's fiscal policies.

Updating royalty, rent and bid rates would also confer other, less obvious benefits. ONRR splits half of all royalty, bid and rental revenues with state governments based on where federal leases are located. So state governments, many of which are struggling with budget shortfalls caused by the downturn in energy prices, would realize about half of increased revenues from reforming federal onshore rates.

Increasing bid and rental rates would also discourage speculation and encourage diligent development of federal leases. On average, operators on federal lands drill on only 1 in 10 leases issued by the BLM. At present, there are more than 16,000 unused, non-producing oil and gas leases on federal lands, covering more than 14 million acres. By making it more expensive to

speculate, increasing bid and rental rates would encourage operators to drill and explore these unused leases, putting more leases into production and generating more royalty revenues.

Finally, by discouraging speculation, increasing bid and rental rates would help address opportunity costs associated with public lands oil and gas leasing. In making planning decisions, BLM often declines to manage lands with oil and gas leases for other resources and resource values, even when leases in these areas are unused and non-producing. Raising bid and rental rates would incentivize companies to purchase leases where they actually intend to develop, so that other, un-leased areas could be devoted to other important public lands uses. In this way, increasing bid and rental rates would help reduce opportunity costs associated with speculative leasing.

5. New revenue-generating regulations and policies

BLM should act on its own findings, as well as those of numerous external reviewers, and commence new rulemakings to update its royalty, bid and rental rates.

B. Hidden Subsidies

1. BLM has the duty and authority to update its policies regarding bonding rates, lease suspensions and reinstatements, and leasing low potential lands.

As noted above, FLPMA requires that BLM ensure a fair return for use of public lands and resources. BLM also has an obligation to ensure that the public lands are managed in accordance with principles of multiple use and sustained yield, such that the variety of uses and users of the public lands are given due consideration. Oil and gas leasing and development may not be treated as the dominant use of public lands at the expense of these statutory mandates.

Further, in leasing public resources, oil and gas companies agree to diligently develop those resources while also protecting the other resources of the public lands, while acknowledging the authority of the BLM to require such diligence. As stated in Section 4 of BLM's standard lease terms (Form 3100-011), when leasing public lands:

Lessee must exercise reasonable diligence in developing and producing, and must prevent unnecessary damage to, loss of, or waste of leased resources. Lessor reserves right to specify rates of development and production in the public interest...

In addition, BLM's regulations and guidance set out obligations that require BLM to update these policies, as discussed in detail below.

2. BLM's policies on bonding rates, lease suspensions and reinstatements, and leasing low potential lands are essentially providing subsidies to the oil and gas industry and encouraging the speculative holding of dormant leases.

By not updating and clarifying policies on bonding, lease suspensions, lease reinstatements and leasing low potential lands, BLM is subsidizing the oil and gas industry's costs to hold inactive

leases for excessive periods and to operate on public lands – in spite of the billions of dollars in industry profits from public lands drilling – and undermining the industry’s obligations of diligent development. The failure to update and clarify these policies especially encourages non-active speculators to retain a large share of leases involving substantial land areas in an undeveloped state for years and even decades on end.

(a) Bonding

BLM’s regulations require that bond amounts are to be set:

...to ensure compliance with the act, including complete and timely plugging of the well(s), reclamation of the lease area(s), and the restoration of any lands or surface waters adversely affected by lease operations after the abandonment or cessation of oil and gas operations...

43 C.F.R. § 3104.1(a). BLM’s guidance provides that the regulatory levels are minimums and also for adjusting bonding levels based on different risk factors that may arise on existing leases or existing unit, statewide or nationwide bonds. However, the agency’s practice is to charge the regulatory minimum.²⁰

BLM’s bonding policies have not been updated in almost sixty years. Minimum bond amounts set in statute no longer reflect the true cost of reclamation or inflation and the agency’s review and tracking procedures for determining bond adequacy and the government’s own liabilities fall far short of where they need to be. As a result, orphaned and abandoned wells are left unclaimed while American taxpayers are left to cover the costs of the oil and gas industry’s negligence.

The bond minimum of \$10,000 for individual bonds was last set in 1960, and the bond minimums for statewide bonds—\$25,000—and for nationwide bonds—\$150,000—were last set in 1951. According to a 2010 GAO report, “If adjusted to 2009 dollars, these amounts would be \$59,360 for an individual bond, \$176,727 for a statewide bond, and \$1,060,364 for a nationwide bond.”²¹ Based on inflation alone, current bond minimums are far lower than originally intended. Taking into account the increasing costs of reclamation further highlights the benefits given to oil and gas companies. A report by Inside Energy shows that the cost of reclaiming a single well can cost up to \$527,829 and that some newer, deeper wells may cost more than \$17 million per well to reclaim.²² It is important to note that minimum individual bond amounts are set per lease not per well. With many leases containing multiple pads and multiple wells per pad, that \$10,000 is even more inadequate. A later 2011 GAO report concluded, “Specifically, the minimum bond amounts—not updated in more than 50 years—may not be sufficient to encourage all operators

²⁰ See, e.g., BLM overview of bonding, setting out only the minimum amounts as amounts to be posted. <http://www.blm.gov/es/st/en/prog/minerals/bonds.html>

²¹ GAO-10-245

²² Stephanie Joyce, Wyoming Public Radio and Jordan Wirfs-Brock. (2016, October 17). The Rising Cost Of Cleaning Up After Oil And Gas. Retrieved July 17, 2017, from <http://insideenergy.org/2015/10/01/the-rising-cost-of-cleaning-up-after-oil-and-gas/>

to comply with reclamation requirements.”²³ And BLM field office managers agree. BLM officials interviewed by GAO at 12 of the 16 field offices agreed that these minimum bond amounts are inadequate for managing potential liability.²⁴ This is because the minimum amounts are not sufficient to serve as an incentive to encourage operators to comply with reclamation requirements and the cost to reclaim a well site far outweighs the value of the existing bonds. Unfortunately, this creates a perverse financial incentive for an oil and gas operator to walk away from a well and leave it orphaned, forcing taxpayers to pick up the plugging and reclamation tab.

In addition to staggeringly low bond amounts, the BLM is not properly tracking or reviewing bond adequacy. According to GAO, “limitations with the data system BLM uses to track oil and gas information on public land restrict the agency’s ability to evaluate potential liability and monitor agency performance.”²⁵ To manage potential liability BLM has policies for reviewing bond adequacy and for managing idle wells (wells that have not produced for at least 7 years) and orphan wells (wells that generally have no responsible or liable parties). These policies direct field offices to develop an inventory and rank and prioritize wells for reclamation. According to a 2011 GAO report, “BLM has not consistently implemented its policies for managing potential liabilities.”²⁶ As an example, GAO notes that according to their own survey of field offices, as of 2009 there were approximately 2,300 idle wells that had been inactive for seven or more years. However, Interior databases showed the number of idle wells was nearly double that amount.²⁷ Moreover, states like Wyoming consider a well idle after a lack of production of only one year. Waiting until year seven not only underestimates the number of wells, but also makes it more likely that the oil and gas operator has already abandoned the well site, and the wait makes it more difficult to start collection from a leaseholder or other responsible party.

The 2015 ANOPR referenced above stated: “the intent of any potential bonding updates would be to ensure that bonds required for oil and gas activities on public lands adequately capture costs associated with potential non-compliance with any terms and conditions applicable to a Federal onshore oil and gas lease.” The ANOPR further acknowledged that the current minimums “do not reflect inflation and likely do not cover the costs associated with the reclamation and restoration of any individual oil and gas operation.”²⁸ The current bonding rates and practices allow oil and gas companies to develop public resources without having to post sufficient bonds or otherwise reclaim drilling sites.

(b) Lease suspensions

²³ Government Accountability Office. (2011). Oil and Gas Bonds: BLM Needs a Comprehensive Strategy to Better Manage Potential Oil and Gas Well Liability. (GAO Publication No. 11-292). Washington, D.C.: U.S. Government Printing Office

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

Federal leases already have longer terms than many state and private leases, and are supposed to be terminated at the end of their ten-year terms. Lease suspensions result in companies holding federal lands and minerals for longer (often much longer) time periods without paying rentals or generating energy or royalties.

BLM's current policy guidance governing lease suspensions, set forth in BLM Manual 3160-10, was issued in 1987. The manual does not provide clear direction to BLM for how and when to exercise its discretion to reject lease suspension requests, and therefore the agency routinely grants suspensions that are not warranted or required by law. This has led to an extensive portfolio of suspended leases on federal lands. As of March 2015, there were 3.25 million acres of federal minerals in suspended leases, many dating back to the 1980s and 1990s.²⁹

The manual also does not direct BLM on how to manage currently suspended leases. Without such direction, BLM rarely evaluates the status of actively suspended leases to determine whether suspensions should be lifted, allowing suspensions to remain in place long after the circumstances that originally justified the suspension no longer exist. Thus, the 1987 manual does not provide direction or assurance that BLM holds suspension requests to the high standard set out in the regulations, provides limited terms for suspension and actively monitors and ends suspensions when they are no longer necessary.

This outdated guidance contributes to BLM's failure to recover revenue for federal resources and ensure producers are diligently developing leased lands. Inappropriate use of lease suspensions allows industry to hold leases indefinitely without making rental payments or producing energy. In this way, lease suspensions can allow industry to evade Congressional intent to diligently develop and provide timely and reasonable access to federal oil and gas resources.

The outdated guidance is also inconsistent with BLM's multiple use mandate. Because BLM regularly declines to adopt conservation management for lands encumbered by leases, holding leases in undue suspension is tantamount to removing those lands from multiple use.

(c) Lease reinstatements

BLM's current policy guidance for reinstatements, set forth in BLM Manual Handbook 3108-1, was last revised in 1995. The guidance does not provide clear direction for BLM to evaluate and approve or deny reinstatements to ensure consistency with the Mineral Leasing Act and agency regulations. Oil and gas leases are automatically terminated "by operation of law" if annual rental rates are not paid by the anniversary date of the lease.³⁰ However, the BLM "may" reinstate these leases under several conditions.³¹ By law, the BLM is only to reinstate leases in cases in which the failure to timely submit the rental was "justified" or "not due to lack of reasonable diligence" by the lessee.

²⁹ Data accessed through LR2000.

³⁰ 43 C.F.R. § 3108.2-1

³¹ *Id.* §§ 3108.2-2, 3108.2-3, and 3108.2-4

According to the BLM Handbook, justification can occur if “sufficiently extenuating circumstances or factors beyond the control of the lessee [] occurred at or near the lease anniversary date.”³² BLM’s regulations provide for three types of reinstatements: Class I (reinstatement at existing rental and royalty rates), Class II (reinstatement at higher rental and royalty rates), and Class III (conversions of unpatented oil placer mining claims). However, the agency’s guidance does not clearly direct which type of reinstatement is appropriate, what specific criteria must be met for a reinstatement to be authorized, or when the agency should exercise its discretion to deny reinstatement requests. Due to the outdated guidance, BLM is permitting oil and gas leases that have been terminated to be reinstated without sufficient basis, providing the oil and gas industry with an extra opportunity to retain leases at the expense of diligent development, and frequently in situations where industry has intentionally defaulted on rental payments because of low prices, only to apply for reinstatements when prices increase.

(d) Leasing low potential lands

As shown in a recent analysis conducted by The Wilderness Society³³, more than 90% of minerals managed by the BLM are currently available for oil and gas leasing - an allocation that is clearly not based on reasonably foreseeable development potential or a strategic evaluation of other multiple uses. The root of this problem is outdated planning guidance that leads BLM to make the vast majority of federal minerals available to leasing in land use plans, regardless of the likelihood of development and in conflict with multiple use management and fiscal responsibility.

BLM’s handbook for fluid minerals planning (Handbook H-1624-1) directs BLM to plan for oil and gas development on federal lands in light of where recoverable deposits of oil and gas are most likely to exist. Chapter III of the handbook requires that BLM use development potential to predict where future drilling activity will take place and where impacts from oil and gas development are likely to be focused within a planning area. Using this information, the handbook directs BLM to assign lease stipulations and other management prescriptions to protect competing resources and mitigate unwanted impacts from drilling and development.

However, when faithfully applied, the handbook often produces illogical management prescriptions that result in significant resource conflicts. With respect to management prescriptions, the handbook leads BLM to *open* low and no potential lands to leasing, and, in many instances, applies weaker protections and stipulations in these areas than high potential areas. Since low potential lands are open to leasing with weak stipulations, they are frequently targeted for speculative leasing. In turn, speculative leases in low potential areas often preclude designations and management decisions that might benefit alternative resources, including decisions for protecting wilderness quality lands and conserving wildlife.³⁴

³² BLM Handbook H-3108-1 at 31

³³ *Open for Business* (October 2014), available at http://wilderness.org/sites/default/files/TWS%20--%20BLM%20report_0.pdf

³⁴ See TWS Development Potential Technical Report for detailed analysis and case studies: <http://wilderness.org/sites/default/files/Development%20Potential-Technical%20Report%20.pdf>.

BLM Handbook H-1624-1 has not been overhauled since 1990. BLM’s guidance for considering and making decisions based on development potential in land use planning must be updated to take a more comprehensive approach to oil and gas allocations.

3. These outdated policies are harming taxpayers and our public lands.

(a) Bonding

Pursuant to 43 CFR 3104.8 “The authorized officer shall not give consent to termination of the period of liability of any bond unless an acceptable replacement bond has been filed or until all the terms and conditions of the lease have been met.” According to Onshore oil and Gas Order No. 1 final abandonment will not be approved until “the surface reclamation work required in the Surface Use Plan of Operations or Subsequent Report of Plug and Abandon has been completed...”³⁵ The BLM Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development or “Gold Book” states, “In most cases, this means returning the land to a condition approximating or equal to that which existed prior to the disturbance.”³⁶ For a variety of reasons, as noted above, operators may not complete final reclamation or receive approval for final abandonment resulting in an abandoned or orphaned well. A well is considered orphaned when the bond is not sufficient to cover well plugging and surface reclamation and there are no responsible or liable parties to cover the costs. These wells pose serious environmental fiscal threats.

From an environmental standpoint, orphaned wells can leak methane, provide a pathway for surface runoff, brine, or hydrocarbon fluids to contaminate surface water and groundwater, and contribute to habitat fragmentation and soil erosion.³⁷ There are already a staggering number of unreclaimed or improperly reclaimed sites across the country. An assessment of ecological recovery at oil and pads on the Colorado Plateau found that more than half of well pads were below the 25th percentile of reference areas.³⁸

Fiscally speaking, once a well is considered orphaned BLM must use federal dollars to fund reclamation. However, “there is no dedicated budget line item to fund orphaned well reclamation; instead, it is dependent on whatever funds are available from BLM state offices and the BLM Washington office...”³⁹ Additionally, reclamation costs have been found to range from \$300 to \$580,000 per well with newer deeper wells costing as much as \$17 million. A 2010 GAO study showed “as of December 2008, oil and gas operators had provided 3,879 bonds, valued at \$162 million, to ensure compliance with lease terms and conditions for 88,357 wells.” That’s only \$1,833 per well. For context, the state of Wyoming may be looking at a price tag of between \$14.7 and \$19 million, or an average cost of more than \$100,000 per well to plug its

³⁵ Onshore Oil and Gas Order No. 1 (XII.B)

³⁶ BLM Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development, Ch. 6

³⁷ Ho, J., et al., (2016). *Plugging the Gaps in Inactive Well Policy*. Washington, D.C.: Resources for the Future

³⁸ Nauman, T.W., et al., Disturbance automated reference toolset (DART): Assessing patterns in ecological recovery from energy development on the Colorado..., *Sci Total Environ* (2017), <http://dx.doi.org/10.1016/j.scitotenv.2017.01.034>

³⁹ GAO 2010

newest and deepest wells.⁴⁰ It is for this very reason that Wyoming, along with several other western states, recently increased its bonding rates, which are now several times higher than the federal rates.⁴¹

Outdated requirements are costing taxpayers. The same 2010 GAO report found “For fiscal years 1988 through 2009, BLM spent about \$3.8 million to reclaim 295 orphaned wells in 10 states...” The report also identified 144 orphaned wells in 7 states that need to be reclaimed. The total cost to reclaim just 102 of those wells is estimated at \$1,683,490.⁴² And this problem is not going away. A subsequent 2011 GAO analysis of OGOR data as of July 7, 2010, showed that of the approximately 5,100 wells idle for 7 years or longer, roughly 45 percent, or about 2,300 wells, have not produced oil or gas for more than 25 years.⁴³ Many of those wells may need government resources to be properly plugged and reclaimed, such that the BLM is subsidizing the oil and gas industry at the expense of taxpayers.

(b) Lease suspensions

Lease suspensions, particularly those that are unwarranted, harm US taxpayers primarily in two ways: lease suspensions cheat U.S. taxpayers of rental and royalty payments; and lease suspensions can preclude the BLM’s ability to manage the public lands for multiple uses.

Unmanaged lease suspensions are fiscally imprudent. A federal mineral lease suspension, under the Mineral Leasing Act, tolls the operating and production requirements of a lease, including the obligations to make rental and royalty payments, and extends the primary term of the lease by the length of the suspension – and longer, given the lax enforcement of suspension terms by BLM. As of March 2015, 2.65 million acres of federal minerals were held in suspended leases and not generating rental or royalty payments for the federal government. These suspensions include millions of acres that have been on hold for decades and have already cost taxpayers more than \$80 million in lost rents alone. This practice deprives US taxpayers of revenue that should be paid for holding these public lands in lease.

In addition to being fiscally imprudent, maintaining suspensions that are not justified based on BLM’s regulations interferes with multiple use management. Unwarranted lease suspensions can and do prevent recreation, conservation and other uses from occurring on these lands. For example, in the Proposed Resource Management Plan for the Grand Junction Field Office, the BLM proposed not to manage South Shale Ridge to protect its wilderness characteristics based at least in part on the presence of suspended oil and gas leases.⁴⁴

Unwarranted suspensions granted for ordinary and foreseeable agency delays “relieve [lessees and/or operators] of the consequences of their poorly timed decisions and actions,” while

⁴⁰ Inside Energy 2016

⁴¹ http://trib.com/business/energy/wyoming-raises-bonding-requirements-for-oil-and-gas-wells/article_74fe1dff-3305-5e5d-881a-27a6d6b874c8.html

⁴² GAO 2010

⁴³ GAO 2011

⁴⁴ See [Grand Junction Proposed Resource Management Plan](#) at Appendix F, p. F-6.

inadequate agency oversight of suspended leases allows suspensions to remain in place years after the reason for the suspension has passed. *See Vaquero Energy*, 185 IBLA at 237. These failures are precluding land management opportunities that might otherwise confer valuable benefits to the public at the same time as they deprive the public of valuable tax revenue.

(c) Lease reinstatements

Federal regulations provide that the BLM has discretion in whether to reinstate leases that were terminated for non-payment. Research indicates that the BLM exercises this discretionary authority frequently – there are 703 currently-authorized federal leases covering 530,000 acres that were terminated and subsequently reinstated. More than one thousand leases affecting over one million acres of federal minerals have been reinstated since the year 2000. This indicates there is a widespread pattern of industry failing to pay rents due the US government, and American public, and not being penalized.

Failing to pay rent to the federal government is contrary to the interests of the United States and cheats American taxpayers. Lease reinstatements allow for oil and gas companies to hold publicly-owned lands and minerals for free – and then simply pay back rent penalty-free if and when the BLM completes the process of terminating the lease. This practice comes at significant cost to the American public, who are owed these rental payments and unable to prosecute the lack of payment.

The failure to pay rentals on time also raises a significant question about whether operators are being diligent in the pursuit of development of their oil and gas leases, which is required under BLM regulations and the Mineral Leasing Act. Leases are supposed to have the purpose of insuring “reasonable diligence, skill, and care.”⁴⁵ It can hardly be argued that companies are exercising diligence and care when they are failing to even make rental payments, and are simply speculating in public lands owned by all Americans while they wait for more favorable market conditions. In addition, federal leases contain provisions to ensure the “protection of the interests of the United States” and the “safeguarding of the public welfare.”⁴⁶ The agency’s current guidance for considering and authorizing reinstatements does not achieve either of these directives.

(d) Leasing low potential lands

Application of the current guidance results in land use planning decisions that make low potential areas open to leasing with relatively weak lease stipulations, regardless of the presence of other resources that could be harmed should development happen, and⁴⁷ regardless of whether BLM’s own data show there is low—or even no—potential for oil and gas. This fundamental flaw in BLM’s guidance has led to a current total of 27 million acres leased for oil and gas development, with less than half in production.⁴⁸ A Congressional Budget Office report recently found that, for parcels leased between 1996 and 2003 (all of which have reached the end of their 10-year exploration period), only about 10 percent of onshore leases issued competitively and

⁴⁵ 30 U.S.C. 187.

⁴⁶ *Id.*

⁴⁷ <http://wilderness.org/sites/default/files/Development%20Potential-Technical%20Report%20.pdf>

⁴⁸ <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics>

three percent of those issued noncompetitively actually entered production.⁴⁹ This means 90% of competitively-issued onshore leases never generated royalties for the US government.

As demonstrated in The Wilderness Society's technical report, the practice of making areas with low development potential available to oil and gas leasing frequently leads to these areas becoming encumbered with speculative leases. Since low potential lands have favorable lease stipulations and can be acquired and held for minimal cost, low potential areas are often targeted for speculative leasing, though rarely drilled and developed. Speculative leasing ties up public lands, creates unnecessary public conflict, and generates minimal revenue.

These decisions have real impacts on multiple use management. For example, in the Proposed Resource Management Plan for the Colorado River Valley Field Office, the BLM proposed not to manage the "Grand Hogback Unit" to protect its wilderness characteristics based on the presence of oil and gas leases, stating:

The Grand Hogback citizens' wilderness proposal unit contains 11,360 acres of BLM lands. All of the proposed area meets the overall required criteria for wilderness character... There are six active oil and gas leases within the unit, totaling approximately 2,240 acres. None of these leases shows any active drilling or has previously drilled wells. The ability to manage for wilderness characteristics in the unit would be difficult. If the current acres in the area continue to be leased and experience any development, protecting the unit's wilderness characteristics would be infeasible...⁵⁰

In the Proposed White River Field Office Resource Management Plan Amendment, the BLM acknowledged that oil and gas leases "preclude other land use authorizations not related to oil and gas... in those areas," including authorizations for renewable energy projects, stating: "Areas closed to leasing... indirectly limit the potential for oil and gas developments to preclude other land use authorizations not related to oil and gas (e.g., renewable energy developments, transmission lines) in those areas."⁵¹ As these examples show, oil and gas leases, even when not developed, preclude other uses of the public lands.

Speculative leases are also fiscally burdensome. Leases in low potential areas generate minimal revenue but can carry significant cost. In terms of revenue, they are most likely to be sold at or near the minimum bid of \$2/acre, and they are least likely to actually produce oil or gas and generate royalties.⁵² See Bighorn Basin PRMP (2015) at p. 73 ("Leasing may be based on

⁴⁹ https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51421-oil_and_gas_options.pdf

⁵⁰ See [Colorado River Valley Proposed Resource Management Plan \(2014\)](#) at Chapter 3, p. 3-135.

⁵¹ See [White River Proposed RMP, Chapter 4](#) at p. 4-498.

⁵² [Center for Western Priorities, "A Fair Share"](#) ("Oil Companies Can Obtain an Acre of Public Land for Less than the Price of a Big Mac. The minimum bid required to obtain public lands at oil and gas auctions stands at \$2.00 per acre, an amount that has not been increased in decades. In 2014, oil companies obtained nearly 100,000 acres in Western states for only \$2.00 per acre. . . . Oil companies are sitting on nearly 22 million acres of American lands without producing oil and gas from them. It only costs \$1.50 per year to keep public lands idle, which provides little incentive to generate oil and gas or avoid land speculation.").

speculation, with leases within high risk prospects usually purchased for the lowest prices.”); White River PRMP (1996) at p. A-7 (“At any given time, most of the acreage that is available for oil and gas leasing in the WRRRA is under lease. . . . Most of the area is leased for speculative purposes and consequently only a small percentage of leases will ever be developed.”). Nonproducing leases generate less than two percent of total revenue generated by the federal onshore system; 90 percent comes from royalties paid on producing leases.⁵³ In terms of costs, leasing in low potential areas requires processing lease nominations, preparing environmental reviews, and resolving protests and resource use conflicts.

In summary, leasing lands and minerals with low potential for oil and gas development – speculative leasing – carries significant costs by precluding BLM from managing for other multiple uses, creating unnecessary public conflict, and wasting agency resources while generating minimal revenue.

4. Updating these policies will benefit taxpayers and the public lands.

(a) Bonding

The benefits associated with updating the BLM’s bonding policies are obvious. If bond minimums are set at an amount equal to the estimated cost of reclamation the government limits the chance it will have to bear the expenses associated with reclaiming orphaned wells. This in turn means that American taxpayers will not be left footing the bill for the industry’s negligence. This will also help deter financially unstable companies or companies that are only interested in speculation from purchasing federal leases. Additionally, proper reclamation of wells pads will help restore federal lands for other uses like recreation and grazing and will help to restore wildlife habitat and limit fragmentation. Improving tracking and review of bond adequacy will also help the government periodically assess liabilities and increase bond amounts or adjust agency practices in response to findings.

A common refrain from the oil and gas industry is that raising bond minimums will discourage development. However, there is little if any evidence of such a result. In fact, many states have higher minimum bond amounts or more practical methods for determining bond amounts but have not seen a decrease in permitting or drilling as a result. For example, Wyoming calculates individual bonds based on well characteristics and depth and California bases statewide bond amounts on the number of wells a company operates. North Dakota, South Dakota, and Utah all have bonding amounts for single wells and all are over \$50,000 and operators continue to drill in those states.⁵⁴

(b) Lease suspensions

⁵³ https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51421-oil_and_gas_options.pdf, p. 2.

⁵⁴ Western Organization of Resource Councils. Weak Oil and Gas Bonding Will Contribute to Reclamation Crisis. (2016, August 15). Retrieved July 17, 2017, from <http://www.worc.org/weak-oil-gas-bonding/>

Updating the agency's policy governing suspensions would ensure BLM is recovering owed rental payments and returning undeveloped lands to multiple use management. By issuing new guidance that directs BLM to exercise its discretion to reject unjustified lease suspensions and monitor existing suspensions to remove those that are no longer justified, BLM would eliminate a hidden subsidy that is currently available to the oil and gas industry. Agency and public scrutiny of lease suspensions would also ensure that public lands are not removed from multiple use management as a result of oil and gas companies illegitimately holding them in suspended status.

In addition to benefiting the public by managing lease suspensions in a fiscally responsible way and protecting multiple use management, updating the agency's policy governing suspensions would help BLM demonstrate that it is managing oil and gas resources consistent with the Mineral Leasing Act and diligent development requirements.

(c) Lease reinstatements

BLM would prevent oil and gas companies from cheating American taxpayers out of rental payments by ensuring lease reinstatements are appropriately evaluated, issued under the proper classification, and exercising discretion to deny reinstatements when warranted. Updating policy guidance for reinstatements would also ensure the BLM is complying with Section 187 of the MLA. Leases are supposed to have the purpose of insuring "reasonable diligence, skill, and care" and to seek the "protection of the interests of the United States" and the "safeguarding of the public welfare." 30 U.S.C. 187. Updating BLM's guidance for reinstating leases would allow the agency to ensure these directives are being upheld.

(d) Leasing low potential lands

Under current agency guidance, BLM is supposed to use development potential to formulate lease stipulations and management prescriptions that will mitigate conflicts between fluid mineral development and other competing uses. However, in its current form, the guidance leaves low and no potential areas open to leasing with weaker protections than moderate and high potential areas. The result is oil and gas management allocations that leave the door open to future resource conflicts and allow speculative oil and gas leasing in low/no potential areas to limit alternative management decisions. Updating the agency's guidance would allow for BLM to better achieve its objective of mitigating oil and gas conflicts and realize multiple use management.

Limiting leasing in low potential areas conflicts the least with industry objectives and can confer significant public benefits. Low potential lands are the "low-hanging fruit" by which BLM can fulfill other objectives of its multiple-use mission, such as managing for wilderness, wildlife and recreation. Yet, as described above, speculative leases on low potential lands can prevent the BLM from otherwise managing lands for alternative purposes and fulfilling its multiple-use mandate. *See also* White River DRMPA (2012) at p. 4-377 ("... authorized oil and gas uses would likely preclude other incompatible land use authorizations"). In addition, limiting exploration and development on low potential lands necessarily conflicts the least with industry objectives. As discussed in the Bighorn Basin PRMP (2015):

[A]lternatives D and F place additional stipulations on oil and gas-related surface disturbances in the Absaroka Front, Fifteenmile, and Big Horn Front MLP analysis areas for the protection of big game, geologic features, and LRP soils. As a result, alternatives D and F could have additional adverse impacts on oil and gas development in these MLP analysis areas. . . . However, because of the generally low to very low potential for oil and gas development and redundancies with other restrictions on mineral leasing from the management of other program areas, management specific to the MLP is less likely to adversely affect oil and gas development in these areas.

Bighorn Basin PRMP at p. 4-87; *see also* White River DRMP (1994) at p. 4-21 (“Prohibiting development in Class I areas would not affect oil and gas production because oil and gas potential in these areas is low.”).

Eliminating the presumption that all lands, regardless of development potential, should be open to leasing would help ensure that other resources and uses of the public lands, such as wildlife, recreation and water, are on equal footing with oil and gas development. Doing so would also create opportunities to enhance the management of those other resource and uses, particularly in areas with low/no development potential.

5. New regulations and policies are needed to halt hidden subsidies to the oil and gas industry.

(a) Bonding

Common sense reforms are necessary to protect taxpayers and the environment. BLM’s new regulations and guidance should include the following:

- Increase the minimum bond amount. At the very least the minimum should be adjusted to reflect inflation. Using a simple consumer price index (CPI) conversion that would set the individual bond at \$81,000, the statewide bond at \$231,000, and the nationwide bond at \$1,390,000. However, we recommend that bond amounts be set on a case by case basis at an amount that will cover the estimated cost of reclamation. This approach is similar to that employed in federal coal and hardrock mining regulations. Bond amounts could be reviewed periodically and adjusted up for new development on a lease or down for completion of final reclamation of a pad.
- Bond amounts should be set per well. This would bring the regulation in line with current oil and gas drilling practices where operators often drill multiple pads per lease and multiple wells per pad. This is similar to many state regulations. Additionally, bonds should take into consideration the relevant characteristic of a well that might impact reclamation costs; including among other things type, depth and target formation.
- Improve review of bond adequacy and liability tracking. This recommendation mirrors that made by GAO in 2011. BLM must “and improve its data system to better evaluate potential liability and agency performance...”⁵⁵

⁵⁵ GAO 2011

- Improve reclamation standards. In addition to the bonding regulations themselves, BLM’s reclamation standards pose a significant issue. BLM’s lack of clear reclamation standards has created a piecemeal approach, where standards change from land use plan to land use plan, creating inconsistent reclamation requirements on federal lands. BLM should adopt broad, uniform, performance-based standards that ensure that all wells drilled on federal lands meet acceptable minimum requirements for reclamation. This approach allows operators to employ their considerable resources and expertise to achieve satisfactory reclamation. It will provide a consistent and more flexible standard across field offices to promote better and more frequent reclamation potentially reducing an operator’s desire to shirk responsibilities if they find current reclamation requirements too prescriptive or rigid.

(b) Lease suspensions

BLM should issue new guidance for managing suspensions that includes clear direction for considering suspension requests and denying unwarranted suspensions; monitoring existing suspensions on a regular basis and removing those that are no longer justified; and providing for public review of lease suspensions. BLM is currently not holding suspension requests to the high standard set out in the regulations, and revised guidance is necessary to ensure compliance.

- Update criteria for granting suspensions: BLM should issue revised direction for considering suspension requests that includes clear criteria for when the agency does and does not have discretion to grant a suspension request. Pursuant to 43 C.F.R. § 3103.4-4(a), obligations regarding all operations and production of oil and gas leases may be suspended “only in the interest of conservation of natural resources” and obligations regarding either operations or production may be suspended only when “the lessee is prevented from operating on the lease or producing from the lease, despite the exercise of due care and diligence, by reason of force majeure, that is, by matters beyond the reasonable control of the lessee”; and must be justified by the applicant. Revised policy should provide the agency with guidance for implementing these regulations and appropriately considering whether to approve lease suspension requests.
- Establish a monitoring and tracking system for suspensions: A lease suspension is not intended to be unending; BLM requires that a suspension terminates when it is “no longer justified in the interest of conservation, when such action is in the interest of the lessor, or as otherwise stated by the authorized officer in the [suspension] approval letter.” 43 C.F.R. § 3165.1(c). BLM’s existing manual directs the agency to “monitor the suspension on a regular basis to determine if the conditions for granting the suspension are extant, and should terminate the suspension when it is deemed no longer necessary.” BLM Manual 3160-10.3.31.C.3. However, in practice this requirement is not applied through any regular or consistent mechanism. More explicit guidance should direct when and how this monitoring occurs. A verification system to ensure regular oversight including directing state offices to evaluate suspended leases on a quarterly basis and report to DC in a publicly available format should also be incorporated into the suspended lease management strategy.

- Increase transparency and opportunities for public involvement in lease suspensions and monitoring: BLM should be required to post documentation of lease suspension requests and decisions, including on its NEPA log, but also in a dashboard available via state office websites. Information on suspended leases, including status and reason for suspension, should also be made public to provide for public oversight and accountability on the length of suspensions in annual oil and gas program reports. A summary of lease suspensions should be included in the BLM’s annual reporting of oil and gas statistics, as well.
- Evaluate need for NEPA review: Finally, BLM should evaluate whether categorical exclusions are appropriate for individual suspensions, applying the “extraordinary circumstances” criteria, and if any of those criteria are met, then an environmental assessment or environmental impact statement must be prepared.

(c) Lease reinstatements

BLM must update its guidance for evaluating and approving or denying lease reinstatements to ensure oil and gas companies are complying with the directives set forth in the Mineral Leasing Act and that taxpayers are receiving rental payments for leased public mineral resources. The practice of reinstating leases that have been terminated for failure to pay the annual rental fee needs to be evaluated by the BLM and much more stringent provisions for reinstatement should be put in place. By law, the BLM is only to reinstate leases in cases in which the failure to timely submit the rental was “justified” or “not due to lack of reasonable diligence” by the lessee. In updating the agency’s guidance, BLM should establish narrow and specific guidelines for when these criteria may be considered to be met.

- Require evidence of extenuating circumstances and reasonable diligence: According to the BLM Handbook, justification can occur if “sufficiently extenuating circumstances or factors beyond the control of the lessee [] occurred at or near the lease anniversary date.”⁵⁶ BLM should ensure that any excuse of non-payment of rent is in fact beyond the control of the lessee—any claimed basis for failure to pay on time must be a “causative factor” showing control had been lost.⁵⁷ Failing to pay rent on time also can only rarely be excused as having occurred despite the exercise of reasonable diligence. To claim diligence, a lessee must be able to show they sent the rental “sufficiently in advance of the due date to account for normal delays.”⁵⁸ Lessees seeking lease reinstatements must be required to provide detailed support that they meet these criteria, and only in the rare circumstances in which they are clearly met should reinstatements be authorized.
- Class I reinstatements should be generally unavailable: BLM should exercise its discretion to not authorize Class I reinstatements (reinstatement at existing rental and royalty rates), except in the most extraordinary circumstances.
- Define “inadvertence” to mean “not duly attentive”: Regarding Class II reinstatements, the failure to pay rent on time should only rarely be excused as having occurred because of inadvertence. Inadvertent means “not duly attentive.” While inadvertence may be

⁵⁶ BLM Handbook H-3108-1 at 31

⁵⁷ *Id.*

⁵⁸ *Id.*

unintentional, it is synonymous with “careless.” This lack of attention should not be readily excused for such a simple task as paying your rent on time. If an oil and gas lease has real value to the operator, certainly they should be attentive enough to pay their rent on time. The failure to pay rent on time is evidence the lease is not valuable to the operator, and therefore leaving the termination in place is justified. The failure to pay rent on time probably signals a general lack of diligence, such as not seriously engaging in actual drilling operations. *See* 43 C.F.R. § 3107.1 (allowing for extension of lease terms if actual, diligent drilling is commenced prior to the end of the primary term).

BLM’s guidance defining when inadvertence can be excused is so broad as to be meaningless. “Inadvertence” is viewed by the BLM to include failure to pay due to carelessness, negligence, an unintentional or accidental oversight, inattention, a mistake, a financial inability to pay timely, or any other reason.” BLM Handbook H-3108-1 at 37. This meaningless view of what constitutes inadvertence must be abandoned. A definition that recognizes inadvertence means “not duly attentive” needs to be put in place. Being careless, negligent, inattentive or not having the financial inability to pay on time are not due reasons to excuse nonpayment.⁵⁹

- *Reinstated leases should not have their terms extended or royalty rates reduced.* The BLM should not extend the terms of the lease or reduce the royalty rate when a lease is reinstated. Reinstatement of oil and gas leases for failure to pay rent should be an exception rather than a rule in the interest of multiple-use management of our public lands.

(d) Leasing low potential lands

BLM should use development potential to plan for oil and gas development on federal lands in ways that mitigate resource conflicts, accommodate multiple uses of public lands without preference, and encourage development in areas that are most economic for oil and gas production. Limiting leasing in areas with low or no development potential would reduce administrative costs, mitigate conflicts between competing resources, and be more faithful to BLM’s multiple-use mandate.

This approach would also be consistent with the MLA, which directs BLM to hold periodic oil and gas lease sales for “lands... which are known or believed to contain oil or gas deposits...” 30 U.S.C. § 226(a); *see also Vessels Coal Gas, Inc.*, 175 IBLA 8, 25 (2008) (“It is well-settled under the MLA that competitive leasing is to be based upon reasonable assurance of an existing mineral deposit.”). These sales are supposed to foster responsible oil and gas development, which lessees must carry out with “reasonable diligence.” 30 U.S.C. § 187; *see also* BLM Form

⁵⁹ The Interior Board of Land Appeals has ruled that being financially unable to pay rent is not considered inadvertent and is, therefore, not grounds for Class II reinstatement. *Dena F. Collins*, 86 IBLA 32 (1985). But BLM policy is nevertheless that “if a lessee does later secure the financial ability and timely files a petition for reinstatement, the petition is to be processed.” BLM Handbook H-3108-1 at 37. BLM should expect that lessees will maintain an ability to meet and abide by their lease terms on a continuous basis; lessees should be ready to pay rent when due, and if they cannot they should be willing to give up the lease and move on to other business opportunities.

3100-11 § 4 (“Lessee must exercise reasonable diligence in developing and producing...leased resources.”).

- BLM plans should set out a framework for oil and gas development that supports closing lands to leasing where development is unlikely to occur: If BLM closes or defers leasing in low-potential areas, and conditions change to make development in those areas more likely, the agency can then complete additional analysis and planning to ensure that development occurs responsibly and accounts for current resource conditions. An updated approach to planning for oil and gas leasing should meaningfully account for development potential and conflicts with other resources.⁶⁰
- Modernize the handbook with an approach that provides for closing lands to leasing and limits leasing in low- or no-potential areas: Updating the handbook would not only support BLM’s obligation to consider managing lands for fish and wildlife, recreation and wilderness values, but also have minimal impacts on industry objectives. In locations like the Ely District in Nevada, where federal minerals are almost 90 percent open to leasing, only 32 wells were authorized over the past 101 years (as of May 21, 2014), even though there are 936 active leases covering just over two million acres of public land.⁶¹ Closing these lands to speculative leasing will not harm responsible oil and gas development.
- Consider basing oil and gas lease sales on a “List of Lands Available for Competitive Nominations,” as authorized by BLM regulations: BLM currently allows the oil and gas industry to nominate any public lands for leasing, which encourages widespread speculation in low potential areas and creates unnecessary conflicts with other multiple uses. This is extremely inefficient and wasteful system for leasing public lands is not the only model available to BLM, however, as current rules also permit BLM to create and utilize a “List of Lands Available for Competitive Nominations.” 43 C.F.R. § 3120.3-1. Such a list would allow BLM to proactively direct industry to areas with better odds of development and with lower resource conflicts, while eliminating areas from consideration that are clearly speculative and unlikely to generate any oil and gas revenues for American taxpayers.

Limiting development in low/no potential areas would allow BLM to minimize the risk of impacts and conflict altogether in areas where development is likely to be minimal in the first place. This practice would also limit speculative leasing practices by the industry, which can foreclose alternative management decisions and burden the BLM with increased administrative costs and conflicts associated with leasing in low potential areas. Under a more strategic approach to making oil and gas allocations in land use planning, lands would be made available for leasing by evaluating both an estimate of oil and gas potential and the conflicts with or

⁶⁰ See TWS No Exit Report for detailed recommendations on an updated approach to making oil and gas allocations in land use planning:

http://wilderness.org/sites/default/files/TWS%20No%20Exit%20Report%20Web_0.pdf

⁶¹ See BLM Nevada Preliminary EA for the Dec. 2015 Oil and Gas Lease Sale, p. 1.4.

potential harm to other resources present on those same lands. We direct BLM to and incorporate by reference the recommendations made in the TWS reports cited above (attached and incorporated herein by reference).

III. Conclusion

This petition is presented under the Administrative Procedure Act, which provides that each agency “shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule”⁶² and the United States Constitution, which protects the right to “petition the Government for the redress of grievances.”⁶³ Interior must respond to this petition “within a reasonable time”⁶⁴ and Interior regulations state that petitions will be given “prompt consideration.”⁶⁵ Courts have found that “a reasonable time for agency action is typically counted in weeks or months, not years.”⁶⁶

The agency must notify petitioners of the denial of a petition, in whole or in part, and with limited exception, a denial must include an explanation on the grounds for denial.⁶⁷ A reviewing court shall compel agency action “unlawfully withheld or unreasonably delayed.”⁶⁸ We request that Interior and BLM respond to this petition and commence both rulemaking and issuance of new guidance in no less than three months of the date of receipt. We also notes that Interior regulations authorize the Secretary to publish this petition in the Federal Register to solicit public comments on the proposed rule-making if those public comments “may aid in the consideration of the petition.”⁶⁹ In light of the BLM’s previous acknowledgment of the need for many of these updates to regulations and policies, and the suitability of a public process, we request that Interior and BLM also public this petition for comment.

The current regulations and guidance underpinning the BLM’s onshore oil and gas leasing program are in dire need of updating. Analyses of these decades-old policies has shown that they are harming the taxpayers that the BLM is obligated to ensure receive the benefits of leasing and the public lands that BLM is obligated to ensure are managed for multiple use and sustained yield. Additionally, updating these rules will help cure widespread violations of the diligent development requirement that is an essential obligation in every federal lease. Updating these

⁶² 5 U.S.C. § 553(e).

⁶³ U.S. Const., amend. I.

⁶⁴ 5 U.S.C. § 555(b)

⁶⁵ 43 C.F.R. § 14.3.

⁶⁶ *In Re: American Rivers and Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (internal citation and quotations omitted). See *Midwest Gas Users Asso. v. Federal Energy Regulatory Com.*, 266 U.S. App. D.C. 91, 833 F.2d 341, 359 (D.C. Cir. 1987) (“This court has stated generally that a reasonable time for an agency decision could encompass ‘months, occasionally a year or two, but not several years or a decade.’” (quoting *MCI Telecommunications Corp. v. Federal Communications Com.*, 200 U.S. App. D.C. 269, 627 F.2d 322, 340 (D.C. Cir. 1980))); *Fund for Animals, et. al. v. Norton, et. al.*, 294 F.Supp. 2d 92, 115 (D.D.C 2003) (petitioners are “entitled to an answer within a reasonable amount of time.”) (emphasis in original)

⁶⁷ 5 U.S.C. § 555(e); 14 C.F.R. § 14.3.

⁶⁸ 5 U.S.C. § 706(1). See *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70, 76-77 (D.C. Cir. 1984).

⁶⁹ 14 C.F.R. § 14.4.

policies will not harm the oil and gas industry, which is currently receiving unnecessary subsidies while profiting at the expense of the American public.

From: Nada Culver
To: [Vincent Devito](#)
Cc: [Nicholas Lund](#)
Subject: thank you for meeting with us
Date: Tuesday, September 19, 2017 3:57:45 AM
Attachments: [RMP_Flowchart2010.pdf](#)
[Leasing EA Flowchart.pdf](#)
Importance: High

Dear Vincent:

Thank you (and Josh, but we don't have his email yet) for your time last week. Clearly, you have a lot of actions underway and more to come. We wanted to follow up on some of the items we discussed.

First, in terms of the ability for the BLM to amend land use plan using an environmental assessment instead of an environmental assessment, BLM's Land Use Planning Handbook explicitly states that certain types of resource management plan amendments can be conducted using environmental assessments. You can access the Handbook here https://eplanning.blm.gov/epl-front-office/projects/nepa/61781/74665/82222/Federal_Register_Notice.pdf <https://eplanning.blm.gov/epl-front-office/projects/nepa/61781/74665/82222/Federal_Register_Notice.pdf> and the discussion starts at the bottom of page 25.

Also, the current effort underway by the Utah BLM to amend the Price and Richfield resource management plans to address oil and gas management through a master leasing plan is being conducted using an environmental assessment. The formal Federal Register notice can be seen here https://eplanning.blm.gov/epl-front-office/projects/nepa/61781/74665/82222/Federal_Register_Notice.pdf <https://eplanning.blm.gov/epl-front-office/projects/nepa/61781/74665/82222/Federal_Register_Notice.pdf>

Second, we did email Gisella and will continue to follow up on finding a date for the trip to Moab. If there is a range of dates that works best for you, please let us know and we can coordinate with Ashley and the local agency folks to make it happen.

Third, since you mentioned you are scaling up the Secretary's Energy Office, we thought it might be helpful to have some handy flowcharts of the land use planning and oil and gas lease sale processes that the BLM uses. We prepared these from BLM's handbooks and guidance to share with other partners and hoped they could be helpful for your expanded staff.

Finally, we'd be glad to set up a time to talk through the petition TWS submitted on the fiscal aspects of the onshore oil and gas leasing program as you think that might be useful.

Nada Culver

Senior Counsel and Director, BLM Action Center

The Wilderness Society

1660 Wynkoop Street #850

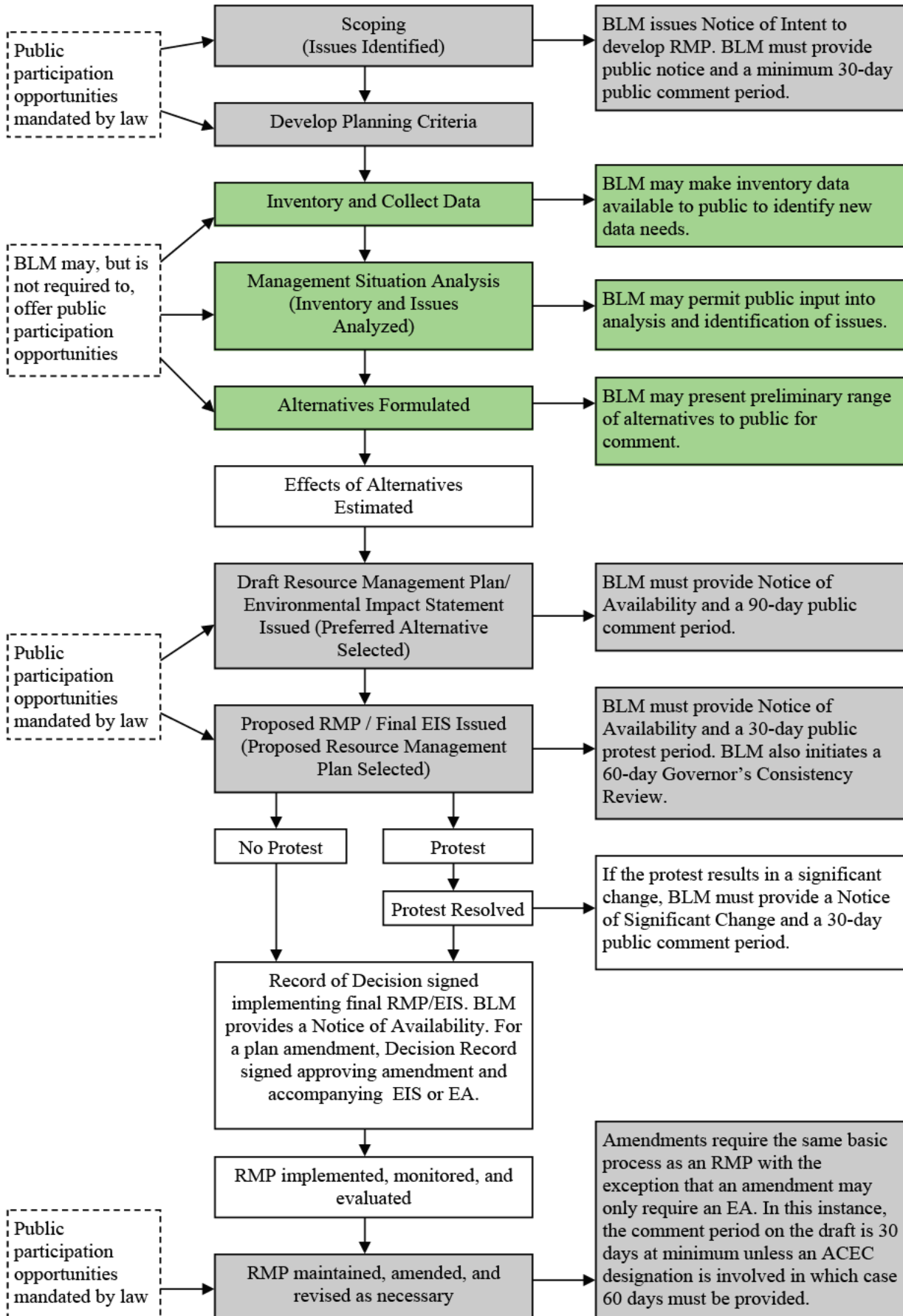
Denver, CO 80202

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Nada_Culver@tws.org

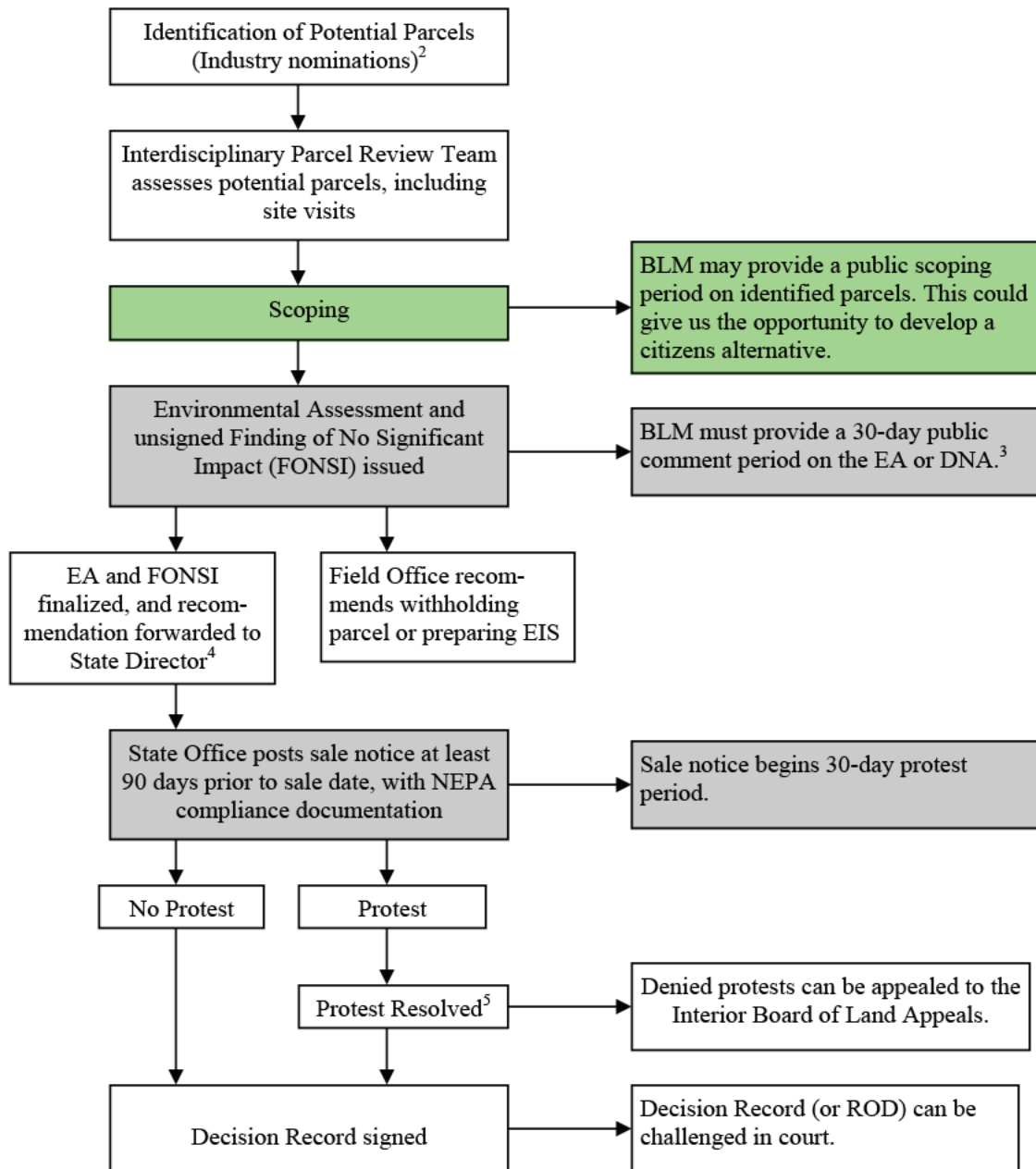
RESOURCE MANAGEMENT PLANNING PROCESS

The left side of the figure shows the progression of planning stages. The boxes on the right highlight the public participation opportunities at each stage.



OIL AND GAS LEASING PROCESS¹

The left side of the figure shows the progression of leasing stages. The boxes on the right highlight the public participation opportunities at each stage.



1. Instruction Memorandum 2010-117 (issued May 17, 2010) establishes, among other oil and gas reforms, a new oil and gas leasing process for public lands. The new process requires more robust NEPA compliance documentation and opportunities for public comment. The IM can be found at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/IM_2010-117.html.
2. State offices will continue to hold quarterly lease sales, but will now rotate lease sale parcels among the field offices so that every field office will not have parcels in every sale.
3. BLM may prepare a DNA in lieu of an EA if the IDPR Team determines the proposed leasing action has already been adequately analyzed in a NEPA document (such as if a Master Leasing Plan has been prepared for the area).
4. Recommendations are not appealable or protestable.
5. The guidance states that BLM should attempt to resolve protests prior to the lease sale, but protests that are not resolved do not prevent bidding on protested parcels at the auction.

From: Devito, Vincent
To: [Ojeda-dodds, Gisella](#); [James Schindler](#); [Christopher Stolte](#); [Campbell, Joshua](#); [Landon Davis](#)
Cc: [Nada Culver](#)
Subject: Petition to the Department of the Interior and Bureau of Land Management requesting rule-making and guidance pursuant to the Administrative Procedure Act
Date: Tuesday, November 14, 2017 10:41:17 AM
Attachments: [APA Petition - oil and gas fiscal policies --9-14-17 - final.pdf](#)

Good morning: Nada (copied) would like an opportunity to meet with this group to discuss the attached petition in the context of the RPC.

Gissela: can you please coordinate? Thank you.

--

Vincent DeVito, Esq.
Counselor to the Secretary of Interior for Energy Policy
Immediate Office of the Secretary
+1.202.208.2884
vincent_devito@ios.doi.gov

**PETITION TO THE DEPARTMENT OF THE INTERIOR AND BUREAU OF LAND MANAGEMENT TO
INITIATE RULE-MAKING AND ISSUE GUIDANCE TO MODERNIZE THE ONSHORE OIL AND GAS
PROGRAM FOR THE BENEFIT OF ALL AMERICANS**

Submitted September 14, 2017

I. Executive Summary

This petition is submitted under the Administrative Procedure Act, which gives citizens the right to request action from a federal agency to issue, repeal or amend a rule, and entitles them to a prompt response. The petition asks the Department of the Interior to reform the fiscal terms and management processes regarding oil and gas leasing to yield the legally-required fair market value return to the American people for the resources they own and to fulfill the Department's multiple use mandate. The proposals made here are intended to maintain oil and gas production from public lands most suitable for that purpose while generating greater revenues and greater public benefits through more productive use of certain lands for other commercial, recreational, and conservation uses.

These beneficial results will result from more rigorous, market-oriented fiscal terms and management practices that ensure public lands are efficiently, productively and appropriately used for public purposes and that the waste and neglect of resources due to speculative holding of chronic, non-producing oil and gas leases are minimized if not eliminated. The proposals will not detract from oil and gas production. To the contrary, the cumulative effect of the proposed changes is to better ensure that economically-feasible, oil and gas leases end up in the hands of diligent and competent producers of oil and gas, and are not held unused by non-producing speculators.

The problem: current practices tie up lands without producing energy or revenues.

Poor, indecisive and inefficient Interior management of oil and gas resources provides hidden subsidies to speculators who do not diligently pursue development. Because Interior often fails to actively manage public lands with dormant oil and gas leases for other public uses, it effectively denies the public—persons, organizations, and companies—the certainty they need to use these lands for beneficial economic, conservation, recreational or other purposes. When the federal agencies leave lands in limbo because of the remote possibility that a long dormant, low-value oil or gas lease might be developed some day, uncertainty reigns, and neither the public nor other industries can make long-term commitments to alternative uses of those lands. The economic, social and environmental benefits of those other uses are thus lost.

Below market royalty and rental rates, low minimum lease bids, inadequate bonds, lengthy and lax lease suspensions, unjustified reinstatements of lapsed leases, and leasing low potential lands encourages speculators to tie up federal lands often for decades—preventing decisions to either expeditiously develop the oil and gas resources for energy or, alternatively, maximize the benefits flowing from other uses of public lands. By subsidizing and enabling dormant leases, current practices tie up lands without producing energy or revenues for the American people and simultaneously preventing those lands from being used for other purposes. Scattered in checkboard fashion across the American West are neglected public lands not utilized for the

greatest good because of Interior's mismanagement and misguided subsidies for non-beneficial uses. Interior's neglect of these lands fails the multiple use standard of federal law.

The solution: charging market rates and discouraging unproductive leasing will yield the right balance of uses and returns.

To provide the greatest benefit to the American public, Interior should incentivize the timely production of oil and gas from public leases by charging market rates at every stage of the leasing and production process, and also decisively managing land and resources to support the most appropriate combination of multiple uses. Federal leases are issued for terms (ten years) that are longer than those used by many states or private parties so the industry already has ample time to develop leased lands. Interior, as manager of all leases of public lands and minerals, should focus on making sure those leases are ended if they are not being used productively and ensure leases are yielding a fair return while they are tying up public lands. Accordingly, this petition asks Interior to more effectively meet the standards of multiple use management and a fair return of revenues to the public by:

1. Charging higher, market-tested royalty rates (such as those used by states and the private sector) instead of the inadequate, subsidy-providing 12.5% rate;
2. Increasing rental rates on federal leases to a level sufficient to incentivize oil and gas production so that the percentage of federal leases that produce energy would rise well-above the current, unsatisfactory levels (e.g. only 50% in Rocky Mountain States);
3. Increasing minimum lease bids, as recommended by the Congressional Budget Office, to deter companies from purchasing leases for speculative purposes only;
4. Updating bonding requirements to reflect current costs associated with reclamation and restoration of lands used for oil and gas production;
5. Reforming lease suspension practices to establish rigorous standards guaranteeing that undeveloped oil and gas leases are either diligently placed into production or cancelled so that the land can be managed for other beneficial uses;
6. Updating lease reinstatement practices to require consistent and higher standards of justification for reinstating lapsed leases, with minimal tolerance for defaults on rental payments; and
7. Stopping the leasing of lands with low potential for oil and gas production and managing those lands for other purposes of greater benefit to the public.

The combination of these policies will generate millions of dollars annually for the American people, as well as states and local communities that benefit from federal oil and gas production. As numerous economic and fiscal studies indicate, higher royalty rates will generate large amounts of additional revenue with negligible impact on production. Indeed, several of the other changes proposed here will ultimately incentivize more timely production of oil and gas from federal lands and minerals, which raises the prospect for a net increase in energy production overall. Finally, and more importantly, a diversity of beneficial uses of federal land will expand as the waste and neglect of lands with dormant, speculative leases decline. Overall, better management of public lands will result in better uses in the right places, including renewable energy, recreation and conservation. More rigorous, decisive and efficient management will

greatly increase the revenues and benefits to the American people from public lands and minerals.

II. Context and Overview

Petitioners request the Department of the Interior (Interior) and Bureau of Land Management (BLM) develop regulations and policies to update the fiscal aspects of its management of onshore oil and gas leasing and development.

On April 15, 2015, BLM issued an Advanced Notice of Proposed Rulemaking (ANOPR) seeking input on potential changes to fiscal policies related to its onshore oil and gas leasing program. As the agency stated: “The anticipated updates to BLM’s onshore oil and gas royalty rate regulations and other potential changes to its standard lease fiscal terms address recommendations from the Government Accountability Office (GAO), and will help ensure that taxpayers are receiving a fair return from the development of these resources.” 80 Fed. Reg. 22148 (Oil and Gas Leasing; Royalty on Production, Rental Payments, Minimum Acceptable Bids, Bonding Requirements, and Civil Penalty Assessments). BLM should follow up on this recognition, as well as similar findings related to other aspects of managing its onshore oil and gas program, to both provide a fair return to the taxpayers who own these resources and also better fulfill its broader obligations as stewards of our public lands. BLM should issue updated policies and commence or continue rulemakings to address these major inadequacies in its onshore oil and gas program.

This Petition identifies two types of policies that need to be updated:

- (1) Revenue-generating policies, which involve payments that are being made but not at sufficient levels to ensure a fair return to the American people and to encourage timely development of resources. These policies include royalty, rental and bid rates.
- (2) Hidden subsidies, which are causing lost revenues needless giveaways to the oil and gas industry and are undermining multiple use management. These policies include bonding rates, lease suspensions, lease reinstatements and leasing low potential lands.

Through the requested rulemaking, Interior and BLM have an opportunity to structure a fiscally responsible oil and gas program that reflects multiple use and sustained yield in the 21st century. BLM must modernize fiscal elements of its oil and gas program to responsibly steward our public lands and ensure a fair return to American taxpayers.

BLM’s onshore oil and gas leasing program has been plagued with economic and environmental problems, stemming from low leasing rates, low royalty rates, low bonding rates and high emissions and gas waste. The Government Accountability Office has repeatedly concluded that “the inflexibility of royalty rates to changing oil and gas prices has cost the federal government billions of dollars in foregone revenues.” GAO-08-691 (Oil and Gas Royalties) at 16. Furthermore, GAO has found that Interior can recoup these revenues with “negligible” impacts on oil and gas production. GAO-17-540 (Oil, Gas, and Coal Royalties) at 16.

Additional systemic problems contribute to BLM's failure to recover revenue for federal resources and ensure producers are diligently developing leased lands. For example, inappropriate use of lease suspensions and unitization allows industry to hold leases indefinitely without production. As of March 2015, there were 3.25 million acres of federal minerals in suspended leases, many dating back to the 1980s and 1990s.¹ Because BLM regularly declines to adopt conservation management for lands encumbered by leases, holding leases in undue suspension is tantamount to removing those lands from multiple use. Similarly, the thousands of idle and orphaned federal wells could be better addressed by sufficient bonding, but instead are risking environmental damage and putting a financial burden on the BLM. Through this rulemaking process, BLM should take the opportunity to address these issues in a way that makes sound economic *and* environmental sense.

BLM is modernizing into an agency that embraces conservation as an integral element of multiple use and sustained yield. As provided in the Federal Land Policy and Management Act (FLPMA), 17 U.S.C. § 1701, et seq., multiple use management does not require the balance of uses on every tract of public land, but rather a combination of resource conservation and uses to "best meet the present and future needs of the American people." The notion that resource development must be balanced with conservation management is explicit in the definition of "multiple use":

[T]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; . . . *the use of some land for less than all of the resources*; a combination of balanced and diverse resource uses that takes into account the long term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, *and natural scenic, scientific and historical values*; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the lands and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

43 U.S.C. § 1702(c) (emphasis added).

Managing and planning for multiple use and sustained yield necessarily means that there must be a significant portion of public lands devoted to conservation in order to sustain public resources. Sustained yield does not support a focus on outputs from resource extraction or industrial uses. FLPMA specifically directs BLM to maintain in perpetuity "a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." FLPMA, 43 U.S.C. § 1702(h). Therefore, sustained yield requires BLM to sustain high-level yields of natural landscapes, scenic resources, clean air and water, wildlife, night skies, soundscapes, and opportunities for solitude, quiet-use, and primitive types of recreation.

BLM's current oil and gas leasing policies recognize that oil and gas development is but one use of the public lands which should be balanced with other multiple uses and considered on equal

¹ Data accessed through LR2000.

ground. Instruction Memorandum 2010-117 explicitly states that in some cases, oil and gas leasing is inconsistent with protection of other public lands resources and values. IM 2010-117 goes on to affirm that, **“Under applicable laws and policies, there is no presumed preference for oil and gas development over other uses.”**

Courts have confirmed the agency’s discretion and obligation to consider protecting environmental values. For example, in *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683 (10th Cir. 2009), the court rejected the BLM’s argument that its analysis under the National Environmental Policy Act (NEPA) did not have to include an alternative that closed Otero Mesa to oil and gas drilling because doing so would violate the its multiple use mandate. *Id.* at 710. Noting that “a delicate balancing is required,” the court explained that “[d]evelopment is a *possible* use, which BLM must weigh against other possible uses – including conservation to protect environmental values.” *Id.* (emphasis in original).

BLM’s onshore oil and gas program must be modernized to ensure that the agency is meeting its broader obligations to the American people. Public lands should not be automatically ceded to the oil and gas industry upon demand. Where public lands and minerals are turned over to the oil and gas industry, other resources must be protected and responsible development diligently pursued.

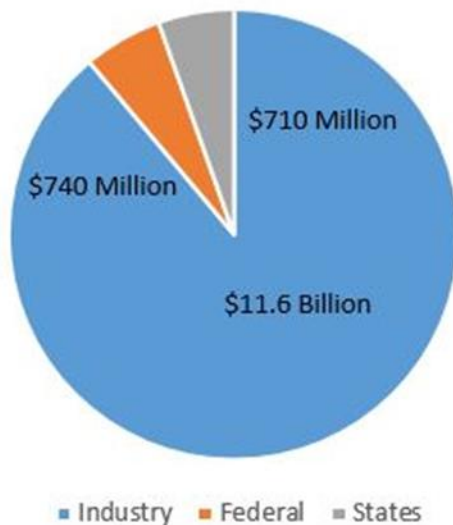
As has been shown by numerous studies, many aspects of the program are outdated and inadequate; key rates have not been updated for decades. Consequently, BLM is conservatively leaving millions of dollars on the table every year that should be compensating the American taxpayer for turning public lands and minerals over to the oil and gas industry. Instead of providing a fair return to taxpayers, oil and gas companies are reaping the benefits of the increased levels of oil and gas production from public resources. State, private and even offshore rates of return are significantly higher, showing that the BLM’s approach can and should be improved.

A recent study found that, due to many of these outdated policies, including royalty rates, the oil and gas industry shares a very small percentage of what they collect from producing federal minerals with taxpayers. In FY 2016, companies developing federal lands and minerals gained some \$11.6 billion selling oil and gas from public lands and minerals, but BLM collected only \$1.4 billion in royalties.² The resulting half of this portion shared with states and counties is thus unfairly decreased, as well; these are unnecessarily small pieces of the pie.

² <https://www.gao.gov/assets/690/685335.pdf>; see also <http://westernvaluesproject.org/rigged-taxpayers-pay-for-big-oil-companies-profits-from-public-lands/>

Federal Onshore Oil and Gas Royalty Revenues

FY 2016



Overall, modernizing the policies that are central to the federal onshore oil and gas program will boost revenues without hindering development while better fulfilling the BLM’s legal obligations under FLPMA and the Mineral Leasing Act (MLA), as discussed in more detail below.

III. Interests of Petitioners

All Americans have a vested interest in the management and use of their public lands and minerals. To the extent that these public resources are being turned over to the oil and gas industry, taxpayers are entitled to a fair return. Lands and minerals held by the oil and gas industry general deprive citizens of the use and enjoyment of public and private split estate lands and resources for hunting, fishing and other types of recreation, solitude, clean air and water, renewable energy development, grazing, and other activities to support their own businesses. BLM’s obligations including ensuring this interference with multiple use is justified. The parties submitting this petition are seeking to enforce those obligations, because the current onshore oil and gas program does not fulfill them.

Dan Bucks is an expert in public revenue and land management issues with over forty years of experience in state government administration. Over this period, he advised elected officials on natural resource revenue and growth management policies. He administered Montana’s state and local revenue laws for coal, oil, gas, and other minerals. He initiated and oversaw Montana’s participation in the joint federal-state mineral auditing program. He actively engaged Interior’s policy making processes from 2015 forward on mineral leasing and royalty issues and testified to Congress on such matters. He has been a witness to four decades of changes in energy production on the Northern Plains—from the growth in Powder River Basin coal, to the Bakken oil boom in Bakken and the emergence of commercial wind farms. From this experience, he acquired a deep understanding of the relationship of these changes to the human and natural environment. He served as Director (2005-2013) and Deputy Director (1981-1988) of the Montana Department of Revenue, Executive Director of the Multistate Tax Commission (1988-

2004), Director of Science and Natural Resources, National Conference of State Legislatures (1980-81), Consultant to the Montana Governor's Office (1979-80), Bush Leadership Fellow (1977-1979) South Dakota State Planning Commissioner (1974-77), and South Dakota Director of Executive Reorganization (1971-1974).

The **Powder River Basin Resource Council** ("Resource Council") is a grassroots community conservation and family agriculture organization in Wyoming. Resource Council members live throughout the state of Wyoming, but the majority of them are rural landowners, many of whom live in a split estate situation with federally-controlled minerals underlying their lands. Resource Council members thus have a keen interest in the BLM's management of oil and gas resources.

Marjorie West is a member of the Resource Council. Along with her husband, Bill, Marge owns a ranch on Spotted Horse Creek in the Powder River Basin of Wyoming, where they grow dry land wheat and raise cattle. Her ranch was homesteaded by Bill's father and expanded by the family over the generations. The Wests' ranch includes a combination of private and federal oil and gas, and the family has been living with the impacts of development of these resources since the coalbed methane boom in the early 2000s. Now that coalbed methane has busted, the Wests are dealing with idle and orphaned wells that have been left on their land.

Leland (L.J.) Turner and his family own a 10,000-acre ranch near the town of Wright, Wyoming in the heart of the one of the largest oil and gas fields in the country. L.J.'s grandfather homesteaded the ranch in 1918 and it has been in the family ever since. The ranch currently has sheep and cattle, and is impacted by oil and gas development from a mix of privately owned and federally owned minerals.

The Wilderness Society is the leading conservation organization working to protect wilderness and inspire Americans to care for our wild places. Founded in 1935, and now with more than one million members and supporters, The Wilderness Society is committed to sound management of our shared national lands, which includes recognizing the values of some lands for conservation and recreation, while also continuing responsible energy development.

IV. Policies requiring new rulemakings

A. Revenue-generating Policies

1. BLM has the duty and authority to modernize its revenue-generating policies for onshore oil and gas development.

BLM has a legal obligation under FLPMA, the MLA and related authorities to modernize its revenue-generating policies for onshore oil and gas development. Under FLPMA, BLM must ensure that American taxpayers "receive fair market value of the use of the public lands and their resources. . . ." 43 U.S.C. § 1701(a)(9). This requirement is also found in the MLA, which demands regular adjustments to royalty and rental rates and minimum bids, in order to "enhance financial returns to the United States. . . ." 30 U.S.C. § 225(b)(1)(B); *see also id.* §§ 225(b)(1)(A), 225(d) (authorizing royalty and rental rates increases). Thus, BLM has a clear duty to update its revenue-generating policies and must do so now, given how outdated those

policies have become and the significant amount of revenue that is not going to American taxpayers.

Congress never intended for onshore royalty rates to remain stagnant. That is why onshore royalties are set “at a rate of *not less than* 12.5 percent. . . .” 30 U.S.C. § 225(b)(1)(A) (emphasis added). This rate represents a floor which Interior must adjust upward as oil and production rises and to avoid the oil and gas industry enjoying windfall profits that rightfully belong to the American people. For instance, in 2009, Interior raised the offshore royalty rate from 12.5 percent to 18.75 percent, in response to rising oil prices.³ However, even though onshore oil production has nearly doubled since 2008, the onshore royalty rate has not changed.⁴

BLM has a similar duty to increase rental rates. All federal leases are “conditioned upon payment . . . of a rental *not less than* \$1.50 acre per acre” for the first five years and \$2.50 per acre for the remaining years. 30 U.S.C. § 225(d) (emphasis added). These rates are well below what is currently needed to incentivize oil and gas development, as less than half of the leased acres on public lands are actually producing oil or gas.⁵ As the Congressional Budget Office (CBO) recently explained: “A higher rental fee increases the cost of holding a lease, giving leaseholders an incentive to either explore parcels or return them to the government. In practice, the current incentive is weak because the fees are small relative to the cost of developing a lease.”⁶ Thus, current rental rates are not creating the necessary incentives to maximize revenue from the development of publicly owned oil and gas resources.

Finally, BLM must increase minimum bids, which are encouraging wasteful speculation by companies that are not diligently developing their leases. Under the MLA, minimum bids must be adjusted to “enhance financial returns to the United States. . . .” 30 U.S.C. § 225(b)(1)(B). Yet, the minimum bid for a competitive lease is just \$2.00 per acre. This is well-below the level needed to deter companies from purchasing leases for speculative purposes. According to CBO, over one-quarter of competitive leases sold for the minimum bid between 2003 and 2012.⁷ A separate analysis found that over half of the companies that currently hold federal leases in the Rocky Mountain states are not even recognized as “active” operators by state oil and gas commissions.⁸ Not only would higher minimum bids help deter these companies from locking-up public lands to the detriment of other income-generating activities, like outdoor recreation, but they would also generate more revenue for taxpayers:

³ Congressional Research Service, Mineral Royalties on Federal Lands: Issues for Congress at 4 (Jan. 2015), available at

https://www.everycrsreport.com/files/20150119_R43891_3bd50f51ada1b53821153ce674b442bc7df659de.pdf.

⁴ Office of Natural Resources Revenue, Production Data, available at <https://onrr.gov/About/production-data.htm>.

⁵ BLM, Oil and Gas Statistics, available at <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics#quickset-programs-oil-and-gas-statistics> 5.

⁶ Congressional Budget Office, Options for Increasing Federal Income from Crude Oil and Natural Gas on Federal Lands at 8, available at <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51421-oil-and-gas-options.pdf>.

⁷ *Id.* at 18.

⁸ Western Values Project, Rugged: Industry already has the keys to the kingdom, available at <http://westernvaluesproject.org/industry-already-has-the-keys-to-the-kingdom/>.

Raising the minimum bid in an auction to \$10 per acre and requiring that same amount to be paid for parcels leased noncompetitively would boost net federal income by an estimated \$50 million over 10 years, CBO estimates. That effect is the net result of increases in federal income from higher bonus bids for some parcels, including all parcels leased noncompetitively, and decreases in rental and royalty income for parcels that attract no bids (though such parcels would have generated relatively little production and royalty income).⁹

For all of these reasons, BLM has an obligation under FLPMA and the MLA to modernize its royalty and rental rates and minimum bids, and to ensure that American taxpayers are receiving a fair return from onshore oil and gas development.

2. BLM's revenue generating-policies are woefully outdated and no longer ensure that the American people are receiving fair market value for the use of public lands and resources.

BLM's revenue-generating policies for oil and gas development are woefully outdated, have not kept pace with inflation, and are weaker than equivalent policies for offshore oil and gas development and those used by many western states. As a consequence of these weak and outdated fiscal policies, CBO predicts that taxpayers could miss out on roughly \$1 billion in revenue over the next decade.

BLM has never updated its royalty rates for onshore oil and gas development. They have remained at 12.5% ever since 1920, when Congress first passed the Mineral Leasing Act. Since that time, oil and gas development – along with the oil and gas industry's profits – have grown exponentially. Oil production from onshore oil and gas wells has soared in recent years – more than doubling since 2007.¹⁰ And there are nearly twice as many active wells on public lands – more than 94,000 – as there were 30 years ago.¹¹ Yet, in spite of this surging production, Interior has made little effort to increase royalty rates to ensure that taxpayers are getting their fair share.

Rental rates and minimum bids have also not been updated since 1987, and have not kept up with inflation. According to Taxpayers for Common Sense (TCS), a nonpartisan budget watchdog organization, rental rates

should at the least be raised to follow inflation, and adjusted annually by regulation. According to the Bureau of Labor Statistics inflation calculator, \$1.50 in 1987 is now \$3.12, and \$2.00 is now \$4.17. An immediate increase in rental rates to these levels would not only increase income to ensure fair return to taxpayers, but would also create incentive for timely development rather than speculation on federal leases.¹²

⁹ CBO, Options for Increasing Federal Income from Crude Oil and Natural Gas on Federal Lands at 32.

¹⁰ ONRR, Production Statistics, available at <https://onrr.gov/About/production-data.htm>.

¹¹ BLM, Oil and Gas Statistics, available at <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics>.

¹² TCS, Comments to the Bureau of Land Management (BLM) on the Oil and Gas Leasing; Royalty on Production, Rental Payments, Minimum Acceptable Bids, Bonding Requirements,

TCS recommended similar adjustments for minimum bids. Not only would this generate increased revenues for taxpayers, it would also deter companies from engaging in wasteful speculation.

Interior's failure to modernize the fiscal structure for onshore development contrasts sharply with its approach for offshore development. In 2007, Interior initiated a series of updates to its offshore fiscal policies, "in an effort to ensure a fair return on oil and gas resources."¹³ These included royalty rate increases of 50 percent, escalating rental rates in order "to encourage faster exploration and development of leases" and minimum bid increases "to account for increases in oil prices. . . ."¹⁴ These changes are expected to generate several billion dollars in additional revenue over the next 30 years, and thus far, "demand [has] remained strong for newly offered leases. . . ."¹⁵

Private mineral leases typically have a royalty rate of 18 percent to 20 percent. Several western states have also taken steps to modernize their fiscal policies for oil and gas development, and to ensure that taxpayers are receiving a fair return on the development of publicly owned oil and gas resources. For example, in February 2016, the State of Colorado increased its royalty rate from 16.67 percent to 20 percent.¹⁶ Since then, demand for state leases in Colorado has actually increased by 22 percent, based on the average number of acres leased per sale.¹⁷ State officials agree with this conclusion, which is not limited to Colorado:

according to state officials, there had been no slowdown in interest in new leases as of August 2016. In fact, Colorado state officials said they were unsure whether the higher royalty rate played much of a role in companies' decision making. Additionally, Texas officials told us that over 30 years ago, Texas began charging a 25-percent royalty for most oil and gas leases on state lands, and this increase has not had a noticeable impact on production or leasing.¹⁸

At this point, federal onshore royalty rates are lower than the rates used by every major western oil and gas producing state.¹⁹ Thus, Interior's fiscal policies must be modernized, in keeping with recent changes for offshore development and by several western states.

3. BLM's outdated fiscal policies are costing taxpayers millions in revenue every year.

and Civil Penalty Assessments (June 19, 2015), available at <http://www.taxpayer.net/library/article/comments-to-blm-on-oil-and-gas-rulemaking>

¹³ GAO, Actions Need for Interior to Better Ensure a Fair Return 13 (Dec. 2013), available at <http://www.gao.gov/assets/660/659515.pdf>.

¹⁴ *Id.* at 13-15.

¹⁵ *Id.* at 14.

¹⁶ *Id.* at 21.

¹⁷ Colorado State Land Board, Oil & Gas Auction Information and Results, available at <https://docs.google.com/document/d/1A8yfmfXmcMtx802wRxktdSuzkFeCrF5tE9XT8ms3Qa0/edit>.

¹⁸ *Id.* at 22.

¹⁹ *Id.* at 9.

Raising federal onshore royalty, rental and bid rates to match or exceed federal offshore rates and rates charged on state and private lands would increase overall revenues and receipts generated by the federal onshore oil and gas program. Recent studies find that outdated federal onshore rates are costing taxpayers tens of millions of dollars in revenues every year.

Royalties, rents and bids are the primary source of revenue for the federal onshore oil and gas program. In FY 2016, the Office of Natural Resources Revenue (ONRR) collected \$1.4 million in royalty payments, \$123 million in bonus bids and \$21 million in lease rental payments. Royalties provide the largest share of federal onshore oil and gas receipts.

Recent studies also find that raising the federal onshore royalty rate to levels consistent with state and private lands leases would generate tens of millions of dollars in additional revenues each year. An April 2016 CBO study found that raising the royalty rate to 18.75 percent would increase net ONRR income by \$200 million over the next 10 years, with an identical amount going to the states.

An earlier, 2011 report by Enegis, LLC examined the effect of increasing the royalty rate to 16.67, 18.75 and 22.5 percent. Like the CBO study, the Enegis report found that net revenue would increase in each of the three scenarios, from \$125 million to as much as \$939 million over the next 25 years. Both the CBO and Enegis reports accounted for any decrease in leasing or production that might result from increasing federal rates.

Raising federal onshore rental and bid rates would also increase net revenues. In addition to analyzing royalty rates, the April 2016 CBO Report estimated that raising the minimum bid to \$10/acre (for competitive and non-competitive leases) would increase revenues by \$50 million over the next 10 years. This same study found that increasing the rental rate by \$6/acre/year would generate an additional \$200 million.

Raising the federal royalty, rent and bid rates would significantly increase revenues and receipts generated by the onshore oil and gas program. If these rates were updated to reflect rates charged on state and private lands, the federal onshore program would likely gain at least half a billion dollars in net revenues over the next decade, with similar amounts going to the states.

4. There are significant revenue-related benefits to modernizing the onshore program's fiscal policies.

Updating royalty, rent and bid rates would also confer other, less obvious benefits. ONRR splits half of all royalty, bid and rental revenues with state governments based on where federal leases are located. So state governments, many of which are struggling with budget shortfalls caused by the downturn in energy prices, would realize about half of increased revenues from reforming federal onshore rates.

Increasing bid and rental rates would also discourage speculation and encourage diligent development of federal leases. On average, operators on federal lands drill on only 1 in 10 leases issued by the BLM. At present, there are more than 16,000 unused, non-producing oil and gas leases on federal lands, covering more than 14 million acres. By making it more expensive to

speculate, increasing bid and rental rates would encourage operators to drill and explore these unused leases, putting more leases into production and generating more royalty revenues.

Finally, by discouraging speculation, increasing bid and rental rates would help address opportunity costs associated with public lands oil and gas leasing. In making planning decisions, BLM often declines to manage lands with oil and gas leases for other resources and resource values, even when leases in these areas are unused and non-producing. Raising bid and rental rates would incentivize companies to purchase leases where they actually intend to develop, so that other, un-leased areas could be devoted to other important public lands uses. In this way, increasing bid and rental rates would help reduce opportunity costs associated with speculative leasing.

5. New revenue-generating regulations and policies

BLM should act on its own findings, as well as those of numerous external reviewers, and commence new rulemakings to update its royalty, bid and rental rates.

B. Hidden Subsidies

1. BLM has the duty and authority to update its policies regarding bonding rates, lease suspensions and reinstatements, and leasing low potential lands.

As noted above, FLPMA requires that BLM ensure a fair return for use of public lands and resources. BLM also has an obligation to ensure that the public lands are managed in accordance with principles of multiple use and sustained yield, such that the variety of uses and users of the public lands are given due consideration. Oil and gas leasing and development may not be treated as the dominant use of public lands at the expense of these statutory mandates.

Further, in leasing public resources, oil and gas companies agree to diligently develop those resources while also protecting the other resources of the public lands, while acknowledging the authority of the BLM to require such diligence. As stated in Section 4 of BLM's standard lease terms (Form 3100-011), when leasing public lands:

Lessee must exercise reasonable diligence in developing and producing, and must prevent unnecessary damage to, loss of, or waste of leased resources. Lessor reserves right to specify rates of development and production in the public interest...

In addition, BLM's regulations and guidance set out obligations that require BLM to update these policies, as discussed in detail below.

2. BLM's policies on bonding rates, lease suspensions and reinstatements, and leasing low potential lands are essentially providing subsidies to the oil and gas industry and encouraging the speculative holding of dormant leases.

By not updating and clarifying policies on bonding, lease suspensions, lease reinstatements and leasing low potential lands, BLM is subsidizing the oil and gas industry's costs to hold inactive

leases for excessive periods and to operate on public lands – in spite of the billions of dollars in industry profits from public lands drilling – and undermining the industry’s obligations of diligent development. The failure to update and clarify these policies especially encourages non-active speculators to retain a large share of leases involving substantial land areas in an undeveloped state for years and even decades on end.

(a) Bonding

BLM’s regulations require that bond amounts are to be set:

...to ensure compliance with the act, including complete and timely plugging of the well(s), reclamation of the lease area(s), and the restoration of any lands or surface waters adversely affected by lease operations after the abandonment or cessation of oil and gas operations...

43 C.F.R. § 3104.1(a). BLM’s guidance provides that the regulatory levels are minimums and also for adjusting bonding levels based on different risk factors that may arise on existing leases or existing unit, statewide or nationwide bonds. However, the agency’s practice is to charge the regulatory minimum.²⁰

BLM’s bonding policies have not been updated in almost sixty years. Minimum bond amounts set in statute no longer reflect the true cost of reclamation or inflation and the agency’s review and tracking procedures for determining bond adequacy and the government’s own liabilities fall far short of where they need to be. As a result, orphaned and abandoned wells are left unclaimed while American taxpayers are left to cover the costs of the oil and gas industry’s negligence.

The bond minimum of \$10,000 for individual bonds was last set in 1960, and the bond minimums for statewide bonds—\$25,000—and for nationwide bonds—\$150,000—were last set in 1951. According to a 2010 GAO report, “If adjusted to 2009 dollars, these amounts would be \$59,360 for an individual bond, \$176,727 for a statewide bond, and \$1,060,364 for a nationwide bond.”²¹ Based on inflation alone, current bond minimums are far lower than originally intended. Taking into account the increasing costs of reclamation further highlights the benefits given to oil and gas companies. A report by Inside Energy shows that the cost of reclaiming a single well can cost up to \$527,829 and that some newer, deeper wells may cost more than \$17 million per well to reclaim.²² It is important to note that minimum individual bond amounts are set per lease not per well. With many leases containing multiple pads and multiple wells per pad, that \$10,000 is even more inadequate. A later 2011 GAO report concluded, “Specifically, the minimum bond amounts—not updated in more than 50 years—may not be sufficient to encourage all operators

²⁰ See, e.g., BLM overview of bonding, setting out only the minimum amounts as amounts to be posted. <http://www.blm.gov/es/st/en/prog/minerals/bonds.html>

²¹ GAO-10-245

²² Stephanie Joyce, Wyoming Public Radio and Jordan Wirfs-Brock. (2016, October 17). The Rising Cost Of Cleaning Up After Oil And Gas. Retrieved July 17, 2017, from <http://insideenergy.org/2015/10/01/the-rising-cost-of-cleaning-up-after-oil-and-gas/>

to comply with reclamation requirements.”²³ And BLM field office managers agree. BLM officials interviewed by GAO at 12 of the 16 field offices agreed that these minimum bond amounts are inadequate for managing potential liability.²⁴ This is because the minimum amounts are not sufficient to serve as an incentive to encourage operators to comply with reclamation requirements and the cost to reclaim a well site far outweighs the value of the existing bonds. Unfortunately, this creates a perverse financial incentive for an oil and gas operator to walk away from a well and leave it orphaned, forcing taxpayers to pick up the plugging and reclamation tab.

In addition to staggeringly low bond amounts, the BLM is not properly tracking or reviewing bond adequacy. According to GAO, “limitations with the data system BLM uses to track oil and gas information on public land restrict the agency’s ability to evaluate potential liability and monitor agency performance.”²⁵ To manage potential liability BLM has policies for reviewing bond adequacy and for managing idle wells (wells that have not produced for at least 7 years) and orphan wells (wells that generally have no responsible or liable parties). These policies direct field offices to develop an inventory and rank and prioritize wells for reclamation. According to a 2011 GAO report, “BLM has not consistently implemented its policies for managing potential liabilities.”²⁶ As an example, GAO notes that according to their own survey of field offices, as of 2009 there were approximately 2,300 idle wells that had been inactive for seven or more years. However, Interior databases showed the number of idle wells was nearly double that amount.²⁷ Moreover, states like Wyoming consider a well idle after a lack of production of only one year. Waiting until year seven not only underestimates the number of wells, but also makes it more likely that the oil and gas operator has already abandoned the well site, and the wait makes it more difficult to start collection from a leaseholder or other responsible party.

The 2015 ANOPR referenced above stated: “the intent of any potential bonding updates would be to ensure that bonds required for oil and gas activities on public lands adequately capture costs associated with potential non-compliance with any terms and conditions applicable to a Federal onshore oil and gas lease.” The ANOPR further acknowledged that the current minimums “do not reflect inflation and likely do not cover the costs associated with the reclamation and restoration of any individual oil and gas operation.”²⁸ The current bonding rates and practices allow oil and gas companies to develop public resources without having to post sufficient bonds or otherwise reclaim drilling sites.

(b) Lease suspensions

²³ Government Accountability Office. (2011). Oil and Gas Bonds: BLM Needs a Comprehensive Strategy to Better Manage Potential Oil and Gas Well Liability. (GAO Publication No. 11-292). Washington, D.C.: U.S. Government Printing Office

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

Federal leases already have longer terms than many state and private leases, and are supposed to be terminated at the end of their ten-year terms. Lease suspensions result in companies holding federal lands and minerals for longer (often much longer) time periods without paying rentals or generating energy or royalties.

BLM's current policy guidance governing lease suspensions, set forth in BLM Manual 3160-10, was issued in 1987. The manual does not provide clear direction to BLM for how and when to exercise its discretion to reject lease suspension requests, and therefore the agency routinely grants suspensions that are not warranted or required by law. This has led to an extensive portfolio of suspended leases on federal lands. As of March 2015, there were 3.25 million acres of federal minerals in suspended leases, many dating back to the 1980s and 1990s.²⁹

The manual also does not direct BLM on how to manage currently suspended leases. Without such direction, BLM rarely evaluates the status of actively suspended leases to determine whether suspensions should be lifted, allowing suspensions to remain in place long after the circumstances that originally justified the suspension no longer exist. Thus, the 1987 manual does not provide direction or assurance that BLM holds suspension requests to the high standard set out in the regulations, provides limited terms for suspension and actively monitors and ends suspensions when they are no longer necessary.

This outdated guidance contributes to BLM's failure to recover revenue for federal resources and ensure producers are diligently developing leased lands. Inappropriate use of lease suspensions allows industry to hold leases indefinitely without making rental payments or producing energy. In this way, lease suspensions can allow industry to evade Congressional intent to diligently develop and provide timely and reasonable access to federal oil and gas resources.

The outdated guidance is also inconsistent with BLM's multiple use mandate. Because BLM regularly declines to adopt conservation management for lands encumbered by leases, holding leases in undue suspension is tantamount to removing those lands from multiple use.

(c) Lease reinstatements

BLM's current policy guidance for reinstatements, set forth in BLM Manual Handbook 3108-1, was last revised in 1995. The guidance does not provide clear direction for BLM to evaluate and approve or deny reinstatements to ensure consistency with the Mineral Leasing Act and agency regulations. Oil and gas leases are automatically terminated "by operation of law" if annual rental rates are not paid by the anniversary date of the lease.³⁰ However, the BLM "may" reinstate these leases under several conditions.³¹ By law, the BLM is only to reinstate leases in cases in which the failure to timely submit the rental was "justified" or "not due to lack of reasonable diligence" by the lessee.

²⁹ Data accessed through LR2000.

³⁰ 43 C.F.R. § 3108.2-1

³¹ *Id.* §§ 3108.2-2, 3108.2-3, and 3108.2-4

According to the BLM Handbook, justification can occur if “sufficiently extenuating circumstances or factors beyond the control of the lessee [] occurred at or near the lease anniversary date.”³² BLM’s regulations provide for three types of reinstatements: Class I (reinstatement at existing rental and royalty rates), Class II (reinstatement at higher rental and royalty rates), and Class III (conversions of unpatented oil placer mining claims). However, the agency’s guidance does not clearly direct which type of reinstatement is appropriate, what specific criteria must be met for a reinstatement to be authorized, or when the agency should exercise its discretion to deny reinstatement requests. Due to the outdated guidance, BLM is permitting oil and gas leases that have been terminated to be reinstated without sufficient basis, providing the oil and gas industry with an extra opportunity to retain leases at the expense of diligent development, and frequently in situations where industry has intentionally defaulted on rental payments because of low prices, only to apply for reinstatements when prices increase.

(d) Leasing low potential lands

As shown in a recent analysis conducted by The Wilderness Society³³, more than 90% of minerals managed by the BLM are currently available for oil and gas leasing - an allocation that is clearly not based on reasonably foreseeable development potential or a strategic evaluation of other multiple uses. The root of this problem is outdated planning guidance that leads BLM to make the vast majority of federal minerals available to leasing in land use plans, regardless of the likelihood of development and in conflict with multiple use management and fiscal responsibility.

BLM’s handbook for fluid minerals planning (Handbook H-1624-1) directs BLM to plan for oil and gas development on federal lands in light of where recoverable deposits of oil and gas are most likely to exist. Chapter III of the handbook requires that BLM use development potential to predict where future drilling activity will take place and where impacts from oil and gas development are likely to be focused within a planning area. Using this information, the handbook directs BLM to assign lease stipulations and other management prescriptions to protect competing resources and mitigate unwanted impacts from drilling and development.

However, when faithfully applied, the handbook often produces illogical management prescriptions that result in significant resource conflicts. With respect to management prescriptions, the handbook leads BLM to *open* low and no potential lands to leasing, and, in many instances, applies weaker protections and stipulations in these areas than high potential areas. Since low potential lands are open to leasing with weak stipulations, they are frequently targeted for speculative leasing. In turn, speculative leases in low potential areas often preclude designations and management decisions that might benefit alternative resources, including decisions for protecting wilderness quality lands and conserving wildlife.³⁴

³² BLM Handbook H-3108-1 at 31

³³ *Open for Business* (October 2014), available at http://wilderness.org/sites/default/files/TWS%20--%20BLM%20report_0.pdf

³⁴ See TWS Development Potential Technical Report for detailed analysis and case studies: <http://wilderness.org/sites/default/files/Development%20Potential-Technical%20Report%20.pdf>.

BLM Handbook H-1624-1 has not been overhauled since 1990. BLM’s guidance for considering and making decisions based on development potential in land use planning must be updated to take a more comprehensive approach to oil and gas allocations.

3. These outdated policies are harming taxpayers and our public lands.

(a) Bonding

Pursuant to 43 CFR 3104.8 “The authorized officer shall not give consent to termination of the period of liability of any bond unless an acceptable replacement bond has been filed or until all the terms and conditions of the lease have been met.” According to Onshore oil and Gas Order No. 1 final abandonment will not be approved until “the surface reclamation work required in the Surface Use Plan of Operations or Subsequent Report of Plug and Abandon has been completed...”³⁵ The BLM Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development or “Gold Book” states, “In most cases, this means returning the land to a condition approximating or equal to that which existed prior to the disturbance.”³⁶ For a variety of reasons, as noted above, operators may not complete final reclamation or receive approval for final abandonment resulting in an abandoned or orphaned well. A well is considered orphaned when the bond is not sufficient to cover well plugging and surface reclamation and there are no responsible or liable parties to cover the costs. These wells pose serious environmental fiscal threats.

From an environmental standpoint, orphaned wells can leak methane, provide a pathway for surface runoff, brine, or hydrocarbon fluids to contaminate surface water and groundwater, and contribute to habitat fragmentation and soil erosion.³⁷ There are already a staggering number of unreclaimed or improperly reclaimed sites across the country. An assessment of ecological recovery at oil and pads on the Colorado Plateau found that more than half of well pads were below the 25th percentile of reference areas.³⁸

Fiscally speaking, once a well is considered orphaned BLM must use federal dollars to fund reclamation. However, “there is no dedicated budget line item to fund orphaned well reclamation; instead, it is dependent on whatever funds are available from BLM state offices and the BLM Washington office...”³⁹ Additionally, reclamation costs have been found to range from \$300 to \$580,000 per well with newer deeper wells costing as much as \$17 million. A 2010 GAO study showed “as of December 2008, oil and gas operators had provided 3,879 bonds, valued at \$162 million, to ensure compliance with lease terms and conditions for 88,357 wells.” That’s only \$1,833 per well. For context, the state of Wyoming may be looking at a price tag of between \$14.7 and \$19 million, or an average cost of more than \$100,000 per well to plug its

³⁵ Onshore Oil and Gas Order No. 1 (XII.B)

³⁶ BLM Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development, Ch. 6

³⁷ Ho, J., et al., (2016). *Plugging the Gaps in Inactive Well Policy*. Washington, D.C.: Resources for the Future

³⁸ Nauman, T.W., et al., Disturbance automated reference toolset (DART): Assessing patterns in ecological recovery from energy development on the Colorado..., *Sci Total Environ* (2017), <http://dx.doi.org/10.1016/j.scitotenv.2017.01.034>

³⁹ GAO 2010

newest and deepest wells.⁴⁰ It is for this very reason that Wyoming, along with several other western states, recently increased its bonding rates, which are now several times higher than the federal rates.⁴¹

Outdated requirements are costing taxpayers. The same 2010 GAO report found “For fiscal years 1988 through 2009, BLM spent about \$3.8 million to reclaim 295 orphaned wells in 10 states...” The report also identified 144 orphaned wells in 7 states that need to be reclaimed. The total cost to reclaim just 102 of those wells is estimated at \$1,683,490.⁴² And this problem is not going away. A subsequent 2011 GAO analysis of OGOR data as of July 7, 2010, showed that of the approximately 5,100 wells idle for 7 years or longer, roughly 45 percent, or about 2,300 wells, have not produced oil or gas for more than 25 years.⁴³ Many of those wells may need government resources to be properly plugged and reclaimed, such that the BLM is subsidizing the oil and gas industry at the expense of taxpayers.

(b) Lease suspensions

Lease suspensions, particularly those that are unwarranted, harm US taxpayers primarily in two ways: lease suspensions cheat U.S. taxpayers of rental and royalty payments; and lease suspensions can preclude the BLM’s ability to manage the public lands for multiple uses.

Unmanaged lease suspensions are fiscally imprudent. A federal mineral lease suspension, under the Mineral Leasing Act, tolls the operating and production requirements of a lease, including the obligations to make rental and royalty payments, and extends the primary term of the lease by the length of the suspension – and longer, given the lax enforcement of suspension terms by BLM. As of March 2015, 2.65 million acres of federal minerals were held in suspended leases and not generating rental or royalty payments for the federal government. These suspensions include millions of acres that have been on hold for decades and have already cost taxpayers more than \$80 million in lost rents alone. This practice deprives US taxpayers of revenue that should be paid for holding these public lands in lease.

In addition to being fiscally imprudent, maintaining suspensions that are not justified based on BLM’s regulations interferes with multiple use management. Unwarranted lease suspensions can and do prevent recreation, conservation and other uses from occurring on these lands. For example, in the Proposed Resource Management Plan for the Grand Junction Field Office, the BLM proposed not to manage South Shale Ridge to protect its wilderness characteristics based at least in part on the presence of suspended oil and gas leases.⁴⁴

Unwarranted suspensions granted for ordinary and foreseeable agency delays “relieve [lessees and/or operators] of the consequences of their poorly timed decisions and actions,” while

⁴⁰ Inside Energy 2016

⁴¹ http://trib.com/business/energy/wyoming-raises-bonding-requirements-for-oil-and-gas-wells/article_74fe1dff-3305-5e5d-881a-27a6d6b874c8.html

⁴² GAO 2010

⁴³ GAO 2011

⁴⁴ See [Grand Junction Proposed Resource Management Plan](#) at Appendix F, p. F-6.

inadequate agency oversight of suspended leases allows suspensions to remain in place years after the reason for the suspension has passed. *See Vaquero Energy*, 185 IBLA at 237. These failures are precluding land management opportunities that might otherwise confer valuable benefits to the public at the same time as they deprive the public of valuable tax revenue.

(c) Lease reinstatements

Federal regulations provide that the BLM has discretion in whether to reinstate leases that were terminated for non-payment. Research indicates that the BLM exercises this discretionary authority frequently – there are 703 currently-authorized federal leases covering 530,000 acres that were terminated and subsequently reinstated. More than one thousand leases affecting over one million acres of federal minerals have been reinstated since the year 2000. This indicates there is a widespread pattern of industry failing to pay rents due the US government, and American public, and not being penalized.

Failing to pay rent to the federal government is contrary to the interests of the United States and cheats American taxpayers. Lease reinstatements allow for oil and gas companies to hold publicly-owned lands and minerals for free – and then simply pay back rent penalty-free if and when the BLM completes the process of terminating the lease. This practice comes at significant cost to the American public, who are owed these rental payments and unable to prosecute the lack of payment.

The failure to pay rentals on time also raises a significant question about whether operators are being diligent in the pursuit of development of their oil and gas leases, which is required under BLM regulations and the Mineral Leasing Act. Leases are supposed to have the purpose of insuring “reasonable diligence, skill, and care.”⁴⁵ It can hardly be argued that companies are exercising diligence and care when they are failing to even make rental payments, and are simply speculating in public lands owned by all Americans while they wait for more favorable market conditions. In addition, federal leases contain provisions to ensure the “protection of the interests of the United States” and the “safeguarding of the public welfare.”⁴⁶ The agency’s current guidance for considering and authorizing reinstatements does not achieve either of these directives.

(d) Leasing low potential lands

Application of the current guidance results in land use planning decisions that make low potential areas open to leasing with relatively weak lease stipulations, regardless of the presence of other resources that could be harmed should development happen, and⁴⁷ regardless of whether BLM’s own data show there is low—or even no—potential for oil and gas. This fundamental flaw in BLM’s guidance has led to a current total of 27 million acres leased for oil and gas development, with less than half in production.⁴⁸ A Congressional Budget Office report recently found that, for parcels leased between 1996 and 2003 (all of which have reached the end of their 10-year exploration period), only about 10 percent of onshore leases issued competitively and

⁴⁵ 30 U.S.C. 187.

⁴⁶ *Id.*

⁴⁷ <http://wilderness.org/sites/default/files/Development%20Potential-Technical%20Report%20.pdf>

⁴⁸ <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics>

three percent of those issued noncompetitively actually entered production.⁴⁹ This means 90% of competitively-issued onshore leases never generated royalties for the US government.

As demonstrated in The Wilderness Society's technical report, the practice of making areas with low development potential available to oil and gas leasing frequently leads to these areas becoming encumbered with speculative leases. Since low potential lands have favorable lease stipulations and can be acquired and held for minimal cost, low potential areas are often targeted for speculative leasing, though rarely drilled and developed. Speculative leasing ties up public lands, creates unnecessary public conflict, and generates minimal revenue.

These decisions have real impacts on multiple use management. For example, in the Proposed Resource Management Plan for the Colorado River Valley Field Office, the BLM proposed not to manage the "Grand Hogback Unit" to protect its wilderness characteristics based on the presence of oil and gas leases, stating:

The Grand Hogback citizens' wilderness proposal unit contains 11,360 acres of BLM lands. All of the proposed area meets the overall required criteria for wilderness character... There are six active oil and gas leases within the unit, totaling approximately 2,240 acres. None of these leases shows any active drilling or has previously drilled wells. The ability to manage for wilderness characteristics in the unit would be difficult. If the current acres in the area continue to be leased and experience any development, protecting the unit's wilderness characteristics would be infeasible...⁵⁰

In the Proposed White River Field Office Resource Management Plan Amendment, the BLM acknowledged that oil and gas leases "preclude other land use authorizations not related to oil and gas... in those areas," including authorizations for renewable energy projects, stating: "Areas closed to leasing... indirectly limit the potential for oil and gas developments to preclude other land use authorizations not related to oil and gas (e.g., renewable energy developments, transmission lines) in those areas."⁵¹ As these examples show, oil and gas leases, even when not developed, preclude other uses of the public lands.

Speculative leases are also fiscally burdensome. Leases in low potential areas generate minimal revenue but can carry significant cost. In terms of revenue, they are most likely to be sold at or near the minimum bid of \$2/acre, and they are least likely to actually produce oil or gas and generate royalties.⁵² See Bighorn Basin PRMP (2015) at p. 73 ("Leasing may be based on

⁴⁹ https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51421-oil_and_gas_options.pdf

⁵⁰ See [Colorado River Valley Proposed Resource Management Plan \(2014\)](#) at Chapter 3, p. 3-135.

⁵¹ See [White River Proposed RMP, Chapter 4](#) at p. 4-498.

⁵² [Center for Western Priorities, "A Fair Share"](#) ("Oil Companies Can Obtain an Acre of Public Land for Less than the Price of a Big Mac. The minimum bid required to obtain public lands at oil and gas auctions stands at \$2.00 per acre, an amount that has not been increased in decades. In 2014, oil companies obtained nearly 100,000 acres in Western states for only \$2.00 per acre. . . . Oil companies are sitting on nearly 22 million acres of American lands without producing oil and gas from them. It only costs \$1.50 per year to keep public lands idle, which provides little incentive to generate oil and gas or avoid land speculation.").

speculation, with leases within high risk prospects usually purchased for the lowest prices.”); White River PRMP (1996) at p. A-7 (“At any given time, most of the acreage that is available for oil and gas leasing in the WRRRA is under lease. . . . Most of the area is leased for speculative purposes and consequently only a small percentage of leases will ever be developed.”). Nonproducing leases generate less than two percent of total revenue generated by the federal onshore system; 90 percent comes from royalties paid on producing leases.⁵³ In terms of costs, leasing in low potential areas requires processing lease nominations, preparing environmental reviews, and resolving protests and resource use conflicts.

In summary, leasing lands and minerals with low potential for oil and gas development – speculative leasing – carries significant costs by precluding BLM from managing for other multiple uses, creating unnecessary public conflict, and wasting agency resources while generating minimal revenue.

4. Updating these policies will benefit taxpayers and the public lands.

(a) Bonding

The benefits associated with updating the BLM’s bonding policies are obvious. If bond minimums are set at an amount equal to the estimated cost of reclamation the government limits the chance it will have to bear the expenses associated with reclaiming orphaned wells. This in turn means that American taxpayers will not be left footing the bill for the industry’s negligence. This will also help deter financially unstable companies or companies that are only interested in speculation from purchasing federal leases. Additionally, proper reclamation of wells pads will help restore federal lands for other uses like recreation and grazing and will help to restore wildlife habitat and limit fragmentation. Improving tracking and review of bond adequacy will also help the government periodically assess liabilities and increase bond amounts or adjust agency practices in response to findings.

A common refrain from the oil and gas industry is that raising bond minimums will discourage development. However, there is little if any evidence of such a result. In fact, many states have higher minimum bond amounts or more practical methods for determining bond amounts but have not seen a decrease in permitting or drilling as a result. For example, Wyoming calculates individual bonds based on well characteristics and depth and California bases statewide bond amounts on the number of wells a company operates. North Dakota, South Dakota, and Utah all have bonding amounts for single wells and all are over \$50,000 and operators continue to drill in those states.⁵⁴

(b) Lease suspensions

⁵³ https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51421-oil_and_gas_options.pdf, p. 2.

⁵⁴ Western Organization of Resource Councils. Weak Oil and Gas Bonding Will Contribute to Reclamation Crisis. (2016, August 15). Retrieved July 17, 2017, from <http://www.worc.org/weak-oil-gas-bonding/>

Updating the agency's policy governing suspensions would ensure BLM is recovering owed rental payments and returning undeveloped lands to multiple use management. By issuing new guidance that directs BLM to exercise its discretion to reject unjustified lease suspensions and monitor existing suspensions to remove those that are no longer justified, BLM would eliminate a hidden subsidy that is currently available to the oil and gas industry. Agency and public scrutiny of lease suspensions would also ensure that public lands are not removed from multiple use management as a result of oil and gas companies illegitimately holding them in suspended status.

In addition to benefiting the public by managing lease suspensions in a fiscally responsible way and protecting multiple use management, updating the agency's policy governing suspensions would help BLM demonstrate that it is managing oil and gas resources consistent with the Mineral Leasing Act and diligent development requirements.

(c) Lease reinstatements

BLM would prevent oil and gas companies from cheating American taxpayers out of rental payments by ensuring lease reinstatements are appropriately evaluated, issued under the proper classification, and exercising discretion to deny reinstatements when warranted. Updating policy guidance for reinstatements would also ensure the BLM is complying with Section 187 of the MLA. Leases are supposed to have the purpose of insuring "reasonable diligence, skill, and care" and to seek the "protection of the interests of the United States" and the "safeguarding of the public welfare." 30 U.S.C. 187. Updating BLM's guidance for reinstating leases would allow the agency to ensure these directives are being upheld.

(d) Leasing low potential lands

Under current agency guidance, BLM is supposed to use development potential to formulate lease stipulations and management prescriptions that will mitigate conflicts between fluid mineral development and other competing uses. However, in its current form, the guidance leaves low and no potential areas open to leasing with weaker protections than moderate and high potential areas. The result is oil and gas management allocations that leave the door open to future resource conflicts and allow speculative oil and gas leasing in low/no potential areas to limit alternative management decisions. Updating the agency's guidance would allow for BLM to better achieve its objective of mitigating oil and gas conflicts and realize multiple use management.

Limiting leasing in low potential areas conflicts the least with industry objectives and can confer significant public benefits. Low potential lands are the "low-hanging fruit" by which BLM can fulfill other objectives of its multiple-use mission, such as managing for wilderness, wildlife and recreation. Yet, as described above, speculative leases on low potential lands can prevent the BLM from otherwise managing lands for alternative purposes and fulfilling its multiple-use mandate. *See also* White River DRMPA (2012) at p. 4-377 ("... authorized oil and gas uses would likely preclude other incompatible land use authorizations"). In addition, limiting exploration and development on low potential lands necessarily conflicts the least with industry objectives. As discussed in the Bighorn Basin PRMP (2015):

[A]lternatives D and F place additional stipulations on oil and gas-related surface disturbances in the Absaroka Front, Fifteenmile, and Big Horn Front MLP analysis areas for the protection of big game, geologic features, and LRP soils. As a result, alternatives D and F could have additional adverse impacts on oil and gas development in these MLP analysis areas. . . . However, because of the generally low to very low potential for oil and gas development and redundancies with other restrictions on mineral leasing from the management of other program areas, management specific to the MLP is less likely to adversely affect oil and gas development in these areas.

Bighorn Basin PRMP at p. 4-87; *see also* White River DRMP (1994) at p. 4-21 (“Prohibiting development in Class I areas would not affect oil and gas production because oil and gas potential in these areas is low.”).

Eliminating the presumption that all lands, regardless of development potential, should be open to leasing would help ensure that other resources and uses of the public lands, such as wildlife, recreation and water, are on equal footing with oil and gas development. Doing so would also create opportunities to enhance the management of those other resource and uses, particularly in areas with low/no development potential.

5. New regulations and policies are needed to halt hidden subsidies to the oil and gas industry.

(a) Bonding

Common sense reforms are necessary to protect taxpayers and the environment. BLM’s new regulations and guidance should include the following:

- Increase the minimum bond amount. At the very least the minimum should be adjusted to reflect inflation. Using a simple consumer price index (CPI) conversion that would set the individual bond at \$81,000, the statewide bond at \$231,000, and the nationwide bond at \$1,390,000. However, we recommend that bond amounts be set on a case by case basis at an amount that will cover the estimated cost of reclamation. This approach is similar to that employed in federal coal and hardrock mining regulations. Bond amounts could be reviewed periodically and adjusted up for new development on a lease or down for completion of final reclamation of a pad.
- Bond amounts should be set per well. This would bring the regulation in line with current oil and gas drilling practices where operators often drill multiple pads per lease and multiple wells per pad. This is similar to many state regulations. Additionally, bonds should take into consideration the relevant characteristic of a well that might impact reclamation costs; including among other things type, depth and target formation.
- Improve review of bond adequacy and liability tracking. This recommendation mirrors that made by GAO in 2011. BLM must “and improve its data system to better evaluate potential liability and agency performance...”⁵⁵

⁵⁵ GAO 2011

- Improve reclamation standards. In addition to the bonding regulations themselves, BLM’s reclamation standards pose a significant issue. BLM’s lack of clear reclamation standards has created a piecemeal approach, where standards change from land use plan to land use plan, creating inconsistent reclamation requirements on federal lands. BLM should adopt broad, uniform, performance-based standards that ensure that all wells drilled on federal lands meet acceptable minimum requirements for reclamation. This approach allows operators to employ their considerable resources and expertise to achieve satisfactory reclamation. It will provide a consistent and more flexible standard across field offices to promote better and more frequent reclamation potentially reducing an operator’s desire to shirk responsibilities if they find current reclamation requirements too prescriptive or rigid.

(b) Lease suspensions

BLM should issue new guidance for managing suspensions that includes clear direction for considering suspension requests and denying unwarranted suspensions; monitoring existing suspensions on a regular basis and removing those that are no longer justified; and providing for public review of lease suspensions. BLM is currently not holding suspension requests to the high standard set out in the regulations, and revised guidance is necessary to ensure compliance.

- Update criteria for granting suspensions: BLM should issue revised direction for considering suspension requests that includes clear criteria for when the agency does and does not have discretion to grant a suspension request. Pursuant to 43 C.F.R. § 3103.4-4(a), obligations regarding all operations and production of oil and gas leases may be suspended “only in the interest of conservation of natural resources” and obligations regarding either operations or production may be suspended only when “the lessee is prevented from operating on the lease or producing from the lease, despite the exercise of due care and diligence, by reason of force majeure, that is, by matters beyond the reasonable control of the lessee”; and must be justified by the applicant. Revised policy should provide the agency with guidance for implementing these regulations and appropriately considering whether to approve lease suspension requests.
- Establish a monitoring and tracking system for suspensions: A lease suspension is not intended to be unending; BLM requires that a suspension terminates when it is “no longer justified in the interest of conservation, when such action is in the interest of the lessor, or as otherwise stated by the authorized officer in the [suspension] approval letter.” 43 C.F.R. § 3165.1(c). BLM’s existing manual directs the agency to “monitor the suspension on a regular basis to determine if the conditions for granting the suspension are extant, and should terminate the suspension when it is deemed no longer necessary.” BLM Manual 3160-10.3.31.C.3. However, in practice this requirement is not applied through any regular or consistent mechanism. More explicit guidance should direct when and how this monitoring occurs. A verification system to ensure regular oversight including directing state offices to evaluate suspended leases on a quarterly basis and report to DC in a publicly available format should also be incorporated into the suspended lease management strategy.

- Increase transparency and opportunities for public involvement in lease suspensions and monitoring: BLM should be required to post documentation of lease suspension requests and decisions, including on its NEPA log, but also in a dashboard available via state office websites. Information on suspended leases, including status and reason for suspension, should also be made public to provide for public oversight and accountability on the length of suspensions in annual oil and gas program reports. A summary of lease suspensions should be included in the BLM’s annual reporting of oil and gas statistics, as well.
- Evaluate need for NEPA review: Finally, BLM should evaluate whether categorical exclusions are appropriate for individual suspensions, applying the “extraordinary circumstances” criteria, and if any of those criteria are met, then an environmental assessment or environmental impact statement must be prepared.

(c) Lease reinstatements

BLM must update its guidance for evaluating and approving or denying lease reinstatements to ensure oil and gas companies are complying with the directives set forth in the Mineral Leasing Act and that taxpayers are receiving rental payments for leased public mineral resources. The practice of reinstating leases that have been terminated for failure to pay the annual rental fee needs to be evaluated by the BLM and much more stringent provisions for reinstatement should be put in place. By law, the BLM is only to reinstate leases in cases in which the failure to timely submit the rental was “justified” or “not due to lack of reasonable diligence” by the lessee. In updating the agency’s guidance, BLM should establish narrow and specific guidelines for when these criteria may be considered to be met.

- Require evidence of extenuating circumstances and reasonable diligence: According to the BLM Handbook, justification can occur if “sufficiently extenuating circumstances or factors beyond the control of the lessee [] occurred at or near the lease anniversary date.”⁵⁶ BLM should ensure that any excuse of non-payment of rent is in fact beyond the control of the lessee—any claimed basis for failure to pay on time must be a “causative factor” showing control had been lost.⁵⁷ Failing to pay rent on time also can only rarely be excused as having occurred despite the exercise of reasonable diligence. To claim diligence, a lessee must be able to show they sent the rental “sufficiently in advance of the due date to account for normal delays.”⁵⁸ Lessees seeking lease reinstatements must be required to provide detailed support that they meet these criteria, and only in the rare circumstances in which they are clearly met should reinstatements be authorized.
- Class I reinstatements should be generally unavailable: BLM should exercise its discretion to not authorize Class I reinstatements (reinstatement at existing rental and royalty rates), except in the most extraordinary circumstances.
- Define “inadvertence” to mean “not duly attentive”: Regarding Class II reinstatements, the failure to pay rent on time should only rarely be excused as having occurred because of inadvertence. Inadvertent means “not duly attentive.” While inadvertence may be

⁵⁶ BLM Handbook H-3108-1 at 31

⁵⁷ *Id.*

⁵⁸ *Id.*

unintentional, it is synonymous with “careless.” This lack of attention should not be readily excused for such a simple task as paying your rent on time. If an oil and gas lease has real value to the operator, certainly they should be attentive enough to pay their rent on time. The failure to pay rent on time is evidence the lease is not valuable to the operator, and therefore leaving the termination in place is justified. The failure to pay rent on time probably signals a general lack of diligence, such as not seriously engaging in actual drilling operations. *See* 43 C.F.R. § 3107.1 (allowing for extension of lease terms if actual, diligent drilling is commenced prior to the end of the primary term).

BLM’s guidance defining when inadvertence can be excused is so broad as to be meaningless. “Inadvertence” is viewed by the BLM to include failure to pay due to carelessness, negligence, an unintentional or accidental oversight, inattention, a mistake, a financial inability to pay timely, or any other reason.” BLM Handbook H-3108-1 at 37. This meaningless view of what constitutes inadvertence must be abandoned. A definition that recognizes inadvertence means “not duly attentive” needs to be put in place. Being careless, negligent, inattentive or not having the financial inability to pay on time are not due reasons to excuse nonpayment.⁵⁹

- *Reinstated leases should not have their terms extended or royalty rates reduced.* The BLM should not extend the terms of the lease or reduce the royalty rate when a lease is reinstated. Reinstatement of oil and gas leases for failure to pay rent should be an exception rather than a rule in the interest of multiple-use management of our public lands.

(d) Leasing low potential lands

BLM should use development potential to plan for oil and gas development on federal lands in ways that mitigate resource conflicts, accommodate multiple uses of public lands without preference, and encourage development in areas that are most economic for oil and gas production. Limiting leasing in areas with low or no development potential would reduce administrative costs, mitigate conflicts between competing resources, and be more faithful to BLM’s multiple-use mandate.

This approach would also be consistent with the MLA, which directs BLM to hold periodic oil and gas lease sales for “lands... which are known or believed to contain oil or gas deposits...” 30 U.S.C. § 226(a); *see also Vessels Coal Gas, Inc.*, 175 IBLA 8, 25 (2008) (“It is well-settled under the MLA that competitive leasing is to be based upon reasonable assurance of an existing mineral deposit.”). These sales are supposed to foster responsible oil and gas development, which lessees must carry out with “reasonable diligence.” 30 U.S.C. § 187; *see also* BLM Form

⁵⁹ The Interior Board of Land Appeals has ruled that being financially unable to pay rent is not considered inadvertent and is, therefore, not grounds for Class II reinstatement. *Dena F. Collins*, 86 IBLA 32 (1985). But BLM policy is nevertheless that “if a lessee does later secure the financial ability and timely files a petition for reinstatement, the petition is to be processed.” BLM Handbook H-3108-1 at 37. BLM should expect that lessees will maintain an ability to meet and abide by their lease terms on a continuous basis; lessees should be ready to pay rent when due, and if they cannot they should be willing to give up the lease and move on to other business opportunities.

3100-11 § 4 (“Lessee must exercise reasonable diligence in developing and producing...leased resources.”).

- BLM plans should set out a framework for oil and gas development that supports closing lands to leasing where development is unlikely to occur: If BLM closes or defers leasing in low-potential areas, and conditions change to make development in those areas more likely, the agency can then complete additional analysis and planning to ensure that development occurs responsibly and accounts for current resource conditions. An updated approach to planning for oil and gas leasing should meaningfully account for development potential and conflicts with other resources.⁶⁰
- Modernize the handbook with an approach that provides for closing lands to leasing and limits leasing in low- or no-potential areas: Updating the handbook would not only support BLM’s obligation to consider managing lands for fish and wildlife, recreation and wilderness values, but also have minimal impacts on industry objectives. In locations like the Ely District in Nevada, where federal minerals are almost 90 percent open to leasing, only 32 wells were authorized over the past 101 years (as of May 21, 2014), even though there are 936 active leases covering just over two million acres of public land.⁶¹ Closing these lands to speculative leasing will not harm responsible oil and gas development.
- Consider basing oil and gas lease sales on a “List of Lands Available for Competitive Nominations,” as authorized by BLM regulations: BLM currently allows the oil and gas industry to nominate any public lands for leasing, which encourages widespread speculation in low potential areas and creates unnecessary conflicts with other multiple uses. This is extremely inefficient and wasteful system for leasing public lands is not the only model available to BLM, however, as current rules also permit BLM to create and utilize a “List of Lands Available for Competitive Nominations.” 43 C.F.R. § 3120.3-1. Such a list would allow BLM to proactively direct industry to areas with better odds of development and with lower resource conflicts, while eliminating areas from consideration that are clearly speculative and unlikely to generate any oil and gas revenues for American taxpayers.

Limiting development in low/no potential areas would allow BLM to minimize the risk of impacts and conflict altogether in areas where development is likely to be minimal in the first place. This practice would also limit speculative leasing practices by the industry, which can foreclose alternative management decisions and burden the BLM with increased administrative costs and conflicts associated with leasing in low potential areas. Under a more strategic approach to making oil and gas allocations in land use planning, lands would be made available for leasing by evaluating both an estimate of oil and gas potential and the conflicts with or

⁶⁰ See TWS No Exit Report for detailed recommendations on an updated approach to making oil and gas allocations in land use planning:

http://wilderness.org/sites/default/files/TWS%20No%20Exit%20Report%20Web_0.pdf

⁶¹ See BLM Nevada Preliminary EA for the Dec. 2015 Oil and Gas Lease Sale, p. 1.4.

potential harm to other resources present on those same lands. We direct BLM to and incorporate by reference the recommendations made in the TWS reports cited above (attached and incorporated herein by reference).

III. Conclusion

This petition is presented under the Administrative Procedure Act, which provides that each agency “shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule”⁶² and the United States Constitution, which protects the right to “petition the Government for the redress of grievances.”⁶³ Interior must respond to this petition “within a reasonable time”⁶⁴ and Interior regulations state that petitions will be given “prompt consideration.”⁶⁵ Courts have found that “a reasonable time for agency action is typically counted in weeks or months, not years.”⁶⁶

The agency must notify petitioners of the denial of a petition, in whole or in part, and with limited exception, a denial must include an explanation on the grounds for denial.⁶⁷ A reviewing court shall compel agency action “unlawfully withheld or unreasonably delayed.”⁶⁸ We request that Interior and BLM respond to this petition and commence both rulemaking and issuance of new guidance in no less than three months of the date of receipt. We also notes that Interior regulations authorize the Secretary to publish this petition in the Federal Register to solicit public comments on the proposed rule-making if those public comments “may aid in the consideration of the petition.”⁶⁹ In light of the BLM’s previous acknowledgment of the need for many of these updates to regulations and policies, and the suitability of a public process, we request that Interior and BLM also public this petition for comment.

The current regulations and guidance underpinning the BLM’s onshore oil and gas leasing program are in dire need of updating. Analyses of these decades-old policies has shown that they are harming the taxpayers that the BLM is obligated to ensure receive the benefits of leasing and the public lands that BLM is obligated to ensure are managed for multiple use and sustained yield. Additionally, updating these rules will help cure widespread violations of the diligent development requirement that is an essential obligation in every federal lease. Updating these

⁶² 5 U.S.C. § 553(e).

⁶³ U.S. Const., amend. I.

⁶⁴ 5 U.S.C. § 555(b)

⁶⁵ 43 C.F.R. § 14.3.

⁶⁶ *In Re: American Rivers and Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (internal citation and quotations omitted). See *Midwest Gas Users Asso. v. Federal Energy Regulatory Com.*, 266 U.S. App. D.C. 91, 833 F.2d 341, 359 (D.C. Cir. 1987) (“This court has stated generally that a reasonable time for an agency decision could encompass ‘months, occasionally a year or two, but not several years or a decade.’” (quoting *MCI Telecommunications Corp. v. Federal Communications Com.*, 200 U.S. App. D.C. 269, 627 F.2d 322, 340 (D.C. Cir. 1980))); *Fund for Animals, et. al. v. Norton, et. al.*, 294 F.Supp. 2d 92, 115 (D.D.C 2003) (petitioners are “entitled to an answer within a reasonable amount of time.”) (emphasis in original)

⁶⁷ 5 U.S.C. § 555(e); 14 C.F.R. § 14.3.

⁶⁸ 5 U.S.C. § 706(1). See *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70, 76-77 (D.C. Cir. 1984).

⁶⁹ 14 C.F.R. § 14.4.

policies will not harm the oil and gas industry, which is currently receiving unnecessary subsidies while profiting at the expense of the American public.

From: Williams, Timothy
To: [Mike McGrady](#)
Subject: IMs
Date: Monday, December 4, 2017 1:49:22 PM
Attachments: [Adaptive Management 2016-140.pdf](#)
[Grazing Priority Setting NEW.pdf](#)
[Grazing Thresholds 2016-142.pdf](#)
[Habitat Assessment 2016-144.pdf](#)
[Habitat Objectives NEW.pdf](#)
[Oil and Gas Prioritization NEW.pdf](#)

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NOTE: Every email I send or receive is subject to release under the Freedom of Information Act.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240
<http://www.blm.gov>

December 1, 2017

In Reply Refer To:

EMS TRANSMISSION

Instruction Memorandum: IM 2016-140, Change 1

Expires: 12/31/2019

To: State Directors, CA, CO, ID, MT/Dakotas, NV, OR, UT, WY

From: Assistant Director, Resources & Planning

Subject: Process for Evaluating Greater Sage-Grouse Land Use Plan Adaptive
Management Hard and Soft Triggers

DD: Annually

Program Areas: 200, 300, and 600 Program Areas

Purpose: This Instruction Memorandum (IM) provides direction and guidance on the implementation of the adaptive management process to evaluate and apply hard and soft triggers and responses, as detailed in the 2015 Greater Sage-Grouse (GRSG) Approved Resource Management Plans and Amendments (GRSG Plans) Great Basin and Rocky Mountain GRSG Regional Records of Decision (RODs) (September 21, 2015).

Policy/Action: The GRSG Plans state that specific hard and soft trigger data (refer to the Adaptive Management Plan within each GRSG Plan) will be analyzed in accordance with the GRSG Plans, as soon as habitat and population data becomes available after the signing of the ROD and then, at a minimum, analyzed annually thereafter.

As soon as practicable and on an annual basis, each Bureau of Land Management (BLM) State Office (SO) will analyze specific hard and soft trigger data and determine if an adaptive management trigger has been exceeded. This will be done in coordinating with federal, state, and local partners, as described in the applicable land use plan. Each BLM SO will implement the following steps to provide for a coordinated evaluation and notification process across the BLM.

Step 1 - Establishing a Baseline Trigger Analysis: In coordination with appropriate Federal, State, and local partners, BLM SO will use the processes and formulas outlined in the applicable GRSG Plan to evaluate population and habitat data to determine if the GRSG Plan's adaptive management soft and hard triggers have been exceeded. This step should occur as soon as practicable after habitat and population data from the state is available. In addition, as soon as practicable State Offices should analyze data relating to any catastrophic loss of population or habitat, such as damage caused by wildfire, that is likely to exceed a hard trigger. Coordination among technical specialists from appropriate state and federal agencies may be necessary to validate the analysis based on the process outlined in the applicable GRSG Plan. The BLM will make a finding about whether a hard or soft trigger has been exceeded before proceeding to Step 2.

When the State Office has information that indicate a hard or soft trigger may have been exceeded, it will notify the appropriate District and Field Offices as soon as possible. If a hard trigger has been exceeded, the hard trigger responses set forth in the applicable GRSG Plan will be implemented. The offices should consider whether approval of pending authorizations within the affected adaptive management response area would exacerbate the trigger or would otherwise be inconsistent with the trigger responses set forth in the applicable GRSG Plan. The State Office should also notify the Washington Office through the normal early alert process when a hard trigger has been exceeded and hard trigger responses are being implemented.

Step 2 Initiate Causal Factor Analysis Including the Identification of Trigger Responses: Once a finding has been made that a hard trigger has been exceeded, the BLM State Office (and/or appropriate District and Field office), in coordination with Federal, state and local partners, will initiate a causal factor analysis process, as defined in the applicable land use plan. This analysis should determine the possible or probable cause(s) of the population and/or habitat decline or lack of a positive population response to favorable environmental conditions. Responses in will be implemented by State, District and/or Field Offices as set forth in the applicable GRSG Plan. In some cases, the appropriate response may not be addressed in the applicable GRSG Plan. In this situation, a plan amendment or NEPA analysis of an implementation action may be required before implementing new or different responses.

Step 3 - BLM Washington Office Notification: State Directors will provide an annual report summarizing the results of the analysis conducted in Steps 1 and 2 to the Assistant Directors for Resources and Planning (AD-200), Minerals and Realty (AD-300) and Fire and Aviation (FA-100). This report will identify any soft or hard triggers that have been exceeded the areas where this has occurred, the appropriate hard trigger responses if a hard trigger was exceeded (as outlined in the applicable GRSG Plan), and a summary of the process that is being used to conduct the causal factor analysis.

Step 4 - Internal and External Notification: Within two weeks of completing Step 3, State Offices will notify the appropriate Federal, State, County, and Tribal partners, as well as

impacted District and Field Offices of the results from the analysis conducted in Steps 1 and 2. Additional regional coordination may be initiated at this step to discuss responses and timelines. As noted in Steps 1 and 2, Federal, State, County, and Tribal partners, as well as staff from local District and Field Offices should already be aware of the conclusions from the analyses conducted in Steps 1 and 2 based on their participation. This step provides notification to local BLM staff and all partners.

Timeframe: This Instruction Memorandum (IM) is effective immediately.

Budget Impact: There is an increased workload associated with implementing the GRSG Plans. The increased workload must be accommodated within existing budgets at the field, district, and state office levels, and may result in not accomplishing targets or the deferral of accomplishments in other program areas through redirection of existing funding.

Background: The GRSG Plans included GRSG habitat and population triggers and associated responses. Each GRSG Plan generally contains both soft and hard triggers and associated responses to address population and habitat changes. When hard triggers are exceeded each GRSG Plan provides for specific plan-level responses to be instituted. A causal factor analysis will determine the cause of the trigger being tripped. When soft triggers are exceeded, more conservative or restrictive conservation measures may be implemented on a project-by-project basis. The habitat and population triggers and responses are specific to each GRSG Plan; State Offices should carefully review their GRSG Plans regarding triggers and responses.

Manual/Handbook Sections Affected: None.

Coordination: Preparation of this IM was coordinated with the Greater Sage-Grouse Implementation Team, Western State Governments, U.S. Forest Service and U.S. Fish and Wildlife Service.

Contact: If you have any questions regarding this IM, please contact Leah Baker, Division Chief for Planning, NEPA, and Decision support (WO-210), (202) 912-7282.

Signed by:
Kristin Bail
Assistant Director, AD-200
Resources and Planning

Authenticated by:
Robert M. Williams
Division of IRM Governance, WO-860

UNITED STATES DEPARTMENT OF THE INTERIOR
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December 1, 2017

In Reply Refer To:
4110 (220) P

Instruction Memorandum No. 2018-
Expires: 09/30/2021

To: All Field Office Officials (except Alaska and Eastern States)

From: Assistant Director, Renewable Resources and Planning

Subject: Setting Priorities for Review and Processing of Grazing Authorizations and Related Livestock Grazing Monitoring

Program Area: Rangeland Management, Wildlife Management

Purpose: This Instruction Memorandum (IM) provides guidance for prioritizing the review and processing of grazing permits and leases (permits) across all BLM managed lands and habitats. This IM also provides guidance on prioritizing monitoring for the effectiveness of livestock grazing management and progress toward achieving land health standards (LHS). The policy in this IM supersedes previous policies regarding the prioritization of grazing permit reviews, including WO IM 2016-141, *Setting Priorities for Review and Processing of Grazing Authorizations in Greater Sage-Grouse Habitat*, and WO IM 2009-018, *Process for Setting Priorities for Issuing Grazing Permits and Leases*.

Policy/Action: This policy is intended to ensure that land health considerations are the primary basis for prioritizing the processing of grazing permits and leases, monitoring the effectiveness of grazing management, and making progress toward achieving land health standards. Field Offices (FOs) will prioritize the following, consistent with land use plans:

- Completing LHS Assessments
- Review and processing of grazing permits and leases (permits)
- Monitoring compliance with grazing permit/lease terms and conditions
- Monitoring progress towards achieving land health standards

Field offices will focus this work in the highest priority landscapes, which, usually include areas where LHS have not been evaluated, areas not achieving LHS, areas with sensitive resources, or where specific issues have been identified. Where possible, FOs should prioritize land health

evaluations based on a watershed(s), group of allotments, or other large geographic area. This provides information for the National Environmental Policy Act (NEPA) analyses that is used for grazing permit renewals and related management actions. BLM's goal in managing to achieve land health standards is to provide for the long-term sustainability of rangelands for livestock grazing, wildlife habitats, and other uses.

The BLM's decision to prioritize grazing permit renewal using the criteria listed below does not indicate that grazing is more of a management concern than other uses of the public lands, or that grazing is an incompatible use in any given area, but rather reflects an agency preference to prioritize limited resources to ensure grazing is properly managed for achievement of land health standards. The BLM recognizes that livestock grazing is an important component of its multiple use mission and that grazing is sustainable and compatible with conserving wildlife habitat.

Setting Priorities for Reviewing and Processing Grazing Permits

FOs must give the highest priority to work necessary to meet applicable legal requirements (e.g., court orders). FOs should then consider the criteria listed below to inform their priority-setting process. These criteria are not listed in order of importance, nor are they all-inclusive and BLM may use additional criteria when setting priorities:

- Areas where Land Health Standards are not being met.
- Prioritization criteria identified in applicable land use plans (as amended).
- Areas where preliminary information indicates resource damage may be occurring and has not been evaluated. This information can come from local data and/or landscape scale information (e.g., Fire and Invasives Assessment Tool (FIAT), the BLM Rapid Ecoregional Assessment (REA), Sage-Grouse Habitat Assessment Summary Reports, Grass-Shrub Fractional Vegetation Maps, and BLM Assessment, Inventory, and Monitoring (AIM) Terrestrial and Aquatic Data Sets).
- Allotments that are wholly or partially within Greater Sage-grouse habitats where one or more land use plan adaptive management trigger(s) has been exceeded, and livestock grazing has been identified as a causal factor in exceeding a trigger.
- Areas where modifications to livestock grazing management will facilitate implementation of vegetation treatments (e.g. restoration of areas dominated by noxious and/or invasive species) to make progress toward achieving activity plan objectives.
- Areas with declining special status species populations, e.g., sage-grouse.
- Areas where known threats are impairing habitat availability or suitability (e.g., cheatgrass invasion).
- Areas where land health standards have never been evaluated.
- The need to respond to urgent concerns (e.g., fire).
- Potential for partnerships that offer opportunities for broader landscape habitat management or other cooperative or coordinated management with adjacent landowners/permittees.

Preparing for Permit Review and Processing

Land health evaluations should be completed and available for any permit that will be fully processed. Field offices should plan in advance to have the land health data collected and the evaluation complete prior to initiating the permit renewal NEPA.

Setting Priorities for Livestock Grazing Management Monitoring

Frequency of monitoring will be influenced by field office capacity and should be based upon the level of resource concerns and uncertainties associated with each allotment or grazing permit/lease. For example, after issuing a new fully processed grazing permit, it may be appropriate to monitor an allotment more frequently in the first 2 to 3 years of implementing a new grazing management system, whereas less frequent monitoring would be needed where a livestock grazing management system has been in place for several years and is making significant progress toward achieving LHS, or is achieving LHS.

Monitoring priority should be based on local knowledge of the resource issues involved, such as areas with a recent history of non-compliance, lotic and lentic riparian areas, allotments where management thresholds and responses have been incorporated into grazing permits/leases, or areas where livestock use has the potential to negatively affect special status species habitats, e.g., sage-grouse.

Consultation and Coordination

As required in Title 43 Code of Federal Regulations (CFR) 4110.3-1(c); 4110.3-3(a); 4110.3-3(b); 4120.2(c) and (e); 4130.2(b) and 4130.6-2¹, field offices will consult and coordinate with grazing permit holders, interested public, state agencies, tribes and other appropriate federal agencies when comparing current conditions to land health standards and objectives; developing alternatives for NEPA analysis, particularly when considering adjustments in authorized use; and developing a monitoring plan, particularly if other parties will be collecting data to determine the effectiveness of any changes in management. In addition to the consultation and coordination with the entities required by regulation, field offices will also include relevant federal and state and local government as appropriate.

Timeframe: This policy is effective immediately.

Budget Impact: The BLM will continue to consider several criteria when prioritizing the review and processing of livestock grazing permits. The BLM's emphasis on reviewing and processing higher priority grazing permits (e.g., where they have the potential to affect Special Status Species, such as sage-grouse) will affect its ability to process and issue permits in lower priority areas. Monitoring requirements and workloads may increase to ensure effective implementation of grazing management plans associated with renewed grazing permits, particularly when management changes or thresholds and responses are implemented.

Background: This policy is intended to ensure that land health considerations are the primary basis for prioritizing the processing of grazing permits and leases, monitoring the effectiveness of grazing management, and making progress toward achieving land health standards. The BLM has issued previous policy including WO IM 2016-141, *Setting Priorities for Review and Processing of Grazing Authorizations in Greater Sage-Grouse Habitat*, issued 09/07/2016, and WO IM 2009-018, *Process for Setting Priorities for Issuing Grazing Permits and Leases*, issued 10/31/2008.

¹ All citations using 43 CFR Part 4100 refer to the version of the grazing regulations published in the October 1, 2005, edition of the Code of Federal Regulations.

The 2015 GRSG Plans include management direction stating that BLM will prioritize the review of grazing permits/leases in Priority Habitat Management Areas (PHMAs). The GRSG plans also provided direction for giving precedence to areas not achieving land health standards; however, the GRSG plans preserved the BLM discretion to use additional criteria for prioritization. On August 4, 2017, the BLM delivered a Response to Secretarial Order 3353 “Greater Sage-Grouse Conservation and Cooperation with Western States” (June 7, 2017) that identified issues related to the 2015 GRSG plans and subsequent policies. This policy update is a result of the Response to SO 3353 as well as feedback from internal staff and external federal, state, and local partners.

Section 3023 in Public Law (PL) 113-291, National Defense Authorization Act (NDAA), 2015, amends Section 402 of the Federal Land Policy and Management Act of 1976 (FLPMA) and includes seven provisions related to livestock grazing. Two of the provisions address completing NEPA requirements on an allotment or multiple-allotment basis and for setting priorities for completing NEPA on the environmental significance of the grazing allotment, permit, or lease, and the available funding for the environmental analysis.

Manual/Handbook Sections Affected: Manual Section 4100 Grazing Administration (Rel. 4-109) in regard to setting priorities; Handbook 4130-1 Authorizing Grazing Use (Rel. 4-75) in regard to setting priorities, completing environmental assessments, reviewing and modifying grazing authorizations; and Handbook 4180-1 Rangeland Health Standards (Rel. 4-107) in regard to criteria for selecting assessment and evaluation areas, and prioritizing assessment and evaluation areas.

Coordination: This IM was prepared in coordination with the BLM Division of Fish and Wildlife Conservation, and the Solicitor’s Office.

Contacts: If you have any questions, please contact Kimberly Hackett, Senior Natural Resource Specialist, Division of Forest, Rangeland, Riparian and Plant Conservation (WO-220) at 202-912-7216 or by email at khackett@blm.gov.

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December 1, 2017

In Reply Refer To:
4130 (220) P

Instruction Memorandum No. 2016-142, Change 1
Expires: 09/30/2019

To: State Directors (California, Colorado, Idaho, Montana/Dakotas, Nevada, Oregon/Washington, Utah and Wyoming), and Center Directors

From: Assistant Director, Renewable Resources and Planning

Subject: Incorporating Thresholds and Responses into Grazing Permits/Leases

Program Area: Rangeland Management

Purpose: This Instruction Memorandum (IM) provides guidance for incorporating and analyzing thresholds and responses, as appropriate, into terms and conditions of grazing permits and the associated National Environmental Policy Act (NEPA) analysis. This guidance applies to Greater Sage-Grouse (GRSG) Priority Habitat Management Areas (PHMA) as described in the Records of Decision for the Approved Resource Management Plan Amendments for the Great Basin and Rocky Mountain GRSG Regions and nine Approved Resource Management Plans in the Rocky Mountain GRSG Region (collectively referred to as the GRSG Plans). Change 1 clarifies the relationship of the GRSG habitat objectives table, land health standards, and thresholds and responses in grazing permit/lease terms and conditions.

Policy/Action:

Field Offices (FOs) will analyze and incorporate thresholds and defined responses into grazing permits within PHMA in accordance with the policy set forth below. FOs will continue to coordinate with permittees, state agencies having lands or managing resources within the area, tribes, other appropriate federal agencies, and interested publics (e.g., local governments) during the review and processing of grazing permits including developing thresholds and responses.

Relationship with GRSG Habitat Objectives

The GRSG Plans provide a habitat objectives table¹ that contains a suite of GRSG seasonal habitat indicators and their values (desired conditions column in the table). These are collectively referred to as habitat objectives and apply to seasonal use areas within all GRSG habitat designations (e.g., PHMAs, General Habitat Management Areas, and Important Habitat Management Areas (Idaho)). The seasonal habitat indicators and values in the habitat objectives table will, in part, guide the development of thresholds for those seasonal habitats found in grazing allotments. Using a single indicator value as a threshold to modify grazing management is not an appropriate use of the habitat objectives table.

Analyzing and Incorporating Thresholds and Responses

Consistent with the GRSG Plans, when a FO fully processes² a grazing permit/lease that includes lands within PHMA, NEPA analysis on that permit/lease will include at least one alternative that analyzes incorporation of relevant thresholds and defined responses into the terms and conditions of the grazing permit or lease. Habitat objectives table from the GRSG plans can inform the development of thresholds at the allotment and site-specific levels, but there are other factors that should be considered as well.

Thresholds will be developed to maintain or move PHMA toward achieving the GRSG habitat objectives based upon consideration of ecological site potential,³ and relevant locally specific conditions. Thresholds are grazing use indicator(s) that can be measured to ensure that current livestock grazing management allows an area to make progress toward achieving GRSG habitat objectives and land health standards. Percent utilization, bank alteration limits, and/or browse utilization limits are examples of thresholds that, if exceeded, could result in the Authorized Officer (AO) applying one or several responsive management actions. The response(s) will identify what changes in livestock grazing management would occur if a threshold is exceeded.

To determine when to select an alternative that incorporates thresholds and responses into permit terms and conditions, the highest priority should be PHMAs when: 1) a Land Health Standards Evaluation (LHE) indicates that the area is not achieving or is not making progress towards

¹ Refer to the IM “Policy on the Use and Modification of the Habitat Objectives Table from the 2015 Greater Sage-Grouse Approved Resource Management Plans and Amendments” for guidance on the use of the Habitat Objectives Table.

² A fully processed grazing permit is a grazing permit that has been issued in accordance with all applicable laws, regulation, and policy including the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and decision processes provided in 43 CFR 4160. Permits issued under Section 402(c)(2) of FLPMA are not considered fully processed.

³The ecological potential of a site is informed from an Ecological Site Description, associated State and Transition Models, and other pertinent data used to complete a Reference Sheet as described in *Interpreting Indicators of Rangeland Health* (M. Pellant, et. al., 2005). If an Ecological Site Description or associated State and Transition Model are not available, the process set out in *Interpreting Indicators of Rangeland Health* describes a process to identify an existing Ecological Site Description that is suitable for the soil, moisture, aspect, and slope of the site in question. If no comparable or suitable Ecological Site Description is available *Interpreting Indicators of Rangeland Health* also describes the process to develop a Reference Sheet in the absence of an Ecological Site Description.

achieving the wildlife/Special Status Species habitat standard as informed by the GRSG habitat assessment report; and 2) the AO determines that current livestock grazing is a significant causal factor for not achieving land health standards relative to GRSG habitat.⁴ Where an AO selects an alternative that does not include thresholds and defined responses, the AO will explain in the decision how the selected livestock grazing management will achieve the desired effect, why thresholds/responses do not need to be included in the grazing permit/lease, and what indicators and metric(s) will be used to evaluate and document achievement of GRSG habitat objectives.

At the AO's discretion, they may select an alternative analyzed in an EA/EIS that includes thresholds and responses for an allotment that currently achieves land health standards for GRSG in order to meet other resource management objectives. For example, FOs may want to incorporate thresholds and responses to ensure success of vegetation treatments, invasive species control, and/or reduction of excessive fuel loads.

FOs will use the sage-grouse habitat suitability assessment(s), which is the product of the Sage-Grouse Habitat Assessment Framework (HAF) (see current HAF)⁵ associated with an allotment or group of allotments to inform the Land Health Assessments, Evaluations and Determinations.⁶ For allotments within GRSG habitat management areas where a grazing permit or lease is not fully processed under 43 CFR 4160, and a sage-grouse habitat assessment was not part of the Land Health Evaluation, FOs will need to update the existing Land Health Evaluation to include an assessment of sage-grouse habitat suitability before the permit can be fully processed.

NEPA Considerations for Implementing Defined Management Responses

When fully processing grazing permits/leases, the FOs will complete the appropriate level of NEPA analyses on an allotment or multiple allotment basis. In most instances, FOs will prepare an EA; however, there may be instances where a CX is appropriate (explained below), or preparation of an EIS is necessary, as described in the NEPA Handbook (H-1790-1).

For any alternative that includes thresholds and responses, multiple responses should be evaluated in the NEPA document that will allow the BLM and permittees a suite of options for responding more quickly when thresholds are exceeded. The analysis should also identify the location, timing, frequency and methodologies used for monitoring the thresholds. Monitoring results are used to determine if thresholds have been exceeded along with causal determination, and if grazing was the causal factor then apply appropriate responses.

⁴ Refer to the IM "Setting Priorities for Review and Processing of Grazing Authorizations," Change 1, for guidance on prioritizing the review and processing of grazing permits/leases in GRSG habitat.

⁵ Refer to the most current Sage-Grouse Habitat Assessment Policy for guidance on assessing suitability of sage-grouse habitat.

⁶ Land Health Assessments and Evaluations assess conditions relative to the land health standards that apply to each parcel of BLM-managed land, evaluate whether each applicable land health standard is being achieved, or whether significant progress is being made toward achieving each land health standard. When one or more land health standards are not being achieved, the BLM completes a Determination to identify the causal factor(s) in non-achievement of the land health standard(s). Refer to Handbook 4180-1 Rangeland Health Standards (Rel 4-107).

If thresholds and responses analyzed in a NEPA document are incorporated into the grazing decision and grazing permit as terms and conditions, the following criteria will help guide whether the selected response(s) can be implemented immediately or will require an additional decision:

- If the response(s) are within the existing terms and conditions of a grazing permit, the response will be implemented immediately without an additional decision. If the AO intends to implement responses to thresholds during the life of a given grazing permit/lease without issuing a new decision, the AO should make that intent clear in both the NEPA document and final grazing decision.
- If the response requires a modification to the terms and conditions of a grazing permit, an additional grazing decision (either Proposed/Final or Full Force and Effect) will need to be issued.

Incorporation of thresholds and management responses into a permit that were not included as terms and conditions in a permit may be possible where:

- The thresholds and management responses were analyzed in another alternative but not selected. A Determination of NEPA Adequacy must be prepared when selecting a previously analyzed alternative. The AO may then issue a new proposed decision selecting the alternative that analyzed the desired thresholds and management responses.
- Monitoring determines that a different management response is needed, but the response was not analyzed in the NEPA analysis for the authorization, then the FOs should implement interim measures that are within the terms and conditions of the existing permit (and covered in an existing NEPA analysis) to minimize impacts to GRSG habitat. FOs must expedite further NEPA analysis to modify the permit and incorporate the appropriate management response.

Using a Categorical Exclusion

The AO may use a categorical exclusion (CX) to satisfy NEPA requirements before issuing a grazing permit in accordance with Section 402(h)(1) of FLPMA, as amended by Public Law No. 113-291, where current grazing management has led to conditions which achieve land health standards. Washington Office IM 2015-121, "*Implementing Amended Section 402(h)(1) of Federal Land Policy and Management Act - Using a Categorical Exclusion when Issuing a Grazing Permit or Lease*," provides guidance for issuing a grazing permit or lease using this CX authority including requiring a review of the 12 extraordinary circumstances listed in 43 CFR 46.215. The FOs are also required to document the rationale as to why the CX applies.

Issuing Permits/Leases Under Section 402(c)(2) of FLPMA

When lower-priority permits, as described in the IM on prioritizing the review and processing of grazing permits/leases, expire, they can be reissued with the same terms and conditions and

operate under authority of Section 402(c)(2) of FLPMA, as amended by Public Law No. 113-291,⁷ until they can be fully processed.

Consultation and Coordination

As required in Title 43 Code of Federal Regulations (CFR) 4110.3-1(c); 4110.3-3(a); 4110.3-3(b); 4120.2(c) and (e); 4130.2(b) and 4130.6-2¹, field offices will consult and coordinate with grazing permit holders, interested public, state agencies, tribes and other appropriate federal agencies when gathering data to compare current conditions to land health standards and objectives; developing alternatives for NEPA analysis, particularly when considering adjustments in authorized use; and developing a monitoring plan, particularly if other parties will be collecting data to determine the effectiveness of any changes in management. In addition to the consultation and coordination with the entities required by regulation, field offices will also include relevant federal and state and local government as appropriate.

Timeframe: This IM is effective immediately.

Manual/Handbook Sections Affected: Handbook 4180-1 Rangeland Health Standards (Rel 4-107), and Authorizing Grazing Use Handbook 4130-1, rel. 4-75.

Budget Impact: Developing thresholds and responses is complex and often requires the consideration of many factors, which may increase the costs of processing individual permits, however, the ability to adjust management to address changing conditions without requiring additional NEPA can provide significant cost and time savings. As FOs take more time preparing thresholds and responses for fully processed permits in PHMA, this may require deferring work such as permit processing and developing range improvements in lower priority areas.

Background: Management direction within the GRSG Plans state that the NEPA analysis for renewals and modifications of livestock grazing permits/leases that include lands within PHMA will include specific management thresholds based on the Habitat Objectives table, Land Health Standards (43 CFR, Part 4180.2), and ecological site potential, and one or more defined responses that will allow the authorizing officer to make adjustments to livestock grazing that has already been subjected to NEPA analysis. On August 4, 2017, the BLM delivered a Response to Secretarial Order 3353 “Greater Sage-Grouse Conservation and Cooperation with Western States” (June 7, 2017) that identified issues related to the 2015 GRSG plans and subsequent policies. This policy update is a result of the Response to SO 3353 as well as feedback from internal staff and external federal, state, and local partners.

⁷ Under 43 U.S.C. 1752(c)(2), the BLM shall replace permits or leases that have expired or have been terminated due to preference transfer and have not been fully processed by a new permit or lease that contains the same terms and conditions of the expired permit or lease pending their full processing.

Coordination: This IM was coordinated with the Division of Decision Support, Planning and NEPA, Division of Fish and Wildlife Conservation, Solicitor's Office and State Directors within GRSG habitat.

Contact: If you have any questions, please contact Kimberly Hackett, Senior Natural Resource Specialist, Division of Forest, Rangeland, Riparian and Plant Conservation (WO-220) at 202-912-7216 or by email at khackett@blm.gov.

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December 1, 2017

In Reply Refer to: 1610, 1734, 4100, 4180, 6700 (230) P

EMS Transmission: xxxxxxxxxxxxxxxxxxxx

Instruction Memorandum No. 2016- 144 Change 1

Expires: 9/30/19

To: State Directors (California, Colorado, Idaho, Montana, Nevada,
Oregon/Washington, Utah, and Wyoming) and Center Directors

From: Assistant Director, Renewable Resources and Planning

Subject: Gunnison and Greater Sage-Grouse (including the Bi-State Distinct Population
Segment) Habitat Assessment Policy

Program Areas: Wildlife Management, Threatened and Endangered Species Management,
Rangeland Management, Riparian Management, Hazardous Fuels Management, Emergency
Stabilization, Burned Area and Rehabilitation.

Purpose: This Instruction Memorandum (IM) provides program direction to Bureau of Land
Management (BLM) Field Offices (FOs) on implementing the BLM Technical Reference 6710-1
(Stiver et al. 2015, Sage-Grouse Habitat Assessment Framework (HAF)). This IM includes
clarification and additional guidance to follow when implementing the HAF to assess habitats for
Gunnison and Greater Sage-Grouse, including the Bi-State Distinct Population Segment, ("sage-
grouse"). This will help promote consistency when completing habitat assessments across the
range of sage-grouse. This IM also includes guidance on roles and responsibilities, best practices
for data management, and the content of a summary report (Attachment 1).

Policy: The following bullets provide guidance for implementing sage-grouse habitat
assessments and a temporary accommodation for areas where habitat mapping is not complete:

- If seasonal habitat mapping is complete, the FO will assess site-scale suitability for the
entire seasonal habitat area(s) in addition to assessing mid- and fine-scale suitability. FOs
should follow the approach found in the habitat assessment training materials hosted by
the National Training Center.
- During the calendar year 2018, if the mapping of seasonal habitat has not been
completed, the FO can complete a site-scale assessment within the area of interest, which
will allow it to complete the Land Health Standards (LHS) Evaluation and issue use
authorizations (e.g., grazing permit renewal). A discussion of the process and results of
the site-scale sage-grouse habitat assessment should be included in the Land Health

Standards Evaluation report.

- BLM State and FOs should continue working with partners to complete the mapping of seasonal habitats, recognizing that some sage-grouse populations are non-migratory, which may reduce the workload required to identify the areas for the multi-scale assessments.
- When multi-scale sage-grouse habitat assessments are completed, BLM Offices are required to complete a Habitat Assessment Summary Report. State offices (SO) should track the areas where the assessments have been completed and report accomplishments to the WO on an annual basis.
- The sage-grouse site-scale habitat suitability determinations are used to evaluate the applicable wildlife/Special Status Species (SSS) land health standard(s) (BLM 2001) for sage-grouse and some other sage-brush obligate species.
- FOs within the GRSG Planning area will use the values in the GRSG Plan Habitat Objectives table and the associated footnotes to inform site-scale suitability as described in the *Establishing Habitat Suitability Indicators and Values* section of the current BLM Habitat Objectives IM.
- FOs with management responsibilities for sage-grouse habitat but whose RMP does not contain a Habitat Objectives Table should use objectives from an applicable sage-grouse conservation plan (e.g., Gunnison Sage-Grouse Rangeland Conservation Plan), the HAF Technical Reference, or values found in scientific literature that are appropriate for the area to inform site-scale suitability values. Refer to the BLM Habitat Objectives IM for a complete discussion of this topic.
- When completing site scale assessments, it is not appropriate to use a single indicator from the habitat suitability rating data form to determine habitat suitability. Rather, look across all the indicators on the form and use a preponderance of evidence approach to determine overall suitability (suitable, unsuitable, or marginal) of the plot. The measured habitat indicator values will vary across time, driven largely by uses and environmental conditions such as annual rainfall. Thus, it is critical to document environmental factors when completing the suitability forms.
- Quantitative data described in the habitat assessment training can be supplemented with additional local data to inform sage-grouse habitat assessments but the limitations of the data should be documented in the suitability data forms.
- On-line training material is available on the National Training Center (NTC) website and classroom training is available through the NTC and other subject matter experts to support implementation of this policy. Please contact the National Sage-Grouse Coordinator or the NTC for further information to meet your training needs.

Prioritizing Sage-Grouse Habitat Assessments

BLM authorized officers will set priorities for sage-grouse habitat assessments using prioritization criteria consistent with the applicable land use plan and the priorities for completing land health assessments to support authorizations as described in the Grazing Prioritization IM. An evaluation of existing data (such as core and supplemental indicator data collected as part of the Assessment, Inventory and Monitoring (AIM) Strategy and legacy trend data) and coordination with state and other partner agencies could also inform the selection of priority areas for assessments. Additional consideration could include areas where habitat information is limited, where changes in management may improve sage-grouse habitat, or

where a GRSG Plan adaptive management trigger has been tripped.

Using a Habitat Assessment Summary Report

FOs can use the multi-scale Habitat Assessment Summary Report to:

- Inform management where to implement actions to improve sage-grouse habitat at the mid-, fine-, and site- scales.
- Identify metrics for setting objectives to determine the effectiveness of vegetation treatments and habitat restoration efforts, including post-fire emergency stabilization and burned area rehabilitation, in sage-grouse habitat.
- Provide context in NEPA documents for proposed actions in sage-grouse habitats.
- Inform the habitat value (e.g. condition and extent) of debits and credits related to compensatory mitigation, which can be used in conjunction with state developed compensatory mitigation valuation approaches.

Establishing Habitat Suitability Indicators and Values

FOs will compare the indicators between the GRSG Plan Habitat Objectives Table (and the relevant footnotes) and the HAF site scale data forms (S-2 through S-6) and take the following steps:

1. Indicators which are in the GRSG Plan's table but not in the HAF forms are to be added to the applicable HAF forms.
2. For indicators that are in the HAF forms but are not in the GRSG Plan's table, offices will measure these indicators and add the following statement in the box where the suitability rating would be recorded: "*No known correlation exists between this indicator and the suitability rating for this seasonal habitat type in this land use plan area.*" The indicator will not be used for the suitability rating of the plot.
3. Offices are required to note the change(s) to the data forms in the "Rationale for Overall Suitability" section of the forms.

FOs will compare the indicator values between the GRSG Plan's Habitat Objectives Table (and the relevant footnotes) and the HAF site scale data forms (S-2 through S-6) and take the following steps:

1. When the HAF indicator values for a suitable rating in S-2 through S-6 differ from the GRSG Plan's Habitat Objectives desired conditions, replace the values in the applicable forms.
2. If indicator values for a suitable rating in the HAF were replaced by indicator values from the GRSG Plan, offices are directed to develop indicator values for the marginal and unsuitable columns using the processes that were used to determine the desired conditions in the Habitat Objectives Table in the GRSG Plans.

Data forms found in the HAF technical reference have been modified to allow changes to the indicator value columns as well as allow adding rows for indicators for those offices that have additional indicators and associated values from the applicable GRSG Plan Habitat Objectives Table or other sage-grouse conservation plan. The customized forms may be found at: <https://spp.blm.gov>

Timeframe: This IM is effective immediately.

Budget Impact: The BLM is required to evaluate habitat as part of its land health standards assessment process and also needs this information when evaluating the impacts of uses in NEPA document for authorizing uses. This IM provides consistent guidance in the methods to use in completing these habitat assessments for sage-grouse. Sage-grouse habitat assessment implementation will be phased in, following prioritization as described in this IM and based on available budgets.

Background: The HAF includes indicators that inform the suitability of habitat for sage-grouse at the mid-, fine-, and site-scales. The HAF also includes a suitability rating process for each scale. Please refer to the HAF for a discussion of the scales, description of seasonal habitat requirements, and examples of the suitability forms for completing the assessment. The BLM has developed training and analytical procedures to complete this rating process. One critical gap that is preventing the BLM from completing the multi-scale habitat assessments in some areas are adequate maps of seasonal habitat use areas. Mid-scale boundary delineation across the range of GRSG is almost complete. These efforts have relied on cross-border coordination within BLM and with partners. The completion of seasonal habitat mapping and delineation of fine-scale polygons are contingent upon continued close coordination of BLM offices and partner agencies within and between states. This process is ongoing.

The BLM will continue to explore and review new tools and data to help streamline habitat assessments and will develop corresponding guidance and training as required. Additionally, the BLM will continue to work with partners to improve the quality, consistency and/or efficiency of the analytical procedures.

On August 4, 2017, the BLM delivered a Response to Secretarial Order 3353 “Greater Sage-Grouse Conservation and Cooperation with Western States” (June 7, 2017) that identified issues related to the 2015 GRSG plans and subsequent policies. This policy update is a result of the SO 3353 as well as from lessons learned in 2017 as BLM FOs began completing the multi-scale assessments as directed in BLM IM 2016-144.

Manual/Handbook Sections Affected:

Manual 4180 and Handbook 4180-1, Manual 6500, Manual 6600, Manual 6840.

Coordination:

This IM was coordinated with the Division of Forest, Rangeland, Riparian and Plant Conservation, the AIM Lead, the NOC Division of Resource Services, and BLM State Office wildlife and sage-grouse leadership within the range of sage-grouse.

Contacts:

Questions or concerns should be addressed to _____, Division Chief, Fish and Wildlife Conservation (W0-230), at 202-912-7366 or Vicki Herren, BLM National Sage-Grouse Coordinator at 202-912-7235 or vherren@blm.gov

References:

BLM (Bureau of Land Management). 2001. Rangeland Health Standards, BLM Handbook H-

4180-1. Department of the Interior, BLM.

http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.61484.File.dat/h4180-1.pdf).

Stiver, S.J., E.T. Rinkes, D.E. Naugle, P.D. Makela, D.A. Nance, and J.W. Karl, eds. 2015. Sage- Grouse Habitat Assessment Framework: A Multiscale Assessment Tool. Technical Reference 6710-1. Bureau of Land Management and Western Association of Fish and Wildlife Agencies, Denver, Colorado.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240
<http://www.blm.gov>

November xxxx, 2017

Reply Refer To: 6710, 4110? 1610? (WO-200) P

EMS Transmission: xxxxxxxxxxxxxxxxxxxx

Instruction Memorandum No. 2018-xxxxx
Expires: xx/xx/2021

To: State Directors (California, Colorado, Idaho, Montana, Nevada,
Oregon/Washington, Utah, and Wyoming) and Center Directors

From: Assistant Director, Renewable Resources and Planning

Subject: Implementation of the Habitat Objectives Table from the 2015 Greater Sage-
Grouse Approved Resource Management Plans and Amendments.

Program Areas: Wildlife Management, Threatened and Endangered Species Management, Rangeland Management, Riparian Management, Hazardous Fuels Management, Emergency Stabilization, Burned Area Rehabilitation, Resource Management Planning.

Purpose: This Instruction Memorandum (IM) provides guidance on the use of the habitat objectives table (often referred to as Table 2-2) in the 2015 Greater Sage-Grouse (GRSG) Approved Resource Management Plans and Amendments (GRSG Plans), including utilizing the best available science to adjust existing values and make use of other indicator values to achieve the seasonal habitat needs for GRSG.

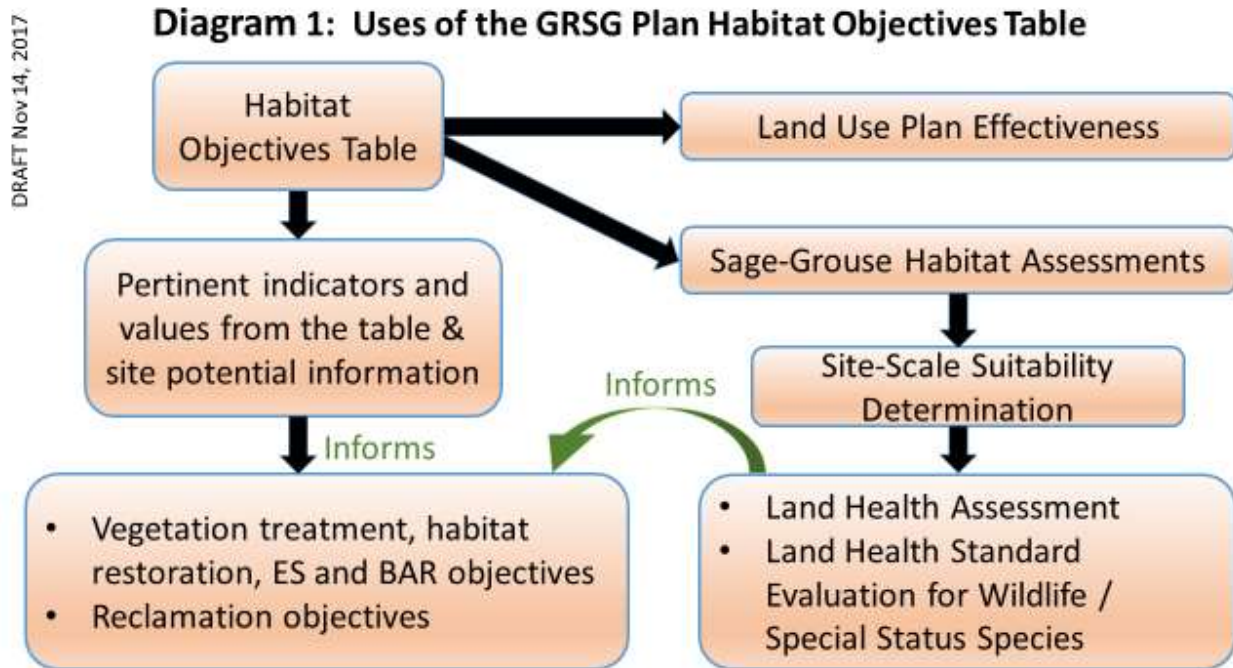
Policy/Action: BLM offices should use the Habitat Objectives Table indicators and their values in the GRSG Plans in assessing site-scale suitability of GRSG habitat and as a component of GRSG Plan effectiveness evaluations. Results from the site-scale sage-grouse habitat assessments are used during the Land Health Standards (LHS, 43 CFR 4180.2) assessment and evaluation process, and should be used to inform management actions. Appropriate indicators from the Habitat Objectives Table should be used to develop objectives for vegetation treatments within BLM-designated GRSG Habitat Management Areas. Baseline vegetation conditions, or the conditions at the onset of a management action, and the calculation of vegetation changes

over time for use during evaluations of land use plan effectiveness should also utilize the habitat indicator values. Offices are to follow the process identified herein when considering whether to utilize values other than the indicators in the GRSG Plan Habitat Objectives Table.

Uses of the GRSG Plan Habitat Objectives Table (See Diagram 1):

- To inform site-scale suitability assessments of sage-grouse habitat following current BLM policy on sage-grouse habitat assessment
- To evaluate land use plan effectiveness for GRSG habitat management, and
- As a basis to develop project objectives in BLM-designated GRSG Habitat Management Areas

Diagram 1: Uses of the GRSG Plan Habitat Objectives Table.



Using the Habitat Objectives Table in Site-Scale Habitat Assessments:

The site-scale habitat ratings of plots are used to assess the proportion of seasonal habitat in the analysis area that is suitable, marginal and unsuitable, consistent with current BLM policy on sage grouse habitat assessment.

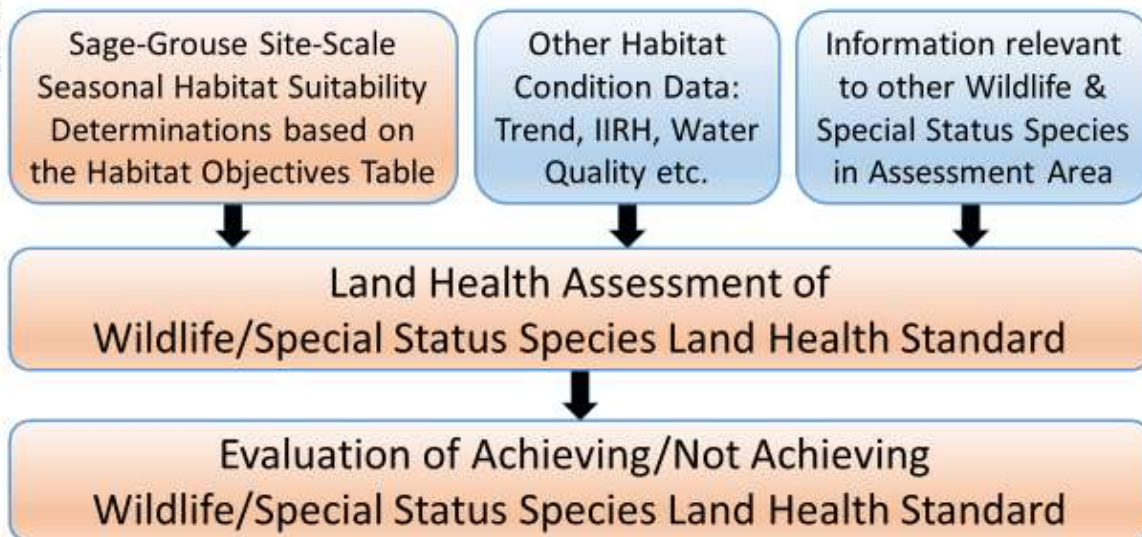
No single indicator from the habitat objectives table should be used by itself to determine site-scale suitability of sage-grouse habitat. Rather, compare the measured data to the indicator value

for the applicable seasonal habitat in the table. Then examine all of the indicators and use a preponderance of evidence approach (see BLM TR 1734-6) to determine overall suitability (suitable, unsuitable, or marginal) of the plot. Successive measurements may reveal variation over time for each of the habitat indicators on a plot, reflecting land uses and environmental fluctuations such as annual rainfall. Thus, it is critical to document certain environmental factors such as drought conditions and the ecological site potential on the site-scale suitability forms (modified as necessary from the Sage-Grouse Habitat Assessment Framework (HAF, BLM TR 6710-1, Stiver et al 2015)) so that it can be used in the LHS evaluations, determination of causal factors for not achieving the standard(s), and other purposes. This is consistent with BLM Habitat Assessment policy and BLM training on the use of the HAF.

Discussion on the use of Site-Scale Habitat Assessments in Land Health Standards Evaluations:
The sage-grouse site-scale habitat suitability determinations are used to evaluate the applicable wildlife/Special Status Species (SSS) land health standard(s) in sage-grouse habitats. During the evaluation, long-term trend or best available data can be used in addition to the sage-grouse habitat suitability determinations (see Diagram 2: Workflow from the Habitat Objectives Table to the Wildlife/SSS Land Health Standard(s) Evaluation). The Land Health Assessment and LHS evaluation tasks, including sage-grouse habitat assessments, should not be viewed as, or completed as, separate workloads. These are all components of the BLM regulatory requirements of achieving Land Health Standards. Whenever possible, complete these tasks simultaneously.

DRAFT Nov 16, 2017

Diagram 2: Workflow from the Habitat Objectives Table to the Wildlife/SSS Land Health Standard Evaluation



Additional Information for the uses of the Habitat Objectives Table:

- Inform the site-scale suitability determinations of seasonal habitats for sage-grouse. The indicators should be used in combination with each other to make a suitability rating, without reliance on a single indicator. Conditions that affect the value of the indicators, e.g., ecological site potential, drought, date of measurement, etc. should be documented on the HAF site scale-habitat suitability worksheets and considered consistent with current BLM policy on sage-grouse habitat assessment. Site scale suitability of sage-grouse habitats along with the conditions documented at the sampling location are used during the LHS evaluation.
- Identify metrics for setting objectives to determine the effectiveness of vegetation treatments and habitat restoration efforts, including post-fire emergency stabilization and burned area rehabilitation, in sage-grouse habitat management areas.
- Inform the reclamation plans during authorization of surface-disturbing activities in sage-grouse habitats.
- Evaluate LUP effectiveness for sage-grouse conservation.
- Describe the desired future conditions in National Environmental Policy Act (NEPA) documents, activity management plans, and other planning documents.
- Use along with results of land health standards evaluations, ecological site potential, habitat assessment(s), and local information to guide development of livestock grazing thresholds.

Inappropriate uses of the habitat objectives table:

- Using the habitat objectives' measured indicator value(s) to assist in evaluation of LUP effectiveness without considering the ecological potential of the site and relevant local information where measurements were taken.
- Using a single measured indicator value to determine sage-grouse habitat suitability.
- Using a single indicator as a criterion to modify grazing management or any other use.
- Adjusting use authorizations based on measured indicator values without a causal factor determination.

Using site-appropriate indicator values:

Not all areas within a given habitat management area will be capable of meeting the desired seasonal habitat values in the habitat objectives table due to inherent variation in vegetation communities and ecological potential. In these cases, it may be appropriate to develop other site-appropriate indicator values. However, there are also situations within a planning area where moisture gradients, elevation gradients, or soil properties support differing vegetation communities where the indicator values for suitable habitat will differ. State Offices should follow these steps when determining whether the values in the GRSB Habitat Objectives Table are obtainable in an area, or whether a different indicator value is more appropriate in the area:

Step 1: Evaluate the utility of the relevant indicator data and science based upon meeting the following criteria:

1. Data accurately describe the desired condition of the seasonal habitat and is supported by science,
2. The analysis used to evaluate the data and its relationship to suitable habitat is available to the public,
3. A change in indicator value is detectable (so that trend can be detected over time), and
4. The values have been reviewed and accepted by the State wildlife agency, if the agency elects to participate.

Step 2: If the State Office determines that other habitat values are appropriate for a seasonal habitat area (Step 1), the authorized officer should use those alternative values rather than those in the Habitat Objectives Table. If there is considerable variation of the vegetation communities within the planning area, it may be necessary to develop additional indicator values to reflect the differing habitat values for those vegetation communities. The documentation for the new information must clearly describe the data sources and science used to reach the adjusted value(s).

Step 3: Use the indicator values that are appropriate for the seasonal habitat area and include documentation supporting the indicator values in the applicable assessment report (e.g., site-scale suitability form, LHS evaluation, plan effectiveness).

Timeframe: This policy is effective immediately.

Budget Impact: Current budget supports the fieldwork to collect core indicator data to inform the indicators in the habitat objectives tables and perform assessments and evaluations of habitat condition and LUP effectiveness. Current budgets are also supporting development and delivery of training on appropriate use of the GRSG habitat objectives table.

Background: Sage-grouse have a fairly specific set of habitat parameters that research has shown are important to its conservation. BLM's overarching goal is to have healthy, intact sagebrush steppes that are achieving or making progress towards achieving land health standards, including the wildlife/special status species habitat standard, and that provide for the long-term sustainability of rangelands for livestock grazing, wildlife habitats, and other uses.

The process for Land Health Assessments has not changed. Standards for Rangeland Health must be achieved, maintained, or significant progress towards achievement must be shown. Current guidance is found in the BLM 4180 Handbook.¹ When the BLM applies land health standards to

¹ BLM Handbook 4180-1, Land Health Standard

assess land health, they are applied regardless of use. If rangelands are meeting all applicable land health standards, adjustments to uses are typically unnecessary. If the BLM determines that rangelands are not meeting the standards of land health, then the BLM should determine the causal factors and implement appropriate management actions to ensure the area is making significant progress toward achieving the standards. When authorizing these appropriate management actions, the BLM should implement a monitoring plan to determine if the actions are accomplishing the desired result.

The ecological potential of a site is informed from an Ecological Site Description, associated State and Transition Models, and other pertinent data used to complete a Reference Sheet as described in *Interpreting Indicators of Rangeland Health* (M. Pellant, et. al., 2005). The ecological potential indicates whether a site can achieve the values for the indicators in the Habitat Objectives Table. If an Ecological Site Description or associated State and Transition Model are not available, the process set out in *Interpreting Indicators of Rangeland Health* describes a process to identify an existing Ecological Site Description that is suitable for the soil, moisture, aspect, and slope of the site in question. If no comparable or suitable Ecological Site Description is available, *Interpreting Indicators of Rangeland Health* also describes the process to develop a Reference Sheet in the absence of an Ecological Site Description.

On August 4, 2017, the BLM delivered a Response to Secretarial Order 3353 “Greater Sage-Grouse Conservation and Cooperation with Western States” (June 7, 2017) that identified issues related to the 2015 GRSG plans and subsequent policies. This policy is a result of the Response to SO 3353 as well as feedback from internal staff and external federal, state, and local partners.

Coordination: This IM was coordinated between the WO Division of Fish and Wildlife Conservation, the WO Division of Forest, Rangeland, Riparian and Plant Conservation, the Division of Resource Services at the National Operations Center, and State Directors within GRSG habitat.

Contact: For further information or clarification, please contact: Vicki Herren (National Sage-Grouse Coordinator at 202-912-7235 or vherren@blm.gov), Kimberly Hackett (Senior Natural Resource Specialist at 202-912-7216 or khackett@blm.gov) or Gordon Toevs (Senior Policy Advisor, Renewable Resources and Planning at 202-567-1589 or gtoevs@blm.gov).

References:

U.S. Department of the Interior, Bureau of Land Management. 2001. Rangeland health standards handbook H-4180-1.

https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_h4180-1.pdf

Stiver, S.J., E.T. Rinkes, D.E. Naugle, P.D. Makela, D.A. Nance, and J.W. Karl, eds. 2015. Sage-grouse habitat assessment framework: a multiscale assessment tool. Technical Reference 6710-1.

Bureau of Land Management and Western Association of Fish and Wildlife Agencies, Denver, Colorado.

Pellant, M., P. Shaver, D.A. Pyke, and J.E. Herrick. 2005. Interpreting indicators of rangeland health, version 4. Technical Reference 1734-6. U.S. Department of the Interior, Bureau of Land Management, National Science and Technology Center, Denver, CO. BLM/WO/ST-00/001+1734/REV05. 122 p.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240
<http://www.blm.gov>

December 1, 2017

In Reply Refer To:
3100(310) P

Instruction Memorandum No.
Expires MM/DD/YYYY

To: All Washington Office, State Office, and Field Office Officials
From: Assistant Director, Energy, Minerals and Realty Management
Subject: Implementation of Greater Sage-Grouse Resource Management Plan Revisions
or Amendments – Oil & Gas Leasing Prioritization Objective

Program Areas: Fluid Minerals Leasing and Operations, Land Use Planning, National Environmental Policy Act (NEPA) Compliance, and Wildlife Greater Sage-Grouse.

Purpose: This Instruction Memorandum (IM) replaces IM 2016-143.

The purpose of this IM is to ensure consistency, certainty, and clarity when implementing the Greater Sage-Grouse (GRSG) Plans' objective to prioritize oil and gas leasing outside of GRSG habitat,¹ while continuing to move forward expeditiously with oil and gas leasing and development.

Policy/Action:

This policy provides guidance for the GRSG Plans' objective to prioritize oil and gas leasing outside of GRSG habitat.² Leasing will continue, with the appropriate stipulations, on all BLM mineral estate designated in the GRSG Plans as "open" for leasing, while taking into

¹ In addition to Priority Habitat Management Area (PHMA), Sagebrush Focal Areas (SFA), and General Habitat Management Areas (GHMA), other designations were made in the GRSG Plans. These include: "Important Habitat Management Areas" (IHMAs – only applicable to the State of Idaho), "Linkage Connectivity Habitat Management Areas" (LCHMA – applicable only in Colorado), "Restoration Habitat Management Areas" (RHMA – applicable only in the Billings and Miles City Field Offices), and "Other Habitat Management Areas" (OHMAs – only applicable to Nevada and Northeastern California). Wyoming's "Core Areas" are generally designated PHMAs. Refer to your approved RMP, as revised or amended.

² This includes split estate lands.

consideration the prioritization strategy and factors described below. However, all lands outside of GRSG habitat do not need to be considered, offered for lease, or leased within a state, field or district office before the BLM considers or offers leases within GRSG habitat. This is a strategy for prioritization for the BLM offices so they can more efficiently process leases for each lease sale within each field or district office while still protecting GRSG habitat. The BLM will ensure that the best information about the GRSG and its habitat informs and guides the entire oil and gas leasing and development process to the extent compatible with lease rights and the appropriate application of stipulations and conditions of approval.

The BLM's prioritization strategy for oil and gas leasing is as follows:

- Where the BLM has a backlog of leases, the BLM will prioritize its work first in non-habitat areas, followed by lower quality habitat areas (e.g., GHMA) and then priority habitat areas (i.e., PHMA, then SFA).
- Prioritization will occur as a result of the application of the management decisions included in the GRSG Plans, including the No Surface Occupancy and Controlled Surface Use stipulations. These management decisions encourage lessees to acquire leases outside of GRSG habitat, followed by lower priority habitat, by applying fewer restrictions in less-sensitive areas. In addition, the BLM will continue to work with lease nominators and potential lessees to voluntarily prioritize leasing in less-sensitive areas, as defined by the prioritization factors listed below.

State offices may lease fluid mineral parcels within GRSG habitat without leasing any parcels outside of GRSG habitat if there are no parcels nominated outside of GRSG habitat and the GRSG plan is determined to be sufficient. The BLM authorized officers may also take into account GRSG and GRSG habitat as appropriate in the course of analyzing the environmental impacts of leasing and development decisions under NEPA.

BLM Field Offices may also take into consideration other prioritization considerations, but only insofar as they are consistent with the governing land use plan and with the prioritization strategy and factors described in this IM. Such prioritization considerations may include first-in/first-out, priority for unit obligation wells, the efficiency to be gained in processing nominations to complete, the operator's proposals for units, potential drainage cases, office workload, and other resource values that must be considered.

The BLM must honor valid existing rights, such as in cases where the BLM issued a lease prior to the GRSG Plans with terms and stipulations that may be different from those provided for in the GRSG Plans.³ When approving permits on these leases, apply reasonable conditions of approval,⁴ such as applicable Best Management Practices (BMP) and Required Design Features (RDF), as the law allows and as described in the GRSG Plans. If the authorized

³ See for example, Rocky Mountain Record of Decision (RM ROD) at page 2-2, Great Basin Record of Decision (GB ROD) at page 2-2.

⁴ 43 CFR § 3101.1-2.

officer determines through an environmental analysis that the potential environmental impacts of approving a permit could be significant, the authorized officer will prepare an Environmental Impact Statement before taking action.

The authorized officer will continue to work with all operators to plug idle wells, and timely restore well sites with appropriate GRGS habitat seed mixes.

Timeframe: This IM is effective immediately.

Budget Impact: Given the conservation challenges and the land management responsibilities, this policy will result in nominal costs for increased planning, coordination, NEPA review, GIS, responding to administrative challenges, and associated program costs. It is anticipated that performance targets/units of accomplishment for the resource programs will adjust to reflect the added complexities and responsibilities. Timelines for leases and wells within GRSG habitat may take longer to process; however, leases and permits outside of habitat will be prioritized for processing.

Background:

The BLM's authorized officer, acting under the delegated authority of the Secretary of the Interior, has discretion to determine which public lands will be offered at a lease sale. The Mineral Leasing Act of 1920 (MLA), as amended, provides that lands subject to disposition under the Act "which are known or believed to contain oil or gas deposits may be leased by the Secretary." (30 U.S.C. § 226(a) (emphasis added)).

On September 21, 2015, the Department of the Interior and the BLM approved the GRSG RODs. Concurrently, the BLM amended or revised the Plans in GRSG habitat to provide conservation measures protective of GRSG and their habitats.⁵

Manual/Handbook Sections Affected: None.

Coordination: This IM was coordinated with the U.S. Department of the Interior, Office of the Solicitor; BLM State Offices; the Renewable Resources and Planning Directorate; and the Energy, Minerals and Realty Management Directorate.

Contact: If there are any questions concerning this IM, please contact Tim Spisak, Acting Assistant Director, Energy, Minerals and Realty Management (WO-300), at 202-208-4201.

⁵ Although the Lander (Wyoming) ROD and Approved RMP do not include this objective, the procedures in this IM will be followed in the areas covered by that RMP in order to ensure consistency in the BLM's oil and gas leasing and development activities throughout the GRSG range. The prioritization of leasing and development is an administrative function, not an allocation decision, and so the Lander RMP does not need to be maintained or amended to adopt this approach to leasing and development.

*****DISCUSSION DRAFT*****
*****FOR LIMITED DISTRIBUTION***** 12/01/2017

Your staff may also contact Steven Wells, Division Chief, Division of Fluid Minerals (WO-310), at 202-912-7143 or s1wells@blm.gov.

From: Mike McGrady
To: [David Bernhardt](#)
Cc: [Matthew Fry](#)
Subject: Fwd: Pipeline Corridor Initiative
Date: Tuesday, January 30, 2018 3:35:47 PM
Attachments: [The Wyoming Pipeline Corridor Initiative BLM Issue Paper.pdf](#)
[WPCI POD Fig3 8x11.pdf](#)
[12-7-17 Barrasso WPCI Letter.pdf](#)
[20171025 VF LTR to BLM Directors Nedd & Rugwell-WPCI MF-MHMdp.pdf](#)

Deputy Secretary Bernhardt,

I wanted to make sure that you are aware on an initiative Wyoming has been working on to establish pipeline corridors in the State that will support enhanced oil recovery of significant federal, state and fee mineral interests. We need the BLM to initiate the NEPA process for developing an EIS so that we can expedite the development of the pipelines in Wyoming. Briefing papers and additional letters on this initiative are attached. If you would like, we can give you a short briefing on the initiative at the end of our call on mitigation. Matt Fry in the Governor's office is leading out this effort and he can be available for the call.

Mike McGrady

Policy Advisor
Office of Governor Matt Mead

2323 Carey Avenue
Cheyenne, WY 82002
307-777-2083

----- Forwarded message -----

From: Matthew Fry <matthew.fry@wyo.gov>
Date: Tue, Jan 30, 2018 at 1:16 PM
Subject: Pipeline Corridor Initiative
To: Mike McGrady <mike.mcgrady1@wyo.gov>

Mike,

I've attached the letters, a summary of the project, and a map. If Bernhardt is interested in talking for a few minutes, let me know.

Thanks,

Matt

--

Matt Fry
Policy Advisor

Office of Governor Matt Mead

2323 Carey Avenue

Cheyenne, WY 82002

matthew.fry@wyo.gov

Phone: 307-777-4510 <tel:(307)%20777-4510>

E-Mail to and from me, in connection with the transaction of public business, is subject to the Wyoming Public Records Act and may be disclosed to third parties.

E-Mail to and from me, in connection with the transaction of public business, is subject to the Wyoming Public Records Act and may be disclosed to third parties.

State of Wyoming – Office of Governor Matt Mead

The Wyoming Pipeline Corridor Initiative

Purpose

The Wyoming Pipeline Corridor Initiative (WPCI) is a project initiated by the State of Wyoming to obtain federal authorization for an intrastate pipeline network (see attached map). The WPCI will facilitate production of approximately 1.8 billion barrels of Wyoming oil. The WPCI aligns with many of the Administration's stated goals, including striving toward energy independence, updating our nation's infrastructure, and creating jobs.

Background

We have designed WPCI as a pipeline corridor network of 25 segments, approximately 1,983 miles in length, and wholly within the State of Wyoming. Approximately 1,150 miles (58%) of the network would be located on Federal Lands, with 708 miles (62% of the federal land mileage) located in corridors designated or proposed in Bureau of Land Management (BLM) Resource Management Plans (RMP). Over 90 percent of WPCI parallels existing pipelines. The Right of Way (ROW) width will vary between 200 – 300 feet and be sufficient to accommodate a number of pipelines of varying types.

The WPCI is a component of Governor Mead's energy strategy for the State of Wyoming (<http://energy.wyo.gov>). One of the primary purposes of the pipeline network is to connect existing oil fields suitable for enhanced oil recovery (EOR) with anthropogenic and natural carbon dioxide (CO₂) sources. The CO₂ will be injected into existing, often "played-out" oil fields, thereby increasing oil production beyond conventional recovery methods with little additional surface disturbance.

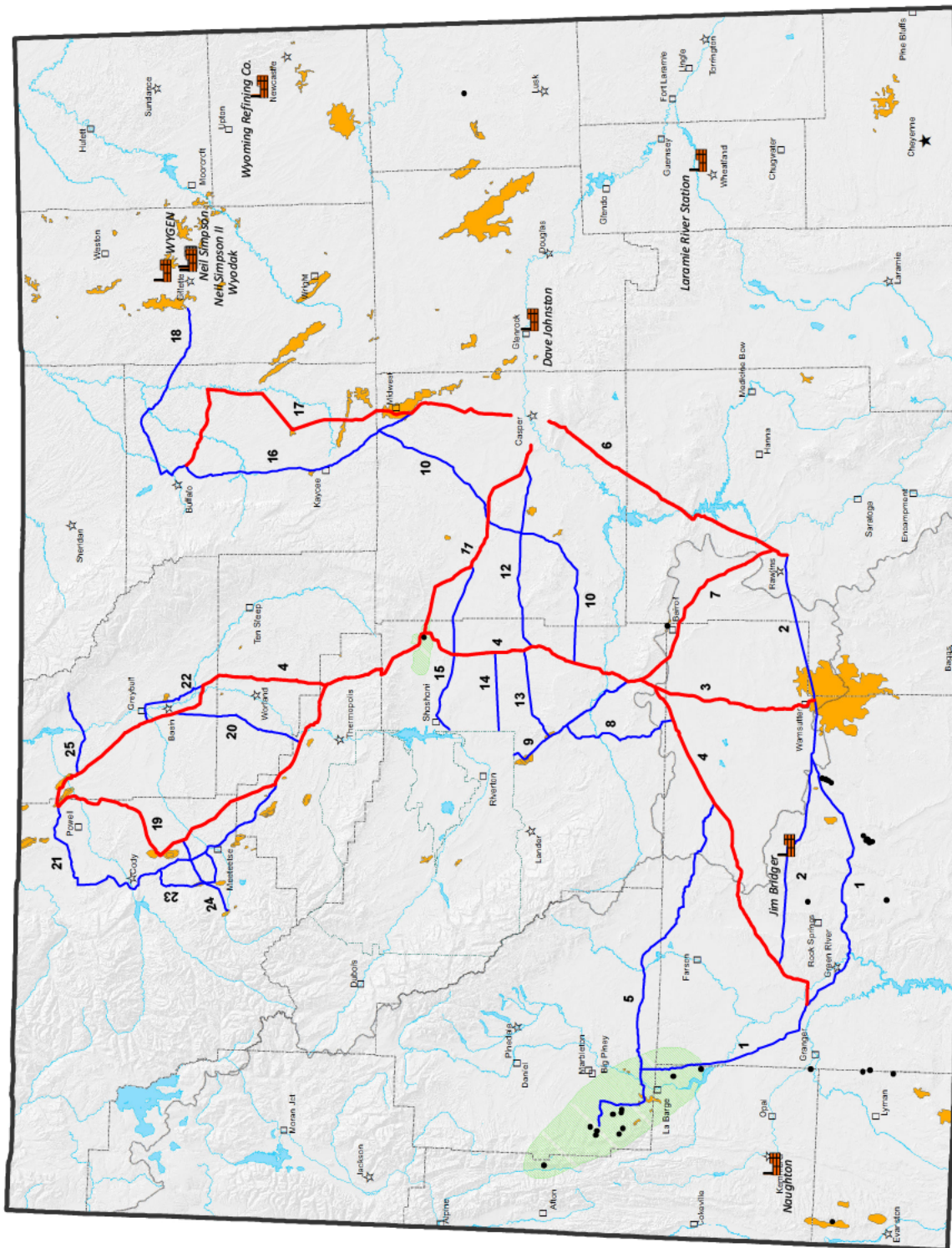
Objectives and Benefits

- An estimated 500 existing oil reservoirs in Wyoming are potential EOR candidates with an estimated production of up to 1.8 billion barrels of oil, based on current technologies. Additionally, 20 trillion cubic feet of CO₂ could be stored as a result of this enhanced development.
- The WPCI will provide a large number of jobs for those building, maintaining, and operating pipelines and EOR fields. These jobs would likely be in Wyoming communities which have recently experienced significant declines in energy-related employment. The University of Wyoming, School of Energy Resources, estimates that 188 jobs are supported for every million barrels of incremental oil production, or 6.7 jobs per million cubic feet/day of purchased CO₂.
- Additional production of oil, gas, and liquids from EOR will generate significant royalties and taxes for federal, state, and local governments.

- The WPCI provides a balanced approach of natural resource utilization and environmental conservation.
- Performing the environmental analysis for the WPCI will alleviate many of the challenges associated with conducting environmental analyses for individual pipeline projects, which is currently a significant obstacle to infrastructure expansion. Individual projects proposed in the WPCI corridors will undergo environmental analysis, but in a shortened timeframe and at reduced costs to proponents, due to the robust National Environmental Policy Act (NEPA) analysis that will be completed to authorize WPCI.
- The WPCI will be located almost entirely within existing ROW corridors, designated in BLM RMPs and/or adjacent to existing pipeline infrastructure. This will minimize the proliferation of linear disturbances; and reduce impacts to wildlife and their habitats, culturally significant properties, and other sensitive resources.
- A sufficiently wide ROW corridor will provide for future location of product pipelines (oil, gas, liquids, etc.) with minimal additional environmental analysis needed and encourage colocation of new pipelines.
- EOR will occur primarily in established oil fields in Wyoming which have historical disturbance, extending the field's life and providing an opportunity to improve the field's reclamation status at the end of their productive life.

Issues

The State of Wyoming requires federal authorization from the BLM for the WPCI. We have invested approximately \$1 million of state funds and worked towards authorization for over four years, but have not yet received final BLM consent to move forward with the proposed NEPA analysis. To fulfill the authorization we intend to work with BLM to develop an Environmental Impact Statement (EIS) that would authorize WPCI through a mechanism that is mutually agreed upon between the State of Wyoming and BLM. Through a Memorandum of Understanding (MOU), the State of Wyoming would cooperatively manage the utilization of WPCI. We would appreciate unified support from the BLM Washington Office and Wyoming Office to complete WPCI, which could then be replicated in other states, thereby providing all of the previously described benefits to a much broader portion of the nation.



- CO2 Producing Wells
- Power Plants
- Existing Fields Suitable for CO2 Flooding
- Trunk Corridor
- Lateral Corridor
- CO2 Producing Fields



United States Senate

December 7, 2017

The Honorable Ryan Zinke
Secretary
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Secretary Zinke:

I write to request immediate support from the Department of Interior in implementing a first-of-its-kind CO₂ corridor project in my home state, a project known as the Wyoming Pipeline Corridor Initiative (WPCI). I understand that on October 27, 2017, Wyoming Governor Matthew Mead sent a letter to the Bureau of Land Management (BLM) headquarters as well as BLM's Wyoming State Office reinforcing his commitment to the WPCI. Governor Mead requested that the BLM inform him whether the agency is still committed to supporting the environmental review process needed to advance the WPCI.

The WPCI is critical to accelerating the deployment of carbon capture, utilization and storage (CCUS) projects in Wyoming. Governor Mead and his staff have spent considerable time and resources developing the WPCI. I commend the Governor's efforts on the WPCI, and I am hopeful that other states will follow Wyoming's lead in developing innovative approaches to accelerate CCUS deployment.

I encourage you to respond to Governor Mead's letter as soon as possible and affirm the BLM's commitment to completing the environmental review process for the WPCI. Your prompt action is consistent with President Trump's executive orders to support American energy and infrastructure development, including Executive Order 13783, entitled "Promoting Energy Independence and Economic Growth," and Executive Order 13807, entitled "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure."

The WPCI represents a tremendous economic and environmental opportunity. The WPCI will grow Wyoming's economy, create vital jobs in rural communities, and serve as a model for the expansion of CCUS across our country.

Thank you for your attention to the WPCI. I look forward to your prompt response.

Sincerely,



JOHN BARRASSO, M.D.
United States Senator

MATTHEW H. MEAD
GOVERNOR



2323 Carey Avenue
CHEYENNE, WY 82002

Office of the Governor

October 27, 2017

Mike Nedd
BLM Acting Director
1849 C Street NW, RM 5665
Washington, DC 20240

Mary Jo Rugwell
BLM State Director
5353 Yellowstone Road
Cheyenne, WY 82009

Re: Wyoming Pipeline Corridor Initiative Support for Completion

Dear Directors,

I write to reinforce my commitment to completion of the Wyoming Pipeline Corridor Initiative (WPCI), and again request your active support in this innovative project. I understand that there may be challenges to this process as we move forward, however, the result of our work will create a model for efficient and environmentally sound pipeline infrastructure development that can be emulated by other interested states with BLM administered lands.

My staff began coordinating with the BLM – Wyoming Office – in 2013 about the possibility of developing WPCI. These conversations were met with positive feedback on the feasibility of the proposal and an interest in the project. Subsequently, we reached out to the BLM – National Office – and received a positive response regarding the feasibility of developing statewide corridors. As a result, the State of Wyoming has invested approximately \$1 million in state resources to develop the WPCI. Our efforts have included extensive interactions with BLM staff to amend Resource Management Plans, effectively route corridors, write a plan of development, and hiring consultants to conduct preliminary impact analyses and write resource reports. We now have a foundationally sound set of documents that are ready to move forward to the NEPA process. The final remaining hurdle is affirmation from BLM on their willingness to proceed.

Timing is critical. Wyoming is preparing to embark upon a legislative session in February, 2018. We need to know whether BLM is willing to continue to work to bring WPCI to fruition and the cost to fund a consultant to prepare an Environmental Impact Statement (EIS), and secure the funds. I need answers to these questions as soon as possible.

I remind you of the potential benefits of WPCI. In Wyoming, this authorization will facilitate the development of approximately 1.8 billion barrels of otherwise unrecoverable oil. Additionally, we would be in a position to permanently store roughly 20 trillion cubic feet of CO₂. This will create a large number of jobs in Wyoming, many of which would benefit

Directors Nedd and Rugwell
October 27, 2017
RE: Support for WPCI Completion
Page 2

communities across the state that have been economically depressed due to the downturn in our energy markets.

Again, I am committed to completion of the WPCI. I believe the benefits to the State, the BLM, and the Nation far outweighs any challenges we may encounter as we work through this process. Please let me know how we can continue to work together to finalize this first of its kind endeavor.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Matthew H. Mead', with a long horizontal flourish extending to the right.

Matthew H. Mead
Governor

MHM:dp

From: Laura King
To: osfoia@ios.doi.gov
Cc: "[Jeremy Nichols](#)"
Subject: FOIA Requests: Notice of Violation/Offer to Assist
Date: Friday, February 2, 2018 11:10:44 AM
Attachments: [Notice of Violation SO 3357 3358 3359 3360.pdf](#)

Dear Ms. Sweeney,

I am writing regarding four separate FOIA requests made by WildEarth Guardians, each dated January 4, 2018, seeking records related to Secretary of the Interior Ryan Zinke's Secretarial Orders 3357, 3358, 3359, and 3360, respectively.

By email on January 17, 2018, you acknowledged receipt of each of these FOIA requests and assigned each a control number, as indicated below:

- For the FOIA request for SO 3357 records, you assigned control # OS201800495.
- For the FOIA request for SO 3358 records, you assigned control # OS201800497.
- For the FOIA request for SO 3359 records, you assigned control # OS201800499.
- For the FOIA request for SO 3360 records, you assigned control # OS201800498.

Pursuant to FOIA, 5 U.S.C. § 552(a)(6)(A)(i), "determinations" on Guardians' FOIA requests are due 20 business days after you received the requests. These FOIA requests were received by you via email on January 4, 2018. Thus, your determinations on these FOIA requests are due today, February 2, 2018. We have not received determinations on these FOIA requests. Please provide an estimated date of completion for your determinations on these FOIA requests.

I have attached a letter that details our concerns. I look forward to hearing from you.

Best,

Laura

Laura King

Staff Attorney

Western Environmental Law Center

103 Reeder's Alley

Helena, MT 59601

(406) 204-4852 (tel.)

king@westernlaw.org

www.westernlaw.org



Headquarters
PO Box 10947
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(541) 485-2471
info@westernlaw.org

Offices
Portland, Oregon
Seattle, Washington
Taos, New Mexico
Santa Fe, New Mexico
Helena, Montana

Defending the West www.westernlaw.org

Western Environmental Law Center

Via Electronic Mail

February 2, 2018

Cindy Sweeney
Department of the Interior
Office of the Secretary, FOIA Office
1849 C St., NW, MS-7328
Washington, D.C. 20240
osfoia@ios.doi.gov

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Specifically, Guardians requested the following records from the U.S. Department of the Interior’s Office of the Secretary:

- Any and all records related to Secretarial Order 3357, which is entitled, “Temporary Delegation of Authority to the Deputy Assistant Secretary for Fish and Wildlife and Parks,” which was signed by the Deputy Interior Secretary on October 17, 2017.
- Any and all records related to Secretarial Order 3358, entitled, “Executive Committee for Expedited Permitting,” which was signed by the Interior Secretary on October 25, 2017.
- Any and all records related to Secretarial Order 3359, entitled, “Critical Mineral Independence and Security,” which was signed by the Interior Secretary on December 21, 2017.
- Any and all records related to Secretarial Order 3360, which is entitled, “Rescinding Authorities Inconsistent with Secretary’s Order

3349, ‘American Energy Independence’,” which was signed by the Deputy Interior Secretary on December 22, 2017.

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At this time, Guardians is not exercising our legal option under FOIA to file suit to compel the Department of the Interior’s Office of the Secretary’s compliance with FOIA’s time limits. 5 U.S.C. § 552(a)(6)(C). However, be informed that time is of the essence. The requested information will help provide insight into four recently issued Secretarial Orders: (1) an order that shifts delegated authority and potentially creates internal conflicts in the Interior Department; (2) an order that creates a committee to expedite energy development permitting, seemingly at the expense of the public interest and the environment; (3) an order that directs a sweeping review of mineral resources in the U.S. and directs that Interior Department agencies open up lands and resources to accommodate more mining and mineral exploitation; and (4) an Order that rescinds several policies that relate to the protection of public lands and resources, as well as the climate. As such, these Orders change the way that the Department of the Interior manages energy development on public lands, and have significant implications for economic

and environmental health and welfare in the United States. Guardians intends to use the requested information to better understand the changes in public lands policy and management that will flow from the Secretarial Orders, and to educate the public on these matters. The rationale driving this request is to inform the public about these current issues, and Guardians' need to access the requested records is therefore very time sensitive.

As you are aware, the FOIA reflects a "profound national commitment to ensuring an open Government." Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21 2009). Agencies are to "adopt a presumption in favor of disclosure." *Id.* Specifically:

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. . . . The presumption of disclosure should be applied to all decisions involving FOIA.

Id.

If your office takes the position that any portion of the requested records is exempt from disclosure, we request that you provide us with an index of those records as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979). A *Vaughn* index must (1) identify each document or portion of document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure of the document or portion of document would damage the interests protected by the claimed exemption. *See Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). "The description and explanation the

agency offers should reveal as much detail as possible as to the nature of the document,” in order to provide “the requestor with a realistic opportunity to challenge the agency’s decision.” *Oglesby v. U.S. Dept. of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996).

Notably, it is black-letter FOIA law that the burden is on the agency to show that any withheld information is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B) (“[T]he burden is on the agency to sustain its action [of withholding documents under any of the FOIA exemptions].”); *Jordan v. DOJ*, 591 F.2d 753, 772-73 (D.C. Cir. 1978 (en banc) (“The agency bears the full burden of proof when an exemption is claimed to apply.”). The quality of an agency’s *Vaughn* index has been found to be essential to the agency’s ability to meet this obligation. *See, e.g., Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 368 (4th Cir. 2009) (“Our review leads us to conclude the Agencies’ descriptions of many of the challenged documents lack the specificity and particularity required for a proper determination of whether they are exempt from disclosure.”); *People of Cal. ex rel. Brown v. EPA*, No. 07-2055, 2009 WL 273411, at *4 (N.D. Cal. Feb. 4, 2009) (ordering in camera review where agency’s *Vaughn* index did not provide enough information for court to evaluate agency’s use of privilege).

Additionally, the U.S. Department of the Interior’s Office of the Secretary is obligated to release any reasonably segregable, non-exempt portions of the requested records. 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”); *see, e.g., EPA v. Mink*, 410 U.S. 73, 91 (1973) (refusing to extend deliberative process privilege protection to “factual material otherwise available on discovery merely [on the basis that] it was placed in a memorandum with matters of law, policy or opinion”).

By this letter, we are offering to assist your office in any way possible to facilitate the U.S. Department of the Interior’s Office of the Secretary’s prompt and open determination on our requests. Please let us know if we can provide any additional information or answer any questions to help facilitate the processing of these FOIA requests.

However, please be aware that legal action may be required if a determination is not promptly forthcoming. Again, it is our client’s legal option under FOIA to file suit to compel compliance with the FOIA’s time

limits and/or to challenge the constructive denial of the request. 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(C)(i), (a)(4)(B).

As we evaluate the need to seek judicial review of this matter, it would be useful to know whether you have implemented a “first-in/first-out” system for processing a backlog of FOIA requests and, if so, the number of requests in line ahead of this one. **Please also provide an estimated date of completion for your responses to these FOIA requests.**

Thank you for your attention to this matter. Again, please do not hesitate to contact us if you have any questions or need any assistance in the processing of our FOIA requests.

Sincerely,

A handwritten signature in cursive script that reads "Laura King". The signature is written in black ink and is positioned above the typed name and contact information.

Laura King
Staff Attorney
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 204-4852
king@westernlaw.org

On behalf of:

Jeremy Nichols
Climate & Energy Program Director
WildEarth Guardians
2590 Walnut Street
Denver, CO 80205
(303) 437-7663
jnichols@wildearthguardians.org

From: Moses-Nedd, IEA_Cynthia
To: [Cynthia Moses-Nedd](#)
Subject: President's \$1 Billion budget proposal for BLM supports access to public lands for multiple uses
Date: Monday, February 12, 2018 2:11:51 PM
Attachments: [BLM Budget News Release_02.12.18.docx](#)

Attached and below are highlights from the President's FY 2019 proposed budget for BLM.

Best,
Cynthia

Cynthia Moses-Nedd
US Department of the Interior
Office of Intergovernmental & External Affairs
1849 C Street, NW, Room 6221
Washington, DC
(202) 208-7461 Ofc
(202) 821-9410 Cell

President's \$1 Billion budget proposal for BLM supports access to public lands for multiple uses

Emphasizes the interconnection between people, the public lands and the economy

WASHINGTON – In keeping with the Administration's goal of securing America's energy dominance, President Trump has proposed a \$1 billion Fiscal Year (FY) 2019 budget for the Bureau of Land Management that will provide resources to promote energy development on public lands while expanding access to recreation and conservation areas.

The President's proposal provides resources to support the Administration's goals and meets the BLM's multiple-use and sustained yield mission in other areas. The budget focuses on the BLM's field operations, including being a "Good Neighbor" to the communities that are home to BLM lands and within common regional boundaries with other Interior bureaus.

Conserving Our Land and Water Resources

BLM lands are working lands that allow traditional land uses such as grazing. The BLM currently administers approximately 18,000 grazing allotments on about 155 million acres of public lands. To support these efforts, the budget proposes \$82.1 million for the Range Management program. In 2019, the Bureau will continue to streamline the grazing permit process and look for opportunities to incorporate flexible terms and conditions into permit renewals.

Generating Revenue and Utilizing Our Natural Resources

The budget requests \$185 million to provide access to energy and minerals development, including resources to establish a competitive leasing program on the Coastal Plain (1002 Area) of the Alaska North Slope, as required by the recently enacted Tax Cuts and Jobs Act. The proposed funding for energy and minerals will add capacity and improve the federal coal leasing and permitting program.

Expanding Outdoor Recreation

Outdoor recreation is vital to the Nation's heritage and economy – a fact that is recognized by the Bureau's 2019 budget request. Recreation activities on BLM lands, including hunting, fishing, motorized recreation, camping, and more, help support thousands of jobs and help contribute millions of dollars of economic activity. Expanding these opportunities is central to the 2019 proposal for the BLM as it requests \$53.2 million for Recreation Resources Management, \$11.9 million for Wilderness Management, and \$26.3 million for National Monuments and National Conservation Areas. An investment of more than \$90 million in these areas continues to support a wide range of recreational opportunities and creates job opportunities in many rural western communities.

Modernizing Our Organization and Infrastructure for the Next 100 years

The BLM owns more than 5,000 structures and buildings, including dams, bridges, electrical and communication systems, trails, and roads. With a request of \$24.9 million, the BLM will tackle its highest priority deferred maintenance projects that support critical health or safety and mission essential repair projects in an effort to directly and positively impact the safety of both Interior employees and the public that they serve.

Protecting Our People and Resources

BLM lands lie directly along nearly 200 miles of the international boundary with Mexico in New Mexico, Arizona and California, where the BLM promotes safety, security, and environmental protection of public lands, public land users, and employees. The 2019 budget request includes \$24.2 million for the Law Enforcement program to continue resource and public safety efforts along the southwest border, as well as combat marijuana cultivation on public lands and address other needs.

Legislative Proposals

To further support recreation on public lands, the Department is seeking the permanent reauthorization of the Recreation Fee program under the Federal Lands Recreation Enhancement Act, which expires on September 30, 2018. The Act provides nearly \$260 million in revenue annually that is used to improve and support recreation facilities on parks

and public lands, including BLM-managed lands.

The BLM seeks to lift the burdensome restrictions on how it manages the Wild Horse and Burro program, as part of the Department's effort to reduce the program's unsustainable long-term costs and to meet the legal obligations under the Wild Free-Roaming Horse and Burro Act of 1971.

The budget also proposes the permanent reauthorization of the Federal Land Transaction Facilitation Act, which expired in 2011. The Act allows lands identified in recent resource management plans as being available for disposal to be sold with the revenue used to acquire lands with high conservation values and to cover costs associated with conducting sales.

-BLM-



News Release

Washington, D.C.

Contact: blm_press@blm.gov

For immediate release

February 12, 2018

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-BLM-

The BLM manages more than 245 million acres of public land located primarily in 12 Western states, including Alaska. The BLM also administers 700 million acres of sub-surface mineral estate throughout the nation. The agency's mission is to sustain the health, diversity, and productivity of America's public lands for the use and enjoyment of present and future generations. The Department estimates that the diverse activities authorized on these lands generated \$75 billion in sales of goods and services throughout the American economy in fiscal year 2016—more than any other agency in the Department of the Interior. These activities supported an estimated

372,000 jobs.

From: Moses-Nedd, IEA_Cynthia
To: [IEA_Cynthia Moses-Nedd](mailto:IEA_Cynthia.Moses-Nedd)
Subject: BLM offers revision to methane waste prevention rule
Date: Monday, February 12, 2018 3:59:21 PM
Attachments: [FINAL - Methane Waste Rule News Release 02.12.17.docx](#)

News Release

Washington, D.C.

Contact: blm_press@blm.gov

For immediate release

Date: Feb. 12, 2018

BLM offers revision to methane waste prevention rule

Notice opens comment period for proposed venting and flaring regulation

WASHINGTON – As part of President Trump’s Executive Order 13783 promoting energy independence [Section 7 (6)(iv)] from March 28, 2017, to review and modify federal regulations that unnecessarily hinder economic growth and energy development, the Bureau of Land Management today announced a proposal to revise the 2016 final Waste Prevention Rule (also known as the venting and flaring rule). The proposed rule would eliminate duplicative regulatory requirements and re-establish long-standing requirements that the 2016 final rule sought to replace. The proposal includes a 60-day opportunity for public comment.

“In order to achieve energy dominance through responsible energy production, we need smart regulations not punitive regulations,” said **Joe Balash, Assistant Secretary for Land and Minerals Management**. “We believe this proposed rule strikes that balance and will allow job growth in rural America.”

Among the concerns identified was that the economic impact on operators was underestimated in the 2016 rule. In addition, a review of existing state and federal regulations found considerable overlap with the rule.

As a result, the BLM is proposing to replace the venting and flaring rule with requirements similar to those that were in force prior to the 2016 final rule. This proposal would align the regulations with administration priorities on energy development, job creation and reduced compliance costs while also working more closely with existing state regulatory efforts.

In an earlier part of this effort, the BLM published a final rule entitled, “Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements,” which suspended or delayed certain requirements of the 2016 final rule until Jan. 17, 2019. The rule, finalized on Dec. 8, ensured that operators on federal and Indian oil and gas leases would not expend their resources on complying with the requirements of the 2016 rule that the BLM is today proposing to replace.

The BLM’s proposal supports the administration’s priorities that require agencies to seek ways to reduce the costs of regulatory compliance (Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs) and that require the Secretary to reconsider the 2016 final rule (Executive Order 13783, Promoting Energy Independence and Economic Growth). Secretary Zinke followed up with Secretarial Order No. 3349, American Energy Independence, on March 29, 2017, which among other things, called for review of the 2016 rule.

“I am glad that Secretary Zinke is proposing to replace the unnecessary and costly methane rule,” **said Senate Environment and Public Works Committee Chairman John Barrasso (R-WY)**. “If left in place, the rule would have discouraged energy production and job creation in Wyoming and across the West.”

“The previous administration scorned domestic energy development and crafted the prior rule to deliberately stifle it,” **said House Natural Resources Committee Chairman Rob Bishop**

(R-UT). “This is a necessary step to promote investment in federal and tribal lands so that economies in the west can grow. We will continue to work in coordination with Secretary Zinke, the Trump administration, states and tribal communities to advance new and better policies.”

“North Dakota has clearly demonstrated that state-led regulations can deliver good environmental stewardship without imposing unnecessary costs,” **Senator John Hoeven (R-ND) said**. “Revising the duplicative BLM methane rule will empower greater energy production on federal lands. At the same time, we continue working to build the infrastructure we need across federal, state and private lands to capture this valuable resource and reduce flaring.”

“Senate Democrats killed the historical opportunity to permanently rid North Dakota of the federal mediocrity that is the venting and flaring rule,” **said Congressman Kevin Cramer**

(R-ND). “I appreciate the Administration’s intentions - with the many problems associated with Obama’s rule, I look forward to closely studying its proposed replacement. It is my hope

it addresses North Dakota's issues, as we have expressed both to Interior and to the federal courts. Methane is a commodity, and facilitating its economical transfer to the market is the solution.”

“The impacts of BLM's Obama-era venting and flaring rule would be devastating to the economy of New Mexico, which relies on the production of energy resources for thousands of jobs along with roughly 30-40% of the State's operating funds,” **said Congressman Steve Pearce (R-NM)**. “The full implementation of this rule would directly threaten funding for schools, teachers, hospitals, law enforcement, and other essential services our communities rely on. I appreciate the Secretary's commitment to improving this rule and look forward to working with the Department to move these necessary reforms forward.”

While the proposed rule is open for public comment generally, the Federal Register notice specifically requests comment on ways that the BLM can reduce the waste of gas by incentivizing the capture, reinjection, or beneficial use of the gas.

Public comments on this proposed rule are due to the BLM within 60 days of the day it appears in the Federal Register, which is expected this week. The BLM is not obligated to consider, or include in the administrative record, comments received after that time or delivered to an address other than those listed below in making its decisions on the final rule.

ADDRESSES:

Mail: U.S. Department of the Interior, Director (630), Bureau of Land Management, Mail Stop 2134LM, 1849 C St., N.W., Washington, D.C. 20240, Attention: 1004-AE52.

Personal or messenger delivery: U.S. Department of the Interior, Bureau of Land Management, 20 M Street, S.E., Room 2134 LM, Washington, D.C. 20003, Attention: Regulatory Affairs.

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions at the website.

– BLM –

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News Release

Washington, D.C.
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Contact: blm_press@blm.gov
Date: Feb. 12, 2018

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"The impacts of BLM's Obama-era venting and flaring rule would be devastating to the economy of New Mexico, which relies on the production of energy resources for thousands of jobs along with roughly 30-40% of the State's operating funds," **said Congressman Steve Pearce (R-NM)**. "The full implementation of this rule would directly threaten funding for schools, teachers, hospitals, law enforcement, and other essential services our communities rely on. I appreciate the Secretary's commitment to improving this rule and look forward to working with the Department to move these necessary reforms forward."

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From: Moses-Nedd, IEA_Cynthia
To: [Cynthia Moses-Nedd](#)
Subject: Fwd: Waste prevention rule
Date: Monday, February 12, 2018 4:02:44 PM
Attachments: [FINAL - Methane Waste Rule News Release 02.12.17.docx](#)

News Release

Washington, D.C.

Contact: blm_press@blm.gov

For immediate release

Date: Feb. 12, 2018

BLM offers revision to methane waste prevention rule

Notice opens comment period for proposed venting and flaring regulation

WASHINGTON – As part of President Trump’s Executive Order 13783 promoting energy independence [Section 7 (6)(iv)] from March 28, 2017, to review and modify federal regulations that unnecessarily hinder economic growth and energy development, the Bureau of Land Management today announced a proposal to revise the 2016 final Waste Prevention Rule (also known as the venting and flaring rule). The proposed rule would eliminate duplicative regulatory requirements and re-establish long-standing requirements that the 2016 final rule sought to replace. The proposal includes a 60-day opportunity for public comment.

“In order to achieve energy dominance through responsible energy production, we need smart regulations not punitive regulations,” **said Joe Balash, Assistant Secretary for Land and Minerals Management.** “We believe this proposed rule strikes that balance and will allow job growth in rural America.”

Among the concerns identified was that the economic impact on operators was underestimated in the 2016 rule. In addition, a review of existing state and federal regulations found considerable overlap with the rule.

As a result, the BLM is proposing to replace the venting and flaring rule with requirements similar to those that were in force prior to the 2016 final rule. This proposal would align the regulations with administration priorities on energy development, job creation and reduced compliance costs while also working more closely with existing state regulatory efforts.

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News Release

Washington, D.C.
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Contact: blm_press@blm.gov
Date: Feb. 12, 2018

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From: Laura King
To: osfoia@ios.doi.gov
Cc: "[Jeremy Nichols](#)"
Subject: RE: FOIA Requests: Notice of Violation/Offer to Assist
Date: Tuesday, February 20, 2018 12:26:09 PM
Attachments: [Second Notice of Violation SO 3357 3358 3359 3360.pdf](#)

Dear Ms. Sweeney,

I am writing again regarding four FOIA requests made by WildEarth Guardians, each dated January 4, 2018, seeking records related to Secretary of the Interior Ryan Zinke's Secretarial Orders 3357, 3358, 3359, and 3360, respectively.

By email on January 17, 2018, you acknowledged receipt of each of these FOIA requests and assigned each a control number, as indicated below:

- For the FOIA request for SO 3357 records, you assigned control # OS201800495.
- For the FOIA request for SO 3358 records, you assigned control # OS201800497.
- For the FOIA request for SO 3359 records, you assigned control # OS201800499.
- For the FOIA request for SO 3360 records, you assigned control # OS201800498.

Your determinations on these FOIA requests were due on February 2, 2018. We have not received determinations on these FOIA requests. Please provide an estimated date on which the agency will complete action on these FOIA requests. 5 USC § 552(a)(7)(B)(ii).

I have attached a letter that details our concerns. Please be aware that we will exercise our legal option to file suit to compel compliance with FOIA's time limits if your determinations on the requests are not promptly forthcoming.

Thank you for your assistance.

Best,

Laura

Laura King

Staff Attorney

Western Environmental Law Center

103 Reeder's Alley

Helena, MT 59601

(406) 204-4852 (tel.)

king@westernlaw.org <<mailto:king@westernlaw.org>>

www.westernlaw.org

From: Laura King [<mailto:king@westernlaw.org>]

Sent: Friday, February 02, 2018 9:09 AM

To: 'osfoia@ios.doi.gov'

Cc: 'Jeremy Nichols'

Subject: FOIA Requests: Notice of Violation/Offer to Assist

Dear Ms. Sweeney,

I am writing regarding four separate FOIA requests made by WildEarth Guardians, each dated January 4, 2018, seeking records related to Secretary of the Interior Ryan Zinke's Secretarial Orders 3357, 3358, 3359, and 3360, respectively.

By email on January 17, 2018, you acknowledged receipt of each of these FOIA requests and assigned each a control number, as indicated below:

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Pursuant to FOIA, 5 U.S.C. § 552(a)(6)(A)(i), "determinations" on Guardians' FOIA requests are due 20 business days after you received the requests. These FOIA requests were received by you via email on January 4, 2018. Thus, your determinations on these FOIA requests are due today, February 2, 2018. We have not received determinations on these FOIA requests. Please provide an estimated date of completion for your determinations on these FOIA requests.

I have attached a letter that details our concerns. I look forward to hearing from you.

Best,

Laura

Laura King

Staff Attorney

Western Environmental Law Center

103 Reeder's Alley

Helena, MT 59601

(406) 204-4852 (tel.)

king@westernlaw.org

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PO Box 10947
Eugene, Oregon 97440
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Offices
Portland, Oregon
Seattle, Washington
Taos, New Mexico
Santa Fe, New Mexico
Helena, Montana

Defending the West www.westernlaw.org

Western Environmental Law Center

Via Electronic Mail

February 20, 2018

Cindy Sweeney
Department of the Interior
Office of the Secretary, FOIA Office
1849 C St., NW, MS-7328
Washington, D.C. 20240
osfoia@ios.doi.gov

Dear Ms. Sweeney,

I am writing regarding four separate FOIA requests made by WildEarth Guardians (“Guardians”), each dated January 4, 2018, seeking records related to Secretary of the Interior Ryan Zinke’s Secretarial Orders 3357, 3358, 3359, and 3360, respectively. These FOIA requests were sent by email.

Specifically, Guardians requested the following records from the U.S. Department of the Interior’s Office of the Secretary:

- Any and all records related to Secretarial Order 3357, which is entitled, “Temporary Delegation of Authority to the Deputy Assistant Secretary for Fish and Wildlife and Parks,” which was signed by the Deputy Interior Secretary on October 17, 2017.
- Any and all records related to Secretarial Order 3358, entitled, “Executive Committee for Expedited Permitting,” which was signed by the Interior Secretary on October 25, 2017.
- Any and all records related to Secretarial Order 3359, entitled, “Critical Mineral Independence and Security,” which was signed by the Interior Secretary on December 21, 2017.
- Any and all records related to Secretarial Order 3360, which is entitled, “Rescinding Authorities Inconsistent with Secretary’s Order

3349, 'American Energy Independence',” which was signed by the Deputy Interior Secretary on December 22, 2017.

By email on January 17, 2018, you acknowledged receipt of each of these FOIA requests and assigned each a control number, as indicated below:

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Pursuant to FOIA, 5 U.S.C. § 552(a)(6)(A)(i), “determinations” on Guardians’ FOIA requests were due 20 business days after you received the requests. These FOIA requests were received by you via email on January 4, 2018. Thus, your determinations on these FOIA requests were due February 2, 2018. A determination consists of (1) a decision to comply or not comply with the request, (2) the reasons for the decision, (3) and, in the case of an adverse decision, a description of the requester’s rights to an appeal. *Id.* We have not yet received a determination on these FOIA requests from your office.

Time is of the essence. The requested information will help provide insight into four recently issued Secretarial Orders: (1) an order that shifts delegated authority and potentially creates internal conflicts in the Interior Department; (2) an order that creates a committee to expedite energy development permitting, seemingly at the expense of the public interest and the environment; (3) an order that directs a sweeping review of mineral resources in the U.S. and directs that Interior Department agencies open up lands and resources to accommodate more mining and mineral exploitation; and (4) an Order that rescinds several policies that relate to the protection of public lands and resources, as well as the climate. As such, these Orders change the way that the Department of the Interior manages energy development on public lands, and have significant implications for economic and environmental health and welfare in the United States. Guardians intends to use the requested information to better understand the changes in public lands policy and management that will flow from the Secretarial

Orders, and to educate the public on these matters. The rationale driving this request is to inform the public about these current issues, and Guardians' need to access the requested records is therefore very time sensitive.

As you are aware, the FOIA reflects a "profound national commitment to ensuring an open Government." Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21 2009). Agencies are to "adopt a presumption in favor of disclosure." *Id.* Specifically:

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. . . . The presumption of disclosure should be applied to all decisions involving FOIA.

Id.

If your office takes the position that any portion of the requested records is exempt from disclosure, we request that you provide us with an index of those records as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979). A *Vaughn* index must (1) identify each document or portion of document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure of the document or portion of document would damage the interests protected by the claimed exemption. *See Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). "The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document," in order to provide "the requestor with a realistic opportunity to challenge the agency's decision." *Oglesby v. U.S. Dept. of Army*, 79 F.3d

1172, 1176 (D.C. Cir. 1996).

Notably, it is black-letter FOIA law that the burden is on the agency to show that any withheld information is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B) (“[T]he burden is on the agency to sustain its action [of withholding documents under any of the FOIA exemptions].”); *Jordan v. DOJ*, 591 F.2d 753, 772-73 (D.C. Cir. 1978 (en banc) (“The agency bears the full burden of proof when an exemption is claimed to apply.”). The quality of an agency’s *Vaughn* index has been found to be essential to the agency’s ability to meet this obligation. *See, e.g., Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 368 (4th Cir. 2009) (“Our review leads us to conclude the Agencies’ descriptions of many of the challenged documents lack the specificity and particularity required for a proper determination of whether they are exempt from disclosure.”); *People of Cal. ex rel. Brown v. EPA*, No. 07-2055, 2009 WL 273411, at *4 (N.D. Cal. Feb. 4, 2009) (ordering in camera review where agency’s *Vaughn* index did not provide enough information for court to evaluate agency’s use of privilege).

Additionally, the U.S. Department of the Interior’s Office of the Secretary is obligated to release any reasonably segregable, non-exempt portions of the requested records. 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”); *see, e.g., EPA v. Mink*, 410 U.S. 73, 91 (1973) (refusing to extend deliberative process privilege protection to “factual material otherwise available on discovery merely [on the basis that] it was placed in a memorandum with matters of law, policy or opinion”).

By this letter, we are offering to assist your office in any way possible to facilitate the U.S. Department of the Interior’s prompt and open determinations on our requests. Please let us know if we can provide any additional information or answer any questions to help facilitate the processing of these FOIA requests.

However, please be aware that, if determinations are not promptly forthcoming, we will exercise our legal option under FOIA to file suit to compel compliance with the FOIA’s time limits and/or to challenge the constructive denial of our requests. 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(C)(i), (a)(4)(B).

As we evaluate the need to seek judicial review of this matter, it would be useful to know whether you have implemented a “first-in/first-out” system for processing a backlog of FOIA requests and, if so, the number of requests in line ahead of this one. **Please also provide an estimated date of completion for your responses to these FOIA requests.**

Thank you for your attention to this matter. Again, please do not hesitate to contact us if you have any questions or need any assistance in the processing of our FOIA requests.

Sincerely,

A handwritten signature in black ink that reads "Laura King". The signature is written in a cursive style with a long horizontal stroke at the end.

Laura King
Staff Attorney
Western Environmental Law Center
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(406) 204-4852
king@westernlaw.org

On behalf of:

Jeremy Nichols
Climate & Energy Program Director
WildEarth Guardians
2590 Walnut Street
Denver, CO 80205
(303) 437-7663
jnichols@wildearthguardians.org