REFORMING OIL AND GAS LEASING ON PUBLIC LANDS

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INTRODUCTION

The past four years of the Trump Administration's "energy dominance" agenda will have long-lasting negative impacts on our lands, waters, and local communities. At a time when the climate crisis is becoming ever more apparent, the Trump Administration was resolutely focused on oil and gas leasing to the detriment of all other benefits provided by public lands. In the past four years alone, the federal government has leased 5.4 million onshore acres to oil and gas interests—some for as low as $2 an acre.[1] The energy-dominance agenda amounts to little more than a giveaway of our public land. If such actions are to be prevented in the

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1. *New Story Map Details How Last Four Years of Trump Oil and Gas Actions Have Impacted Public Lands and Communities*, THE WILDERNESS SOC'Y (Oct. 26, 2020), https://www.wildernessaction.org/new-story-map-details-how-last-four-years-trump-oil-and-gas-actions-have-impacted-public-lands-and-communities; 30 U.S.C. § 226(b)(1)(B) (2021). $2 per acre is the statutory minimum that the federal government is allowed to lease land. *Id.*

future, it is imperative that the Biden Administration focus on reforming the oil and gas leasing program.

This Article focuses on administrative actions, absent any legislative changes, that the Biden Administration could take to start reforming the oil and gas leasing program. However, before looking toward the future, in Part I, I briefly discuss the legacy of the Trump Administration's policies. In Part II, I then provide a brief overview of the statutes pertinent to the onshore leasing program. Finally, Part III outlines administrative actions the Biden Administration could take.

I. THE LEGACY OF THE TRUMP ADMINISTRATION'S ENERGY-DOMINANCE AGENDA

Fossil fuels produced on federal lands account for approximately 24% of all U.S. carbon-dioxide emissions.[2] Lands leased during the Trump Administration will contribute to these emissions for decades to come. In general, leases issued under the Mineral Leasing Act (MLA) are granted for a primary term of 10 years,[3] which is extended indefinitely if qualifying drilling operations are in place, the lease contains a well capable of producing in paying quantities, or if the lease is entitled to receive an allocation of production from an off-lease well.[4] A lease conveys to a lessee the right to:

> [U]se so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold subject to: Stipulations attached to the lease; restrictions deriving from specific, nondiscretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed.[5]

In short, once the lease is conveyed there is very little the Biden Administration can do to alter the outcome. Oil and gas leases lead to drilling rigs, roads, pipelines, and pollution—permanently scarring public

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2. *See* MATTHEW D. MERRILL ET AL., FEDERAL LANDS GREENHOUSE GAS EMISSIONS AND SEQUESTRATION IN THE UNITED STATES: ESTIMATES FOR 2005–14 1, 8 (2018), https://pubs.usgs.gov/sir/2018/5131/sir20185131.pdf. This number includes upstream (extraction-based) and downstream (user-based) emissions. *Id.*

3. 30 U.S.C. § 226(e).

4. 43 C.F.R. §§ 3107.1–.3 (2020).

5. 43 C.F.R. § 3101.1–2.

lands, harming wildlife, destroying habitats, and contributing to degraded air and water quality.[6] While a significant amount of oil and gas leasing has occurred under every administration, the extent of leasing under the Trump Administration is particularly jarring. Not only did the pace far exceed any we have seen before,[7] the Trump Administration also opened areas that were once thought protected, valued for their pristine wilderness and for their cultural significance.[8] Because little can be done to prevent development once the leases are conveyed, these leases stand to be a persistent environmental legacy of the Trump Administration.[9] Indeed, in its waning days, the Trump Administration rushed to push through a lease sale in one of America's last pristine ecosystems: the Arctic National Wildlife Refuge.[10] Holding the largest stretch of wilderness in the United States, the refuge is home to caribou, wolves, migratory birds, and three species of bears, including polar bears.[11] Local indigenous populations rely on these resources to sustain their culture and way of life, therefore drilling in the arctic will spell disaster not only for the wildlife but also for the

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6. *The Climate Report 2020: Greenhouse Gas Emissions from Public Lands*, THE WILDERNESS SOC'Y, https://www.wilderness.org/sites/default/files/media/file/TWS_The%20Climate%20Report%202020_Greenhouse%20Gas%20Emissions%20from%20Public%20Lands.pdf (last visited May 14, 2021) ("[T]he lifecycle emissions from the production and combustion of fossil fuels produced on public lands as a result of the federal leasing program are equivalent to over 20% of total U.S. GHG emissions.").

7. *See* Emily Holden et. al., *Revealed: The Full Extent of Trump's 'Meat Cleaver' Assault on US Wilderness*, THE GUARDIAN (Oct. 26, 2020), https://www.theguardian.com/environment/ng-interactive/2020/oct/26/revealed-trump-public-lands-oil-drilling (showing that the Trump Administration offered as much land in four years as the Obama dministration offered in all eight years).

8. *See, e.g.*, *Notice of Sale to be Issued for Coastal Plain Oil and Gas Leasing Program Dec. 7*, BUREAU OF LAND MGMT. (Dec. 7, 2020), [hereinafter *Notice of Sale*] https://www.blm.gov/press-release/notice-sale-be-issued-coastal-plain-oil-and-gas-leasing-program-dec-7 (announcing sale of land in the Arctic National Wildlife Refuge). *See also* Emily Holden, *Trump 'turns back the clock' by luring drilling companies to pristine lands*, THE GUARDIAN (FEB. 12, 2020), https://www.theguardian.com/environment/2020/feb/12/trumps-legacy-drilled-public-lands-and-the-resulting-carbon-emissions (reporting the Trump administration enticed energy companies to lease "pristine lands" through cheap rates).

9. 30 U.S.C. § 226(i)–(m) (2021).

10. *Notice of Sale*, *supra* note 8. *See* Alex DeMarban, *ANWR lease sale fizzles for Trump administration, with revenue falling far short of hopes*, ANCHORAGE DAILY NEWS (Jan. 7, 2021), https://www.adn.com/business-economy/energy/2021/01/06/anwr-lease-sale-brings-in-144-million-in-bids-mostly-from-alaska-state-owned-corporation/ (reporting that the livestream lease sale, which occurred on January 6, only raised $14.4 million dollars, "with the vast majority of winning bids submitted by a development corporation owned by the state of Alaska.").

11. *See Wildlife & Habitat*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/refuge/arctic/wildlife_habitat.html (last visited May 14, 2021) ("The [Arctic] Refuge's rich pageant of wildlife includes 42 fish species, 37 land mammals, eight marine mammals, and more than 200 migratory and resident bird species.").

communities that rely on this wildlife to survive[12] Along with its contributions to climate change, the Trump Administration will leave behind a legacy of scarred lands and destroyed wilderness that could be impossible to undo. For this reason, it is vital that new reforms are developed to prevent such outcomes in the future. While legislation ultimately is needed for longstanding change, there are two significant administrative steps the Biden Administration can take to start implementing reforms: (1) rewriting land-use plans; and (2) fully utilizing the discretion granted to the Department of Interior to not issue leases in certain areas.

II. MINERAL LEASING ACT AND FEDERAL LAND POLICY MANAGEMENT ACT

This next Part provides a brief outline of the major statutes pertaining to onshore leasing, the MLA,[13] as amended by the Federal Onshore Oil and Gas Leasing Reform Act (FOOGLRA),[14] and the Federal Land Policy Management Act (FLPMA).[15]

A. Federal Land and Policy Management Act

Enacted in 1976, FLPMA governs the way in which public lands are administered by the Bureau of Land Management (BLM) under the principles of "multiple use and sustained yield . . . ."[16] The multiple-use sustained-yield mandate enshrines the concept of meeting the needs of both present and future generations. To that end, BLM must manage lands in a way that protects important ecological, historical, environmental, and archaeological values, while at the same time recognizing "the Nation's need for domestic sources of minerals, food, timber, and fiber . . . ."[17]

FLPMA tasks BLM with inventorying public lands, and with developing land-use plans (LUPs) for these inventoried lands.[18] All subsequent resource management decisions must be consistent with these

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12. *The impact of President Trump's energy dominance agenda*, THE WILDERNESS SOC'Y ACTION FUND (Oct. 26, 2020), https://storymaps.arcgis.com/stories/417110924baa4f57896165e3f5e96a11.

13. Mineral Leasing Act of 1920, Pub. L. No. 66-146, 41 Stat. 437 (1920).

14. Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330-256 (1987).

15. Federal Land Policy and Management Act, Pub. L. No 94-579, 90 Stat. 2743 (1976).

16. 43 U.S.C. § 1701(a)(7) (2021).

17. 43 U.S.C. § 1701(8), (12).

18. 43 U.S.C. §§ 1711(a), 1712(a).

underlying LUPs.[19] Central to the development of LUPs is the determination of which lands are eligible for oil and gas leasing.[20] Once BLM has determined which lands are eligible for oil and gas leasing, the MLA dictates how leasing occurs.[21]

B. Mineral Leasing Act and the Federal Onshore Oil and Gas Leasing Reform Act

In 1920, President Woodrow Wilson signed the MLA into law to "promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain."[22] The MLA confers sole authority over the Federal mineral estate, regardless of the surface management agency, to the Department of Interior.[23] Since the MLA's inception in 1920, Congress has amended the MLA many times, including, pertinent to this Article, by FOOGLRA in 1987.[24]

The MLA, as amended by FOOGLRA, grants the Secretary of Interior the discretion to lease public lands that are "known or believed to contain oil or gas deposits . . . ."[25] An interested party submits an expression of interest (EOI) to BLM nominating certain parcels to lease.[26] BLM reviews nominated parcels for availability, compliance with the National Environmental Policy Act (NEPA), and other legal and policy requirements.[27] After reviewing the parcels, BLM will post a proposed lease sale notice along with NEPA compliance documentation.[28] Once BLM has made a final determination as to which leases will be included in the sale, the agency posts a Notice of Competitive Lease Sale at least 45 days prior to the start of the lease sale.[29]

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19. 43 U.S.C. § 1713.

20. Thomas R. Delehanty, *Executive Authority to Keep It in the Ground: An Administrative End to Oil and Gas Leasing on Federal Land*, 35(2) UCLA J. ENV'T L. & POL'Y 145, 155, 183 (2017).

21. 30 U.S.C. § 226(b)(1)(A) (2021).

22. Mineral Leasing Act of 1920 ch. 85, 41 Stat. 437, 437 (1920).

23. 30 U.S.C. § 226; *About the BLM Oil and Gas Program*, BUREAU OF LAND MGMT. https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about (last visited May 14, 2021).

24. *See* Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330-256 (amending the MLA in 1987).

25. 30 U.S.C. § 226(a).

26. 43 C.F.R. § 3120.3-2 (2020).

27. 43 C.F.R. § 3120.4-2. *See Expression of Interest (EOI),* BUREAU OF LAND MGMT., https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/parcel-nominations (last visited May 14, 2021) (explaining how parcels are reviewed for availability and environmental concerns after an EOI is submitted).

28. 43 C.F.R. § 3120.4-2.

29. *Id.*; U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT., INSTRUCTION MEMORANDUM NO. 2018-034, UPDATING OIL AND GAS LEASING REFORM – LAND USE PLANNING AND LEASE PARCEL

The MLA dictates that eligible lands must be leased to "the highest responsible qualified bidder" via a competitive bidding process.[30] Leases for which no bids are received are subsequently leased under a noncompetitive process.[31] Lease sales are to be held for each State "where eligible lands are available" at least quarterly[,]"[32] and leases are issued for a primary term of ten years and continue "so long as oil or gas is produced in paying quantities . . . ."[33]

III. REFORMING OIL AND GAS LEASING

As stated above, the Trump Administration's "energy-dominance" agenda has prioritized oil and gas leasing above all other uses of public lands. It has resulted in leasing not only millions of acres but also in leasing areas in pristine wilderness once thought out of bounds to development.[34]

The Biden Administration issued an order pausing oil and gas leasing on public lands.[35] While the pause will afford the administration time to review the oil and gas leasing program, the Order is not a permanent solution. Although never tested, an outright permanent ban on leasing on public lands is unlikely to withstand legal scrutiny.

The purpose of the MLA is "[t]o promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain."[36] To that end, the introduction to the Act very clearly states: "Deposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite (including all vein-type solid hydrocarbons), or gas, and lands containing such deposits owned by the United States . . . *shall* be subject to disposition . . . ."[37] Similarly, FLPMA notes that as part of its multiple-use mandate, BLM must manage lands in a way that recognizes the Nation's need for, among other resources, "domestic sources of minerals . . . ."[38] An attempt to ban all

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REVIEWS (Jan. 31, 2018), [hereinafter MEMORANDUM NO. 2018-034] https://www.blm.gov/policy/im-2018-034.

30. 30 U.S.C. § 226(b)(1)(A).

31. 30 U.S.C. § 226(c)(1).

32. 30 U.S.C. § 226(b)(1)(A).

33. 30 U.S.C. § 226(i).

34. *See, e.g.*, *The Impact of President Trump's Energy Dominance Agenda*, *supra* note 12 (noting how these lands "provide critical habitat for many plants and animals, clean water and offer fantastic opportunities for recreation and exploration.").

35. DEP'T OF INTERIOR, ORDER NO. 3395, TEMPORARY SUSPENSION OF DELEGATED AUTHORITY (2021) https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3395-signed.pdf.

36. Mineral Leasing Act of 1920, ch. 85, Pub. L. No. 146, 41 Stat. 437 (1920).

37. 30 U.S.C. § 181 (emphasis added).

38. 43 U.S.C. § 1701(a)(12) (2021).

leasing would arguably be counter to congressional intent—and to the purposes of both the MLA and FLPMA.

Although leasing moratoria issued by the BLM have been upheld by the courts,[39] moratoria are, by their very definition, temporary. An outright permanent ban on all public lands would require congressional action. That said, there are still significant short-term and long-term steps an administration can take to reform leasing on public lands. The following Parts look at two actions: reducing the acreage of lands deemed eligible for oil and gas leasing when developing LUPs and fully utilizing the Department of Interior's discretion to not issue leases in areas that would be better managed for other resource values.

A. Amend Land-Use Plans by Closing More Lands to Oil and Gas Leasing

FLPMA delegates authority to BLM to create and amend land-use plans to observe the principle of "multiple use and sustained yield."[40] A significant component of these plans is the designation of which lands will be opened to oil and gas leasing.[41] Historically, BLM has operated under the presumption that all lands not specifically closed by Congress or withdrawn by the President should be deemed eligible for leasing.[42] This practice overwhelmingly favors oil and gas development to the detriment of other public land uses and values—and is arguably contrary to FLPMA's multiple-use mandate.

As a result of this practice, 90% of the 245 million acres of public land managed by BLM are open to oil and gas leasing, leaving only 10% to be actively managed for other purposes.[43] Compounding the problem, BLM

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39. *See, e.g.*, Krueger v. Morton, 539 F.2d 235, 240 (D.C. Cir.1976) (holding the Secretary of the Interior's decision to suspend the issuing of permits was not an abuse of discretion under the MLA).

40. 43 U.S.C. § 1712(c)(1).

41. *Land Use Planning and NEPA Compliance,* U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT. (2020), https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/land-use-planning.

42. *See, e.g.*, *Report to Secretary Ken Salazar Regarding the Potential Leasing of 77 Parcels in Utah*, U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT. 1, 6 (2009), https://www.eenews.net/features/documents/2009/06/11/document_gw_02.pdf ("[The Utah RMPs] adopted a broad planning level presumption that the large majority of available BLM lands should potentially be made available for oil and gas development, including lands with wilderness characteristics and lands immediately adjacent to the National Parks.").

43. *Open for business (and not much else): Analysis shows oil and gas leasing out of whack on BLM lands*, THE WILDERNESS SOC'Y, [hereinafter *Open for business*] https://www.wilderness.org/articles/article/open-business-and-not-much-else-analysis-shows-oil-and-gas-leasing-out-whack-blm-lands (last visited May 14, 2021); *BLM Land FAQs*, THE WILDERNESS SOC'Y, https://www.wilderness.org/articles/article/blm-lands-faqs#:~:text=A%3A%20The%20Bureau%

routinely makes land available for oil and gas development that, due to their low probability of ever being developed, would be far better suited for other uses.[44] Currently, 26.6 million acres of public lands are under lease and yet fewer than half these acres—about 12.7 million—are actively developed.[45] While not all these lands are being actively drilled, they are also not being managed for long-term conservation goals that would benefit recreation, wildlife, or a multitude of other potential uses.[46] Yet BLM continues to lease vast acres of land for oil and gas development—often at incredibly low rates.[47] This allows oil and gas companies to engage in speculative leasing, thereby hoarding public lands that would be more appropriately managed for other purposes.

The Biden Administration should work towards developing LUPs that embrace the multiple-use mandate and more equitably balance public-land values. BLM has significant discretion in developing LUPs, and nothing in FLPMA requires BLM to open any lands to leasing that have not been specifically closed by Congress or the President. To the contrary, one can argue BLM has not only the discretion but the obligation to balance other resource values—such as conservation, wilderness, and recreation—with mineral resource needs to determine what lands it should open to oil and gas leasing and which it should close.

1. The Multiple-Use Sustained-Yield Mandate Is Complex But Discretionary

Congress tasked BLM with managing its lands in accordance with the multiple-use sustained-yield mandate. As the Supreme Court stated in *Norton v. S. Utah Wilderness Alliance*: "'Multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put . . . ."[48] FLPMA defines *multiple use* as:

20of%20Land,than%20any%20other%20government%20agency (last visited May 14, 2021).

44. Kate Kelly et al., *Backroom Deals*, CTR. FOR AMERICAN PROGRESS (May 23, 2019), https://www.americanprogress.org/issues/green/reports/2019/05/23/470140/backroom-deals/.

45. *Oil and Gas Statistics Table 2 Acreage in Effect,* U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT. (2020), https://www.blm.gov/programs-energy-and-minerals-oil-and-gas-oil-and-gas-statistics; *Oil and Gas Statistics Table 6 Acreage in Producing Leases,* U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT. (2020), https://www.blm.gov/programs-energy-and-minerals-oil-and-gas-oil-and-gas-statistics.

46. *Open for Business*, *supra* note 43.

47. *Id.*

48. Norton v. S. Utah Wilderness All., 542 U.S. 55, 58 (2004) (quoting 43 U.S.C. § 1702(c)).

> [M]anagement 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; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; 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 land 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.[49]

Section 202 of FLPMA further defines criteria BLM must consider in the development and revision of land-use plans. Among these criteria are the requirements that BLM:

- [G]ive priority to the designation and protection of areas of critical environmental concern; . . .
- [C]onsider present and potential uses of the public lands;
- [C]onsider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;
- [W]eigh long-term benefits to the public against short-term benefits . . . .[50]

In short, BLM must carefully weigh the values of a wide variety of public land resources, and also account for these values both now and in the future. Significantly, the definition of multiple use makes clear that BLM's focus should not necessarily be on the greatest economic return but instead

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49. 43 U.S.C. § 1702(c) (2021).
50. 43 U.S.C. § 1712(c)(3),(5)–(7).

should consider the relative values of the resources.[51] Although a difficult task, the careful balancing required by FLPMA simply does not support a presumption in favor of oil and gas leasing over other uses.

Courts have upheld the notion that FLPMA does not mandate the prioritizating development on public lands. In *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, BLM argued that it could not consider closing the entirety of the Otero Mesa to development because doing so would violate the concept of multiple use.[52] The United States Court of Appeals for the Tenth Circuit flatly rejected this argument, stating:

It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses. . . . Accordingly, BLM's obligation to manage for multiple use does not mean that development *must* be allowed on the Otero Mesa. Development is a *possible* use, which BLM must weigh against other possible uses—including conservation to protect environmental values.[53]

However, even if favoring oil and gas leasing is permitted by FLPMA, it is certainly not required. FLPMA is not a prescriptive statute. It describes the goals BLM must reach in developing LUPs, but not the ways in which BLM should achieve these goals. As a result, the statute grants significant discretion to BLM to fully consider the wide range of values provided by public lands and to develop LUPs that reflect this plethora of values. Included in this discretion is the authority to close lands to oil and gas leasing, above and beyond those already closed by Congress or the President.[54]

While any planning decision must comply with all applicable laws and regulations, such as NEPA,[55] clearly, BLM has authority to close more lands to oil and gas leasing at the land-use planning stage. The possibilities include: closing lands with low potential for oil and gas development that should be actively managed for other values, closing lands with high-value wilderness and wildlife habitat, closing lands with high-value cultural resources, and closing lands with high-value recreation access. Because LUPs are often in place for decades, and because all management actions must comply with an LUP, an LUP that more appropriately balances public-land resources will have longstanding value.

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51. 43 U.S.C. § 1702(c).

52. New Mexico *ex rel.* Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 710 (10th Cir. 2009).

53. *Id.* (emphasis in original).

54. 43 U.S.C. § 1714(a).

55. 43 U.S.C. § 1712(c)(8)–(9); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

B. The Department of Interior Should More Actively Exercise Its Discretion to Issue Leases

Once BLM deems lands eligible for oil and gas development under the land-use planning process, the Secretary of Interior still has considerable discretion when determining whether to issue a lease.

In authorizing the Secretary to issue leases, the MLA states: "All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may* be leased by the Secretary."[56] The word *may* is discretionary in nature.[57] It creates no obligation on the part of the Secretary to lease lands subject to disposition; it only creates the authority to do so. Further, despite BLM's practice of regularly leasing lands with no known potential for development,[58] the clause "which are known or believed to contain oil or gas deposits" arguably restrains the Secretary from leasing lands which contain no such deposits.

Admittedly, not all language in the MLA is discretionary. For example, the statute states: "Lease sales *shall* be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary."[59] However, BLM points to this language to suggest that lease sales are required.[60] This is not the case. The lease sale is *only* required *if* eligible lands *are available*. The key is, therefore, whether eligible lands are available, and BLM has the discretion to determine whether eligible lands should be made available.

Courts have consistently upheld this discretion. As the Supreme Court stated in *Norton*: "A land use plan, however, is a tool to project present and future use. Unlike a specific statutory command requiring an agency to promulgate regulations by a certain date, a land use plan is generally a statement of priorities; it guides and restrains actions, but does not prescribe

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56. 30 U.S.C. § 226(a) (2021) (emphasis added).

57. Fogerty v. Fantasy, Inc., 510 U.S. 517, 533 (1994) ("The word 'may' clearly connotes discretion.").

58. *See, e.g.*, *Speculative Leasing*, TROUT UNLIMITED, https://www.tu.org/energy/low-potential-lands-campaign/ (last visited May 9, 2021).

59. 30 U.S.C. § 226(b)(1)(A) (emphasis added).

60. *See, e.g.*, U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT., DOI-BLM-CO-050-2020-0037-EA, PRELIMINARY ENVIRONMENTAL ASSESSMENT FOR THE DECEMBER 2020 COMPETITIVE OIL & GAS LEASE SALE 10 (2020), https://www.blm.gov/sites/blm.gov/files/EA_WRFO_KFO_Sept%202020_Draft.pdf ("Offering quarterly oil and gas lease sales is mandated to the BLM . . . ."). *See also, e.g.*, *U.S. Department of the Interior Budget and Policy Priorities for Fiscal Year 2020: Oversight Hearing before the Committee on Natural Resources*, 116th Cong. 30–34 (2019) (testimony of Michael Nedd, Deputy Director, Bureau of Land Management) ("Under the Department's commitment to responsible energy development, the BLM now consistently conducts quarterly lease sales, as required by the Mineral Leasing Act.").

them."[61] Although the Court in *Norton* was not debating the issuance of a lease, the holding applies: even if lands are deemed eligible for oil and gas leasing in a land-use plan, BLM is not required to lease these lands. BLM has both the discretion *and* the obligation to review nominated parcels and determine, in the context of FLPMA's multiple-use mandate and as a result of environmental reviews, if nominated lands should in fact be made available.

Despite this discretion, BLM treats nominations of eligible lands as a signal that these lands should be made available for leasing. Overwhelmingly, after an interested party nominates a parcel of land, BLM reviews the nominated parcel consistent with its NEPA and FLPMA obligations, attaches required notices and stipulations, and makes the land available for lease.[62] In essence, BLM reviews look at how the nominated parcel should be offered rather than whether it should be offered in the first place.[63] BLM's response to public comments requesting withdrawal or deferral of releases shows that BLM presumes that once a parcel is nominated, BLM is obligated, to some degree, to lease the land.[64] While deferrals or withdrawals do occur, they tend to be a result of political pressure or court cases.[65] As a result of this presumption, BLM overwhelmingly favors oil and gas leasing on public lands above other uses. This preference is clear just in the numbers: in 2020BLM held over 400 oil and gas lease sales in the West[66] and offered nearly 52 million acres for oil

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61. Norton v. S. Utah Wilderness All., 542 U.S. 55, 56 (2004).

62. *See, e.g.*, MEMORANDUM NO. 2018-034, *supra* note 29. The memorandum explains: "Therefore, the BLM will not routinely defer leasing when waiting for an RMP amendment or revision to be signed. Rather, when making leasing decisions, the BLM will exercise its discretion consistent with existing RMPs and the State Director should consult with the Washington Office (WO) before deciding to defer leasing of any parcels." *Id.*

63. *Id.*

64. *See, e.g.*, U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT., RESPONSE TO PUBLIC COMMENTS 4TH QUARTER (DECEMBER) 2020 COMPETITIVE OIL AND GAS LEASE SALE ENVIRONMENTAL ASSESSMENT DOI-BLM-WY-0000-2020-0010-EA (2020) (responding "no response required" to WildEarth Guardians' comment stating FOOGLRA "simply requires BLM to *consider* oil and gas leasing on land consistent with RMP" and "just because land is identified for leasing does not mean that it must be leased.") (emphasis in original).

65. *See, e.g.*, Niina H. Farah, *BLM Halts Leases After Sage Grouse, Climate Legal Brawls*, E&E NEWS (Nov. 14, 2019), https://www.eenews.net/stories/1061543717 (discussing how the Idaho District Court ordered a preliminary injunction to prevent leases on sage grouse habitat).

66. *See Oil and Gas Statistics Table 15 Competitive Oil and Gas Lease Sales by BLM State Offices*, U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT. (2020), https://www.blm.gov/programs-energy-and-minerals-oil-and-gas-oil-and-gas-statistics. The following states were included when calculating the number of oil and gas lease sales in the West: Colorado, Montana, Nevada, New Mexico, Utah, and Wyoming.

and gas lease sales throughout the entire country between 2010 and 2019.[67] Many of these sales were in key habitats for threatened species, on land with low potential for oil and gas development, or in areas valued for their hunting access and wilderness.[68] A key example of this preference is leasing within habitats vital for the threatened greater sage-grouse. Despite efforts in 2015 to establish plans to protect the greater sage-grouse, including a commitment to prioritize leasing outside sage-grouse habitats, BLM continues to offer thousands of acres of priority habitats for oil and gas lease sales.[69] Under the Trump Administration, leasing in sage-grouse habitats significantly increased, with little attempt to adhere to a prioritization commitment.[70] Since January of 2017, over 637,000 acres of priority sage-grouse habitat has been offered for lease.[71] BLM only deferred leases in priority habitats when forced to do so as a result of court decisions in *MWF v. Bernhardt* and *Western Watersheds v. Zinke*.[72] However, many of these deferrals were simply added to later lease sales.[73]

The Biden Administration can put policies in place to revert presumptions in favor of oil and gas lease sales. BLM should review nominated lands and acknowledge that it has the authority to reject the nomination of lands where oil and gas development would cause harm to other valuable public-land resources.

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67. *See Oil and Gas Statistics Table 11 Acres Offered for Lease and Acres Sold, Calendar Years 2009–2020*, U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT. (2020), https://www.blm.gov/programs-energy-and-minerals-oil-and-gas-oil-and-gas-statistics.

68. *Speculative Leasing*, *supra* note 58. *See, e.g.*, U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT., FIRST QUARTER 2020 COMPETITIVE OIL AND GAS LEASE SALE ENVIRONMENTAL ASSESSMENT DOI-BLM-WY-0000-2020-0003-EA (2020), https://eplanning.blm.gov/public_projects/nepa/1502328/20008128/250009583/20191113.201Q.EA.pdf (analyzing impacts to Wyoming March 2020 lease sale).

69. *See generally See* GRANT GARDNER ET AL., OIL AND GAS DEVELOPMENT ON FEDERAL LANDS AND SAGE GROUSE HABITATS (2019), https://www.eenews.net/assets/2019/07/29/document_pm_01.pdf (discussing oil and gas development in sage-grouse habitats since 2015).

70. *Id.* at 6.

71. *See id.* at app. B1–B6 (totaling the lands leased in Priority Habitat Management Areas (PHMA) from February 2017 to March 2019 across the six-state study area).

72. *See* Montana Wildlife Federation v. Bernhardt, No. CV-18-69-GF-BMM, 2020 WL 2615631, at *8–10 (D. Mont. May 22, 2020) (holding the 2018 IM and the lease sales violated the FLPMA). *See also* W. Watersheds Project v. Zinke, 336 F. Supp. 3d 1204, 1211–12 (D. Idaho Sept. 21, 2019) (summarizing why the court granted preliminary injunction on the leases).

73. *Compare* BUREAU OF LAND MGMT., Q3 WYOMING GAS AND LEASE SALE RESULTS (2020) (reporting eight parcels sold), *with* BUREAU OF LAND MGMT., Q4 WYOMING GAS AND LEASE SALE RESULTS (2020) (increasing to over 150 parcels sold). After the National Wildlife Federation protested to the BLM third quarter lease sale environmental assessment challenging 165 parcels of land, BLM deferred sales of land one quarter. *See* Letter from Mary Greene, Public Lands Attorney, Nat'l. Wildlife Fed'n., Protest of the Third Quarter Competitive Oil and Natural Gas Lease Sale Environmental Assessment DOI-BLM-WY-0000-2020-0008-EA, (Aug. 18, 2020) (on file with the Bureau of Land Management).

C. FLPMA's "Unnecessary or Undue Degradation" Mandate Limits DOI's Discretion

Although BLM's discretion to reject a lease nomination arguably extends to its discretion to accept a nomination, FLPMA's "unnecessary or undue degradation" clause places some limits on this discretion. FLPMA requires that "[i]n managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."[74] Presumably, this action extends to leasing decisions and should prevent BLM from issuing any leases that would cause "unnecessary or undue degradation of the lands." FLPMA does not define "unnecessary or undue degradation" (UUD), but two relevant cases have examined the requirements this standard imposes on BLM.Although the decision was focused on BLM's FLPMA obligations as they pertain to wilderness-study areas, the Tenth Circuit in *Sierra Club v. Hodel* briefly addressed BLM's discretion under the UUD standard.[75] BLM argued: the UUD standard "breath[es] discretion at every pore" and the provision was not a "standard capable of judicial application, and thus that its decisions whether to enjoin private activities which affect public lands fall beyond the purview of judicial review."[76] The Tenth Circuit disagreed, holding that the "UUD standard provided 'law to apply,' and 'imposes a definite standard on the BLM.'"[77] While the Tenth Circuit Court provided little clarity as to the meaning of undue degradation, the decision makes clear that the clause limits BLM's discretion and opens the door for further claims to hold BLM to this standard.

In *Mineral Policy Center v. Norton*, the District Court for the District of Columbia reviewed the Department of Interior's revised interpretation of UUD.[78] Pertinent to this paper, the court reviewed the Department of Interior's 2001 amendment to the interpretation of the UUD standard.[79] Prior to 2001, DOI asserted its authority to "prohibit mining activities found unduly degrading, although potentially lucrative."[80] DOI stated:

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74. 43 U.S.C. § 1732(b) (2021).

75. Sierra Club v. Hodel, 848 F. 2d 1068, 1074 (10th Cir. 1988).

76. *Id.*

77. Roger Flynn, *Daybreak on the Land: The Coming of Age of the Federal Land Policy and Management Act of 1976*, 29 VT. L. REV. 815, 833 (2005) (quoting Sierra Club v. Hodel, 848 F.2d 1075 (10th Cir. 1988), *overruled on other grounds by* Village of Los Ranchos of Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992)).

78. *Min. Pol'y Ctr.*, 292 F.Supp. 2d at 41–42.

79. *Id.* at 41.

80. *Id.*

> Congress did not define the term "unnecessary or undue degradation," but it is clear from the use of the conjunction "or" that the Secretary has the authority to prevent "degradation" that is necessary to mining, but undue or excessive. This includes the authority to disapprove plans of operations that would cause undue or excessive harm to the public lands.[81]

This interpretation substantially changed in 2001 with the advent of the George W. Bush Administration. Then Department of Interior Solicitor William G. Myers wrote an opinion stating "that 'unnecessary' and 'undue' 'may be reasonably viewed as similar terms (the second term defining the first) or as equivalents'" and as a result "as long as a proposed mining activity is 'necessary to mining,' the BLM has no authority to prevent it."[82] The court rejected this latter interpretation stating: "[T]he Solicitor misconstrued the clear mandate of FLPMA. FLPMA, by its plain terms, vests the Secretary of the Interior with the authority-and indeed the obligation-to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land."[83] Although the opinion pertains to the impact of mining on public lands, it must also be applied to oil and gas development: BLM must prevent oil and gas development from unduly harming or degrading the public land, even if doing so means not issuing leases that may be profitable.

Ultimately, BLM has significant discretion when deciding whether to issue a lease, but this discretion is limited by FLPMA's UUD standard. The Biden Administration should develop policies and practices that recognize both this discretion and this obligation. Instead of operating under a presumption in favor of oil and gas lease sales, BLM should develop policies that truly embody the spirit of multiple use. These policies should require decision-makers to assess the relative value of all resources provided by public lands and to consider the impacts of oil and gas development on these resources, including water quality, air quality, wildlife habitats, wilderness, and recreation. Decision-makers should utilize their discretion to reject lease nominations on lands that would be better managed for other resource values or if oil and gas development in the nominated area would lead to unnecessary or undue degradation.

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81. Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998, 69,999 (Nov. 21, 2000) (to be codified at 43 C.F.R. pts. 2090, 2200, 2710, 2740, 3800 and 9260).

82. *Min. Pol'y Ctr.*, 292 F. Supp. 2d at 41 (quoting Memorandum the Solicitor of the Department of the Interior to the Secretary of the Department of the Interior 9 (Oct. 23, 2001)).

83. *Id.* at 42.

CONCLUSION

The Biden Administration has an opportunity to fully embrace the concept of "multiple use and sustained yield" and to reject the notion that oil and gas development should be valued above all other uses of our public lands.