SYMPOSIUM PANEL

EMERGING ISSUES IN NATURAL RESOURCES POLICY

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INTRODUCTION: INTERIOR'S IRRATIONAL ROLLBACKS: PLACING FOSSIL FUELS OVER THE PUBLIC INTEREST, BY JAYNI FOLEY HEIN*

The United States is at a crossroads in national energy policy. The current presidential administration's Department of the Interior (Interior) is committed to a strategy of "energy dominance" that heavily favors fossil fuels.[1] At the same time, the science of climate change is resoundingly clear: burning fossil fuels for energy is a primary driver of climate change, which inflicts mounting damages to the economy, environment, and public health.[2] While the Trump

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1 *See* Press Release, White House, President Donald J. Trump is Unleashing American Energy Dominance (May 14, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-unleashing-american-energy-dominance.

2 *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 SYNTHESIS REPORT 46 (2015) ("Emissions of CO_2 from fossil fuel

administration has hitched its wagon to the fossil fuel energy of the past, legal advocates—including those at the Institute for Policy Integrity at New York University School of Law (Policy Integrity)—are marshaling modern scientific and economic tools to fight these irrational policies in federal court, and often succeeding.

Policy Integrity celebrated its tenth anniversary in September 2018 with a conference entitled, "Energy and Environmental Policy: The Quest for Rationality."[3] I moderated a panel with three public lands and natural resources experts: Nada Culver, Senior Counsel and Director, The Wilderness Society's Bureau of Land Management Action Center;[4] David Hayes, Executive Director of the State Energy & Environmental Impact Center at New York University School of Law and former Deputy Secretary of the Interior; and Brenda Mallory, Executive Director and Senior Counsel, Conservation Litigation Project. In their transcribed, edited remarks that follow this introduction, these esteemed colleagues provide unique perspectives on the challenges and opportunities ahead for public lands and natural resources. This introductory piece sets the stage by discussing key Trump administration deregulatory actions in the natural resources area and describing recent victories for rationality. I conclude with some reflections on Policy Integrity's advocacy and legal scholarship on public lands and natural resources.

A. *Background: Clutching to Fossil Fuels in an Era of Climate Change*

The federal government owns about thirty percent of the land in the United States, the vast majority of which is located in western states.[5] Interior is the federal government's largest landowner, and it is also responsible for deciding whether, and on what terms, to lease public land to private energy developers for coal, oil, and

combustion and industrial processes contributed about 78% of the total GHG emissions increase from 1970 to 2010, with a similar percentage contribution for the increase during the period 2000 to 2010 (high confidence).").

[3] *See Energy and Environmental Policy: The Quest for Rationality*, INST. FOR POLICY INTEGRITY, https://policyintegrity.org/news/event/energy-and-environmental-policy-the-quest-for-rationality3 (last visited Sept. 19, 2019).

[4] In the interim between the symposium and publication, Nada Culver joined the National Audubon Society as Vice President for Public Lands and Senior Policy Counsel.

[5] *See* CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA i, 1, 4 (2017).

natural gas extraction, as well as renewable energy development.[6] Interior is subject to a "multiple use" mandate in managing federal lands, which is defined, in part, as "meet[ing] the present and future needs of the American people," through "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 . . . recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values."[7] Interior is also directed by statute to prevent unnecessary or undue degradation of public lands.[8]

In the first half of the Trump administration, Interior has embarked upon rulemaking processes to roll back cost-benefit justified regulations designed to curb potent methane emissions from oil and gas wells;[9] weaken offshore drilling safety rules passed in the wake of the BP Deepwater Horizon oil spill disaster;[10] rescind a rule governing hydraulic fracturing;[11] and rescind a rule designed to close corporate loopholes when valuing royalties from fossil fuel production.[12] Each of these regulatory rollbacks would weaken or rescind cost-benefit justified regulations passed by prior administrations, resulting in the transfer of hundreds of millions of

[6] *See id*. at 4; 30 U.S.C. §§ 201, 226 (2012).

[7] 43 U.S.C. § 1702(c) (2012).

[8] *See id.* § 1732(b).

[9] *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49,184, 49,184 (Sept. 2018) (to be codified at 43 C.F.R. pts. 3160, 3170) ("In this action, the Bureau of Land Management is revising its regulations, as amended by the November 18, 2016, rule . . . in a manner that reduces unnecessary compliance burdens. . .").

[10] *See* Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Blowout Preventer Systems and Well Control Revisions, 83 Fed. Reg. 22,128 (May 11, 2018) (to be codified at 30 C.F.R. pt. 250) ("The Bureau of Safety and Environmental Enforcement is proposing to revise existing regulations for well control and blowout preventer systems. This proposed rule would revise requirements for well design, well control, casing, cementing, real-time monitoring, and subsea containment.").

[11] *See* Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 61,924 (Dec. 29, 2017) (to be codified at 43 C.F.R. pt. 3160).

[12] *See* Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36,934 (Aug. 7, 2017) (to be codified at 30 C.F.R. pts. 1202, 1206).

dollars of benefits from the public to the fossil fuel industry, and subjecting the public to greater environmental risks.[13]

Amidst these costly regulatory rollbacks—designed to remove "burdens" on the energy industry[14]—Interior is contemplating opening vast new swaths of federal lands and waters to fossil fuel extraction, from the pristine Arctic National Wildlife Refuge to offshore waters along the entire United States coastline.[15] President Trump has taken actions rescinding offshore oil and gas leasing moratoria enacted by President Obama and downsizing national monuments established by his predecessors to allow for fossil fuel extraction.[16] For instance, President Trump, by proclamation, reduced Bears Ears National Monument by roughly eighty-five percent, replacing it with two much smaller, noncontiguous areas and allowing former monument areas to be opened to uranium mining, oil and gas drilling, road construction, and mechanized vehicles.[17] All of these actions have been pursued in the name of "energy dominance," but it is clear that the public may incur great economic and environmental losses from these policies if they are allowed to stand.[18] The true beneficiary of these policies is the fossil fuel industry.

While the Trump administration embraces the fossil fuel energy sources of the past, the urgent threat that climate change poses to the economy, environment, and public health is increasingly clear. The Intergovernmental Panel on Climate Change is unequivocal that emissions from fossil fuel combustion are the

[13] *See* INST. FOR POLICY INTEGRITY, HEALTH & ENVIRONMENTAL BENEFITS UNDER THREAT FROM RECENT ENVIRONMENTAL DEREGULATORY ACTIONS (2019), https://policyintegrity.org/documents/Benefits_at_Stake.pdf.

[14] *See* Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017).

[15] *See generally* BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, COASTAL PLAIN OIL AND GAS LEASING PROGRAM EIS (Apr. 20, 2018); *see also* BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, 2019–2024 NATIONAL OUTER CONTINENTAL SHELF OIL AND GAS LEASING DRAFT PROPOSED PROGRAM 1 (2018).

[16] *See* Yereth Rosen, *U.S. Judge Scraps Trump Order Opening Arctic, Atlantic Areas to Oil Leasing*, REUTERS (Mar. 30, 2019), https://www.reuters.com/article/us-usa-oil-trump-leases/u-s-judge-scraps-trump-order-opening-arctic-atlantic-areas-to-oil-leasing-idUSKCN1RB0FP.

[17] *See NRDC et. al v. Trump (Bears Ears)*, NAT. RESOURCES DEF. COUNCIL, https://www.nrdc.org/court-battles/nrdc-et-v-trump-bears-ears (last updated Nov. 8, 2019).

[18] *See* INST. FOR POLICY INTEGRITY, *supra* note 13.

leading cause of climate change.[19] Economists are sounding alarms, as well. In early 2019, the Federal Reserve released a report finding that climate change is expected to cause growing losses to American infrastructure, property, and the economy.[20] Economists view these losses as the result of a fundamental market failure: fossil fuel prices do not properly account for climate change costs. Bold new policies are needed to address increasingly costly climate change.

While states, cities, and other subnational groups press forward, filling the federal climate leadership void, advocates are pushing back against Interior's irrational rollbacks in the courts.

B. *Reinstating Rationality Through the Courts*

Environmental organizations and state attorneys general have challenged several actions by Interior to rollback cost-benefit justified environmental regulations. Many of these challenges have been successful.[21]

One important bulwark in public lands litigation is the Administrative Procedure Act (APA), which requires federal agencies to follow certain procedures when issuing, staying, or repealing regulations.[22] States and environmental organizations have brought several successful federal lawsuits challenging Interior's stays and rollbacks on the basis of APA violations. Federal courts have held that:

Interior's repeal of the Valuation Rule, which governs fossil fuel royalties, violated the APA by failing to provide a "reasoned explanation" for the change in policy;[23]

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[19] *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 2, at 4–5.

[20] *See* Glenn D. Rudebusch, *Climate Change and the Federal Reserve*, FED. RESERVE BANK OF SAN FRANCISCO: ECON. LETTERS (Mar. 15, 2019), https://www.frbsf.org/economic-research/publications/economic-letter/2019/march/climate-change-and-federal-reserve/?utm_source=frbsf-home-economic-letter-title&utm_medium=frbsf&utm_campaign=economic-letter.

[21] *See* Joe Sexton, *Trump, All About Winning, Sees Losses in Court Pile Up*, PROPUBLICA (Apr. 2, 2019, 3:02 PM), https://www.propublica.org/article/president-donald-trump-losses-fred-barbash-washington-post-q-and-a.

[22] *See* Administrative Procedure Act of 1967, 5 U.S.C. § 553 (2012).

[23] *See* Pamela King, *Court Blocks Trump's Rule Rollback*, E&E NEWS (Apr. 15, 2019), https://www.eenews.net/stories/1060162603.

Interior's delay of the Valuation Rule also violated the APA because the agency failed to seek public comment and lacked statutory authority for the delay;[24]

Interior's delay of the Waste Prevention Rule, which limited methane emissions from oil and gas wells, violated the APA's notice-and-comment requirements and arbitrarily failed to consider the forgone benefits of the Waste Prevention Rule;[25]

Interior's proposed replacement of the Waste Prevention Rule was likely to be found arbitrary and capricious, justifying a preliminary injunction, because the agency failed to give any reasons for changing course;[26] and

Interior violated the APA when it agreed to a land exchange with Alaska intended to facilitate building a road through Izembek National Wildlife Refuge, because it failed to acknowledge its prior position that the land exchange should not go through due to environmental harm to the Refuge.[27]

Policy Integrity has played an active role in supporting these legal challenges by submitting regulatory comments,[28] filing amicus

[24] *See* Becerra v. U.S. Dep't of the Interior, 276 F. Supp. 3d 953, 966 (N.D. Cal. 2017).

[25] *See* California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1111, 1121–22 (N.D. Cal. 2017), *appeal dismissed*, No. 17-17456, 2018 WL 2735410 (9th Cir. Mar. 15, 2018).

[26] *See* California v. U.S. Bureau of Land Mgmt., 286 F. Supp. 3d 1054, 1068 (N.D. Cal. 2018).

[27] *See* Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt, 3:18-cv-00029-SLG, slip op. at 12, 21, 23, 28 (D. Alaska Mar. 29, 2019), https://s3.amazonaws.com/arc-wordpress-client-uploads/adn/wp-content/uploads/2019/03/29073148/Izembek-Exchange-Agreement-order.pdf

[28] *See, e.g.*, Inst. for Policy Integrity, Comment Letter on Proposed Repeal of Consol. Fed. Oil & Gas and Fed. & Indian Coal Valuation Reform (May 4, 2017), https://policyintegrity.org/documents/Policy_Integrity_Comments_on_Proposed_Repeal.pdf; Inst. for Policy Integrity, Comment on the Proposed Recession or Revision of Certain Requirements for Waste Prevention and Res. Conservation (Apr. 23, 2018), https://policyintegrity.org/documents/Policy_Integrity_Comments_to_BLM_on_Waste_Prevention_Rescission.pdf.

briefs,[29] and authoring relevant legal scholarship[30] and op-eds explaining why the agency's irrational actions should not withstand judicial scrutiny.[31] Other lawsuits challenging deregulatory actions are underway, led by state attorneys general and environmental groups.

Another category of court decisions addressed President Trump's actions affecting natural resources. In a major setback for the "energy dominance" agenda, in early 2019, a federal court held that President Trump could not reverse former President Obama's permanent withdrawal of certain offshore areas from oil and gas leasing, including regions in the Arctic and Atlantic.[32] Federal courts are in the process of deciding whether an acting President can downsize existing national monument boundaries absent express statutory authority to do so, as President Trump did to Bears Ears and Grand Staircase Escalante national monuments.[33] Policy Integrity authored scholarship on these legal questions.[34]

[29] *See, e.g.*, Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae in Support of Plaintiffs' Motion for Summary Judgment at 7, California v. Dep't of the Interior, 381 F. Supp. 3d 1153 (N.D. Cal. 2019) (No. 17-cv-05948-SBA), https://policyintegrity.org/documents/ONRR_Valuation_Rule_Brief_062518.pdf; Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae In Support of Respondents-Intervenors and Dismissal, Wyoming v. U.S. Dep't of Interior, 366 F. Supp. 3d 1284 (D. Wyo. 2018) (No. 2:16-cv-00285-SWS), https://policyintegrity.org/documents/BLM_Methane_Brief_WY_v_DOI.pdf.

[30] *See* Bethany A. Davis Noll & Denise A. Grab, *Deregulation: Process and Procedures that Govern Agency Decisionmaking in an Era of Rollbacks*, 38 ENERGY L.J. 269, 269, 295 (2017); Jayni Hein, *Fed. Lands and Fossil Fuels*, 42 HARV. ENVTL. L. REV. 1, 4, 42 (2018).

[31] *See e.g.,* Jayni Hein, *Pushing for the Public Interest*, N.Y. TIMES (June 6, 2018), https://www.usnews.com/news/national-news/articles/2018-06-06/putting-fossil-fuel-interest-over-the-public-interest; Bethany A. Davis Noll & Jayni F. Hein, *Trump Follows Through on Deregulation, But At What Cost*, HILL (June 23, 2017), https://thehill.com/blogs/pundits-blog/energy-environment/339140-trump-follows-through-on-deregulation-but-at-what-cost.

[32] *See* Rosen, *supra* note 16.

[33] *See* NAT. RESOURCES DEF. COUNCIL, *supra* note 17; *The Wilderness Society et al. v. Trump et al.*, NAT. RESOURCES DEF. COUNCIL, https://www.nrdc.org/court-battles/wilderness-society-et-v-trump-et-grand-staircase-escalante (last updated Nov. 8, 2019).

[34] *See, e.g.*, Jayni Foley Hein, *Monumental Decisions*, 48 ENVTL. L.J. 125, 126 (2018); Memorandum from the Institute of Policy Integrity at New York University School of Law to Rebecca Doolittle, Project Manager, Bureau of Land Mgmt. (Nov. 15, 2018) (on file with New York University Environmental Law Journal).

Finally, a third category of cases has scrutinized the climate change analysis agencies must conduct when evaluating potential new federal mining, drilling, and infrastructure projects, in order to comply with the National Environmental Policy Act (NEPA).[35] The current administration's public lands and energy policy conspicuously lacks any climate change goals, but that does not exempt agencies from disclosing and evaluating climate change effects in their environmental reviews pursuant to NEPA. Federal courts have held that Interior must account for upstream and downstream climate effects in oil, gas, and coal leasing decisions,[36] and that the Federal Energy Regulatory Commission must do the same for interstate natural gas pipeline approvals.[37]

Moreover, some federal courts have held that federal agencies must monetize climate change effects—by using the Interagency Working Group's global social cost of greenhouse gases—when they describe the economic benefits of proposed projects; otherwise, they risk understating environmental costs and placing a thumb on the scale in favor of development.[38] Policy Integrity's amicus briefs, comments, and scholarships have supported this litigation, advocating for appropriate and comprehensive NEPA analysis, including the use of the Interagency Working Group's social cost of greenhouse gases as an accessible, peer-reviewed measure of incremental climate damages.[39]

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[35] *See* National Environmental Policy Act (NEPA) of 1970, 42 U.S.C.A. § 4321 (2012).

[36] *See* WildEarth Guardians v. U.S. Bureau of Land Mgmt., 870 F.3d 1222, 1235, 1237 (10th Cir. 2017); WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41, 59 (D.D.C. 2019); W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt., No. CV-16-21-GF-BMM, 2018 WL 1475470 at *12 (D. Mont. Mar. 26, 2018); San Juan Citizens Alliance v. U.S. Bureau of Land Mgmt., 326 F.Supp. 3d 1227, 1228 (D.N.M. 2018); Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining, 274 F. Supp. 3d 1074, 1101–03 (D. Mont. 2017).

[37] *See* Sierra Club v. Fed. Energy Regulatory Comm'n, 867 F.3d 1357, 1371, 1375 (D.C. Cir. 2017).

[38] *See* High Country Conservation Advocates v. U.S. Forest Serv., 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014); *Mont. Envtl. Info. Ctr.*, 274 F. Supp. 3d at 1085–99.

[39] *See e.g.*, Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae In Support of Plaintiff's Motion for Summary Judgment at 14–15, WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41 (D.D.C. 2019) (No. 16-1724), https://www.law.nyu.edu/sites/default/files/Wildearth.proposed.amicus.brief-filed.pdf

C. *Policy Integrity's Earlier Contributions to Federal Natural Resources Law and Policy*

Policy Integrity's tenth anniversary is an apt time to reflect, briefly, on the organization's previous contributions to federal natural resources law and policy. Before the present era of deregulation, Policy Integrity was focused on advocating for more rational public lands decision-making that accounts for environmental costs.

Policy Integrity supported a major policy change in January 2016, when Interior launched a new effort to reform the federal coal leasing program, placing a moratorium on new coal leases while it conducted a review and evaluated potential changes.[40] Policy Integrity had been encouraging similar reforms for more than a year, sharing our research with officials at Interior and the White House and authoring several reports that were heavily cited in the scoping report for the review.[41]

Policy Integrity has also provided extensive input on the appropriate methods for analyzing the greenhouse gas impacts of natural resource extraction, leading to important court rulings on this issue. Policy Integrity filed comments on dozens of environmental impact statements for extraction projects, urging the full quantification of climate impacts using the Interagency Working Group's Social Cost of Carbon and Social Cost of Methane. Policy Integrity also filed amicus briefs in multiple cases on this issue. In September 2017, the U.S. Court of Appeals for the Tenth Circuit held that the Bureau of Land Management (BLM) violated NEPA by providing an inadequate analysis of the likely climate impacts from four major coal leases.[42] Policy Integrity's amicus brief for the case focused on the economic arguments at the

[40] *See* DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3338 (2016), *rescinded by* DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3348 (2017).

[41] *See generally* JAYNI FOLEY HEIN & PETER HOWARD, INST. FOR POLICY INTEGRITY, ILLUMINATING THE HIDDEN COSTS OF COAL (2015); JAYNI FOLEY HEIN, INST. FOR POLICY INTEGRITY, PRIORITIES FOR FEDERAL COAL REFORM: TWELVE POLICY AND PROCEDURAL GOALS FOR THE PROGRAMMATIC REVIEW (2016); JAYNI FOLEY HEIN & PETER HOWARD, INST. FOR POLICY INTEGRITY, RECONSIDERING COAL'S FAIR MARKET VALUE: THE SOCIAL COSTS OF COAL PRODUCTION AND THE NEED FOR FISCAL REFORM (2015); JAYNI FOLEY HEIN & CAROLINE CECOT, INST. FOR POLICY INTEGRITY, COAL ROYALTIES HISTORICAL USES AND JUSTIFICATIONS (2016).

[42] *See* WildEarth Guardians v. U.S. Bureau of Land Mgmt., 870 F.3d 1222, 1222, 1235 (10th Cir. 2017).

center of the ruling. This ruling helped establish important legal precedent for the quantification of greenhouse gas emissions in environmental impact statements. In addition, our amicus brief in a 2019 case supported a ruling that the BLM must consider the cumulative impact of greenhouse gas emissions generated by past, present, and reasonably foreseeable lease sales.[43]

Since 2009, we have advocated that government leasing decisions account for "option value," a financial concept that places value on delaying irreversible decisions in order to gain more information. We have suggested policy changes through academic publications,[44] numerous public comments, and a federal lawsuit in which the D.C. Circuit said for the first time that option value must be taken into account and, when feasible, also quantified.[45] Interior ultimately changed its practices, as the offshore oil and gas leasing program proposed in early 2015 devoted several pages to option value and related concepts, using language that closely resembled the arguments Policy Integrity had repeatedly made to the agency.[46] Likely effects of this change include less leasing in sensitive areas and higher minimum bids for lease sales. We have also testified before Congress on offshore oil and gas leasing, and provided extensive input to Interior's Royalty Policy Committee.[47]

Conclusion

While the Trump administration clutches to the fossil fuels of the past, advocates are successfully challenging its deregulatory

[43] *See generally* Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae In Support of Plaintiff's Motion for Summary Judgment, WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41 (D.D.C. 2019) (No. 16-1724), https://www.law.nyu.edu/sites/default/files/Wildearth.proposed.amicus.brief-filed.pdf.

[44] *See, e.g.*, Michael A. Livermore, *Patience is an Economic Virtue: Real Options, Natural Resources, and Offshore Oil*, 84 U. COLO. L. REV. 581, 581 (2013).

[45] *See* Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 610 (D.C. Cir. 2015).

[46] *See* BUREAU OF OCEAN ENERGY MGMT, U.S. DEP'T OF THE INTERIOR, 2017–2022 OUTER CONTINENTAL SHELF OIL AND GAS LEASING DRAFT PROPOSED PROGRAM at 8-3, 8-4, 8-13 (2015), https://perma.cc/8AU3-7MS4; Inst. For Policy Integrity, Comments to the Bureau of Ocean Energy Management on its Five-Year Offshore Leasing Program from 2017–2022 (July 31, 2014), https://policyintegrity.org/documents/Comments_to_BOEM_on_2017-22_Program.pdf.

[47] *See, e.g.,* Inst. for Policy Integrity, Comments to Royalty Policy Committee, Dep't. of the Interior (Apr. 23, 2018), https://policyintegrity.org/documents/RoyaltyPolicyCommittee_Feb_2018_comments.pdf.

actions. Economic principles, like balanced cost-benefit analysis and quantification of environmental costs, have a played a key role in demonstrating the irrationality of many of these rollbacks in federal court, as well as in the court of public opinion.

REMARKS OF NADA WOLFF CULVER[**]

The way we split this panel is that I'm going to talk a bit about litigation. The title of this conference was a little challenging, with the "Quest for Rationality" idea. In the litigation context, what we're seeing is that there really isn't a quest for rationality. Rather, the quest seems to be to undo anything that relates to conservation, especially conservation in the last administration. I work a lot with the BLM, which is the biggest land manager actually in the country. In addition to managing most of the surface estate in the country, about 250 million acres, they manage all of the mineral estate, which means they handle all the oil and gas leasing for all the federal agencies and all the coal.[48]

BLM is pretty much the favorite agency of this administration. They've been very, very, very busy. They've also been the target of a lot of litigation.[49] There are a lot of claims of rationality and economic principles to support actions that undermine conservation. But, what we're seeing is that they're not really living up to that, and the courts are noticing it.

One of the topics that has come up a few times today is related to what we refer to as BLM's methane rule.[50] The methane is released because when you produce oil, you also produce natural gas. With the natural gas, you can either vent or flare it.[51] So if you

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[48] *See* MARK K. DESANTIS, CONGRESSIONAL RESEARCH SERV., R45480, U.S. DEPARTMENT OF THE INTERIOR: AN OVERVIEW 8 (2019), https://fas.org/sgp/crs/misc/R45480.pdf; *see also An All of the Above Energy Approach*, BUREAU OF LAND MGMT., https://www.blm.gov/programs/energy-and-minerals (last visited Oct. 30, 2019).

[49] See discussion *infra* for examples.

[50] *See* CAROL HARDY VINCENT, CONGRESSIONAL RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA (2017), https://fas.org/sgp/crs/misc/R42346.pdf.

[51] *See* Paul Rauber, *Let It Burn: Congress Allows Flaring, Venting of Methane Gas*, SIERRA CLUB (Feb. 3, 2017), https://www.sierraclub.org/sierra/green-life/let-it-burn-congress-allows-flaring-venting-methane-gas.

ever see pictures of flames coming out, if you've seen *There Will Be Blood*,[52] what that is, is the flaring of natural gas. Sometimes producers capture that and sell it, but sometimes, it is too annoying for them to do so. The reason that we want oil and gas producers to capture it is because methane is one of the most devastating pollutants in terms of its effect on climate change.[53] But also, if as a producer you capture that natural gas, you sell it. And we, the American people, get the royalties.[54] So there is both fiscal and environmental responsibility there. Under the Obama administration, a rule was issued to require checking for methane leaks.[55] And also capturing the gas and selling it for royalties.[56] Imagine that.

There was a lawsuit brought right at the end of the Obama administration by a couple of states and two industry groups to try to kill the methane rule.[57] But, that didn't work. There was also an effort to end the methane rule that was then in effect by using the Congressional Review Act.[58] That was stopped by John McCain.[59]

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[52] THERE WILL BE BLOOD (Paramount Vintage 2007).

[53] *See* Rauber, *supra* note 51.

[54] TAXPAYERS FOR COMMON SENSE, GAS GIVEAWAYS: METHANE LOSSES ARE A BAD DEAL FOR TAXPAYERS 3 (2018), https://www.taxpayer.net/wp-content/uploads/2018/04/TCS-Report-Gas-Giveaways_-April-2018.pdf.

[55] *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83008, 83011 (Nov. 18, 2016) (to be codified at 43 C.F.R. pts. 3100, 3160, 3170).

[56] *See id*.

[57] *See* Ellen M. Gilmer, *The Many Lives of BLM Methane Litigation*, E&E NEWS (May 3, 2018), https://www.eenews.net/stories/1060080679.

[58] *See* Mark Hand, *GOP Fails to Repeal Obama Methane Rule after John McCain, 2 Other Republicans Defect*, THINKPROGRESS (May 10, 2017), https://thinkprogress.org/senate-votes-to-save-blm-methane-rule-d2f0c9db71ce/. In August 2019, EPA issued a proposed rule that would rescind emissions limits on methane in transmission and storage: "Because the proposed amendments would remove sources in the transmission and storage segment from the source category, the proposal also would rescind the emissions limits in the 2012 and 2016 NSPS that currently apply to those sources. These include limitations on both methane emissions and emissions of VOCs." EPA, FACT SHEET: EPA PROPOSES POLICY AMENDMENTS TO THE 2012 AND 2016 NEW SOURCE PERFORMANCE STANDARDS FOR THE OIL AND NATURAL GAS INDUSTRY (2019), https://www.epa.gov/sites/production/files/2019-08/documents/fact_sheet._proposed_amendments_to_nsps_for_oil_and_natural_gas_industry.8.28.19.pdf. As an alternative, EPA is "proposing to rescind the methane requirements in the NSPS for oil and natural gas sources, without removing any sources from the source category." *Id.*

[59] *See* Hand, *supra* note 58.

There's some great video of him going up to vote and this gaggle of Republican senators trying to stop him and he shoves them out of the way and gives them the thumb down.[60]

After that, the BLM tried, in June 2017, to issue a rule under Section 705 of the APA, which allows you to delay the effective date of regulations.[61] Now, to delay the effective date of regulations—that would be for regulations not yet in effect. The methane regulation was already in effect. But they just tried anyway. The court said no, you actually cannot do that—with quite a bit of a snarky language—and said, you cannot use this for regulations already in effect.[62] And in terms of the economics and rationality, there was language highlighting the fact that the attempt to delay the rule has actually caused more uncertainty for industry, not less. So BLM tried again in December 2017, when they issued a new rule to suspend the existing rule. And, I think Vickie Patton (of Environmental Defense Fund) mentioned this one. And in this situation, a court actually enjoined the suspension rule.[63] For those of you who have recently been studying the rules of civil procedure in class, this is a very high bar. It's not easy to get an injunction, but the court said that BLM's reasoning was untethered to evidence.[64] So the court was not simply granting an injunction. The court was pretty much insulting the suspension rule, and noting that there is irreparable harm by putting this suspension rule into effect.

Just last week, a new rescission rule was issued, and it was published in the Federal Register today.[65] There was already a complaint filed in the Northern District of California by the states of California and New Mexico last week.[66] I really hope and believe

[60] *See Senate Session*, C-SPAN (May 10, 2017), https://www.c-span.org/video/?428302-1/senators-speak-fbi-directors-firing (covering Senate session in which John McCain votes against BLM methane rule).

[61] *See* Ellen M. Gilmer, *Court Nixes Trump Admin's 'Unlawful' Delay of BLM Rule*, E&E NEWS (Oct. 4, 2017), https://www.eenews.net/stories/1060062677.

[62] *See id*.

[63] *See* Ellen M. Gilmer, *Court Reverses 'Untethered' Suspension of BLM Methane Rule*, E&E NEWS (Feb. 23, 2018), https://www.eenews.net/stories/1060074579.

[64] *See id.*

[65] *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49184 (Nov. 27, 2018) (to be codified at 43 C.F.R. pts. 3160, 3170).

[66] *See* Complaint for Declaratory and Injunctive Relief, California v. U.S. Bureau of Land Mgmt., No. 3:17-cv-07186 (N.D. Cal. Dec. 19, 2017).

that The Wilderness Society and a number of other groups will be following our case today. But the complaint filed by California and New Mexico has some pretty snarky language, as well, noting that this is a rule that repeals requirements that just one year ago BLM determined were necessary to fulfill statutory mandates to avoid waste.[67] So we'll see where this one goes, but I'm optimistic we'll get some new snarky language from the courts in California.

Moving on to another one. I wanted to highlight some challenges to oil and gas leasing in sage grouse habitat. How many people have seen a sage grouse? Oh, good. A couple. So here's a picture of a sage grouse.[68] It's often referred to as a chicken-sized flightless bird. I put this picture in here to show you it's not all of those things. It does also fly when chased by raptors or water trucks.[69] How many people here have purchased oil and gas leases? Okay. So what you should know about those, and the reason that this lawsuit was brought, is once you've purchased an oil and gas lease on federal land, it's good for at least ten years.[70] You can get it extended beyond that as long as you drill or if you ask the BLM to extend it for you.[71] Once leases are issued, this has a huge impact on federal land.[72] And this administration changed the way that leasing was happening on our federal lands. It's no longer required for the BLM to conduct environmental review before issuing leases.[73] It's no longer required to allow public comment.[74] We are still allowed to file administrative protests, but we only get ten days to do that.[75] And if you issue the decision on a Friday, that ten days goes by pretty quickly. Also, you're not allowed to email in a protest, you have to fax them. Anybody own a fax machine? Yes. Very challenging.

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67 *See id.* at 3.

68 *See, e.g.*, *Guide to North American Birds: Greater Sage-Grouse*, AUDUBON, https://www.audubon.org/field-guide/bird/greater-sage-grouse (last visited Sept. 12, 2019).

69 *See id.*

70 *See General Oil and Gas Leasing Instructions*, BUREAU OF LAND MGMT., https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/general-leasing (last visited Sept. 12, 2019).

71 *See id.*

72 *See id.*

73 *See* Ellen Gilmer, *Critics on New Leasing Policy,* E&E NEWS (Feb. 2, 2018), https://www.eenews.net/stories/1060072713.

74 *See id.*

75 *See id.*

So this process has become complicated. The stated purpose of the new guidance was to simplify and streamline the leasing process to alleviate unnecessary impediments and burdens.[76] What do those burdens look like? You're looking at it. Me and the sage grouse, both. A federal case was brought and the court enjoined the guidance.[77] Now that would be two injunctions, at least so far, in this little overview. And if you read the opinion, we had some pretty snarky stuff going on here. The court says, the public involvement requirements of FLPMA, which is the Federal Land Policy and Management Act—this is the organic act that governs the BLM—and NEPA, the bedrock environmental law that requires public involvement and environmental review, can't be set aside in the name of expediting oil and gas sales.[78] The benefits of public involvement and the mechanism by which public involvement is obtained are not "unnecessary impediments and burdens."[79] So, we're really seeing the courts calling out the government on the fact that its arguments are not rational and meaningful. And like a lot of this administration's actions, we see these supposed economic arguments and they're really just a cloak for "we just want to make it easier to drill."

The last cases I wanted to highlight here—we don't have decisions on this litigation yet, so the snarkiness has not occurred, but I feel good about it. These cases arose out of the original review that was conducted pursuant to an executive order issued by President Trump, in which he asked Secretary of the Interior Ryan Zinke to review twenty-seven national monuments that were created by previous Presidents.[80] This is a place where we see new rationales again, and the review for the monuments were factors well beyond the Antiquities Act.[81] The Act directs Presidents to designate national monuments to protect antiquities.[82] Here we have Secretary

[76] *See* Memorandum from the Deputy Dir., Policy & Programs, Exercising Authority of the Dir. of the Bureau of Land Management to All Field Officials (Jan. 31, 2018).

[77] *See* W. Watersheds Project v. Zinke, 336 F. Supp. 3d 1204 (D. Idaho 2018).

[78] *See id*. at 1233.

[79] *See id*. at 1239.

[80] *See A List of the 27 National Monuments Under Review*, NAT'L PARKS CONSERVATION ASS'N (Dec. 4, 2017), https://www.npca.org/resources/3211-a-list-of-the-27-national-monuments-under-review.

[81] *See* Antiquities Act of 1906, 54 U.S.C. §§ 320301–03 (2012).

[82] *See id.*

Zinke being told to look at things like: Were they appropriately classified under the Act? Do they look at the right considerations of multiple use policy?[83] Well, of course they don't because they're Antiquities Act monuments. Do they have impacts on the available use of lands outside the boundaries? Do they impact concerns of state and local governments? Do they affect the availability of federal resources outside the boundaries? So directing a review that looks at all sorts of factors that have nothing to do with the designation of monuments and that courts historically, because we have seen the designation of monuments challenged over the years, have explicitly declined to consider.

We're now challenging the radical reductions of the Bears Ears National Monument by eighty-five percent and the Grand Staircase Escalante National Monument by about fifty percent in court, but the new proclamations that were issued by President Trump follow this kind of same pattern of the rationale.[84] You'll see that they both state that the new proclamations were issued because he's determined the appropriate protective area involves the examination of factors such as the uniqueness and nature of the objects, the nature of the needed protections, and the protection provided by other laws.[85] Again, none of these are factors that are supposed to be taken into account under the Antiquities Act or have ever been considered by courts.[86]

In the new Bears Ears proclamation, there's a whole section about how there wasn't a sufficient threat of damage or destruction to these objects.[87] We'll set aside the fact that the Bears Ears area had been subjected to repeated threats of destruction, including major arrests for looting and selling of artifacts to pothunters.[88] So even if we actually needed to meet the standard, it was met. But let's

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[83] *See* NAT'L PARKS CONSERVATION ASS'N, *supra* note 80.

[84] *See The Wilderness Society et al. v. Trump et al. (Grand Staircase-Escalante)*, NAT. RESOURCES DEF. COUNCIL, https://www.nrdc.org/court-battles/wilderness-society-et-v-trump-et-grand-staircase-escalante (last visited Aug. 29, 2019).

[85] *See* Proclamation 9861, 82 Fed. Reg. 58081 (Dec. 4, 2017).

[86] *See* Antiquities Act of 1906, 54 U.S.C. §§ 320301–03 (2012).

[87] *See* Proclamation 9861, 82 Fed. Reg. 58081.

[88] *See* Jenny Rowland-Shea, *Bears Ears Cultural Area: The Most Vulnerable U.S. Site for Looting, Vandalism, and Grave Robbing*, CTR. FOR AM. PROGRESS (June 13, 2016), https://www.americanprogress.org/issues/green/news/2016/06/13/139344/bears-ears-cultural-area-the-most-vulnerable-u-s-site-for-looting-vandalism-and-grave-robbing.

just set that aside, because that it is not the relevant requirement. The requirement is that the President has decided this area should be set aside for future generations.[89] We don't need to actually show that people are stealing the cultural resources or destroying the rock art.

Similarly, in the new Grand Staircase-Escalante proclamation, the proclamation talks about how some of these areas are already being managed by the Forest Service because they're roadless or by the BLM because they're under protection as wilderness study areas.[90] What that has to do with protecting some of the most amazing dinosaur fossils being found in the world is beyond me. And I don't think you need to actually be a paleontologist to know that might be a pretty unconvincing justification. And we do know the real economics at play here, because we've seen documents released, having to do with efforts to turn some of these lands over for leasing uranium, oil and gas, and coal.[91]

Overall, the opinions we have seen from the courts reinforce that we are seeing a lack of rationality and economic basis for this administration's actions, and I think we'll continue to see that.

REMARKS OF DAVID J. HAYES[***]

I have been looking forward to sharing my observations about how the federal government is addressing natural resources issues under President Trump. It is my pleasure to do so here at New York University, at a conference sponsored by Policy Integrity.[92] Policy Integrity has been playing a significant role in many of the natural resources issues that I am discussing here today. With the skillful guidance of Ricky Revesz, Jayni Hein, Bethany Davis-Noll, and

[89] *See* 54 U.S.C. §§ 320301–03.

[90] *See* Proclamation 9861, 82 Fed. Reg. 58081.

[91] *See* Brady McCombs, *Lands Stripped from Utah Monuments Open to Claims, Leases by Oil, Gas, Coal and Uranium Companies*, SALT LAKE TRIB. (Feb. 3, 2018), https://www.sltrib.com/news/environment/2018/02/03/lands-stripped-from-utah-monuments-open-to-claims-leases.

[***] David J. Hayes is the Executive Director of the State Energy & Environmental Impact Center at the New York University School of Law. He was the Deputy Secretary and Chief Operating Officer for the U.S. Department of the Interior for Presidents Obama and Clinton.

[92] *See Energy and Environmental Policy: The Quest for Rationality*, INST. FOR POLICY INTEGRITY, https://policyintegrity.org/news/event/energy-and-environmental-policy-the-quest-for-rationality3 (last visited Sept. 19, 2019).

their team, Policy Integrity's disciplined legal and economic analyses have slowed or halted several of the administration's most egregious efforts to roll back important natural resource protections.

I begin with an acknowledgement, reinforced by my personal experience as the former Deputy Secretary of the Department of the Interior, that conflicting economic, social, cultural, and environmental interests complicate how we choose to manage our nation's natural resources. For example, the law tells our nation's largest single landowner—the BLM—to manage its public lands for "multiple use" and "sustained yield," setting up inevitable conflicts among different types of public uses—such a conservation and recreation—and private uses—such as mineral extraction and grazing, while adhering to the BLM's overarching statutory obligation to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resources and archeological values"[93] and to "take any action necessary to prevent unnecessary or undue degradation of [public] lands."[94]

In recent years, balancing natural resources interests has become even more challenging as a growing and spreading population puts new pressures on natural landscapes; an exploding oil and gas sector stresses rural land and water resources; and a changing climate upends water resource patterns, coastal infrastructure, ocean and inland fisheries, wildfire risks, and human health risk vectors.[95]

While previous administrations differed in how they struck a balance among competing resource interests, the Trump administration has moved in an entirely different direction that radically departs from American norms. Rather than acknowledging its responsibility to balance competing interests against a backdrop of fundamental protection and stewardship of our nation's natural resources, the Trump administration has set a natural resource hierarchy that establishes "energy dominance" as its overarching priority.[96] The administration has compounded the error of

[93] 43 U.S.C. §§ 1701(a)(7)–(8) (1976).

[94] *Id.* § 1732(b).

[95] For a comprehensive overview of the expected effects of climate change in the coming century, see INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE WORKING GRP. I, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS (2013), https://www.ipcc.ch/report/ar5/wg1.

[96] *See* Press Release, White House, President Donald J. Trump is Unleashing American Energy Dominance (May 14, 2019), https://www.whitehouse.gov/

elevating energy development as the first and arguably only priority for natural resource use by unabashedly favoring fossil fuel energy—and all of the adverse environmental externalities that go with coal, oil and gas development—over renewable, clean domestic energy.

President Trump set the tone for his unbalanced natural resources policy in his early Executive Order 13783, entitled "Promoting Energy Independence and Economic Growth."[97] The executive order calls for more aggressive expansion of "our Nation's vast energy resources"[98] and the "immediate review of all agency actions that potentially burden the safe, efficient development of domestic energy resources."[99]

Interior Secretary Zinke and Deputy Secretary David Bernhardt followed up the President's executive order with Secretarial Orders 3349[100] and 3360[101] which, in the name of "American Energy Independence," directed the Department to "identify agency actions that unnecessarily burden the development or utilization of the Nation's energy resources and support action to . . . suspend, revise, or rescind such agency actions as soon as practicable."[102]

These actions spawned a self-described "energy dominance" agenda that discards any pretense of a balanced natural resources policy and, instead, pursues a no-holds-barred expansion of fossil fuel energy development on public lands—whether the industry, or the American people, want it or not.

The Trump administration has aggressively pursued its energy dominance agenda by simultaneously pushing initiatives in three major areas: (1) opening up more lands and offshore waters to fossil fuel exploration and development; (2) shorting public planning and environmental reviews for fossil fuel projects on public lands; and

briefings-statements/president-donald-j-trump-unleashing-american-energy-dominance.

97 *See* Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 31, 2017).

98 *Id.* § 1(a).

99 *Id.* § 2.

100 *See* U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3349: AMERICAN ENERGY INDEPENDENCE (2017), https://www.doi.gov/sites/doi.gov/files/uploads/so_3349_-american_energy_independence.pdf.

101 *See* U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3360: RESCINDING AUTHORITIES INCONSISTENT WITH THE SECRETARY'S ORDER (2017), https://www.eenews.net/assets/2018/01/05/document_gw_04.pdf.

102 U.S. DEP'T OF THE INTERIOR, *supra* note 100, § 3.

(3) seeking to reduce private companies' costs by removing or watering down fiscal and environmental obligations associated with mining and drilling activities on public lands. I will tick through each of the initiatives to illustrate the vigor with which Interior is pushing its fossil fuel energy development agenda over countervailing interests.

1. *Opening Up More Lands for Fossil Fuel Development*

As one of its first moves, the Interior Department lifted the moratorium on coal leasing that former Secretary Jewell had put in place pending completion of a long-delayed programmatic environmental impact review of the federal coal program. State attorneys general challenged Interior's decision to lift the moratorium without undertaking any environmental review under NEPA, and the U.S. District Court in Montana agreed that the administration's failure to complete an environmental review violated NEPA.[103]

Secretary Zinke proposed to open up nearly the entirety of offshore waters to oil and gas drilling—with the exception of Florida, in response to a request from its Republican governor. State attorneys general have vowed to fight opening up new areas for offshore drilling.[104]

The Department enthusiastically supported, and is now implementing, plans to drill for oil and gas in the iconic Arctic National Wildlife Refuge.[105] It also has initiated hearings and an environmental review process aimed at expanding oil and gas leasing in the National Petroleum Reserve-Alaska, including in the environmentally pristine and sensitive Teshekpuk Lake area.[106]

Interior's political leadership has shredded a historic, bipartisan, science-based and industry-approved agreement to

[103] *See Coal on Public Lands,* STATE ENERGY & ENVT'L IMPACT CTR., http://www.law.nyu.edu/centers/state-impact/issues/public-lands/coal-on-public-lands (last visited Oct. 21, 2019).

[104] *See Five-Year Oil and Gas Leasing Plan*, STATE ENERGY & ENVT'L IMPACT CTR., http://www.law.nyu.edu/centers/state-impact/issues/oceans-and-water-policy/five-year-oil-and-gas-leasing-plan (last visited July 28, 2019).

[105] *See* Henry Fountain & Steve Eder, *In the Blink of an Eye, a Hunt for Oil Threatens Pristine Alaska*, N.Y. TIMES (Dec. 3, 2018), https://www.nytimes.com/2018/12/03/us/oil-drilling-arctic-national-wildlife-refuge.html.

[106] *See* Christopher Solomon, *America's Wildest Place is Open for Business*, N.Y. TIMES, https://www.nytimes.com/interactive/2017/11/10/opinion/sunday/wildest-place-in-america.html (last visited Sept. 19, 2019).

protect several million acres of sensitive public lands from oil and gas development to accommodate needed wildlife protections for the greater sage grouse and associated species, thereby exposing vitally important conservation lands to fossil fuel development and needlessly triggering a drawn-out fight under the Endangered Species Act.[107]

2. *Shortening Public Participation and Environmental Reviews*

Deputy Secretary Bernhardt issued Secretarial Order 3355 to remove "the impediments to efficient development of public and private projects that can be created by needlessly complex NEPA analysis."[108] Directives included targeting the completion of final EIS within one year and setting a default page limit of 150 pages for EISs for major projects.[109]

Interior has issued new guidelines that shorten or, in some cases, bar public participation in oil and gas permitting decisions so as to facilitate quick approval of oil and gas leases without accountability. For example, Interior eliminated the "master leasing plan" program that facilitated public input and environmental review of potential oil and gas leasing on public lands that were near national parks or otherwise implicated competing cultural, recreational, or conservation interests.[110]

3. *Reducing Regulatory "Burdens" on Coal and Oil & Gas*

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[107] *See* Coral Davenport, *Trump Administration Loosens Sage Grouse Protections, Benefiting Oil Companies*, N.Y. TIMES (Dec. 6, 2018), https://www.nytimes.com/2019/03/15/climate/trump-sage-grouse.html.

[108] U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3355: STREAMLINING NATIONAL ENVIRONMENTAL POLICY ACT REVIEWS AND IMPLEMENTATION OF EXECUTIVE ORDER 13807: "ESTABLISHING DISCIPLINE AND ACCOUNTABILITY IN THE ENVIRONMENTAL REVIEW AND PERMITTING PROCESS FOR INFRASTRUCTURE PROJECTS" (2017).

[109] *See id*.

[110] *See* Imari Walker Karega, *BLM Order 2018-034: Updating Oil and Gas Leasing Reform—Land Use Planning and Lease Parcel Reviews*, DUKE SCI. POL. (June 4, 2018), https://scipol.duke.edu/track/updating-oil-and-gas-leasing-reform-%E2%80%93-land-use-planning-and-lease-parcel-reviews/blm-order; Scott Streater, *Key Obama-Era Leasing Reform to Get the Ax,* E&E NEWS (Oct. 27, 2017), https://www.eenews.net/stories/1060064921; *see also* Dep't of the Interior, Instruction Memorandum IM 2018-034 (Jan. 31, 2018), https://www.blm.gov/policy/im-2018-034 (eliminating "MLPs"). *See generally The Short Life of the BLM's Master Leasing Plans*, BILL LANE CTR. FOR AM. W.: THE W. BLOG, https://west.stanford.edu/news/blogs/and-the-west-blog/2018/master-leasing-plans.

Production on Public Lands

Interior also has been aggressively attempting to roll back basic fiscal and environmental responsibilities that coal, oil and gas companies have when operating on public lands—in the name of reducing "unnecessary burdens" that diminish American energy dominance.[111] The highest profile rollbacks share the common characteristic of ignoring or downplaying governmental interests in ensuring that private companies pay fair value for valuable minerals that they extract from public lands, and that they conduct their activities in an environmentally sound way.[112] They represent an abdication of the federal government's obligation to manage our public lands responsibly on behalf of the American people. Three rulemakings illustrate the point.

When the Bureau of Reclamation developed its rules governing oil and gas activities in the 1980s, hydraulic fracturing technology was in its infancy. Today, BLM estimates that more than ninety percent of the nearly 100,000 oil and gas wells operating on public lands are engaged in hydraulic fracturing activities.[113]

Hydraulic fracturing activities carry with them a variety of environmental risks that relate, in particular, to the use of chemicals in hydraulic fracturing operations, the potential contamination of groundwater from poorly-constructed hydraulic fracturing wells, and the unsafe management and disposal of large volumes of contaminated "produced water" that flow back to the surface during hydraulic fracturing activities.[114]

The Obama administration acknowledged that its outdated oil and gas drilling rules needed to address new risks associated with hydraulic fracturing activities. Accordingly, it launched an extended public rulemaking that ultimately produced a final rule that laid out

[111] *See* Press Release, U.S. Dep't of the Interior, Interior Department Finalizes New Waste Prevention Rule (Sep. 18, 2018), https://www.doi.gov/pressreleases/interior-department-finalizes-new-waste-prevention-rule.

[112] *See* discussion of Hydraulic Fracturing Rules, Royalty Reforms, and Methane Waste Prevention Rule, *infra*.

[113] *See* Press Release, Dep't of the Interior, Bureau of Land Mgmt., BLM Rescinds Rule on Hydraulic Fracturing (Dec. 28, 2017), https://www.blm.gov/press-release/blm-rescinds-rule-hydraulic-fracturing.

[114] *See generally* EPA, HYDRAULIC FRACTURING FOR OIL AND GAS: IMPACTS FROM THE HYDRAULIC FRACTURING WATER CYCLE ON DRINKING WATER RESOURCES IN THE UNITED STATES EXECUTIVE SUMMARY 20, 24, 31 (2016) https://www.epa.gov/sites/production/files/2016-12/documents/hfdwa_executive_summary.pdf.

common sense, uniform standards for conducting oil and gas hydraulic fracturing operations on public lands.[115]

The Trump administration, with the active support of the oil and gas industry, has worked to nullify Interior's hydraulic fracturing rules and return to the status quo ante—namely, the absence of any federal regulations governing hydraulic fracturing-related oil and gas drilling activities on public lands—despite the ubiquitous nature of the practice, and the clear risks that it poses to health and the environment.[116]

State attorneys general have filed suit against the administration's rescission of the hydraulic fracturing rule, based on the rule's lack of a reasoned basis for abandoning the prior rule, and its inconsistency with Interior's statutory obligations. Time will tell how the courts will treat Interior's "never mind" approach to this serious issue.[117]

Several years ago, the General Accountability Office and the Department of the Interior Inspector General blew the whistle on a deceptive practice that fossil fuel companies were utilizing to avoid paying royalties due to the federal government.[118] The watchdogs noted that coal companies, in particular, were basing their royalty calculations on "sales" of coal to corporate affiliates at below-market prices.[119] The affiliates then typically would enter into subsequent, arms-length transactions with buyers at a higher, market-based price point, thereby enabling the coal company to avoid paying the full royalty amount due to the federal government.[120]

The Obama administration addressed this glaring need for reform by promulgating a "valuation" rule that explicitly outlawed the use of affiliate transactions as the basis for determining royalty

115 *See* 43 C.F.R. § 3160 (2018).

116 *See* Eric Lipton & Hiroko Tabuchi, *Driven by Trump Policy Changes, Fracking Booms on Public Lands*, N.Y. TIMES (Oct. 27, 2018), https://www.nytimes.com/2018/10/27/climate/trump-fracking-drilling-oil-gas.html.

117 *See Fracking*, STATE ENERGY & ENVTL. IMPACT CTR., http://www.law.nyu.edu/centers/state-impact/issues/public-lands/fracking (last visited Sept. 19, 2019).

118 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-140, COAL LEASING: BLM COULD ENHANCE APPRAISAL PROCESS, MORE EXPLICITLY CONSIDER COAL EXPORTS, AND PROVIDE MORE PUBLIC INFORMATION (2013), https://www.gao.gov/assets/660/659801.pdf.

119 *See id.*

120 *See id.*

payments. Instead, it required that arms-length transactions and, in certain cases, prices gleaned from commodity market information, should be used to calculate royalty obligations.[121]

The Trump administration attacked this good government reform as an apparent affront to energy domination,[122] inferring that the federal government should acquiesce in disreputable practices that cheated the U.S. government—and, derivatively, American taxpayers—from funds owed by fossil fuel companies to the U.S. Treasury. After unsuccessfully attempting to put the valuation reform rule on hold, Interior published a proposed rule to repeal the rule "in its entirety."[123]

After completing a perfunctory comment period, Interior finalized its nullification of the valuation reform rule, keeping in place the abusive practice that enabled coal and oil and gas companies to deceive the federal government and avoid making royalty payments.[124] State attorneys general who had fought the delay filed suit on the final rule.[125] Policy Integrity filed an effective amicus brief supporting the state attorneys general's challenge.[126]

In March 2019, the federal district court in California sided with the attorneys general in finding that the Office of Natural Resources Revenue (ONRR) violated the APA in repealing the valuation rule.[127] ONRR had not provided an adequate,

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[121] *See* Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 81 Fed. Reg. 43,338 (July 1, 2016) (to be codified at 30 C.F.R. pts. 1202, 1206); *See* Press Release, Dep't of the Interior, Interior Department Announces Initial Steps to Strengthen Federal Energy Valuation Rules, Expand Guidance on Federal Coal Program (Dec. 19, 2014), https://www.doi.gov/news/pressreleases/interior-department-announces-initial-steps-to-strengthen-federal-energy-valuation-rules-expand-guidance-on-federal-coal-program.

[122] *See* Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 31, 2017).

[123] U.S. Dep't of the Interior, Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 16,323 (Apr. 4, 2017).

[124] U.S. Dep't of the Interior, Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36,934 (Aug. 7, 2017).

[125] *See Coal on Public Lands*, STATE ENERGY & ENVTL. IMPACT CTR., http://www.law.nyu.edu/centers/state-impact/issues/public-lands/coal-on-public-lands, (last visited Sept. 19, 2019).

[126] *See* Brief for Institute for Policy Integrity as Amicus Curiae Supporting Plaintiffs, California v. Dep't of the Interior, No. 17-cv-05948-SBA (N.D. Cal. June 25, 2018).

[127] *See* Order Re Cross-Motions for Summary Judgment, California v. Dep't of the Interior, No. C 17-5948 SBA (N.D. Cal. Mar. 29, 2019), https://www.eenews.net/assets/2019/04/15/document_ew_01.pdf

reasoned explanation for disregarding the facts and circumstances that supported the 2016 issuance of the valuation rule, and the court vacated the August 2017 repeal rule.[128]

Interior's advocacy on behalf of oil and gas companies over the public interest also is reflected in the Department's virulent attack on the Obama administration's methane waste reduction rule, also known as the "venting and flaring" rule.[129] The rule, which was finalized in November 2016, was prompted by oil and gas lessees who vent or burn off (flare) large quantities of unwanted methane (natural gas) that impede the co-production of oil supplies.[130] The practice is widespread due to the relatively low value of natural gas and the limited availability of gas pipeline infrastructure in certain oil and gas regions.

The upshot of the practice is the waste of valuable, publicly owned natural resources, and the avoidance of royalty payments associated with the extraction of those resources, in contravention of the Minerals Leasing Act.[131] The large quantity of methane losses also poses adverse health effects and climate pollution concerns, given that methane is a powerful greenhouse gas.[132]

As with the royalty reform rule, the administration launched unsuccessful efforts to unilaterally put off compliance with the final rule, followed by promulgation of a notice-and-comment "suspension rule" that would have had a similar effect.[133] State attorneys general challenged both actions, and the District Court in

[128] *See id. See generally, Coal on Public Lands,* STATE ENERGY & ENVTL. IMPACT CTR., https://www.law.nyu.edu/centers/state-impact/issues/public-lands/coal-on-public-lands (last visited Oct. 30, 2019).

[129] *See* 83 Fed. Reg. 49,184, (Sept. 28, 2018) (to be codified at 43 CFR pt. 3160, 3170).

[130] *See id.* at 49,185.

[131] *See* 30 U.S.C. §§ 225, 226(b),(c) (2012).

[132] *See* Eric Lipton, *Profiting, at a Cost*, N.Y. TIMES (Dec. 27, 2018), https://www.nytimes.com/interactive/2018/12/26/us/politics/donald-trump-environmental-regulation.html (discussing health problems related to burning and venting of methane on the Fort Berthold Indian Reservation).

[133] *See Methane Waste Prevention Rule*, STATE ENERGY & ENVTL. IMPACT CTR., http://www.law.nyu.edu/centers/state-impact/issues/public-lands/methane-waste-prevention-rule (last visited Sept. 19, 2019) (explaining that earlier, the administration attempted to nullify the BLM waste prevention rule via a Congressional Review Act resolution that passed in the U.S. House of Representatives in May 2017, but narrowly failed in the U.S. Senate).

the Northern District of California struck down both administrative gambits as violative of the APA.[134]

Following its losses in the courts, BLM finally proposed a replacement rule that greatly scaled back restrictions on methane venting and flaring.[135] Last fall, BLM finalized the rule and it was immediately challenged by state attorneys general.[136]

It will be interesting to see how reviewing courts address the rollback of the waste prevention rule. As with many of its rollbacks, Interior emphasizes the cost to industry as the primary basis for excusing compliance with common sense restrictions on wasting valuable public resources. As state attorneys general have noted, Interior's analysis of industry costs is inflated, particularly in light of the commitments that many companies are undertaking voluntarily to reduce harmful methane emissions, its companion analysis of foregone societal benefits is poorly supported.[137]

The disastrous Gulf Oil Spill occurred during my tenure as Deputy Secretary of the Department of the Interior.[138] I was the first administration official on the scene in the Gulf of Mexico on the morning of April 21, 2010 and, in the months that followed, Secretary Salazar and I put together a regulatory response plan that simultaneously focused on stopping the leak, and reforming the deep water oil and gas regulatory system that had clearly failed to meet basic safety expectations.[139] The Department worked closely with the President's Deepwater Horizon Oil Spill Commission, the oil and gas industry, and outside experts to promulgate new safety rules that have materially improved offshore drilling safety, while addressing the root causes of the Deepwater Horizon oil spill.[140]

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134 *See id.*

135 *See* Press Release, Bureau of Land Mgmt., BLM Offers Revision to Methane Waste Prevention Rule (Feb. 12, 2018), https://www.blm.gov/press-release/blm-offers-revision-methane-waste-prevention-rule.

136 *See* Complaint at 1-2, California v. Zinke, No. 3:18-cv-05712 (N.D. Cal. Sept. 18, 2018).

137 *See* State Plaintiffs' Notice of Motion and Motion for Summary Judgment; Memorandum in Support, California v. Bernhardt, No. 4:18-cv-05712-YGR (N.D. Cal. June 7, 2019).

138 *See generally Gulf Oil Spill*, SMITHSONIAN OCEAN, https://ocean.si.edu/conservation/pollution/gulf-oil-spill (last visited Nov. 16, 2019).

139 *See id*.

140 *See* David J. Hayes, *Beyond the Movie: Deepwater Horizon Redux*, HUFFPOST (Oct. 04, 2016), https://www.huffingtonpost.com/entry/beyond-the-movie-deepwater-horizonredux_us_57f2a2dbe4b0c2407cdf2508.

Remarkably, the Trump administration has completed rulemakings that undercut even these high profile, and clearly needed, safety improvements.[141] In particular, key safety reforms included in the Interior's Bureau of Safety and Environmental Enforcement's (BSEE's) original well control rule, promulgated in 2016, were repealed in a revised rule that was finalized in May 2019, as laid out in a Complaint filed by a coalition of environmental groups in the Northern District of California:

> [The 2019 final rule] weaken[ed] standards related to real-time monitoring, blowout preventer functionality, inspection and testing of safety equipment, and maintenance of safe drilling margins. [It] also eliminate[d] much of the new regulatory oversight that had been added under the 2016 Well Control Rule, instead giving industry more leeway to police itself. In addition, some of the repeals and revisions were not proposed in the proposed rule, including changes to the safe drilling margin requirements, real-time monitoring standards, blowout preventer requirements on floating platforms, and blowout preventer testing intervals.[142]

The sole justification for these rollbacks was to eliminate "unnecessary burdens on stakeholders."[143] Little or no explanation was provided for why BSEE "disregarded its previous factual findings from the 2016 Well Control Rule," nor was there an attempt "to meaningfully respond to concerns raised . . . in comments" on the proposed rollback rule.[144]

The Trump administration also has been attentive to requests by oil and gas companies to loosen the administration and enforcement of laws that protect wildlife. As referenced above,[145] Interior dramatically scaled back a historical conservation agreement that protected 10.7 million acres of sensitive western habitat for the greater sage grouse—a species in severe decline and in danger of being listed as threatened or endangered under the

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[141] *See Offshore Drilling Regulations*, STATE ENERGY & ENVTL. IMPACT CTR., http://www.law.nyu.edu/centers/state-impact/issues/oceans-and-water-policy/offshore-drilling-regulations (last visited Sept. 14, 2019); *see also* 84 Fed. Reg. 21,908, 21,908, 21,910 (May 15, 2019) (to be codified at 30 CFR pt. 250).

[142] *See* Complaint at 25–29, Sierra Club v. Angelle, No. 3:19-cv-03263 (N.D. Cal. June 11, 2019), https://www.nrdc.org/sites/default/files/complaint-weakening-offshore-drilling-safety-protections-20190611.pdf.

[143] 84 Fed Reg 21,908.

[144] Complaint, *supra* note 142, at 26–36.

[145] *See* Davenport, *supra* note 107.

Endangered Species Act.[146] The oil and gas industry cheered the replacement plan, which reduced protection areas by approximately eighty percent to only 1.8 million acres.[147] In October 2019, the U.S. District Court in Idaho enjoined the BLM from implementing its revisions of the sage grouse plan, based on the Department's failure to adequately to explain or justify its changes, and its failure to analyze their potential environmental impacts under NEPA.[148]

Similarly, oil and gas interests have complained that they can be liable under the 100-year old Migratory Bird Treaty Act for the death of migratory birds that alight in oil-contaminated pits or that die in oil spills.[149] The attentive Trump administration responded by issuing a Solicitor's opinion that purports to nullify operation of the Migratory Bird Treaty Act's strict liability provisions.[150] State attorneys general, the Audubon Society, and other conservation groups have filed suit.[151]

Even more troubling is Interior's launch of a rulemaking that could undermine Endangered Species Act protections in a number of ways, including by attempting to inject economic analysis into listing decisions, despite the statute's clear prohibition on doing so.[152] "The proposals also attempt to establish a regulatory precedent that would effectively prohibit species impacted by climate change from gaining protections by prohibiting FWS and

146 *See id*.

147 *See id.*

148 *See* W. Watersheds Project v. Zinke, 336 F. Supp. 3d 1204 (D. Idaho 2018).

149 *See* David J. Hayes & Lynn Scarlett, Opinion, *A Free Pass to Kill Migratory Birds*, N.Y. TIMES (June 7, 2018), https://www.nytimes.com/2018/06/07/opinion/a-free-pass-to-kill-migratory-birds.html.

150 *See id.*

151 *See Migratory Bird Treaty Act*, STATE ENERGY & ENVTL. IMPACT CTR. (last visited Sept. 17, 2019), http://www.law.nyu.edu/centers/state-impact/issues/wildlife/migratory-bird-treaty-act; Press Release, Audubon Soc'y, Audubon Lawsuit Seeks to Restore Protections for Migratory Birds (May 24, 2018), https://www.audubon.org/news/audubon-lawsuit-seeks-restore-protections-migratory-birds.

152 *See* Stephen Lee, *Broad Changes to Endangered Species Protections Could Be Coming*, BLOOMBERG ENV'T (May 25, 2019), https://news.bloombergenvironment.com/environment-and-energy/broad-changes-to-endangered-species-protections-could-be-coming.

NMFS from considering whether a changing climate is threatening the continued existence of certain species."[153]

At the same time that Interior has engaged in a single-minded push for "energy dominance," it has virtually abandoned its countervailing stewardship responsibilities. As noted above, its treatment of fiscal and environmental rules as "burdens" that should be lifted—rather than basic corporate responsibilities that flow from the privilege of operating on public lands—illustrates the point.[154]

In addition, Interior has embraced the administration's head-in-the-sand, anti-science approach to climate change—despite the enormous, direct impact that climate change is having on the natural resources that Interior is obligated to responsibly manage.[155] For example, Secretarial Order 3360, referenced above, rescinded the climate change chapter of Interior's manual, removing Interior's policy commitment to "adapt to the challenges posed by climate change to its mission, programs, operations, and personnel [and to] use the best available science to increase understanding of climate change impacts, inform decision-making, and coordinate an appropriate response to impacts on land, water, wildlife, cultural and tribal resources, and other assets."[156]

Other federal agencies also are giving short shrift to climate change-related considerations that should be playing a material role in many natural resource management decisions.[157]

As dictated in President Trump's Executive Order 13783, for example, the White House Council on Environmental Quality withdrew its guidance on how agencies should take climate impacts

[153] *Endangered Species Act*, STATE ENERGY & ENVTL. IMPACT CTR., http://www.law.nyu.edu/centers/state-impact/issues/wildlife/endangered-species-act (last visited Sept. 17, 2019).

[154] *See* discussion *supra*.

[155] *See, e.g.*, Rebecca Beitsch, *Trump Interior Chief Says Climate Change Response Falls on Congress*, HILL (May 7, 2019), https://thehill.com/policy/energy-environment/442605-interior-secretary-says-climate-change-response-falls-on-congress.

[156] U.S. DEP'T OF THE INTERIOR, *supra* note 101; *see also* Elizabeth Shogren, *Interior Revokes Climate Change and Mitigation Polices*, HIGH COUNTRY NEWS (Jan. 4, 2018), https://www.hcn.org/articles/climate-change-interior-department-revokes-climate-change-and-mitigation-policies.

[157] *See* Press Release, Ctr. for Biological Diversity, Trump Administration Guts Climate Change Reviews for Federal Actions (June 21, 2019), https://biologicaldiversity.org/w/news/press-releases/trump-administration-guts-climate-change-reviews-federal-actions-2019-06-21.

into account when preparing environmental impact reviews for federally-connected projects and alternatives under NEPA.[158]

Withdrawing White House guidance, however, does not absolve the federal government from addressing climate change in environmental reviews required by NEPA. As the District of Columbia Circuit Court ruled in *Sierra Club v. Federal Energy Regulatory Commission* (the "Sabal Trail" decision), for example, the Federal Energy Regulatory Commission (FERC) cannot comply with NEPA and make a sound "public convenience and necessity" determination for a pipeline project without evaluating foreseeable direct and indirect greenhouse gas emissions associated with the project—including downstream emissions associated with the handling and combustion of gas by pipeline recipients.[159] Other courts have made the same point that NEPA requires the disclosure and analysis of direct, indirect, and cumulative climate-related environmental issues in environmental impact statements prepared for federal decisionmakers.[160]

And yet administration appointees continue to skirt—and even flout—the law. For example, the D.C. Circuit is now reviewing a case from upstate New York (*Otsego 2000*) in which FERC thumbed its nose at the Sabal Trail decision by concluding that it need not evaluate upstream or downstream greenhouse gas emissions associated with a pipeline improvement project.[161] As part of its decision, the Commission announced a new, FERC-wide NEPA policy that perpetuates this misreading of the law, without providing any opportunity for input, and despite an ongoing review of the same issue in another docket.[162]

Thankfully, state attorneys general continue to ask courts to step in and require the administration to comply with its legal obligations. In this case, a coalition of seven attorneys general, led by former New York Attorney General Barbara Underwood, filed

158 *See* Exec. Order No. 13783, 82 Fed. Reg. 16,093, 16,094 (Mar. 31, 2017).

159 *See* Sierra Club v. Fed. Energy Regulatory Comm'n, 867 F.3d 1357, 1374 (D.C. Cir. 2017).

160 *See, e.g.*, San Juan Citizens All. v. Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1242–43 (D.N.M. 2018) (collecting cases).

161 *See* Otsego 2000 v. Fed. Energy Regulatory Comm'n, 767 F. App'x 19, 21 (D.C. Cir. 2019).

162 *See Pre-Filing Environmental Review Process*, FED. ENERGY REGULATORY COMM'N, https://www.ferc.gov/resources/processes/flow/lng-1-text.asp (last visited Sept. 17, 2019).

an amicus brief last week challenging FERC's unlawful attempt to avoid its NEPA obligations.[163]

The Trump administration is upending decades of balanced stewardship of our nation's natural resources by bending environmental and public health-related legal obligations to favor the fossil fuel industry's interests and the administration's quest for "energy dominance."[164]

Thankfully, state attorneys general, prominent NGOs and think tanks including Policy Integrity are in the courts and in the public square, demanding that our government return to managing our natural resources for the benefit of all Americans, rather than for special interests' short-term gains. Our nation's collective stakes in the fight could not be higher.

REMARKS OF BRENDA MALLORY[****]

Good afternoon. It's a pleasure to be here. Let me thank Jayni and Ricky both for the invitation to be part of this program. It's been thought-provoking sitting here and hearing the other panelists this morning. I also want to congratulate Policy Integrity on its ten-year anniversary. I know personally of the Policy Integrity's work and have both enjoyed and found it invaluable. Nevertheless, hearing others regale its accomplishments was inspiring. Thank you for what you do, particularly right now, when the focus on rationality and environmental and economic approaches to rulemaking are even more important.

In fact, it's almost comical to be discussing this administration's emerging public lands policy under the heading "Quest for Rationality." The administration's activities have seemed like much more of a grudge match than a rational approach to public lands policy. As we get further into the first term, the driving force

[163] *See* Brief for New York et al. as Amici Curiae Supporting Petitioners, *Ostego 2000*, 767 F. App'x 19 (No. 18-1188), https://ag.ny.gov/sites/default/files/2018_12_03_otsego_2000_amicus_brief_as_filed.pdf.

[164] *See* Press Release, *supra* note 96.

[****] Brenda Mallory is the Executive Director and Senior Counsel for the Conservation Litigation Project, an effort created to protect environmental and conservation values on public lands through strategic collaboration with academics, pro bono counsel, and environmental organizations. Brenda served as the General Counsel of the White House Council on Environmental Quality during the Obama administration and served in senior leadership roles at the Environmental Protection Agency.

has expanded from simply getting rid of the things that President Obama or the Obama administration did, to purging policies that have been important in public lands management for decades. Let me read a quote from an article that George Washington University Law Professor Rob Glicksman wrote. It captures my sense of what's happening in the public lands world:

> The Trump agenda seeks more than just to return to the pre-1960 regime, and it goes beyond trying to wipe out reforms of the New Deal and the Progressive era. The administration's touchstone for public land management hearkens back to 1872. That was the year Congress passed the General Mining Law, which made minerals such as gold and copper and the title to the land containing them, available to anyone basically for free. The law epitomized an era in which disposition of federal lands and resources was the predominant goal, and in which lands that were retained were to be milked dry of extractable commodities. The Trump approach is a radical rejection of virtually every reform of public land law in the last hundred years.[165]

Unlike modern environmental laws, which came into being along with reforms that increased public participation and emphasized data-based decisionmaking, public lands law has been evolving for well over a century.[166] The administration is reviving practices from earlier decades where there was an assumption that mineral resources should be extracted from the land, companies and other regulated entities received preferred access to planning and decisionmaking processes, and careful analysis of impacts was undervalued. Under the banner of "streamlining" or "energy dominance," many policy approaches designed to ensure data driven decisions and more inclusive decisionmaking processes have been eliminated.[167]

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[165] Robert Glicksman, Opinion, *Trump's Policies Blasting at the Foundations of Conservation in Public Land Law*, HILL (July 17, 2018), https://thehill.com/opinion/energy-environment/397282-trumps-policies-blasting-at-the-foundations-of-conservation-in.

[166] *See, e.g.*, Marla Mansfield, *A Primer of Public Land and Law*, 68 WASH. L. REV. 801 (1993) (as a primer on the development of public and law), https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1025&context=fac_pub.

[167] *See, e.g.*, Press Release, U.S. Dep't of the Interior, Department of the Interior Releases Energy Burdens Report (Oct. 25, 2017), https://www.doi.gov/pressreleases/department-interior-releases-energy-burdens-report; *see also* Memorandum from the Deputy Dir., Policy & Programs, Exercising Authority of the Dir. of the Bureau of Land Management, to All Field Officials (Jan. 31, 2018).

The administration, however, does not share the view Glicksman describes. A press release from Interior in the summer of 2018, touting President Trump's 500 days, notes that public lands are once again available for use.[168] The notion that public lands are for "use" underscores the administration's thinking about public lands management. There is a heavy emphasis on the economic value that can be offered through the public lands, and on traditional uses like hunting, ranching, and grazing activities. In contrast, there is less focus on the notion that some areas are so special or unique that the appropriate management is conservation or preservation.

What the administration reflects in its narrative is a belief that things have really shifted too far away from initial notions of what was appropriate public lands management. Some describe this as simply responding to the greed of industry and other supportive allies who benefit from use of public lands. While surely in the mix, there are also fundamental differences in the philosophical view of how public lands resources should be managed and what their value to society is. The tension in views about use versus conservation of public lands often undergirds specific policy disagreements. The Secretary of the Interior has broad discretion in the management of public lands and in balancing the various interests and targets for protection reflected in the various statutory mandates.[169] Unlike environmental programs and related statutes, such as the Clean Air Act, the Secretary is not limited by explicit criteria to the same degree as Administrators of EPA and other agencies.[170] Thus, once this administration can discipline itself to follow the appropriate process, it will be able to accomplish a lot in changing public lands management and the regulatory process that governs. That is concerning to me and should be to those wanting environmentally protective approaches to public lands management to be given more importance, but this is the reality.

I have one visual I want to share. It is entitled, "Managing Public Lands for Energy Dominance," and identifies a number of the major actions that have been taken by Congress, the President,

168 *See* Press Release, U.S. Dep't of the Interior, Interior Celebrates 500 Days of American Greatness Under President Trump (June 5, 2018), https://www.doi.gov/pressreleases/interior-celebrates-500-days-american-greatness-under-president-trump.

169 *See* 16 U.S.C. § 835c (2012).

170 *Compare id.* (duties of Secretary of the Interior), *with* 33 U.S.C. § 1344 (2012) (Clean Water Act describing Secretary's responsibilities).

and Interior to alter public lands policy.[171] This administration came in with the focus on energy dominance. Using all of the tools available and with the benefit of both houses of Congress and the presidency, the administration has been able to make a broad range of changes that are designed to shift the direction and the way that we approach public lands management. With over thirty actions listed[172] on my visual, I will only touch on a few examples of executive branch actions. But before I turn to those, I want to mention the Congressional Review Act (CRA)[173] activities. We are at a conference focused on the quest for rationality in policymaking and I can't help but note that the CRA is the antithesis of that.

The CRA is a statute that requires Congressional review of certain agency rules when they are issued and authorizes Congress to essentially revoke the rule with a majority of both Houses and the President's signature. The statute had not been successfully used very much before the Trump administration came on board with both houses of Congress on its side. Now the administration has used it at least fifteen times to eliminate regulations that were done in the latter part of the Obama administration. Three of those were relevant to Interior: the BLM Planning Rule,[174] the Stream Protection Rule,[175] and a rule addressing Alaska wildlife refuge management.[176] With no hearings, minimal process, no required

171 *See* Brenda Mallory, Exec. Dir. & Senior Counsel for the Conservation Litig. Project, Remarks at the Institute for Policy Integrity Symposium on Energy and Environmental Policy: The Quest for Rationality (Sept. 18, 2018) (referencing slide titled Managing Public Lands for Energy Dominance).

172 *See id.* The visual references, among other things, presidential actions on infrastructure, regulatory reform, energy independence, monuments review, and streamlining; it included secretarial orders on toxic ammunition, restarting the coal program, climate change, mitigation, and energy burdens, and streamlining; it listed rulemakings on hydraulic fracturing, BLM methane, and NEPA and ESA amendments; and it provided examples of planning documents and Solicitor Opinions.

173 *See* 5 U.S.C. § 801 (2012).

174 *See President Trump Signs Measure Repealing BLM Planning 2.0 Rule*, *Republican News*, U.S. SENATE COMM. ON ENERGY & NAT. RES. (Mar. 27 2017), https://www.energy.senate.gov/public/index.cfm/2017/3/president-trump-signs-bill-repealing-blm-planning-2-0-rule.

175 *See* Congressional Nullification of the Stream Protection Rule Under the Congressional Review Act, 82 Fed. Reg. 54924 (Nov. 17, 2017).

176 *See* Effectuating Congressional Nullification of the Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska Under the Congressional Review Act, 82 Fed. Reg. 52,009, 52,011 (Nov. 9, 2017).

justification, and a simple majority of both Houses, the CRA allows Congress to wipe out the product of years of study, public process, and stakeholder engagement. It undermines all of the elements of rational decisionmaking.

With the Stream Protection Rule, as an example, the Obama administration spent seven years on that rule, including studies, analysis, and significant process.[177] Yet, through the CRA mechanism, the outcome of that effort was cast aside. Once a rule is eliminated through the Congressional review process, the agency can't issue another regulation that's substantially similar without congressional approval. There have now been a number of calls for the reform or elimination of the CRA precisely because of the harmful consequences to rational policymaking.[178]

Moving to some of the other items referenced on the illustration. President Trump issued numerous executive orders rescinding President Obama's orders and directing Interior to review and revise specific policies. Interior issued rules delaying or suspending rules relating to hydraulic fracturing, methane emissions, and royalty rates. Interior has launched changes to multiple resource management plans: sage grouse plans are an example that has received considerable attention because they involve approximately 186 million acres covering parts of eleven states, and the 2015 plans, which are the focus of the attack, were the result of an unprecedented, bi-partisan, federal, state, and local collaboration over many years.[179] In December 2018, Interior issued a Final Environmental Impact Statement (EIS) and proposed plan amendments that would significantly decrease the scope of protected areas and the degree of protection in a number of the

[177] Press Release, U.S. Dep't of the Interior, Interior Department Finalizes Stream Protection Rule to Safeguard Communities from Coal Mining Impacts (Dec. 19, 2016), https://www.doi.gov/pressreleases/interior-department-finalizes-stream-protection-rule-safeguard-communities-coal-mining.

[178] *See, e.g.*, *Congressional Review Act Resolutions in the 115th Congress*, COAL. FOR SENSIBLE SAFEGUARDS, https://sensiblesafeguards.org/cra (last visited Sept. 17, 2019).

[179] *See* Press Release, U.S. Dep't of the Interior, Historic Conservation Campaign Protects Greater Sage-Grouse (Sept. 22, 2015), https://www.doi.gov/pressreleases/historic-conservation-campaign-protects-greater-sage-grouse (noting the sage grouse's range is approximately 173 million acres); *see also* Coral Davenport, *Trump Administration Loosens Sage Grouse Protections, Benefiting Oil Companies*, N.Y. TIMES (Dec. 6, 2018), https://www.nytimes.com/2019/03/15/climate/trump-sage-grouse.html.

plans.[180] Two other plans under development relate to the Bears Ears and Grand Staircase Escalante National Monuments. In December 2017, President Trump made significant reductions in the size and protections for those monuments that had been established in designations by former Presidents Obama and Clinton, respectively.[181] While legal challenges to the President's actions are still pending as Nada has outlined, draft management plans for those significantly modified monuments went through a notice and comment process that ended in November 2018: Bears Ears in mid-November[182] and Grand Staircase at the end of November.[183] Interior will next issue Proposed Management Plans and Final EISs. The draft management plans illustrate key pillars of this administration's strategy for public lands management.

First, make as much land as possible available for extractive purposes. This includes eliminating protected areas, such as monuments or other designated withdrawal areas, or using the management planning process to allow more permitted activities in the area. Once the restrictions are eliminated, allow more leasing, mining, and other extractive activities to occur. The administration is very proud of the fact that it is increasing leasing opportunities

[180] *See, e.g.*, BLM, Notice of Availability of the Utah Greater Sage-Grouse Proposed Resource Management Plan Amendment and Final Environmental Impact Statement, Utah, 83 Fed. Reg. 63,527 (Dec. 10, 2018).

[181] *See* Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,093 (Dec. 8, 2017) (modifying Grand Staircase-Escalante National Monument); Proclamation No. 9681, 82 Fed. Reg. 58,081, 58084–85 (Dec. 8, 2017) (modifying Bears Ears National Monument).

[182] *See* Notice of Availability of the Draft Bears Ears National Monument Indian Creek and Shash Jáa Units Monument Management Plans and Final Environmental Impact Statement, Utah, 84 Fed. Reg. 36,118, 36,119 (July 26, 2019); BLM Notice of Availability, 83 Fed. Reg. 41,111 (Aug. 17, 2018); *see also,* BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, EXECUTIVE SUMMARY: BEARS EARS PROPOSED MMPS/FINAL EIS (2019), https://eplanning.blm.gov/epl-front-office/projects/lup/94460/20000100/250000103/Executive_Summary_Bears_Ears_Proposed_MMPs-Final_EIS.pdf.

[183] *See* Notice of Availability of the Grand Staircase-Escalante National Monument-Grand Staircase, Kaiparowits, and Escalante Canyon Units and Federal Lands Previously Included in the Monument That Are Excluded From the Boundaries Draft Resource Management Plans and Associated Environmental Impact Statement, 84 Fed. Reg. 44,326, 44,327 (Aug. 23, 2019); *see also* U.S. DEP'T OF THE INTERIOR, EXECUTIVE SUMMARY: GSENM-KEPA PROPOSED RMPS/FINAL EIS (2010), https://eplanning.blm.gov/epl-front-office/projects/lup/94706/20001992/250002377/01_GSENM-KEPA_Proposed_RMPs-Final_EIS_Executive_Summary.pdf.

and expanding other uses. This leasing is important because it creates an impediment to future land management planning. Once the land is leased, it is locked up for a certain number of years and subject to contractual and property rights expectations. It will be more difficult to return some of these areas to a protected status without cost to the government.

Turning now to several procedural issues affecting public lands management. The administration is focused on modifying the management planning processes with the stated goal of streamlining. In the name of efficiency and reducing burdens on the energy development, Interior is making changes that eliminate the opportunity for comment by the public, either by shortening time frames or finding ways to avoid public process.[184] These changes are being made to Interior's own regulations, but also to guidance that affects Interior's implementation of NEPA.[185] The administration is looking at revising the NEPA regulations as well. NEPA is often referred to as the Magna Carta in the environmental area, one of the first statutes to set forth a planning process that required the analysis of impacts before the federal government made a decision to take an action.

The NEPA regulations have been in place since the 1970s, but in August 2017, President Trump issued an executive order that launched an examination of the regulatory review process by White

[184] *See, e.g.*, Glicksman, *supra* note 165; Press Release, U.S. Dep't of the Interior, *supra* note 167; Sharon Buccino, *Keeping the Public in Public Lands*, 48 ENVTL. L. REP. 10297 (2018); *see also* Memorandum from the Deputy Dir., Policy & Programs, to All Field Officials (June 12, 2018), https://www.blm.gov/policy/pim-2018-014 (outlining the streamlined process for obtaining permits to drill federally owned minerals from non-federal land).

[185] *See* US DEP'T OF THE INTERIOR, ORDER NO. 3355, STREAMLINING NATIONAL ENVIRONMENTAL POLICY ACT REVIEWS AND IMPLEMENTATION OF EXECUTIVE ORDER 13807, "ESTABLISHING DISCIPLINE AND ACCOUNTABILITY IN THE ENVIRONMENTAL REVIEW AND PERMITTING PROCESS FOR INFRASTRUCTURE PROJECTS" (2017), https://www.doi.gov/sites/doi.gov/files/elips/documents/3355_-_streamlining_national_environmental_policy_reviews_and_implementation_of_executive_order_13807_establishing_discipline_and_accountability_in_the_environmental_review_and_permitting_process_for.pdf; *see also* Memorandum from the Deputy Secretary to Assistant Secretaries, Heads of Bureaus and Offices, and NEPA Practitioners on Additional Direction for Implementing Secretary's Order 3355 Regarding Environmental Assessments (Aug. 6, 2018), https://cdn.ymaws.com/www.ima-na.org/resource/dynamic/blogs/20180808_163922_22958.pdf.

House offices.[186] The executive order entitled, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure," directed the Office of Management and Budget and the Council on Environmental Quality (CEQ) to take steps to examine and improve the permitting processes.[187] CEQ, my former agency, was tasked to help lead efforts to streamline and facilitate maximizing opportunities under NEPA to more quickly address the environmental issues.[188]

In that vein, CEQ issued an advanced notice of proposed rulemaking in the summer of 2018.[189] It was originally published for a thirty-day comment period, but that was extended to sixty days.[190] In the notice, CEQ asks a series of questions that relate to every aspect of the NEPA process. Some are more mundane operational questions like, should CEQ change the number of pages for an EIS, or should the agency take steps that will make it more possible for agencies to coordinate their various processes? Although some of the questions seem innocuous, NEPA watchers are worried given the policy changes and proposals the administration is making and supporting outside of the NEPA context. For example, in early 2018, the administration sent a legislative roadmap for infrastructure projects to Congress.[191] As outlined below, it included proposals that would significantly alter NEPA implementation. Similarly, a number of federal agencies, including Interior, are changing their agency-specific NEPA guidance.[192] CEQ's broad questions set the stage for opening up all parts of the regulations, including basic definitions that have been in place for years. The distrust of the

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

187 *See id*.

188 *See* 42 U.S.C. § 4344 (2012); *see also Agency NEPA Implementing Procedures*, COUNCIL ON ENVTL. QUALITY, https://ceq.doe.gov/laws-regulations/agency_implementing_procedures.html (last visited Nov. 1, 2019).

189 *See* Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591 (June 20, 2018).

190 *See* Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 32,071 (July 11, 2018).

191 *See* WHITE HOUSE, LEGISLATIVE OUTLINE FOR REBUILDING INFRASTRUCTURE IN AMERICA 36 (2018), https://www.politico.com/f/?id=00000161-8a9d-d53a-a5f5-bffd597b0000.

192 *See* U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3355: STREAMLINING NATIONAL ENVIRONMENTAL POLICY ACT REVIEWS AND IMPLEMENTATION OF EXECUTIVE ORDER 13807: "ESTABLISHING DISCIPLINE AND ACCOUNTABILITY IN THE ENVIRONMENTAL REVIEW AND PERMITTING PROCESS FOR INFRASTRUCTURE PROJECTS" (2017).

administration's goals with respect to NEPA reform has created some awkwardness for the NEPA watchers in the advocacy community. If you have had any involvement in the NEPA process, you know that there are improvements that could be made and opportunities to expand the benefits of the review process. However, venturing down a reform path if the administration is hoping to gut the statute is ill-advised. CEQ received approximately 12,500 comments on the rule, including about 300 or so that are substantive comments.[193] The agency is in the process of determining what a proposal will look like.[194]

The legislative infrastructure roadmap referenced above is another area in which CEQ has been playing a big role.[195] The plan the administration issued lays out the legislative changes they think would encourage infrastructure investment. Included in the plan is a section on environmental management, which includes proposed revisions to many environmental statutes that would impact infrastructure projects.[196] Relevant to NEPA, the plan reinforces the idea of shortening the time frames associated with the completing the NEPA process; the plan urges a twenty-one month period for completing the NEPA document and only allowing three months between the time the environmental document has been completed and the decision is issued.[197]

The plan also urges eliminating EPA's role in evaluating the quality of the NEPA document; it notes that EPA can comment like everyone else.[198] However, EPA's role was intended to be broader than other commenters.[199] It was charged with determining whether the NEPA document provided the essential information and analysis required by the statute. The plan called for eliminating that role. As an aside, in the fall of 2018, EPA issued a memorandum eliminating

193 *See Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, REGULATIONS.GOV, https://www.regulations.gov/docket?D=CEQ-2018-0001 (last visited Nov. 3, 2019).

194 The agency released its proposal in January 2020. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (proposed Jan. 10, 2020) (to be codified at 40 C.F.R. pts. 1500–05, 07–08).

195 *See* WHITE HOUSE, *supra* note 191.

196 *See id.*

197 *See id.*

198 *See id*.

199 *See National Environmental Policy Act,* EPA, https://www.epa.gov/nepa (last visited Nov. 3, 2019).

its rating process.[200] The infrastructure roadmap also urged making it easier for agencies to adopt categorical exclusions, which eliminate the need for a public NEPA process.[201] It will not be surprising if some of these ideas find their way into the upcoming NEPA proposal.

Finally, my last topic is compensatory mitigation. Over the years, mitigation has become an increasingly important part of regulatory and permitting processes.[202] However, Interior seems intent on changing that fact.[203] Generally speaking, mitigation is the practice of avoiding, reducing, or minimizing the impacts of a planned activity.[204] Compensatory mitigation includes the practice of allowing the payment of fees to mitigate for the impacts of the proposed action. In the regulatory permitting process, mitigation measures have been an important part of convincing agencies that they should approve a desired activity that will have environmental impacts.[205] In the 1980s, there was a lot of resistance from the environmental community about the idea of people using mitigation as a way to get their permits; it was the regulated community and its supporters advancing the value of various mitigation approaches.[206] Over time, mitigation has become a more accepted part of the

[200] *See* Memorandum from Brittany Bolen, EPA Associate Administrator, to the Regional Administrators on Changes to EPA's Environmental Review Rating Process 37–38 (Oct. 22, 2018), https://www.epa.gov/sites/production/files/2018-10/documents/memorandum_on_changes_to_epas_environmental_review_rating_process.pdf.

[201] *See* WHITE HOUSE, *supra* note 195, at 37–38.

[202] *See generally, Background on Compensatory Mitigation*, ENVTL. L. INST., https://www.eli.org/compensatory-mitigation/background-compensatory-mitigation (last visited Sept. 14, 2019).

[203] *See* Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment: Hearing Before the S. Comm. on Energy & Nat. Res., 114th Cong. 16 (2016) (statement of Michael Bean, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks, U.S. Dep't of the Interior); Michael Doyle, *Trump Admin Torpedoes Obama-era Mitigation Goal*, E&E NEWS (July 27, 2018), https://www.eenews.net/stories/1060091417; Justin Pidot, *Interior Department Will No Longer Require Industry to Offset Damage to Public Lands*, HILL (July 26, 2018, 6:00 PM), https://thehill.com/opinion/energy-environment/399093-interior-department-will-no-longer-require-industry-to-offset.

[204] *See Background on Compensatory Mitigation*, *supra* note 202.

[205] *See id*.

[206] *See* Palmer Hough & Morgan Robertson, *Mitigation Under Section 404 of the Clean Water Act: Where it Comes From, What it Means*, 17 WETLANDS ECOLOGY & MGMT. 15, 16 (2008); Leslie Roberts, *Wetlands Trading is a Loser's Game, Say Ecologists*, 260 SCIENCE 1890, 1890–91 (1993).

process, not only for Clean Water Act permitting, which first recognized the concept of no net loss of wetlands, but in other permitting situations as well.[207] Interior has certainly taken advantage of it. During the Obama years, there was a lot of focus on mitigation policies. With greater understanding about the impacts of projects and what was needed for successful mitigation, Interior adopted policies that moved from a no net loss standard to actually thinking about achieving net benefits.[208] These policies called on the agencies to consider the uncertainties that exist in areas where mitigation is offered and to factor in the potential implications of climate change in determining what mitigation measures were needed.[209] There were a number of both policy and legal documents issued during the Obama administration that supported Interior's use of mitigation, as referenced below. These were eliminated by the Trump administration slowly over the course of its first twenty-one months.[210]

In Executive Order 13783,[211] President Trump rescinded President Obama's 2015 presidential memorandum entitled, "Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment."[212] Secretary Zinke then revoked his predecessor's secretarial orders that addressed mitigation: Specifically, Order 3349[213] revoked Secretarial Order 3330,[214] which was issued in October 2013 and called for the development of landscape-scale mitigation policies. Zinke's order also called for review and reconsideration of all mitigation policies and reports that were developed as a result of the 2013 order. Further implementing Secretarial Order 3349, Deputy Secretary David Bernhard issued Secretarial Order 3360 in December 2017,

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[207] *See Background on Compensatory Mitigation*, *supra* note 202 (discussing wetland compensatory mitigation).

[208] *See* Michael Doyle, *Trump Admin Torpedoes Obama-era Mitigation Goal*, E&E NEWS (July 27, 2018), https://www.eenews.net/stories/1060091417.

[209] *See, e.g.*, U.S. DEP'T OF THE INTERIOR, MANUAL ON LANDSCAPE-SCALE MITIGATION POLICY (2015), https://www.doi.gov/sites/doi.gov/files/uploads/TRS%20and%20Chapter%20FINAL.pdf.

[210] *See id.*

[211] Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

[212] *See* Memorandum on Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment, 80 Fed. Reg. 68,743 (Nov. 6, 2015).

[213] *See* U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3349 (2017).

[214] *See* U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3330 (2013).

revoking a number of internal guidance documents on mitigation which were imbedded in various Bureau handbooks and incorporated into the strategy proposed for the National Petroleum Reserve.[215] Most recently, in the summer of 2018, Interior's bureaus issued additional mitigation guidance. Fish and Wildlife Service rescinded 2016 policies that had instructed staff to strive for a net conservation benefit in the mitigation throughout various programs.[216] The BLM issued guidance prohibiting staff from requiring compensatory mitigation as a condition of approval in its actions, unless such mitigation was required by other state or federal programs.[217] Under limited circumstances, the BLM will accept voluntary compensatory mitigation, which raises the question of how significant the on the ground impact of the new policy will actually be.[218]

Nevertheless, the message to the staff is that compensatory mitigation cannot be treated as a routine tool to be deployed in the approval process. Without compensatory mitigation, it remains to be seen how and whether damaging impacts are reduced. The guidance provides that, pursuant to FLPMA Section 302(b), the BLM still has the obligation to ensure that any approved activity will not cause "unnecessary or undue degradation."[219] We'll see what that means in practice. Thank you.

215 *See* U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3360 (2017).

216 *See* U.S. Fish and Wildlife Service Endangered Species Act Mitigation Policy, 83 Fed. Reg. 36,469 (July 30, 2018).

217 *See* Bureau of Land Mgmt., Instruction Memorandum IM 2019-018 (Dec. 6, 2018), https://www.blm.gov/policy/im-2019-018.

218 *See id*.

219 43 U.S.C. § 1732(b) (2012).