July 9, 2020

To: Bureau of Land Management, Utah State Office
Subject: Comments on the Draft Environmental Assessment for the Proposed September 2020 Competitive Oil and Gas Lease Sale, Docket No. DOI-BLM-UT-0000-2020-0004-EA

The Institute for Policy Integrity at New York University School of Law\(^1\) respectfully submits comments on the Draft Environmental Assessment for the Bureau of Land Management’s (BLM) Proposed September 2020 Competitive Oil and Gas Lease Sale in Utah. In this proposed lease sale, BLM Utah is contemplating offering 77 parcels consisting of 114,049.77 acres located in Juab, Sanpete, Sevier, Emery, Duchesne, Grand, Uintah and San Juan counties in the BLM’s Moab, Richfield, Vernal, Price, and Fillmore Field Offices. Many of the tracts that would be offered for lease are located in areas valuable for recreation, wildlife, environmental conservation, cultural use, and tourism. Moreover, many of these tracts have low oil and gas development potential.

In this draft Environmental Assessment (EA), BLM fails to uphold its statutory duty to manage public lands for multiple use, and fails to consider more limited leasing scenarios pursuant to the National Environmental Policy Act (NEPA). Additionally, the agency impermissibly fails to consider the informational value of delay, and is therefore unlikely to fulfill its duty to obtain “fair market value” for the nominated parcels under the Federal Land Policy and Management Act (FLPMA) and Mineral Leasing Act (MLA). Moreover, BLM disregards many of the likely adverse economic effects of the proposed lease sale on the local community. If BLM fails to correct these errors, its analysis would be rendered arbitrary and capricious.

Specifically, in this EA:

- BLM fails to properly account for multiple-use values, in violation of FLPMA;
- BLM fails to analyze several viable alternatives that would reduce environmental and social harms and protect other multiple uses, violating NEPA;
  - BLM should have analyzed one or more environmentally-protective development scenarios that would offer fewer tracts for lease,

\(^1\) This document does not purport to represent the views, if any, of New York University School of Law.
particularly in popular recreation and scenic areas, including areas close to national parks;
  o BLM should have analyzed the option of deferring some of these parcels to a later date, especially those that have low development potential, in order to account for option value, or the informational value of delay. In particular, BLM’s failure to assess option value makes it likely that the agency will violate FLPMA and the MLA by failing to obtain “fair market value” for these parcels;
  • BLM fails to give due consideration to adverse economic impacts on the local community, as required by NEPA.

Should BLM proceed with the lease sale based on such incomplete and flawed analysis, the lease sale would be arbitrary and capricious.

I. BLM Fails to Properly Account for Multiple-Use Values in this EA, in Violation of FLPMA.

Enacted in 1976, the Federal Land Policy and Management Act (FLPMA) directs that federal land management adhere to the principles of multiple use and sustained yield.  

FLPMA explains that “multiple use” requires “harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.” The statute also mandates that the Department of the Interior “shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”

BLM must manage its lands for a variety of uses, not primarily for oil and gas development. One of the stated goals of FLPMA is to “preserve and protect certain public lands in their natural condition.” As the Tenth Circuit has held, “[i]t is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses.”

---

2 43 U.S.C. § 1701(a)(7) (instructing that “management be on the basis of multiple use and sustained yield unless otherwise specified by law”); see also Our Mission, U.S. BUREAU OF LAND MANAGEMENT, https://perma.cc/MH7Q-W8C7 (“Congress tasked the BLM with a mandate of managing public lands for a variety of uses such as energy development, livestock grazing, recreation, and timber harvesting while ensuring natural, cultural, and historic resources are maintained for present and future use.” (emphasis added)).

3 43 U.S.C. § 1702(c).

4 Id. § 1732(b).

5 Id. § 1712(c)(1).

6 Id. § 1701(a)(8); see also Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1299 (10th Cir. 1999).

7 New Mexico Ex. Rel. Richardson v. BLM, 565 F.3d 683, 710 (10th Cir. 2009).
The Court further noted, “[a] parcel of land cannot both be preserved in its natural character and mined.”

In this EA, BLM proposes to offer large amounts of land—including land with low or no oil and gas potential—for oil and gas leasing. BLM even acknowledges that the majority of parcels leased in the Moab region are likely to never see drilling due to their low potential and/or high cost of exploration and development. The parcels in the Moab region that BLM does expect to be produced will require access roads and related infrastructure that will have adverse effects on the scenic, environmental, and recreational values of the area. Parcel 34 in the Price Field Office likewise has low development potential and oil and gas activity there poses significant multiple-use conflicts, including with nearby national parks and wilderness areas.

Offering these tracts for lease violates BLM’s statutory duty to manage public lands for multiple uses, as leasing even low potential tracts often forecloses other valuable public land uses like conservation of environmentally valuable areas, recreation, scenic uses, and potential renewable energy development. There is no evidence in the EA or elsewhere in the administrative record that BLM has meaningfully grappled with its multiple-use mandate, for instance, by considering deferring or removing parcels with valuable recreational, scenic, or environmental values such as those parcels within 10 miles of national parks, parcels with important wildlife habitat, and/or parcels with important recreational and scenic value to Moab, Utah, or the United States.

BLM’s omission is remarkable, especially considering the unique and valuable non-extractive uses present within the areas offered for lease. The Moab Field Office encompasses 1.8 million acres of scenic canyon country. Moab’s public lands include a vast variety of striking arches, natural bridges, mesas, and spires, as well as the Colorado and Green Rivers. These canyonlands are home to many types of desert wildlife, from bighorn sheep, mule deer, and white-tailed prairie dogs to the Endangered Species Act-listed Colorado pikeminnow and Mexican spotted owl. The Moab Field Office is a magnet for recreation and outdoor tourism in Utah, including off-highway vehicles, mountain biking, climbing, base jumping, hiking, horse-back riding, and river rafting. While visitors also

---

8 Id. (quoting Rocky Mtn. Oil & Gas Ass’n v. Watt, 696 F.2d 734, 738 n. 4 (10th Cir.1982)).
10 See id. at 54; see also Lower Last Chance Wilderness, Wilderness Connect, https://wilderness.net/visit-wilderness/?ID=796 (last visited July 8, 2020).
11 Id. at 54; see also Moab Field Office, Bureau of Land Mgmt., https://www.blm.gov/office/moab-field-office (last visited July 8, 2020).
come to visit Canyonlands and Arches National Parks, they cannot participate in some of these more intensive recreational activities within the national parks themselves, and instead rely on the areas close to the parks to do so – on many of the very same parcels contemplated for lease in this EA. The Moab Field Office is also known for dinosaurs tracks and features the Mill Canyon Tracksite Interpretive Trail.15

Unfortunately, leasing even low-potential lands often prevents conservation of environmentally valuable areas and interferes with recreation and other uses that BLM must consider and protect pursuant to FLPMA. As just one example, even if oil and gas tracts are not developed, their mere presence often precludes BLM from proactively managing the area for wilderness characteristics or important wildlife habitat. Section 201 of FLPMA requires BLM to maintain an inventory of all public lands and their resources and other values, which includes wilderness characteristics.16 Land management for wilderness characteristics entails closure to mineral resource production, motorized vehicles, timber production, and roads.17 When conducting a wilderness characteristics inventory, BLM assesses parcels for the presence or absence of wilderness characteristics including their size (roadless areas with over 5,000 acres of contiguous BLM lands are preferred), naturalness, and outstanding opportunities for either solitude or primitive and unconfined recreation.18 Yet in the past, the presence of mineral leases has foreclosed BLM from managing parcels for wilderness characteristics.19 In several resource management plans (RMPs) finalized by BLM Utah, the presence of mineral leases prevented the protection, preservation, or maintenance of wilderness characteristics.20 This concern is not merely hypothetical. As recently as 2019, areas directly bordering parcels proposed for lease in this sale were designated as wilderness, such as the Lower Last Chance Wilderness Area that borders parcel 34.21

BLM violates FLPMA’s multiple-use mandate by offering numerous tracts for lease that have very low development potential, yet have other valuable public uses that are equally important under federal law. In light of its multiple-use mandate, BLM should not offer low-potential lands for leasing, and must manage some public lands for distinct—and potentially more important—land uses. As the next section explains, BLM should have considered the option of a far more tailored lease sale that avoids multiple-use conflicts, as

17 See, e.g., BLM, GRAND JUNCTION DRAFT RESOURCE MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT, 4-256 to 258 (2012), https://perma.cc/Y6A6-KMDC.
21 See EA at 54.
well as the option of deferring at least part of this lease sale in order to account for the
public's valuable option to delay development.

II. The EA Fails to Analyze Several Viable Alternatives That Would Reduce
Environmental and Social Harms, Protect Other Multiple Uses, and Help
Ensure that BLM Obtains “Fair Market Value”

The EA fails to analyze several viable alternatives that would reduce environmental
and social harms and protect other multiple uses better than BLM’s identified alternatives.
NEPA regulations specify that the agency must “[r]igorously explore and objectively
evaluate all reasonable alternatives,” so as to “provid[e] a clear basis for choice among the
options.”22 The agency must also analyze alternatives that are, in fact, distinct.23

First, in addition to the “no action” alternative, the EA should have analyzed one or
more environmentally-protective development scenarios that would offer fewer tracts for
lease, particularly in popular recreation and scenic areas, including areas close to national
parks. Second, the EA should have analyzed the option of deferring some of these parcels to
a later date, especially those that have low development potential, in order to account for
option value, or the informational value of delay, and help ensure that BLM obtains “fair
market value” for these parcels as required under FLPMA.

A. BLM Fails to Consider the Alternative of Offering Fewer Tracts for Lease in this
Sale, Especially in Light of Multiple-Use Conflicts and Low Oil and Gas Potential
on Several Parcels.

In the EA, BLM analyzes only two alternatives: offering all of the nominated parcels
assessed in the EA for lease, and the “no action” alternative in which a lease sale is not held
and no parcels are offered.24 But in light of the low development potential of many of the
parcels included in the proposed sale, as well as clear multiple-use conflicts, BLM should
have analyzed a middle option: offering fewer parcels in this lease sale, limited to those
with high development potential and minimal multiple-use conflicts.

1. BLM acknowledges that many of the parcels to be offered have low
development potential, and should have assessed a more limited lease sale
alternative that avoids multiple-use conflicts.

BLM acknowledges that numerous parcels in the Moab Field Office identified for the
upcoming lease sale have low development potential, and in fact, the majority of them may

23 See Muckleshoot Indian Tribe, 177 F.3d 800, 813 (9th Cir. 1999) (NEPA analysis failed to consider
reasonable range of alternatives where it “considered only a no action alternative along with two virtually
identical alternatives”); Wilderness Society v. Wisely, 524 F. Supp. 2d 1285, 1312 (D. Colo. 2007) (BLM violated
NEPA by failing to consider “middle ground compromise between the absolutism of the outright leasing and
no action alternatives”).
24 EA at 22–23.
not be developed at all during their lease term. BLM recognizes that of the nearly 48,000 oil and gas leases analyzed in Utah in one government report, just 6.17 percent were drilled and 3.76 percent produced.  

In assessing a subset of parcels in the Moab Field Office, BLM states, "[f]or the purpose of this analysis it is assumed that 50 nominated parcels encompassing 78,790.85 acres will result in 14 wells and 114.8 acres (one well pad and access road disturbance at 8.2 acres)." Moreover, past experience in Moab has shown that the region is not particularly productive. BLM notes that, "[o]ver a four-year period from 2016 to 2019, including federal and non-federal lands, 43 percent of APDs [applications for permits to drill] received in Grand County were drilled . . . and 35 percent of APDs received in San Juan County were drilled..." In other words, more than half of the leases that received approval to drill between 2016 to 2019 were never even drilled.

When low-potential lands are leased to private developers, those developers may hope that energy prices will rise, that new ways to extract marginal energy will be found, or that the leases can later be sold to another company. Over the last 30 years, production of oil or gas has been reported on only one-quarter of all acreage on federal lands leased for oil and gas drilling. While private developers use these public lands as a mere poker chip—buying them at low cost and holding them in the event they become more valuable—speculative leases prevent conservation of environmentally valuable areas and often foreclose valuable uses like recreation, scenic and cultural use, designation as wilderness, or even renewable energy production.

Leasing low-potential lands without considering narrower alternatives violates BLM's legal mandates in multiple ways. For one, BLM is authorized to lease only lands "which are known or believed to contain oil or gas deposits," yet the agency presents no evidence that the parcels it does not expect be drilled contain oil or gas. And as discussed further below, this failure also violates BLM’s obligation to consider reasonable alternatives pursuant to NEPA.

In the Moab Field Office, many parcels identified for leasing have low development potential yet pose several multiple-use conflicts, including recreation, scenic value, wildlife

25 Id. at 19 n.5.
26 EA at 19.
27 Id.
31 See generally New Mexico, 565 F.3d at 711.
protection, cultural and tribal resources, and more.\textsuperscript{32} Parcels to be offered in this lease sale include several that fall within the Canyon Rims, Labyrinth Rims / Gemini Bridges, and South Moab Special Recreation Management Areas.\textsuperscript{33} Other parcels border or contain popular recreation areas including the Old Spanish Trail, the Magnificent Seven Trail System, the Fruit Bowl Highline Area, and the Mineral Bottom Recreation Site.\textsuperscript{34} Indeed, the Master Lease Plan (MLP) prepared for the Moab region describes the “iconic scenery” of the area, and aims to “reflect[] the balance and benefit of both recreation and the mineral extraction industry.”\textsuperscript{35} Activities including hiking, wildlife conservation and appreciation, climbing, rappelling, mountain biking, off-roading, and ziplining draw visitors to the area and to many of the parcels at issue, specifically, supporting diverse uses of the public lands and contributing jobs and sustainable revenue to the local economy.\textsuperscript{36} Moab Field Office parcels of particular note for their recreational and other multiple-use values include parcels 08; 39; 45; 48; 66; 68–80; 83–88; 90; 97; 111–113; 116–124; 132–134 and 136.\textsuperscript{37} Moreover, some of the parcels are within ten miles of Canyonlands or Arches National Parks.\textsuperscript{38} Developing these areas for oil and gas would have negative effects on the environmental, scenic, and recreational value of these parcels.\textsuperscript{39}

BLM attempts to minimize such detrimental environmental effects in the EA by noting that the MLP calls for no surface occupancy (NSO) and controlled surface use (CSU) stipulations on many of these parcels.\textsuperscript{40} However, BLM does not offer any assurance that waivers, exemptions, or modifications to these NSO and CSU stipulations will not be granted. In fact, the Moab MLP itself states that such exemptions, waivers, or modifications are possible and may be granted.\textsuperscript{41} The Government Accountability Office recently found that BLM rarely involves the public in decisions to grant waivers, exemptions, or modifications to lease stipulations.\textsuperscript{42} In other words, even if BLM claims here that the land

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{32} See EA at 19–21, 294–299 (App’x D).
\item \textsuperscript{33} See id. at 93, 96–101.
\item \textsuperscript{34} See, e.g., id. at 101, 187.
\item \textsuperscript{36} See generally infra Sec. III.
\item \textsuperscript{37} See, e.g., EA at 295 (describing these parcels as within special recreation management areas and/or within other special focus areas for recreation or environmental protection and study); id. at 14–16 (describing some parcels with proximity to Sole Source Aquifers or Public Drinking Water Source Protection Zones, as well as parcels that may experience negative impacts on recreation due to development); id. at App’x A (providing a parcel-specific description of stipulations).
\item \textsuperscript{38} See id. at 13, App’x A.
\item \textsuperscript{39} See id.
\item \textsuperscript{40} Id. at 6, App’x A.
\item \textsuperscript{41} Moab MLP, supra note 35, at 6, App’x A-1.
\end{itemize}
\end{footnotesize}
will be free of surface disturbance or occupancy, the public has no guarantee that the leases will remain subject to these stipulations, and the public may never be notified if or when such protections are lifted.

Exempting, waiving, or modifying such stipulations can be very consequential: BLM could approve access roads in areas that are designated as NSO in the Moab MLP and the EA, or BLM could grant surface access to drill new wells in areas currently designated as NSO or CSU in the MLP and EA. It is a red herring for BLM to lean on these stipulations as evidence that drilling and development in these iconic recreational and wildlife areas will have no adverse environmental effects. Moreover, even with stipulations remaining in place, some adverse environmental and social effects are possible, if not likely, including wildlife disruption, scenic impairment, air pollution, noise pollution, light pollution, and more. Such effects are likely if directional drilling, or hydraulic fracturing, is used to access and develop parcels with CSU or NSO stipulations. In fact, the EA acknowledges that NSO or CSU parcels could be developed by directionally drilling into the federal parcels from non-federal lands, yet fails to disclose or assess the environmental risks of such drilling practices.43

Another likely negative effect is increased road traffic to and from production sites, heightening the risk of traffic accidents for tourists and residents.44 Even for NSO and CSU parcels, trucks and other infrastructure would be needed to move any oil or gas from production sites to market. For certain parcels, such as numbers 68 through 97, this would require trucks to use Highway 313, one of the region’s vital tourist and recreation roads that connects the town of Moab to Canyonlands National Park and Dead Horse Point State Park, as well as dozens of BLM recreation areas and campgrounds. In 2019, Canyonlands National Park had more than 733,000 visitors.45 The truck traffic and infrastructure effects from any new leases would have cumulative, adverse environmental and social effects, especially when added to existing federal and state mineral leases, as well as existing traffic from tourism and recreation. BLM does not discuss these traffic and infrastructure effects in this EA, in the Moab MLP, nor the RMP, thus failing to take the requisite “hard look” at environmental effects, in violation of NEPA.46

In addition to the Moab Field Office, parcel 34 in the Price Field Office is located just five miles from Capitol Reef National Park (CRNP), which had more than 1.2 million visitors in

---

43 See EA at 14, 18, 43.
44 See, e.g., id. at 27.
Parcel 34 directly borders the Lower Last Chance Wilderness Area, which is part of the San Rafael Swell and features brightly colored and wildly eroded sandstone formations, deep canyons, and giant plates of stone tilted upright through geologic upheaval. Evidence of Native American cultures is common throughout the San Rafael Swell in the form of pictograph and petroglyph panels. From about 1776 to the mid-1850s, the Old Spanish Trail trade route passed through the Swell. The Swell also provides excellent habitat for wildlife. More than 200 desert bighorn sheep live among the rugged landscape, as well as bald eagles and peregrine falcons, both sensitive species.

BLM states that reasonably foreseeable impacts from oil and gas development on parcel 34 include “[p]otential impacts to [the] viewshed from highly visited areas in CRNP,” and sounds of oil and gas development disrupting solitude or the visitor experience in the park. BLM also notes that oil production on the parcel, while unlikely, would require frequent truck traffic, and natural gas production would require a new gas pipeline to be built to connect into existing pipeline infrastructure 30 miles away. The region has a history of problematic pipeline projects, resulting in wasteful flaring of natural gas when pipelines were deactivated due to safety concerns. BLM also states that light pollution from development could affect dark skies in the park and the Lower Last Chance Wilderness Area.

While the negative effects of drilling on parcel 34 are apparent, the economic upside for BLM is low. BLM states that, “[t]here is little potential for oil production in the area ... [and] low potential for natural gas.” Moreover, BLM offered two parcels in the same area in a December 2019 lease sale and neither sold; in fact, both are still available for non-

———


49 Id.

50 Id.

51 EA at 9.

52 Id. at 55.

53 Brian Maffly, Paradox Pipeline Lives Up to Its Name for Utah Regulators, SALT LAKE TRIBUNE (Feb. 16, 2020), https://www.sltrib.com/news/environment/2020/02/16/paradox-pipeline-lives-up/ (“Faced with only bad options, the agencies’ governing boards last month chose to ‘deactivate’ the pipeline — purging it of gas and sealing it — and authorize Wesco to torch up to 300,000 cubic feet of gas a day at its Blue Hills plant.”).

54 EA at 54.

55 Id.
competitive leasing. While BLM may not be strictly prohibited from leasing parcel 34, it should have considered assessing a lease sale option that removes it from consideration due to low development potential and multiple-use conflicts, including with parks and wilderness areas.

BLM should have more closely scrutinized multiple-use conflicts and analyzed a more limited leasing option pursuant to NEPA that offers exclusively high-potential, low-conflict parcels for lease. Such an analysis is required under NEPA, as multiple federal courts have held in striking down BLM leasing determinations as arbitrary and capricious. The Tenth Circuit, for instance, held that BLM violated NEPA when it failed to consider the alternative of not opening specific lands to leasing in a land use plan that “are extraordinary in their fragility and importance as habitat.” The Court explained that BLM’s failure to do so violated NEPA’s requirement to “take a hard look at all reasonable options.” The court rejected BLM’s consideration of a “full closure” alternative (essentially the no-action alternative) as inadequate, explaining that the option of closing a “portion of the overall plan area ... differs significantly from full closure” and so must also be considered. Moreover, reinforcing its conclusion, the Court cited BLM’s multiple-use mandate, stating, “[g]iven the powerful countervailing environmental values, we cannot say that it would be ‘impractical’ or ‘ineffective’ under multiple-use principles to close the Mesa to development.”

The District of Colorado applied similar logic in a recent case concerning BLM’s NEPA analysis of a draft RMP. The court explained:

I disagree with BLM’s argument that there is no substantive difference between an alternative that opens low and medium potential areas for leasing and one that does not. The basis of BLM’s argument here is that it was not required to consider the latter option because such a low percentage of the low and medium potential areas were projected to be developed. But if those areas were open for leasing,


57 See EA at 54 (citing BLM, Manual Transmittal Sheet 6340—Management of BLM Wilderness).

58 New Mexico, 565 F.3d at 711.

59 Id.

60 Id.

61 Id.
even if there is a minimal chance for development, it would detract from BLM designating that land for other uses.\textsuperscript{62}

The court further explained that “the principle of multiple use does not require BLM to prioritize development over other uses,” and “it seems a reasonable alternative would be to consider what else may be done with the low and medium potential lands if they are not held open for leasing.”\textsuperscript{63} Further, the court noted that analyzing the “no action” alternative did not relieve the agency of its duty to consider “any other alternative along the spectrum.”\textsuperscript{64} The court held that BLM violated NEPA by failing to consider a reasonable range of alternatives.\textsuperscript{65}

So too, here. Failure to consider a more limited leasing scenario that voids multiple-use conflicts in this EA renders the analysis arbitrary and capricious.

\textbf{2. BLM’s own analysis in a different proceeding reveals environmental sensitivities warranting cessation of recreational activities in the very same areas offered for mineral leasing here.}

Unanswered questions about potential wildlife impacts and conflicts with other multiple uses warrant more analysis and explanation in this NEPA process, especially in light of BLM’s actions and statements in a separate proceeding that involves several of the parcels offered for lease here. On May 29, 2020, BLM requested input from the public on “a proposal to protect wildlife and raptors though restricting roped and aerial activities within Mineral and Hell Roaring Canyons.”\textsuperscript{66} The approximately 10,000-acre area identified for potential restrictions provides habitat for golden eagles, Mexican Spotted Owl, desert bighorn sheep, and other wildlife.\textsuperscript{67} BLM states in the news release that recreational activity in the Mineral and Hell Roaring Canyons has increased in recent years, leading to impacts to wildlife habitat, and that BLM is developing a proposal “to help mitigate this conflict.”\textsuperscript{68}


\textsuperscript{63} \textit{Id.} (citing \textit{New Mexico}, 565 F.3d at 710).

\textsuperscript{64} \textit{Id.} at 1166 (citing \textit{New Mexico}, 565 F.3d at 711 n.32).

\textsuperscript{65} \textit{Id.} at 1167.


\textsuperscript{67} \textit{Id.}

\textsuperscript{68} \textit{Id.}
Yet, this EA proposes new oil and gas leases in about half of the proposed restricted aerial and roped activity parcels. These parcels include numbers 71 through 78.\(^{69}\) It is very hard, if not impossible, to reconcile BLM’s two competing proposals: one that would restrict roped recreational activity due to concerns for wildlife, and the other (in this EA) proposing new mineral leasing and extraction in the exact same parcels.

At the very least, BLM should further analyze these potential wildlife conflicts and the apparent discrepancy between its two proposed actions in the same area. Even with NSO or other stipulations in place—which cannot be entirely guaranteed, as explained above—oil and gas development has many impacts including noise, vibration, visual disturbance, and development infrastructure such as trucks and access roads that can have impacts on wildlife, recreation, and environmental and scenic values. BLM has not explained how or why such mineral development effects will not jeopardize the wildlife in the very same parcels proposed for roped recreational restriction due to their environmental sensitivity. Barring further explanation, proceeding with oil and gas leasing in these areas would be arbitrary and capricious.

B. BLM Fails to Consider a Deferred Leasing Alternative That Would Offer Fewer Parcels for Sale Now, and Defer Other Parcels to a Later Date After Conducting Further Analysis.

BLM also fails to consider a deferred leasing alternative that would offer fewer parcels for sale now, and reserve parcels with possible multiple-use conflicts and/or low development potential to a later date after further analysis can be conducted. This failure violates the agency’s legal obligation to consider option value and makes it unlikely that BLM will obtain “fair market value” for these parcels as required by FLPMA and the MLA.

1. Considering a Deferred Leasing Alternative Meets FLPMA and MLA Requirements.

BLM should assess the environmental, social, and economic costs and benefits of deferring at least some of the nominated parcels. BLM must manage federal fossil fuels to earn “fair market value” for the public and to harmonize energy production with resource conservation.\(^{70}\) Analyzing a deferred leasing alternative is necessary in order to determine the optimal time to issue any leases and thereby minimize environmental and social risks.


\(^{70}\) 43 U.S.C. §§ 1701(a)(8)–(9).
and secure the public’s right to obtain “fair market value” for its resources.\textsuperscript{71} By setting aside more public lands for conservation and recreational opportunities now, BLM will have time to gather important information on environmental risks and sensitivities; economic risks, including changing resource prices and impacts from development on tourism; and competing land uses, including renewable energy development, recreation, and habitat and watershed protection.

Moreover, the MLA requires BLM to account for conservation and specifically consider the timing—including potential for delay—of mineral lease sales. Specifically, the MLA requires the agency “to [e]nsure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States ... and for the safeguarding of the public welfare,” including the “prevention of undue waste.”\textsuperscript{72} As the Supreme Court explained, the MLA emphasizes “[c]onservation through control,” with “one of the main congressional concerns” being “the prevention of an overly rapid consumption of oil resources.”\textsuperscript{73}

Yet here, despite legal mandates and practices within other Department of Interior agencies, BLM does not consider the option of deferring particular parcels for this lease sale, as the EA lacks any meaningful evaluation of the timing of the proposed lease sale or consideration of delaying particular parcel sales. BLM’s total failure to meaningfully evaluate the potential for delaying leasing—including due consideration of option value—violates FLPMA and the MLA and, should BLM proceed with the lease sale based on such an incomplete analysis, would render the lease sale determination arbitrary and capricious.

2. **BLM Must Account for Option Value by Assessing a Deferred Leasing Alternative, Given the Irreversible Nature of Drilling and Development.**

At the lease sale stage, BLM has an important opportunity to determine which, if any, tracts to make available to private energy developers. Just because a given tract is nominated and eligible for mineral leasing does not mean that BLM must offer it for lease. In fact, it may be advantageous for BLM to defer part or all of a lease sale altogether, pending more comprehensive environmental information, completion of a relevant cultural or scientific study, or more community input. If BLM learns new information regarding, for instance, environmental or safety hazards, developmental value, recreational value, carbon sink value, or cultural significance, it is much more difficult (if not impossible) to act on this information when land is already leased.\textsuperscript{74}

In light of the uncertainty and near-irreversibility associated with leases for mineral development, BLM should account for option value, or the informational value of delay, at


\textsuperscript{72} 30 U.S.C. § 187.

\textsuperscript{73} Boesche v. Udall, 373 U.S. 472, 481 (1963).

\textsuperscript{74} See Jayni Hein et al., supra note 19, at 17.
the lease sale stage by offering only high-potential lands, if any, in lease sales, and deferring other parcels that pose potential resource conflicts.

**There Is Option Value to Delaying Oil and Gas Lease Sales**

Option value is the informational value of delaying irreversible decisions, such as when and on what terms to sell non-renewable resources to private companies. BLM holds, on behalf of the American public, a perpetual option to develop or lease its fossil fuel resources. When the government sells the right to develop a tract to a private lessee, it extinguishes the perpetual option that it holds on behalf of the American people, and sells a time-limited option to a private actor, valid for the duration of the lease (typically 10–15 years for the initial term of an oil or natural gas lease). Consideration of option value requires that BLM determine when and where exercising its perpetual options would be most socially opportune, including by accounting for environmental, social, and economic ramifications. The value associated with the option to delay can be large, especially when there is a high degree of uncertainty about price, extraction costs, and the social and environmental costs imposed by drilling—each of which are present here with respect to the EA.

Even if BLM does not account for option value in its leasing decisions, oil and gas companies will, and they will time extraction and resource decisions in a manner that is privately optimal, rather than socially optimal. Indeed, option value explains the routine practice of companies purchasing tracts and waiting years to develop them, when conditions are optimal from their perspective, if they ever do develop them. BLM must strategically plan its own lease sales in order to maximize social welfare.

In fact, the federal government uses option value in other resource management determinations. Interior’s Bureau of Ocean Energy Management (BOEM) incorporated option value in its offshore oil and gas leasing program for 2017–2022. BOEM stated that: (i) environmental and social cost uncertainties can affect the size, timing and location of leasing; (ii) option value can be a component of the “fair market value” of a lease; and (iii) BOEM can raise minimum bids, rents, and royalties for leases to account for option value. BOEM also uses a “hurdle price” analysis to ensure that any areas included in its leasing program are expected to earn positive net economic value.

Likewise, BLM has deferred other parcels and lease sales in order to gather more information about risks and timing. For instance, the BLM Pecos District Office deferred thirty-one parcels from a September 2018 lease sale due to concerns about potential water

---

75 Livermore, supra note 71, at 585, 589.
76 Id.
77 Id.
79 Id. at 8-2, 8-12 to 8-14.
contamination from oil and gas activity.\textsuperscript{80} For a series of BLM oil and gas lease sales near the Chaco Culture National Historical Park, lease sale protests and public opposition led BLM to defer some parcels until it could conduct more analysis on cultural sites within the proposed leasing area.\textsuperscript{81} More recently, the combination of market factors and Covid-19 led BLM, as well as the states of Colorado and Utah, to defer a number of scheduled oil and gas lease sales.\textsuperscript{82}

In a similar vein, the Forest Service decided, in May 2019, to reject expressions of interest for oil and gas drilling on 52,000 acres in the Humboldt-Toiyabe National Forest in Nevada. The Forest Service’s analysis revealed:

\begin{quote}
... unfavorable geologic conditions in the area, meaning that there is little to no potential of oil and gas resources in the area. Additionally, camping, hunting, fishing, and motorized recreation are popular activities in the proposed lease area and represent part of a $12.5 billion recreation industry in Nevada—an industry that supports 87,000 jobs statewide. The unfavorable geologic conditions, coupled with concerns over potential impacts to wildlife and to the recreational and scenic values of the iconic Nevada landscape, led to the selection of the No Leasing Alternative.\textsuperscript{83}
\end{quote}

Additionally, two cases from the U.S Court of Appeals for the D.C. Circuit hold that consideration of option value is required when assessing “fair market value.” In California \textit{v. Watt}, the Court remanded an offshore leasing determination because Interior failed to “properly consider[] the economic effect of delaying lease sales,” keying in on the fact that the agency “ignored the price rises in crude oil that make delay a factor increasing the value of any recovered resources.”\textsuperscript{84} The Court was even more explicit about the need to consider option value in \textit{Center for Sustainable Economy \textit{v. Jewell}}, explaining that an agency may “act[] irrationally in failing to [consider] the informational value of delay,” and highlighting the

\begin{flushleft}
\textsuperscript{80} \textit{See} Hein at al., \textit{supra} note 19, at 23.
\textsuperscript{81} \textit{Id.} at 28–29.
\textsuperscript{84} 668 F.2d 129, 1319–20 (D.C. Cir. 1981).
\end{flushleft}
Department’s “qualitative analysis of the benefits of delaying leasing” as satisfying this standard. As the Court explained, because “[m]ore is learned with the passage of time”—including about drilling costs, safety and environmental risks, and the economics of the oil and gas industry, among others—the “informational value of delay is a relevant cost” that agencies must consider when assessing “fair market value.”

In line with this past agency practice and federal case law, environmental, social, and economic uncertainty support waiting for as much time as possible to develop non-renewable resources, especially areas that have other wildlife, habitat, watershed protection, carbon sink, recreational, or scenic values. BLM should limit the areas it makes available for oil and gas leasing and consider a deferred leasing alternative because there is economic, social, and environmental value in keeping more land protected and off-limits to extraction.

The EA Should Have Considered a Deferred Leasing Alternative and Analyzed Numerous Uncertainties That Weigh Against Fossil Fuel Leasing.

Given the potential for irreversible damage and suboptimal public land uses embedded within BLM’s preferred leasing alternative, BLM should have accounted for the following uncertainties in the EA by exploring a deferred leasing alternative:

- Current and expected resource prices in the United States and in global energy markets, especially in light of recent record-low oil prices and volatility (described more below);
- Environmental conditions and risks from drilling including local pollution, habitat effects, endangered species effects, and greenhouse gas emissions;
- Competing uses of the public lands, including recreational activities, preservation, wildlife protection, renewable energy development, cultural and tribal use, and tourism;
- Current and expected effects of climate change on the ecosystem, which affect environmental sensitivities;
- Information on the cost of drilling in the region and bringing those resources to market;
- Safety, pollution-capture, and other drilling technologies;
- Energy efficiency, energy conservation, and fuel economy standards that affect fossil fuel demand; and
- Laws and regulations governing drilling and development on public lands, air pollution, endangered species, and other environmental concerns.

For instance, the Moab MLP describes how NSO stipulations should be applied to any new leases in identified areas for the protection of cultural resources, high use recreation routes and trails, high use climbing and canyoneering areas, Special Recreation Management Areas, important drinking water source protections zones,

---

85 779 F.3d 588, 610 (D.C. Cir. 2015).
86 Id.
water resource, ephemeral streams, Areas of Critical Environmental Concern (ACEC), and viewsheds and soundscapes bordering Arches and Canyonlands National Parks. But rather than defer any of the numerous parcels that pose these conflicts or contain these sensitivities, BLM brushes away any potential conflicts by resting on the MLP’s required stipulations. It is far more logical—and in fact required pursuant to FLPMA and NEPA—for BLM to carefully assess these conflicts and sensitivities and at least consider deferring lease sales in the areas that contain important competing resources and values.

Indeed, BLM should learn more about any potential heightened risks or uncertainties through further studies and analysis, rather than lease any such parcels. One fitting, non-exclusive example is the apparent conflict between proceeding with oil and gas leasing on parcels 71 through 78 in the Moab Field Office while BLM considers closing the very same area to roped recreation due to potential wildlife conflicts.

Resource price uncertainty is another factor that counsels strongly towards deferring at least some of these parcels in this lease sale, if not all of them, in order to earn fair market value for the use of public lands. As explained above, many of the parcels offered in this lease sale have low potential for oil and gas, yet pose multiple-use conflicts. However, the mere presence of leased tracts on BLM lands often forecloses BLM managing those areas for wilderness values, important wildlife habitat, ACECs, and myriad other public uses. BLM must at least consider deferring the sale of low-potential lands at such low resource prices pursuant to NEPA, FLPMA, and the MLA.

In sum, BLM must at least consider the substantial environmental, cultural, and economic benefits of waiting to lease at some parcels that have important conservation and recreational values and low oil and gas potential. Because BLM has failed to do so here, the EA does not take the requisite “hard look” at environmental effects and does not evaluate reasonable alternatives, in violation of NEPA.

3. BLM’s Failure to Consider the Economic Impacts of Delaying Parcels for Lease Sale Violates Its Obligation to Obtain “Fair Market Value” for the Use of Public Lands.

BLM’s total lack of consideration of option value also creates a scenario in which BLM is likely to violate its requirement under FLPMA and the MLA to obtain “fair market value” for any lease sale. By neglecting any consideration of option value—contrary to judicial mandates and administrative precedent—BLM risks repeating a pattern of obtaining minimal payments from oil companies to sit on low-potential parcels while depriving the public of the enjoyment of those lands. This outcome is particularly likely in

---

87 Moab MLP, supra note 35, at 3.
88 See supra Sec. I.
89 See, e.g., Marsh, 490 U.S. at 374.
the present moment, as recent economic trends make it especially unlikely that BLM will derive “fair market value” from the proposed sale.

**BLM Is Highly Unlikely to Receive “Fair Market Value” for the Proposed Sale, Emphasizing the Requirement to Consider Delay**

While BLM’s failure to consider option value or genuinely analyze the possibility of delaying leasing is unlawful in and of itself, this failure is particularly egregious because—in light of recent BLM leasing and production trends and record-low oil and gas prices—the agency is highly unlikely to receive “fair market value” for the parcels at issue. What’s more, BLM’s repeated failure to assess option value or consider delayed-leasing alternatives is directly responsible for some alarming federal leasing trends.

Particularly in recent years, BLM has regularly offered lease sales for low-potential lands that developers scoop up at negligible prices and sit on without any development, depriving the public of other—and often more valuable—uses of the land for minimal compensation. As of the end of fiscal year 2018, half of the over 25.5 million acres of federal land locked up in oil and gas leases—nearly 13 million acres—was lying idle without production. The rate is even higher in Utah, where nearly 1.5 of the 2.6 million leased federal acres—over 57 percent—were sitting idle. As the Congressional Budget Office explained, “[m]ost leased parcels have no exploratory drilling or production during the lease term,” with leases issued noncompetitively particularly unlikely to enter production. These trends are being exacerbated as the Trump administration makes more low-potential lands available for lease: BLM offered more acres for lease during calendar years 2017–2018 than under the entire last four years of the Obama administration, with a lower percentage of those acres receiving bids.

Companies engage in the practice of speculative leasing and sitting on low-potential lands for multiple reasons. First, companies often have a “perverse incentive ... to sit on undeveloped federal land,” since by having subservice reserves as assets on a balance sheet, a company can “immediately improve its overall financial health, boost its attractiveness to shareholders and investors, and even increase its ability to borrow on favorable terms.” Second, although there is frequently “little evidence that much oil or gas

---


91 Id.


is easily accessible,” buyers may be “hoping that the land will increase in value nonetheless, because of higher energy prices, new technologies that could make exploration and drilling more economical or the emergence of markets for other resources hidden beneath the surface.” In other words, buyers are considering option value—as rational economic actors do when assessing market value. Yet in this lease sale, BLM fails to consider the prospect of waiting to offer leases until energy prices are higher and justify the costs of leasing, including foregoing opportunities to promote other economically valuable uses, like outdoor recreation—failing to uphold its mandate to earn fair market value.

While it is clear why oil and gas companies often choose to purchase leases with little prospect of near-term drilling, it is far less clear why BLM facilitates these transactions. After all, the nation derives little monetary benefit from unproductive leases. For one, the government does not receive royalties when a parcel is undeveloped, thereby depriving taxpayers of the primary source of income from onshore leasing. That leaves only lease and rental payments for the land itself, but these are frequently negligible for low-potential lands. The MLA imposes a minimum upfront bid of just $2 per acre for onshore oil and gas leases—an amount that has not changed since 1987. Additionally, a parcel that does not receive any bids can still be leased noncompetitively, whereby the first qualified applicant is entitled to lease the land upon payment of a $435 application fee. Rental payments for nonproducing lands are also minimal: A company pays an annual rental fee of only $1.50 per acre during the first five years of the rental term, and just $2 per acre for the remainder of the term. For many non-producing parcels, therefore, total revenues are just a few hundred or thousand dollars per year—hardly a fair value for the land’s exclusive use.

---


96 The Congressional Budget Office estimates that royalties accounted for 90 percent of the government’s gross income from onshore leasing from 2005 to 2014. CBO Report, *supra* note 90, at 2. Even here, taxpayers receive an unreasonably low benefit from production on federal land, as the federal onshore royalty rate of 12.5 percent “is less than the royalty rate imposed by many states for production of oil and gas on state-owned land. For example, current state royalty rates are 25 percent in Texas, 18.75 percent in Oklahoma, and 16.67 percent in Colorado, Montana, and Wyoming; New Mexico and North Dakota use both 16.67 percent and 18.75 percent rates.” *Id.* at 20.


98 *Id.* § 226(c)(1); 84 Fed. Reg. 59,730, 59,731 (Nov. 6, 2019).

99 30 U.S.C. § 226(d). Although the MLA provides these amounts as minimums, BLM regulations set annual rents at these statutory-minimum amounts. 43 C.F.R. § 3103.2-2(a).
Indeed, a large and increasing percentage of federal lands are leased either noncompetitively or at or near the minimum bid value. Roughly half of all parcels leased from 2003–2012 went for less than $10 per acre, including about 4,000 parcels—approximately 15 percent—that did not receive a bid and were leased noncompetitively.\textsuperscript{100} During that time, over 25 percent of the parcels that were leased competitively yielded just the $2 per acre minimum bid.\textsuperscript{101} Just in Utah from 2007–2017, more than 200,000 acres were leased either noncompetitively or for a low bid of under $10 per acre.\textsuperscript{102} Recent years have only exacerbated this problem: The percentage of leases being given away through noncompetitive sales “surged in the first year of the Trump administration to the highest levels in over a decade” and now “make up a majority of leases given out by the federal government” in numerous states.\textsuperscript{103} In one extraordinary example, one corporation has secured 227 oil and gas leases in Montana since the start of 2018 covering over 113,000 acres of federal land—without submitting a single bid or paying anything beyond application fees and minimum rent amounts.\textsuperscript{104}

In light of these trends, there is no reason to believe that these proposed parcels will be put to productive use or yield significant revenue if sold in this lease sale. Indeed, BLM’s own estimates in the EA reveal that the majority of the nominated parcels will not see any drilling, with the vast majority of the land remaining unproductive.\textsuperscript{105} And if recent history is any guide, BLM is likely to obtain minimal revenue for those lands. For instance, in the most recent BLM Utah State Office lease sale, held this past March, all but four of the 22 bids went for the minimum $2 per acre.\textsuperscript{106} In a BLM Utah lease sale held last year, every single sold parcel went for the statutory minimum.\textsuperscript{107} These results are particularly pronounced in the area near the proposed lease sale: Of the 17 parcels that BLM put up for lease in Grand County in 2019, according to one analysis, less than 45% of the acreage sold

\textsuperscript{100} CBO Report, \textit{supra} note 90, at 2.
\textsuperscript{101} \textit{Id.} at 18.
\textsuperscript{102} \textit{Locked Out, supra} note 29, at 3.
\textsuperscript{103} Lipton & Tabuchi, \textit{supra} note 95. Illuminating examples of this trend abound. As Taxpayers for Common Sense explained in a recent article: “A first quarter lease sale in Colorado that took place in March last year brought in just $13 per acre with bid revenue totaling under $14,00 for the 1,055 acres leased. The year before that, taxpayers received an average of just $5 per acre in exchange for 1,400 acres of federal land in the state. Last year’s first quarter Montana lease sale saw just 62,000 acres or 37 percent of 167,000 acres on offer receive bids. Bids per acre in Mississippi in 2018 averaged $2.01, a hair above the legal minimum of $2.” \textit{Now is the Time to Press Pause on Oil and Gas Leasing, TAXPAYERS FOR COMMON SENSE} (Mar. 17, 2020), \url{https://www.taxpayer.net/energy-natural-resources/time-to-press-pause-on-oil-and-gas-leasing/}.
\textsuperscript{104} \textit{Taxpayers Lose in Noncompetitive Montana Lease Sale, TAXPAYERS FOR COMMON SENSE} (Nov. 27, 2018), \url{https://www.taxpayer.net/energy-natural-resources/taxpayers-lose-in-noncompetitive-montana-lease-sale/}.
\textsuperscript{105} \textit{See supra} notes 25–27 and accompanying text.
\textsuperscript{106} \textit{Mar. 10, 2020 Oil & Gas Lease Sale Results}, BLM \textit{UTAH STATE OFFICE}, \url{https://eplanning.blm.gov/public_projects/nepa/1501633/20014476/250019567/Mar2020SaleResults.pdf}.
\textsuperscript{107} \textit{June 11, 2019, Oil & Gas Lease Sale Results}, BLM \textit{UTAH STATE OFFICE} \url{https://eplanning.blm.gov/public_projects/nepa/119572/174906/212465/1-June2019_SaleResults.pdf}. 
and that acreage all went for the minimum bid of $2 per acre. As a result, the State of Utah received only a few thousand dollars from these sales.\footnote{Letter from Grand County Council to BLM Re: Grand County Opposition to Bureau of Land Management September 2020 Oil and Gas Lease Sale Affecting Acreage in Grand County 2 (July 7, 2020), available at https://www.grandcountyutah.net/AgendaCenter/ViewFile/Agenda/_07072020-1215.}

Like in these recent lease sales, it is likely here that many or most of the nominated parcels will receive noncompetitive or minimum bids and remain nonproductive throughout the lease term, depriving the public of the land’s unencumbered enjoyment and higher-value uses—such as recreation, tourism activities, wildlife conservation, or even renewable energy production—while yielding negligible revenue. And although BLM briefly suggests otherwise—speculating that “bonus bids (the amount paid at time of auction), annual rent fees (for 10 years regardless of activity on a leased parcel), and royalties (if and when production occurs) may provide substantial income to county governments”\footnote{EA at 49.}—it provides no basis for this cursory conclusion, and fails to acknowledge the extensive counterevidence from previous BLM lease sales.

Through consideration of option value, BLM can avoid this result. Specifically, if BLM rationally considers the value of delay (as oil speculators who snatch up low-potential lands already do), it would recognize that parcels currently believed to possess zero- or low-development potential could sell for a much greater future price if later discovered to have high potential. In the meantime, removing these parcels from this lease sale would allow them to be put toward more beneficial uses—such as ecosystem conservation, carbon sink purposes, renewable energy development, watershed protection, or recreation—rather than sitting idly in the hands of energy speculators. Eliminating low-potential lands from this lease sale could also increase the bids for higher potential lands in other lease sales, as it would restrict supply by making far fewer acres available for lease.

Instead, however, BLM fails to consider option value or timing in proposing to lease these parcels, creating the likelihood that the parcels will be snatched up for minimum value, if not leased noncompetitively, and fail to yield substantial revenues over the lease term. Should BLM proceed in this fashion, it will not obtain fair market value for these parcels, in violation of FLPMA and the MLA.

\textit{Recent Economic Developments Further Reduce the Likelihood of Obtaining Fair Market Value and Underscore the Option to Delay}

On top of the fact that BLM infrequently obtains fair market value for low-potential lands, economic developments in recent months make that possibility especially remote at this time, and further underscore the need for BLM to account for option value and consider delaying the proposed leasing. Specifically, as the national and global economies have contracted as a result of the COVID-19 pandemic, two particular developments have affected the oil-and-gas sector and make it particularly unlikely for the government to reap fair value for its lands.
For one, global oil prices have plunged. The price of crude oil is $40.51 per barrel as of July 6, 2020, according to data from the U.S. Energy Information Administration, which represents a drop of more than one-third since the start of 2020.\(^{110}\) And although oil prices have somewhat rebounded since reaching unprecedented depths in April—including one day in which prices were negative\(^{111}\)—they still remain far below pre-pandemic levels, with growing concern about when or if they will reach such levels again. Indeed, some forecasters believe that recent dips in oil prices portend long-term declines: BP recently “cut its estimates for oil and gas prices in the coming decades between 20% and 30%,” as it “now sees the prospect of the pandemic having an enduring impact on the global economy, with the potential for weaker demand for energy for a sustained period.”\(^{112}\) Likewise, the International Monetary Fund projects only a modest rebound in oil prices toward “about 25 percent below the 2019 average.”\(^{113}\) Not only does decreased long-term oil prices mean that the government will receive lesser royalty payments from any oil that is developed, but substantial volatility and uncertainty in the oil market likely means that companies will be more cautious in their approach and even less willing than normal to make high bids for leasing rights. In this economic climate, failing to even consider option value and delayed leasing fails to secure fair market value for the public and is arbitrary and capricious.\(^{114}\)

Recent royalty-payment moratoriums compound this trend and supply the second reason that BLM is especially unlikely to obtain fair market value at this moment. Specifically, BLM has been granting requests from oil and gas producers to reduce royalty payments from their already-low levels,\(^{115}\) effectively allowing operators to set their own reduced rates.\(^{116}\) Under this policy, BLM has permitted a rate to be reduced all the way down to 0.5 percent (a 96 percent reduction from the normal 12.5 percent royalty rate) and allowed for unlimited extensions in 60-day increments.\(^{117}\) Oil companies have been taking advantage: BLM approved every application for a reduced royalty rate filed in April, with the rate reduced to 2.5 percent for one-third of leases.\(^{118}\) In Utah alone, BLM reduced


\(^{111}\) *Id.*


\(^{114}\) See, e.g., supra notes 58–63, 82–84 and accompanying text.

\(^{115}\) See supra note 94.


\(^{117}\) *Id.*


22
royalty rates for 76 leases covering nearly 90,000 acres—some of which are literally adjacent to lands proposed for lease in this sale. And a few weeks ago, BLM made it even easier for producers to seek royalty relief, allowing a reduced rate for any leases that are “uneconomic at the current royalty rate.” Since royalty rates are currently at record lows—and may remain so for the foreseeable future—BLM is likely to receive limited royalty payments for any parcels that are drilled in the near-to-medium term, further diminishing the value that it will receive from the proposed lease sale.

Consideration of option value would account for these developments and counsel strongly towards delay. In particular, low oil prices and royalty rates—coupled with market uncertainty and volatility—make it especially unlikely for BLM to obtain fair market value for the nominated parcels at this time. Ironically, BLM briefly recognizes that “recent changes in the U.S. and global economies and in the oil and gas sectors” have significantly affected “current economic conditions,” yet fails to take account of this effect in any meaningful fashion when assessing whether to proceed with the proposed lease sale.

In short, BLM is highly unlikely to obtain “fair market value” or “reasonable prices” in the proposed lease sale, in violation of FLPMA and the MLA. Its failure to rationally consider option value or the possibility of delaying these leases would render its determination to lease these parcels arbitrary and capricious.

III. BLM’s Analysis of Economic Impacts Presents an Incomplete and Lopsided Picture That Fails to Give a Hard Look at Key Costs.

BLM also fails to consider numerous adverse economic impacts in its assessment of the proposal’s economic effects, most notably lost tourism revenue, that biases its analysis and skirts NEPA’s requirements for a reasoned and balanced assessment of all impacts. While agencies are not necessarily required to monetize all impacts, NEPA mandates a “balancing” of considerations, both for and against the proposed action. These

119 Id.
121 EA at 49.
122 See 40 C.F.R. § 1502.23 (explaining that a “cost-benefit analysis” may be “relevant to the choice among environmentally different alternatives ... being considered for the proposed action,” but that “the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations,” and “[i]n any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision”).
123 Sierra Club v. Sigler, 695 F.2d 957, 978–79 (5th Cir. 1983) (“[I]t is vitally important that [the environmental assessment] fully and accurately disclose ... costs associated with the project.”); see also Chelsea Neighborhood Ass’ns v. U.S. Postal Serv., 516 F.2d 378, 387 (2d Cir. 1975) (“NEPA, in effect, requires a broadly defined cost-benefit analysis of major federal activities.”).
considerations must be provided in detail that “allows those removed from the initial process to evaluate and balance the factors on their own.”

BLM provides detailed projections of the beneficial economic and government-revenue impacts of the proposed oil and gas lease sales in the draft EA, while making only cursory reference to “concern about effects on recreation and tourism activities” without similar analysis or meaningfully taking these impacts into account. Specifically, BLM monetizes the proposed lease sale’s direct, indirect, and induced employment effects, labor income effects, and output effects on recreation and tourism without accounting for the myriad ways in which drilling infrastructure and resource extraction activity may decrease the region’s tourism and thereby blunt those beneficial impacts. Making matters worse, the EA even presents numerical estimates of increased tourism-related spending from oil and gas employment, noting only briefly and without analysis that “[a] reduction of spending within the same industrial sectors would have opposite effects.” Not only is decreased activity in key economic sectors as a result of oil and gas development relevant to reasoned and balanced analysis, but it is also readily quantifiable.

Such perfunctory reference to projected adverse economic effects is a clear failure to meet NEPA’s requirements to “indicate those considerations ... which are likely to be relevant and important to a decision.” Perhaps the most substantial of these considerations is lost tourism revenue in a region for which tourism is the vital economic lifeblood of communities. In Grand County, Utah, where many of the parcels in this lease sale are located, travel and tourism represents 49% of total employment, compared with a national average of just 15.9%. Seasonality of unemployment, another measure of tourism activity, varies from nearly 13% unemployment in the winter season when visitors are scarce, to under 2% in the summer during high visitation. Finally, over 42% of Grand County’s employment is in the travel and tourism sector, 15.6% of which is

---

124 Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n, 449 F.2d 1109, 1113-14 (D.C. Cir. 1971) (holding that “NEPA mandates a rather finely tuned and ‘systematic’ balancing analysis” that “provides evidence that the mandated decision making process has in fact taken place”).

125 Id. at 51.

126 Id.

127 See Janaki R. R. Alavalapati & Wiktor L. Adamowicz, Tourism Impact Modeling for Resource Extraction Regions, 27(1) ANNALS OF TOURISM RES. 188 (2000), https://doi.org/10.1016/S0160-7383(99)00064-X, for one example of a simple model used to measure the impact of resource extraction on tourism. However, in recent years, techniques for such modeling have developed dramatically and can be used either broadly or for granular analysis. See generally Holger Robert Maier et al., Introductory Overview: Optimization Using Evolutionary Algorithms and Other Metaheuristics, 114 ENVTL. MODELLING & SOFTWARE, https://www.researchgate.net/publication/329351246_Introductory_overview_Optimization_using_evolutionary_algorithms_and_other_metaheuristics.

128 40 C.F.R. § 1502.23.

129 HEADWATERS ECON., A Profile of Industries That Include Travel & Tourism: Grand County 6 (2020).

130 Id. at 10.
accommodation—a visitor-only sector of the local economy that would not be replaced by any purported population increase due to the proposed action. Even when tourism-specific sectors such as accommodation are patronized by oil and gas workers, the effect is likely to crowd out tourists that also patronize other tourism oriented businesses and are “part of a long-term economic development trajectory for the region,” as opposed to any “boom” from resource extraction that “will be relatively short-term and non-local.”

Several parcels are located near state and national parklands that attract hundreds of thousands of visitors each year, as well as wilderness areas, historic trails, and special recreation management areas. BLM itself notes that “development might impair the visitor experience ... through palpable noise and visible impact.” Research provides that such impacts are likely to reduce local tourism in the long-term, creating a “boom-bust” economic development pattern seen in many resource rich regions and counties. For instance, BLM “found that visitation to Utah’s Dinosaur National Monument declined by over 40 percent between 1999 and 2014 as oil production in Uintah County increased by 358 percent and gas production increased by 339 percent”—just one notable and nearby example of many similar instances in which tourism dropped as oil and gas exploration increased.

While BLM indicates that the government may benefit from royalties on oil and gas drilling, it fails to acknowledge the significant potential offsetting losses in tourism tax revenue. Grand County sends $5.4 million per year to the state of Utah in transient room tax revenue alone, and in 2018, visitors brought $312.8 million in total taxable spending to

---

131 Id. at 14.
132 EA at 49.
135 EA at 13.
The local community understands the importance of this revenue for their communities: The Moab City Council recently asked BLM not to proceed with these lease sales, citing the importance of tourism to the economy as well as pollution from the proposed “massive industrial development that traverses some of our prime recreational areas.”

Even amidst the Covid-19 pandemic, visitors and locals can participate in many outdoor recreation and tourism activities in the Moab region, such as socially-distanced hiking, camping, climbing, biking, and more.

The stark indicators of the importance of tourism revenue contrast sharply with BLM’s failure to meaningfully evaluate the costs of reduced tourism due to resource extraction in the draft EA as required by NEPA. This leads BLM to falsely suggest that the proposed lease sale will have overwhelmingly positive economic impacts, creating an unrealistic and misleading picture that excludes substantial costs. Proceeding with the lease sale based on such an inconsistent analysis would too be arbitrary and capricious.

CONCLUSION

For all the foregoing reasons, BLM’s analysis of the proposed lease sale is deficient. Because BLM fails to account for multiple-use values, does not consider viable alternatives including the alternative of delayed leasing, and disregards key adverse economic impacts likely to result from the proposed lease, proceeding with the lease would be arbitrary and capricious in violation of FLPMA, the MLA, and NEPA.

Respectfully,

Jayni Hein, Natural Resources Director
Max Sarinsky, Attorney
Jessica Rollén, Summer Law Clerk

Institute for Policy Integrity
jayni.hein@nyu.edu

---


141 See, e.g., Johnston v. Davis, 698 F.2d 1088, 1094–95 (10th Cir. 1983) (remanding an environmental impact statement because “unrealistic” assumptions “misleading[ly]” skewed comparison of the project’s positive and negative effects); Ctr. for Biological Diversity v. NHTSA, 538 F.3d 1172, 1198 (9th Cir. 2008) (finding a NEPA analysis insufficient after agency “put a thumb on the scale by undervaluing the benefits and overvaluing the costs”); see generally Bus. Roundtable v. SCC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (reversing agency determination for “inconsistently and opportunistically fram[ing] the costs and benefits” of a rule).
Attachments:

1) Congressional Budget Office, Options for Increasing Federal Income from Crude Oil and Natural Gas on Federal Lands (2016)
2) CTR. for Am. Progress, Oil and Gas Companies Gain by Stockpiling America’s Federal Land (2018)
3) Gov’t Accountability Office, Improved Collection and Use of Data Could Enhance BLM’s Ability to Assess and Mitigate Environmental Impacts (2017)
4) Headwaters Econ., A Profile of Industries That Include Travel & Tourism: Grand County (2020)
6) Jayni Hein, et al., Look Before You Lease (2020)
7) Int’l Monetary Fund, World Economic Outlook Update (June 2020)
8) Michael Livermore, Patience is an Economic Virtue: Real Options, Natural Resources, and Offshore Oil, 84 U. Colo. L. Rev. 581 (2013)
9) Eric Lipton & Hiroko Tabuchi, Energy Speculators Jump on Chance to Lease Public Land at Bargain Rates, N.Y. Times (Nov. 27, 2018)
11) Taxpayers for Common Sense, Gaming the System: How Federal Land Management in Nevada Fails Taxpayers
12) Taxpayers for Common Sense, Locked Out: The Cost of Speculation in Federal Oil and Gas Leases (2017)
14) W. Values Project, Oil and Gas Development at the Doorstep of “America’s Best Idea” (2016)